



# **GUIDANCE NOTES FOR IT PPP Projects**

**Ministry of Electronics & Information Technology**

**2017**

*This document is advisory in nature and aim to sensitize the bid management teams on good practices and harmonize/standardize the RFP clauses and terms & conditions.*

*All the part of documents “Model RFP Templates for Public Private Partnerships and Guidance Notes for preparation of RFPs for E–Governance Projects” are based on existing Central Government Guidelines, feedback from stakeholders and prevalent international practices. However it is possible that the State Government / Nodal Agencies may have their own specific procurement Guidelines which may or may not be consistent with the clauses of the RFP, Guidance notes or Contract Agreement.*

*It may be noted that these documents do not substitute or overrule any approvals currently required by the concerned Department/State Government Nodal Agency for finalization of the RFP. Accordingly it is advised that all necessary approvals are taken from appropriate authorities, as done before publication of these model documents.*

## Glossary

1.	BLT	Build Lease Transfer
2.	BOO	Build Own Operate
3.	BOOT	Build Own Operate Transfer
4.	BOT	Build Operate Transfer
5.	C&AG	Comptroller & Auditor General, Government of India
6.	CVC	Central Vigilance Commission
7.	DEA	Department of Economic Affairs
8.	DFID	Department for International Development
9.	MeitY	Ministry of Electronics & Information Technology, Government of India
10.	EOI	Expression of Interest
11.	FIRR	Financial Internal Rate of Return
12.	GFR	General Financial Rules, 2017
13.	GoI	Government of India
14.	ICB	International Competitive Bidding
15.	ICT	Information and Communication Technology
16.	KPI	Key Performance Indicator
17.	LROT	Lease Renovate Operate and Transfer (model under PPP )
18.	MMP	Mission Mode Project
19.	NeGP	National e-Governance Plan
20.	NPV	Net Present Value
21.	NICSI	National Informatics Centre Services Inc.
22.	O&M	Operations and Maintenance
23.	OP	Outright purchase
24.	OPE	Out-of-pocket expenses
25.	OPP	Original Project Proponent
26.	PFI	Private Fund Initiative

27.	PPP	Public Private Partnerships
28.	QCBS	Quality Cum Cost Base Selection
29.	ROE	Return on Equity
30.	RFE	Request for Empanelment
31.	RFP	Request for Proposal
32.	SOW	Scope of Work
33.	SLA	Service Level Agreement
34.	SPV/C	Special Purpose Vehicle/Company
35.	TCO	Total Cost of Ownership
36.	T&M	Time and Material
37.	VFM	Value for Money



## Terms used for this Document

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Terms	Meaning
<b>Nodal Agency</b>	The nodal agency which is responsible for executing the project and assists the Department in carrying out the Bidding. Also this is known as State Designated Agency. In case the Government department itself decides to carry out the Bidding and execute the project, then the term “Nodal Agency” should be replaced by the Department.
<b>Department or Authority</b>	The Department is the ultimate “owner” of the project. The e-Governance is carried out within the domain of the department.
<b>Private Vendor or Agency or Partner</b>	The Vendor who is bidding or the Vendor who has been Selected post the bid process, depending on the context of usage in this Document
<b>(Optional)</b>	Certain clauses are optional to be put in the document and would depend on certain conditions. These may be included in the RFP, post establishing the relevance of the clause.

## Key Highlights / Changes Introduced

<b>1 Preparation for establishing the feasibility of a e-Governance PPP project</b>	<ul style="list-style-type: none"> <li>– Provided for enough pre-Tender planning and establishing financial and economic feasibility of the project</li> </ul>
<b>2 Eco-System for managing the PPP Project</b>	<ul style="list-style-type: none"> <li>– Defining roles of various entities for ensuring proper check and balances for creating a successful PPP project</li> </ul>
<b>3 Balanced Sharing of Risks</b>	<ul style="list-style-type: none"> <li>– Identification of risks and allocating it to the party best positioned to handle that risk</li> </ul>
<b>4 Eligibility and Technical Evaluation</b>	<ul style="list-style-type: none"> <li>– Rationalized the criterions in the Eligibility / Prequalification and the Technical evaluation (eliminated restrictive criterions)</li> </ul>
<b>5 Promote Transparency of Information</b>	<ul style="list-style-type: none"> <li>– Standards in the quality of information to be provided in the RFP document</li> <li>– Upfront sharing of Project Budget information</li> </ul>
<b>6 Standardization / Clarity</b>	<ul style="list-style-type: none"> <li>– Recommendations on Performance and Output specifications</li> <li>– Choice of PPP Model</li> <li>– Risk Allocation Matrix</li> </ul>
<b>7 Focus on Outcomes</b>	<ul style="list-style-type: none"> <li>– Payment Schedule linked to the outcomes/Transactions</li> </ul>
<b>8 Rational approach to drafting of Service Level Agreements</b>	<ul style="list-style-type: none"> <li>– Aligned as per International practices &amp; procedures for establishing a baseline, service credits and earn-backs</li> </ul>
<b>9 Updated Some of the Key Clauses</b>	<ul style="list-style-type: none"> <li>– Debarment from bidding</li> <li>– Conflict of interest</li> <li>– Clarifications Request/Appeal Post Technical Evaluation</li> </ul>
<b>10 Promoted Small and Medium Enterprises</b>	<ul style="list-style-type: none"> <li>– Allocation of % on Contract Value</li> <li>– Evaluation Score assigned</li> </ul>

## ***Cross Utility of this document***

***While this document has been developed for PPP contracts, it has been structured to manage large and complex projects involved in e-Governance Service Delivery.***

***Since these projects are long duration projects, there are a lot of risks involving demand (number of transactions), Design, Maintenance, Technology, Inflation etc. It has been observed that in case the Government tries to pass-on these risks to the private sector during the procurement process, it has an adverse affect of the chances of success. This standard document (including contract agreement) focuses on a partnerships approach where the risk is shared between the Government and private partner in the e-Governance journey.***

***Hence to that extent this Model RFP can be used for large, complex and long duration projects (more than 7 years) involving service delivery. Also this template can also be used for taking over a live project after the completion of the contract period of the incumbent vendor (i.e. less of development work and more of Operations and Maintenance work).***

## Table of Contents

<b>PRE – BID PROCESS: PPP PROJECT ASSESSMENT .....</b>	<b>11</b>
<b>1 INTRODUCTION .....</b>	<b>13</b>
1.1 BACKGROUND .....	13
1.2 PPP MODE OF PROCUREMENT FOR E-GOVERNANCE PROJECTS .....	13
1.3 DEFINITION OF PPPs IN INDIA .....	13
1.4 EXTANT POLICY GUIDELINES ON PPPs .....	14
1.5 OBJECTIVES AND SCOPE .....	15
<b>2 RELEVANCE OF PPP IN E-GOVERNANCE .....</b>	<b>16</b>
2.1 WIN-WIN PROPOSITION .....	16
2.2 KEY ELEMENTS OF PPP IN E-GOVERNANCE .....	16
2.3 CHARACTERISTICS OF PPPs IN E-GOVERNANCE .....	17
2.4 OBJECTIVES OF PPPs IN E-GOVERNANCE .....	18
2.5 COMPLEXITIES IN PPPs .....	18
2.6 WHEN SHOULD PPP BE CONSIDERED? .....	19
2.7 PPP IN E-GOVERNANCE: LACK OF RESOUNDING SUCCESSFUL CASE STUDY .....	22
2.8 RISKS IDENTIFICATION AND ALLOCATION – CRITICAL FOCUS OF PPP DESIGNING .....	22
2.9 MAJOR POLITICAL CONSTRAINTS AND CHALLENGES TO PPP .....	29
<b>3 PPP MODELS AND THEIR VARIANTS .....</b>	<b>31</b>
3.1 PROJECT CHARACTERISTICS AFFECTING CHOICE OF PPP MODE .....	31
3.2 PPP MODELS .....	33
3.3 WHICH MODEL TO SELECT? .....	37
3.4 PPP SUPPORTING ENVIRONMENT .....	38
<b>4 OVERVIEW OF THE PPP PROCESS .....</b>	<b>46</b>
4.1 IDENTIFY AND STRUCTURE FEASIBLE PPP PROJECTS .....	46
4.2 FINANCIAL ASSESSMENT OF PPP PROJECTS .....	48
<b>TIPS FOR BID PROCESS FOR PPP PROJECTS .....</b>	<b>52</b>
<b>5 CHOOSING THE BEST-SUITED PROCUREMENT METHOD .....</b>	<b>53</b>
5.1 PROCUREMENT STRATEGIES .....	53
5.2 GENERIC PROCUREMENT STRATEGIES .....	53
5.3 DESIGN OF THE PROCUREMENT PROCESS .....	56
<b>6 DESIGNING SERVICE PERFORMANCE SPECIFICATIONS .....</b>	<b>62</b>
6.1 SEVERITY WEIGHTS .....	62
6.2 SERVICE LEVEL CHANGES .....	62
6.3 SERVICE LEVEL CLASSIFICATIONS .....	63
6.4 SERVICE LEVEL FAILURES .....	63
6.5 SERVICE LEVELS – ESTABLISHMENT AND VALIDATION .....	63

6.6	CALCULATING PENALTIES AS SERVICE CREDITS .....	72
6.7	EARN-BACKS .....	73
6.8	UNACCEPTABLE SERVICE .....	73
6.9	CONTINUOUS IMPROVEMENT .....	74
6.10	GENERAL PROVISIONS .....	74
6.11	ESCROW AGREEMENT .....	75
6.12	RESALE OF NETWORK BANDWIDTH .....	76
6.13	ILLUSTRATIVE TEMPLATE FOR SLA .....	76
<b>7</b>	<b>FIRST DRAFT OF KEY PROJECT DOCUMENTS .....</b>	<b>97</b>
<b>8</b>	<b>APPROVALS: PROCESS FOR IN-PRINCIPLE CLEARANCE.....</b>	<b>99</b>
8.1	PREPARING FOR PROCUREMENT .....	99
8.2	FORMING A PROCUREMENT AND EVALUATION TEAM .....	99
8.3	REVIEWING AND UPDATING PROJECT INFORMATION .....	100
8.4	APPOINTING AN INDEPENDENT MONITOR .....	101
<b>9</b>	<b>BID PREPARATION: EOI AND RFP PROCESS.....</b>	<b>102</b>
9.1	EOI PROCESS .....	102
9.2	RFP & CONTRACT DESIGN .....	102
9.3	READINESS CHECK AND FINAL APPROVAL .....	103
9.4	APPLICATION FOR FINAL APPROVAL .....	105
9.5	BIDDING - RFP AND BID EVALUATION .....	105
<b>10</b>	<b>BEST PRACTICES IN BIDDING, EVALUATING, AND NEGOTIATING PPP TRANSACTIONS .....</b>	<b>106</b>
10.1.1.1	Preference to domestically manufactured electronic products in Government procurement (PMA) .....	108
<b>11</b>	<b>PUBLIC DISCLOSERS AND AUDIT REQUIREMENTS.....</b>	<b>111</b>
11.1	PUBLIC DISCLOSURE OF THE PPP AGREEMENT .....	111
11.2	APPROACH TO PUBLICATION .....	112
11.3	PRESERVING COMMERCIAL CONFIDENTIALITY .....	112
11.4	AUDITING OF PPP PROJECTS .....	113
<b>APPENDIX</b>	<b>.....</b>	<b>114</b>

## Need for standardization of RFPs for PPP projects

### Need for a standardized framework

With a view to enabling a smooth transition from Government projects to Public Private Partnerships (PPPs) and for adoption of best practices, DIT(GoI) has recognized the critical role of standardizing documents and processes to be adopted for structuring and award of PPP contracts. Standardized documents enable project authorities to save on the time and costs involved in structuring and awarding complex e-Governance PPP projects. In addition, they afford protection to individual entities and officials against making errors and answering for them. Such standard documents typically lay down the norms, principles and parameters to be followed for PPP projects and enable project authorities to adopt them with considerable ease for meeting the specific requirements of individual projects.

One of the key factors for the success of a PPP contract is the transparency of the selection process. A fair and competitive selection of the private partner is of utmost importance in the entire process since cost and quality of service to users would depend on the performance of the private partner. In line with this objective, guidelines have been framed for the Request for Proposal (RFP) stage involving submission of financial bids subsequent to a process of pre-qualification at the Expression of Interest (EOI) stage.

The guidelines are broad and generic in nature and aim at lending transparency and predictability to the entire process, allowing decisions to be made objectively and expeditiously. They address the critical minimum requirements that must be observed in conducting a credible selection process.

It is expected that the concerned Departments & State's Nodal Agencies intending to procure PPP projects would adopt this document while conducting the bidding process for e-Governance PPP projects. It allows sufficient flexibility for incorporating project specific requirements without compromising on the underlying principles. The salient features of the guidelines are as follows:

### Two-stage process

The bidding process for PPP projects is divided into two stages. The first stage is generally referred to as Expression of Interest (EOI). The objective is to pre-qualify and short-list eligible bidders for stage two of the process. These have been provided in **Section 1 : Guidance Notes : Model RFP Templates for Implementation Agencies**. These should be used before the second and final stage, which is generally referred to as the Request for Proposal (RFP) or invitation of financial bids, the bidders engage in a comprehensive scrutiny of the project before submitting their financial offers.

### Conclusion

A Model RFP document has been developed based on the principles outlined above. It is generic in nature and aims at lending transparency, efficiency and predictability to the entire process, allowing decisions to be made objectively and expeditiously. It also provides the requisite sector-specific and project-specific flexibility by placing several provisions within square brackets, thus enabling the Nodal Agencies to make necessary substitutions.

## **PRE – BID PROCESS: PPP PROJECT ASSESSMENT**

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## 1 Introduction

### 1.1 Background

In the past few years, e-Governance has gained considerable momentum in India, with several strategic e-Governance initiatives of the Government of India and the State Governments being executed in partnership with the Information Technology (IT) industry. The National e Governance Plan (NeGP), which was approved in May, 2006 and comprises of 27 Mission Mode Projects (MMPs) and 10 components, seeks to improve delivery of Government services to citizens and businesses with the following Vision:

*“Make all Government services accessible to the common man in his locality, through common service delivery outlets and ensure efficiency, transparency & reliability of such services at affordable costs to realize the basic needs of the common man”*

For major projects like Bharat Nirman, Rural Employment Guarantee Schemes etc., the line ministries have been advised to make use of e-Governance as also automation techniques from the inception stage. States have also been given the flexibility to identify additional state-specific projects, relevant to the economic development of the State.

Accordingly, the focus of e-Governance projects is now more on outcomes and service delivery rather than being IT hardware-centric.

### 1.2 PPP Mode of Procurement for E-Governance Projects

Recognizing the private sector capacities in India in providing IT services, the Government of India recognizes that a partnership approach under the **Public Private Partnership (PPP)** should be one of the modes of procurement, wherever feasible, for obtaining e-Governance solutions, without compromising on the security aspects.

As per Ministry of Finance, Department of Economic Affairs, (Infrastructure Section) PPP is formally defined projects, as “a project based on a contract or Contract Agreement (PPP), between a Government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges”. In a more general context, PPP refers to a contractual agreement between public and private sector partners, allowing for greater private sector participation than traditional, and involves a different/evolved nature of relationship between the public and private sectors from the traditional arms-length to one based on trust.

### 1.3 Definition of PPPs in India

The **Department of Economic Affairs (DEA)** defines PPPs as:

*PPP means an arrangement between a government or statutory entity or government owned entity on one side and a private sector entity on the other, for the provision of public assets and/ or related services for public benefit, through investments being made by and/or management undertaken by the private sector entity for a specified time period, where there is a substantial risk sharing with the private sector and the private sector receives performance linked payments that conform (or are benchmarked) to specified, pre-determined and measurable performance standards.*

## 1.4 Extant Policy Guidelines on PPPs

The Ministry of Finance (Department of Economic Affairs) have prescribed broad guidelines of the Government of India, for Formulation, Appraisal and Approval of Central Sector Public Private Partnership (PPP) Projects<sup>1</sup>. The only exceptions to these guidelines are the Ministry of Defence, and the Departments of Atomic Energy and Space. Even though e-Governance cannot be defined as an “infrastructure service”<sup>2</sup>, these guidelines serve an important best practices for successful implementation of e-Governance Projects in India.

The best practices include several infrastructure sector specific policy guidelines<sup>3</sup> and toolkits issued by the Government of India. The Comptroller and Auditor General of India (C&AG)<sup>4</sup> have also issued guidelines for audit of PPP projects.

The difference between physical infrastructure projects is that

- a) These projects are capital intensive, generally use conventional technology and are not significantly impacted by issues of **technological obsolescence, strategic control, interoperability, change management and exit management**.
- b) Against this position, **e-Governance projects are highly technology and intellectual capital intensive and are majorly impacted by technological obsolescence, strategic control, interoperability issues, change management and exit management**.
- c) Primary policy objective of PPPs in the infrastructure space where investment requirements are large is to procure substantial investments by the private sector, which is not the case for e-Governance projects. Hence as e-Governance projects are not “infrastructure projects”, there is a lack of institutionalized financing for these projects.

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<sup>1</sup> Guidelines for Formulation, Appraisal and Approval of Public Private Partnership Projects, Ministry of Finance, Department of Economic Affairs, 2008,

[http://www.pppinindia.com/pdf/guidelines\\_approval\\_central\\_sector\\_ppp\\_projects\\_english.pdf](http://www.pppinindia.com/pdf/guidelines_approval_central_sector_ppp_projects_english.pdf).

<sup>2</sup> DEA, MoF has defined the Infrastructure services as (i) Roads and bridges, railways, seaports, airports, inland waterways; (ii) Power; (iii) Urban transport, water supply, sewerage, solid waste management and other physical infrastructure in urban areas; (iv) Infrastructure projects in Special Economic Zones; and (v) International convention infrastructure centres and other tourism infrastructure projects.

<sup>3</sup> Ref PPP initiatives of the States at <http://www.pppinindia.com/ppp-initiatives-states.php>

<sup>4</sup> The C&AG guidelines on PPP audit are available at

[http://saiindia.gov.in/cag/sites/default/files/Audit\\_meth/Public\\_Private\\_Partnerships\(PPP\)\\_Infrastructure\\_Projects-Public\\_Auditing\\_Guidelines-2009/ppp-project.pdf](http://saiindia.gov.in/cag/sites/default/files/Audit_meth/Public_Private_Partnerships(PPP)_Infrastructure_Projects-Public_Auditing_Guidelines-2009/ppp-project.pdf)

## 1.5 Objectives and Scope

The Guidance detailed in this document are intended for application in respect of PPP projects in e-Governance and seek to augment the aforesaid broad principles and guidelines, in respect of issues specific to such projects.

These guidance notes can apply to all Central Sector or Centrally Sponsored e-Governance PPP projects including the MMPs and components under NeGP. For the purposes of this document, “e-Governance” shall mean the use of Information and Communications Technology (ICT) at all levels of the Government in order to provide services to the citizens, interaction with business enterprises and communication and exchange of information between different agencies of the Government in a speedy, convenient efficient and transparent manner. Basically, e-Governance is all about reform in governance, facilitated by the creative use of Information and Communications Technology. Business Process Reengineering (BPR) is the key to implementing e-Governance reforms.

## **2 Relevance of PPP in e-Governance**

### **2.1 Win-Win Proposition**

When assessing eGovernance projects for PPP model, one has to ask first: could the private sector has the wherewithal required to design and operate an e-governance services? If so, would that be preferable to the public sector financing and operating the system, thus freeing up public sector resources for projects that have higher social returns? And second: would the private sector be able to manage and operate the e-Governance project, under government supervision or regulation, more efficiently than the government? If so, how can the government get the highest number of competitive bids so that PPP's in e-Governance represent a best value and a technical innovation?

In most countries, the rationale to undertake e-Governance are compelling. All levels of government require modernization, new technologies, better efficiency, and improved services for citizens and customers. However, many of the upgrades and modernization required is not only capital intensive and expensive, but is also complex to manage and outside of the scope and skill-set of most government agencies. By having the private sector perform an e-Governance or ICT service, on behalf of, the government, a potential “win-win” solution can be realized where the private sector financed and operates a system, the government is in a better position to “ensure” effective delivery of the service, and the customer/citizen is receiving a higher quality service and is engaged more constructively in customer interfaces with the public sector.

### **2.2 Key Elements of PPP in e-Governance**

In order for Public-Private Partnerships in e-Governance to be successful, they must be firmly rooted within an overall policy framework of reform for the delivery of public services and the administration of government.

On their own, PPPs can help improve the efficiency of a specific public service or governmental administrative procedure, but unless PPPs occur within the context of an overall policy framework that supports broader reforms, beyond just improved efficiency in one specific service or procedure, the goals and objectives of PPPs in E-Governance will remain limited.

PPPs can realize these objectives best when they are part of an overall policy framework of reform in the delivery of public services and the management of governmental administrative procedures. Key elements of these policy frameworks should include:

- Government ministries that focus on policymaking and planning, but that delegate operational decision-making to Nodal Agencies, their Boards and their managers;
- Regulation & performance monitoring of these Nodal agencies and any private service providers (PPPs) that is done by a Nodal Officer from the concerned Department/Ministry;

- Ownership of the IT infrastructure by a Nodal Agency which is responsible for service delivery or contracting with private companies, through PPPs, for the delivery of these services;
- Operation of IT Infrastructure, and the delivery of e-Governance services by private vendors through transparent, competitively-procured PPPs.

PPPs therefore, are one important part of a much broader framework to separate or un-bundle key roles of governance: planning & policy-making; regulation & performance monitoring; ownership of assets and contracting for their operations & management, and; the operation and management of those services and procedures. Without a dedicated effort to realize these broader policy objectives, PPPs can add processing capacity and delivery capacity, but they will likely be unable to contribute significantly to improving efficiency, productivity, performance, and quality throughout the sector.

## 2.3 Characteristics of PPPs in E-Governance

A PPP typically has the following characteristics:

- The private sector is responsible for carrying out or operating the project and takes on a share of the associated project risks
- During the operational life of the project the public sector's role is to monitor the performance of the private partner and enforce the terms of the contract
- The private sector's costs may be recovered in whole or in part from charges related to the use of the services provided by the project, and may be recovered through payments from the public sector
- Public sector payments are based on performance standards set out in the contract
- Often the private sector will contribute the majority of the project's capital costs, although this is not always the case, especially when the Government already has invested in various infrastructure like SDC, SWAN, CSC etc.

It will often be necessary to build or add to existing assets in order to meet the infrastructure needs of the economy and users. However, an important part of the infrastructure PPP concept is that:

- A PPP is focused on **outputs**, and
- The outputs of the PPP are **citizen services**, not infrastructure assets.

The reason for the focus on outputs and services rather than assets is to encourage efficient use of public resources and improved infrastructure quality.

A PPP brings the public and private sectors together as partners in a contractual agreement, for a pre-defined period to provide the services. However given the short lifespan of the IT infrastructure, the contract should provide a framework to refresh the technology and the assets during the contract period.

The private partners provide specified IT infrastructure services and, in return, the public sector either pays for those services or grants the private partner the right to generate revenue from the project. For example, the private partner may be allowed to charge user fees or receive revenue from other aspects of the project. The best PPPs will have the public and private partners working together to build and sustain a long-term relationship that is of benefit to all.

## 2.4 Objectives of PPPs in E-Governance

The objectives of PPPs in e-Governance could include:

- **Improved efficiency** in the delivery of citizen services or the performance of administrative procedures;
- **Expanded access** to citizen services and to public information;
- **Greater transparency & reduced corruption** through improved access to public information;
- **Improved quality of service** by both measuring and achieving key performance indicators;
- **Reduced costs** in the delivery of citizen services or the execution of administrative procedures;
- **The sharing of key risks** between them;
- **Maximizing Value for Money** through reduced costs and lower risks to the public sector;
- **Improved competitiveness** of the overall governance and economic framework;
- **Improved commercial performance** in the delivery of citizen services and execution of public administration, such as achieving levels of cost-recovery specific performance indicators;
- **Transfer of technology** and improved capacity of the public sector to better manage public services and administrative procedures

## 2.5 Complexities in PPPs

A PPP is not a panacea for all the uncertainties & challenge which govern the e-Governance projects. The following are noted complexities in PPPs. Most of these can be minimized under certain circumstances and through careful management of the PPP design by the Nodal Agency. This requires capacity (experience and expertise) to manage the PPP process.

### Complex Procurement Process with Associated High Transaction Costs

The PPP project must be clearly specified, including allocation of risk and clear statement of the service output requirements. The long-term nature of PPP contracts requires greater consideration and specification of contingencies in advance.

The Bidding and negotiation process is a costly exercise. Transactions advisors and legal experts will typically be required.

### Contract Uncertainties

PPPs often cover a long-term period of service provision. Any agreement covering such a long period into the future is naturally subject to uncertainty, more so in Information Technology. Given that there would be significant changes in requirements and technologies during the lifetime of the PPP the contract may need to be modified to reflect the changes.

This can entail large costs to the public sector and the benefit of competitive Bidding to determine these costs is usually not available. This issue can be mitigated by selecting relatively stable projects as PPPs and by specifying in the original contract terms how future contract variations will be handled and priced.

### **Enforcement and Monitoring**

Once it enters the implementation and O&M phases, the success of the PPP from the public perspective will depend on the ability of the Nodal Agency to monitor performance against standards and to enforce the terms of the contract.

### **Difficulty in Demonstrating Value for Money in Advance**

Ideally, a project should be procured as a PPP on the basis of a clear demonstration that it provides value for money (VFM) compared with public sector procurement. However, it is difficult to demonstrate VFM in advance due to uncertainties in predicting what will happen over the life of the project and due to a lack of information about comparable previous projects.

In India, many projects procured in the e-Governance area, experience time overruns, and hence it is likely that well-managed private procurements will be able to complete projects on time. Furthermore, the capacity gap (which includes funds, managing operations, technology and other resources) is far greater than the Nodal Agency can meet by itself. In this case, it may sometimes not be a question of public vs. private procurement, but rather the choice between private procurement or none at all. If this is the case then the focus should be on making a careful assessment of alternative project options to be sure that the projects that are selected are the best ones economically and financially.

## **2.6 When Should PPP Be Considered?**

The use of PPP for infrastructure projects should only be considered in the following situations :

- ***The public sector environment is suited to supporting PPPs*** – a PPP is a complex arrangement that requires support from the Public sector during development and long term operation. Since these are long term projects, there would be numerous instances which would require flexibility on both sides to ensure continuity to the project. The likelihood of PPP success will be increased when the public sector supporting environment is strong. The environment includes amongst other things, the right type of capacity (experience & qualifications) to manage the PPP projects.
- ***The project is suitable to being carried out as a PPP*** – certain characteristics make a project well suited to being a PPP, while others imply that the PPP approach will be difficult or inappropriate. For e.g. Hardware supply, software development, data entry etc. in isolation would not be amenable for PPP project.

- ***The potential barriers to successful project implementation have been identified and can be overcome*** – many of the common obstacles to successful PPP implementation can be identified in advance. If these are insurmountable then the project should not proceed as a PPP. If they can be overcome, as will often be the case, then this needs to be factored into the PPP development and thoroughly planned for.
- ***Given that these conditions are satisfied, the project must be commercially viable for the private sector and offer value for money (VFM) for the public sector*** —the choice of PPP should allow the project to be undertaken at lower cost on a lifetime basis, while delivering the same or better quality services than could be achieved through implementation by the public sector or private sector on their own. It must also be commercially viable in order to be attractive to private investors.

These important conditions should be checked early for every project. This will improve the quality and likely success of projects entering the PPP development pipeline.

Where these tests are not met it may be better to carry out the project through the traditional procurement route (which may mean through direct funding). In this case private sector involvement might be introduced in Project Implementation/Development and O&M phase, but primary responsibility for financing and control of the project would remain with the appropriate Nodal Agency.

### **PPP Suitability**

To help Nodal Officers check how well suited a project is to being developed as a PPP, an initial assessment whether the project is amenable to a PPP model needs to be undertaken. These are as follows:

- **Project Design, Need and Justification**
  - a. Is there a clear and demonstrated need for the project?
  - b. Is the project consistent with the objectives and scope of the Government Department undertaking this project and National e-Governance Plan?
  - c. Is the project consistent with wider government objectives, policies and programmes?
  - d. Is there a clear and agreed understanding of the goals/citizen charter of the project and are these properly reflected in its design?
  - e. Are the project's desired performance and service levels adequately defined?
  - f. Are stakeholders supportive of the project?
  - g. Has the necessary BPR has been planned / undertaken?
- **Initial Commercial Case**
  - a. Has an initial commercial case been prepared?
  - b. Is the project expected to achieve a satisfactory financial return for the private partner?



- c. Are the proposed financing arrangements / user charges realistic?
- d. Is the Department willing to pay for the gap in commercial viability?

- **Initial Risk Management Strategy**

- a. Have all major project risks been identified, including those indicated by the Suitability Filter, ideally in the form of a risk matrix?
- b. Has a realistic preliminary risk management strategy been prepared for dealing with identified risks?
- c. Is the industry mature enough to hedge the risks involved?

- **Forward Planning**

- a. Does the project team have adequate skills and resources?
- b. Have requirements for PPP consultants been identified?
- c. Are financial resources available for project development activities?
- d. Is there a realistic timetable for the progress of the project?

### **Commercial Viability**

Commercial viability is crucial if the project is to attract a private partner. For a project to be commercially viable does not mean it cannot receive some financial and other support from the public sector. In some cases such support may be necessary, and initiatives such as Viability Gap Funds (VGF) have been established for this purpose.

### **Value for Money and Risk Allocation**

In order for PPPs to offer value for money (VFM), the higher costs of engaging a private agency must be more than offset by the greater efficiencies offered by private sector construction and operation and the reductions in risks borne by the public sector. This means there must be effective risk transfer to the private sector.

Careful and appropriate risk allocation between the public and private partners is a critical focus of PPP design to achieve value for money. If private partners do not bear the risks that are under their control, their incentives for efficiency will be weakened and PPP benefits may be reduced. The requirements for effective risk transfer and the ability to harness private sector efficiencies means PPPs are best suited to projects for which:

- It is possible to clearly specify the requirements in terms of service outputs – the idea is to capture as much of the private sector efficiencies as possible by allowing scope for bidders to introduce efficiencies through innovations proposed in their bids
- The requirements can be specified so as to enable monitoring of performance against measurable standards and enforcement of penalties where standards are not met
- The requirements of the public sector sponsor are likely to be stable throughout the life of the PPP – the aim is to avoid the need to renegotiate the contract at a later date due to changes to project scope or requirements

## 2.7 PPP in E-Governance: Lack of Resounding Successful Case Study

PPPs are used to deliver infrastructure services in many countries internationally including United Kingdom, Australia, South Africa, Canada, USA, South Korea, Ireland, Portugal and others.

Australia, South Africa and the UK all assign a leading role in reviewing and approving proposed PPPs to the relevant department of the Government. This role goes well beyond that of assessing the implications for government finances to consider whether a PPP is the appropriate approach, whether the project is viable on the business case presented and whether it delivers value for money (VFM). **In each of these countries, the role of reviewing and approving PPP proposals is separated from that of providing project development assistance, where the government is involved in this, and of capacity-building. This is currently missing for e-Governance projects in India.**

## 2.8 Risks Identification and Allocation – Critical Focus of PPP Designing

### 2.8.1 Risks Identification

Assessing and allocating risk to achieve added efficiency is what makes PPP a potentially powerful way of reducing project-related costs and achieving improved value for money for the public sector. The *level* of risk can be **changed by allocating responsibility for individual risks to those who are best able to manage them.** This is one of the most important component of defining an PPP project. The diagram below illustrates how Risk planning should be engaged into.



Figure 1 : Risk Management

The parties involved in a project can affect the amount of risk by:

- The level of **influence** they have over events, and
- the level of **information** they have about the present and the future.

### Major risks in e-Governance PPPs

The typical risks are shown and described in the table below, grouped according to important project stages and 'other' risks.

Table 1 : Type of Risks

Risk type	Description
<b>Pre-Implementation Phase Risks</b>	
Pre-Go Live risks	Refers to the risk involved in the pre Go-live phase, specially with respect to Issue of Government notifications for the revised process, allocation of powers, other technical, legal, financial issues, are inadequate or not robust enough resulting in possible deviations from the planned or expected outcomes in the PPP project development.
Government Rules and Notifications	Refers to the risk that necessary Government rules and notifications are not obtained in a timely fashion, resulting in delays to project implementation and the project as a whole.
Financing risks	The financial risk which the bidding organization may be willing to undertake, in case there has been lack of provisioning of detailed information / change in requirements post the award of the project.
<b>Project Implementation Phase Risks</b>	
Solution Design risk	Refers to the risk that the technology used will be unexpectedly superseded during the term of the project and will not be able to satisfy the requirements in the output specifications. It would result in increased costs of a replacement technology.
Solution Development risk	Refers to the risk that the solution development and commissioning of the hardware required for the project will not be completed on time, budget or to specification. It may lead to additional technology and development costs.
Approvals risk	Refers to the risk that delays in approvals to be obtained during the development phase will result in a delay in the project implementation as per the work plan. Such delays in obtaining approvals may lead to cost overruns.
Integrations with other applications	Refers to the integration the application is supposed to have with the core application developed for the department. The risks involved are related to access to the external systems given the ownership of the assets lies with the PPP vendor.
Quality of Data Entry	Refers to the accuracy of data entry of the historical records and the requirement of necessary approvals on every record. Lack of quality check can

Risk type	Description
	be a big risk linked to the success of the project.
	<b>Operation Phase Risks</b>
Operations and maintenance risk	Refers to the risks associated with the need for increased maintenance of the solution over the term of the project to meet performance requirements.
Volume risk	Refers to the risk that demand for a service will vary from that initially projected, such that the total revenue derived from the project over the project term will vary from initial expectations. There is no risk in annuity contracts.
Technology obsolescence	Refers to the technology obsolescence linked to the duration or increase in the load
Payment risk	Refers to the risk that payments are not made in full or are not set at a level that allows recovery of costs of the PPP vendor.
Financial risk	Refers to the risk that the private sector over stresses a project by inappropriate financial structuring. It can result in additional funding costs for increased margins or unexpected refinancing costs.
	<b>Handover Risks</b>
Handover risk	Refers to the risk that the PPP vendor will default in the handover of the asset at the end of the project term or will deviate from the minimum quality / value of the asset that needs to be handed back to the public entity.
Terminal value risk	Refers to the risk relating to differences from the expected realizable value of the underlying assets at the end of the project.
	<b>Other Risks</b>
Change in law	Refers to the risk that the current legal / regulatory regime will change, having a material adverse impact on the project.
Force Majeure	Refers to the risk that events beyond the control of either entity may occur, resulting in a material adverse impact on either party's ability to perform its obligations under the PPP contract.
Sponsor risk	Refers to the risk that sponsors will prove to be inappropriate or unsuitable for delivery of the project, for example due to failure of their company.

Risk type	Description
PPP Vendor event of default	Refers to the risk that the private entity will not fulfill its contractual obligations and that the government will be unable to either enforce those obligations against the sponsors, or recover some form of compensation or remedy from the sponsors for any loss sustained by it as a result of the breach or the sponsors will prove to be inappropriate or unsuitable for delivery of the project.
Government event of default	Refers to the risk that the government will not fulfill its contractual obligations and that the private entity will be unable to either enforce those obligations against the government, or recover some form of compensation or remedy from the government for any loss sustained by it as a result of the breach.

## 2.8.2 Risks Allocation

Risk allocation is critical to the success of a PPP in the sense that sharing of project uncertainties and the transfer of ownership should those uncertainties arrive, allow for better delivery planning and accountability between Public and Private sectors.

Some of the Risk mitigations and allocations exercised in a PPP project are presented in the table here under:

Table 2 : Allocation of Risks

No.	Risks	Mitigation	Allocation
1.	<b>Pre-Go Live risks</b>	Institutionalized PPP management process, regulations, laws and clear agreement on project outcomes	<ul style="list-style-type: none"> <li>• Institutionalized PPP management process, regulations etc: Public sector</li> <li>• Project outcomes: Both Parties</li> </ul>
2.	<b>Technology risk</b>	Obligation on Private Party to refresh technology as required from time to time to meet the output specifications. Penalty Deductions for failure to meet output specifications.	Private Party.
3.	<b>Latent defect risk</b>	Wherever possible, the design and development of the Facilities required for a Project must be performed or procured by the Private Party.  If, however, the Project involves the take-over by the Private Party of existing Facilities, then the Private Party must undertake a thorough due diligence of these Facilities to	If the Private Party (or any of its subcontractors) designs and constructs the Facilities, the Private Party.  If not, then the Nodal

No.	Risks	Mitigation	Allocation
		<p>uncover defects before the Signature Date. The procedure for and cost of the remediation of such discovered defects can then be pre-agreed.</p> <p>Reporting obligation on Private Party to promptly disclose discovered defects.</p>	<p>Agency, but only if there is no or insufficient insurances available to mitigate this risk and if the Nodal Agency's liability is capped (subject to VFM considerations).</p>
4.	<b>Completion risks</b>	<p>Efficient project Management</p> <p>Timely approvals on the design documents</p>	Private Party, unless delay caused by Public sector
5.	<b>Design risk</b>	<p>Clear output specifications.</p> <p>Design warranty.</p> <p>Patent and latent defect liability.</p> <p>Consultation with and review by Nodal Agency (but review must not lead to input specifications by Nodal Agency).</p> <p>Independent Expert appointment to resolve disputes on expedited basis.</p>	Private Party.
6.	<b>Cost over-run risk</b>	<p>Fixed price development contracts.</p> <p>Contingency provisions.</p> <p>Standby debt facilities / additional equity commitments (Shareholder and other funder commitments); provided that these commitments are made upfront and therefore anticipated in the base case Financial Model.</p> <p>However, if the Project is not performing as anticipated in the base case Financial Model, then (to effect a rescue of the Project) these commitments may be implemented, but the prior approval of the Nodal Agency is required if such commitments will increase its liabilities on termination.</p>	Private Party.
7.	<b>Planning risk</b>	The Nodal Agency must identify at the feasibility phase any planning approvals that can be obtained by the Nodal Agency before the detailed designs for the Project are finalized. These approvals must then be obtained before the Project is put to	In relation to any non-design and construction specific planning approval, the Nodal Agency.

No.	Risks	Mitigation	Allocation
		tender/bid.  The Private Party must identify before the Signature Date all planning approvals that are required for the Project having regard to the specific design inputs proposed by the Private Party. The Private Party must make adequate provision in its development programme for such approvals.  Relief Event.	In relation to any design or construction specific planning approval, the Private Party
8.	<b>Availability risk</b>	Clear output specifications.  Performance monitoring.  Penalty regime.	Private Party.
9.	<b>Market, demand or volume risk</b>	In a Unitary Payment type PPP, the Unitary Payment must be paid based on availability (not actual usage by the Nodal Agency).	In relation to a Unitary Payment funded Project, the Nodal Agency.  In relation to a revenue generating Project, the Private Party.
10.	<b>Utilities supply risk</b>	Emergency back-up facilities, e.g. generators.  Emergency supply contracts. Special insurance.	Private Party unless the utilities are supplied by the Nodal Agency and such supplies are not covered by the special insurance.
11.	<b>Insolvency and outside creditor risk</b>	SPV structure to ring-fence project.  Security over necessary Project Assets.  Limitations on debts and other funding commitments of the Private Party including any outside the Project.  Reporting obligations in respect of any litigation; financial information; disputes with creditors.  Substitution of Private Party in terms of Direct Agreement.	Private Party.
12.	<b>Sub-contractor risk</b>	Subcontractors must have expertise, experience and contractual responsibility for their performance obligations.  Substitution of subcontractors.	Private Party.



No.	Risks	Mitigation	Allocation
		Due diligence by the Nodal Agency must include review of first tier subcontracts to confirm that pass through of risks down to the first tier subcontractors and their subcontractors is provided for in the Project subcontracts.	
13.	<b>Operating risk (technology, environmental, cost and management)</b>	<p>Clear output specifications.</p> <p>Penalty regime and performance monitoring.</p> <p>Adequate O&amp;M contract.</p> <p>Substitution rights.</p> <p>Security and special insurance.</p>	Private Party.
14.	<b>Maintenance risk</b>	As above.	Private Party.
15.	<b>Force Majeure (act of God) risks</b>	<p>Define "Force Majeure" narrowly to exclude risks that can be insured against or are dealt with more adequately by other mechanisms such as Relief Events or Compensation Events.</p> <p>Relief and Compensation Events.</p> <p>Termination.</p>	<p>If risks are insurable, risk allocated to Private Party.</p> <p>If risks are not insurable, then risk is shared insofar as Nodal Agency may pay some compensation.</p>
16.	<b>Political risk</b>	<p>Limit risk to Changes in Law and to expropriation, nationalization or privatization (collectively, "expropriating actions") of the Nodal Agency, services or assets of the Private Party.</p> <p>Distinguish between General and Discriminatory Changes in Law.</p> <p>In relation to Discriminatory Changes in Law, termination by Private Party with compensation.</p>	<p>In relation to Discriminatory Changes in Law and expropriating actions, the Nodal Agency.</p> <p>In relation to General Changes in Law, the Private Party.</p>
17.	<b>Regulatory risk</b>	<p>Legal scan undertaken to be by the Nodal Agency at the feasibility phase of the Project to identify all such approvals.</p> <p>Implementation by the Nodal Agency of an intergovernmental liaison process with the responsible government authorities before the procurement phase.</p> <p>Due Diligence by Private Party to identify approvals it requires for its operating requirements.</p>	<p>If any such approvals (other than those relating to Private Party's operating requirements) can be obtained before the Signature Date, the Nodal Agency.</p> <p>In relation to the</p>



No.	Risks	Mitigation	Allocation
		If permitted under applicable law, obtain all such approvals before the Signature Date.	Private Party's operating requirements, the Private Party.
18.	<b>Tax rate change risk</b>	Compensation for tax increases or new taxes arising from Changes in Law.	In relation to tax increases or new taxes, the Nodal Agency.
19.	<b>Inflation risk</b>	Index linked adjustment to Unitary Payments or user charges. However, index-linking not blanket, but only to specified input items.	Shared between the Private Party and the Nodal Agency in relation to specified input items.
20.	<b>Residual value risk</b>	<p>Obligations on Private Party to maintain and repair.</p> <p>Audit towards the end of Project Term.</p> <p>Security by the Private Party in favour of the Nodal Agency, e.g. final condition bond, or deduction from Unitary Payment.</p> <p>Reinstatement obligations on Private Party.</p>	Private Party.

Please refer Appendix for common type of risk allocation depending on the type of PPP model.

## 2.9 Major Political Constraints and Challenges to PPP

As with any shift in government policy or practice, a number of stakeholder groups will inevitably resist to change. Employing PPP models for government service delivery is certainly no exception. PPPs have frequently been the impetus for major political and social resistance. The following are several of the most common constraints or challenges to PPP.

- *Perceived Misuse of Taxpayer Money* – When a private operator is introduced into public services, there is often the risk that the public will perceive that tax-payer money is transferred to profit-driven enterprises.
- *Private Profits in Exchange for Service Quality* – Often the public perception is that the only way the private operator can make a profit in PPP projects is by cutting corners in service quality. Past failures in large-scale PPP infrastructure projects cast a shadow on current PPP initiatives in other sectors.
- *Past Failures in Technology Investments* – Past public expenditures in technology have not always yielded expected results. In these cases, the public criticizes the waste of money, and become wary of supporting other major investments in ICT or e-Governance.
- *Lack of capacity to develop and manage PPP* – It is possible to have political will to support PPP, but no skills in government to further them. In this situation, it is extremely useful to establish a designated Nodal Agency within government, and invest in the training of its staff.

- *Lack of local private ICT industry* – Many emerging market countries lack private ICT industries that are sufficiently developed to partner with the government on e-Governance PPP projects.

### 3 PPP Models and Their Variants

Public-private partnership's (PPPs) can take a range of types encompassing various roles, ownership arrangements, and allocations of risk between the private and public partners. These different types are called PPP models. Common examples of different models are management contracts, lease, build-own-operate (BOO) contracts, and build-operate-transfer (BOT) contracts. In the roads sector, BOT is a common PPP mode, with revenues for the private operator often being from tolls (BOT Tolls contract) or from a fixed annual/semi-annual payment (BOT Annuity contract).

This section provides more detail on the main PPP model alternatives. It is important that practitioners understand the various PPP modal options and their applicability or appropriateness to specific type of a situation. After reading this section the user should have acquired an understanding that will aid them in selecting the appropriate PPP mode.

The PPP modes that have common characteristics can be grouped into 'families'. Within these families lie a vast range of possible modal combinations and variations to suit the particular project. These variations, which are sometimes subtle and embedded deep in the contractual detail of the project, are too many to be discussed here. The task of defining a project to this level of detail and defining it in the contract will usually be carried out by specialist transaction advisors.

#### 3.1 Project Characteristics Affecting Choice of PPP Mode

The different modes and variants of them will be appropriate to different projects. This will depend in particular on the nature of the service or output required, which in turn depends on the sector and sub-sector, and the political and economic climate in which the PPP will be carried out.

The key aspects that define the PPP mode are:

- Does the PPP involve building **new assets** to provide the service (capital expenditure project), or are the required services for operations and management only?
- Which **roles** will the private sector carry out? For example, who will provide the initial capital for the hardware procurement? Who will design and develop the solution?
- Who will have **ownership** of the assets during the PPP and when the PPP ends?
- What will be the **duration** of the PPP contract?
- How are the various project risks allocated between the private and public partners?
- What will be the major **revenue source** for the project? For example, will it be from charges to users (user charges), or payment from Government (eg Quarterly fixed payments minus penalties)?
- Is demand for the e-Governance service expected to be stable over the period of the contract?

**New or existing assets** – Be-Spoke developments, which include **major capital expenditure** to build new infrastructure, have different requirements to the **maintenance of existing IT assets**.

The scope of potential private sector roles is broader in green-field projects. The chosen PPP mode will reflect whether the private sector will be responsible for the design, finance and construction of the project (eg DBO agreement or a variation) or only some of these roles.

**Ownership flexibility** – There may be legal restrictions on public ownership. Other practical issues need to be taken into account in deciding ownership, such as strategic ownership of the data. Restrictions on ownership rule out PPP modes that specifically contain ownership aspects, such as Build-own-operate (BOO) and its variants (eg. BOOT). In this case other options such as lease management contracts, BOT, BTL, could be considered.

**Lifetime of the IT assets and scale of initial investments** – IT infrastructure assets that involve large upfront capital costs, such as roads, require long timeframes for cost recovery. Such assets may be suited to long-term contracts (eg BOT, BLT etc). However, long timeframes also bring greater risk of future unknowns. The public sector may be required to take on some of these risks by providing some guarantee to cost recovery in order to attract private sector project finance. For example, for a e-District project for which provisioning of caste certificate is one of the services, the future traffic volumes are uncertain.

The PPP might be structured with annuity payments rather than being toll-based, to reduce the revenue risk to the private operator. The willingness or ability of the public sector partner to meet these risks is a further factor to be considered in determining the length of contract. For example, if facilities to support long-tenor debt are not available shorter term contracts with renewal clauses may be appropriate.

**The nature of the service to be provided and the supporting infrastructure assets** – More broadly, the nature of the end-user service itself will tend to favour a type of contracting structure. This is related to the capital cost structure (scale and timing) and the nature of the assets (physically fixed to their location or transportable).

Large IT assets, solution and service infrastructure assets tend to be natural monopolies and require some form of institutional price and quality regulation, either within the terms of contract or by a dedicated regulatory agency.

**Cost recovery options** – Whether the revenue from the PPP will be from a user-charge or a management fee or annuity paid by the public sector has important implications for the nature of the risk sharing.

**Stability of demand for the services required** – long-term PPP contracts are best suited to the provision of services which are not expected to change much through time. These projects have lower risk of unforeseeable outcomes compared with projects whose services are subject to change, for example in sectors that are subject to rapid technological change. (for e.g. Income Tax returns). In some cases it may be necessary to provide the project with some protections from competition in order to reduce volume and revenue risk.

### 3.2 PPP Models

The various PPP model variants can be summarized as follows:

Table 3 : PPP Model and their characteristics

Broad category	Main Variants	Ownerships of Capital Assets	Responsibility of investment	Assumption of risk	Duration of contract
Managed Services / Management Contract	Outsourcing	Public	Public	Public	1-3 years
	Maintenance Management	Public	Public/Private	Public/Private	3-5 years
	Operational Management	Public	Public	Public	3-5 years
Turnkey		Public	Public	Public/Private	1-3 years
Affermage / Lease	Affermage	Public	Public	Public/Private	5-20 years
	Lease <sup>5</sup>	Public	Public	Public/Private	5-20 years
Concessions	Franchise	Public/Private	Public/Private	Public/Private	3-10 years
	BOT <sup>6</sup>	Public/Private	Public/Private	Public/Private	15-30 years
Private ownership of assets and PFI type	BOO/DBFO	Private	Private	Private	Indefinite
	PFI <sup>7</sup>	Public/Private	Private	Public/Private	10-20 years
	Divestiture	Private	Private	Private	Indefinite

The main features of each of the broad categories of the PPP models are discussed next.

#### Managed Services / Management contracts

A Managed Services / Management contracts is a contractual arrangement for the management of a part or whole of a public enterprise by the private sector. Management contracts allow private sector skills to be brought into service design and delivery, operational control, labour management and equipment procurement. However, the public sector retains the ownership of facility and equipment. The private sector is assigned specified responsibilities concerning a service and is generally not asked to assume commercial risk.

The private contractor is paid a fee to manage and operate services. Normally, the payment of such fees is performance-based. Usually, the contract period is short, typically three to five years.

The main pros and cons of this model include the following:

#### Pros:

- Can be implemented in a short time.
- Least complex of all PPP models.
- In some countries, politically and socially more acceptable for certain projects

<sup>5</sup> Build-Lease-Transfer (BLT) & Lease Renovate Operate Transfer are a variants.

<sup>6</sup> Build-Operate-Transfer (BOT) has many other variants such as Build-Transfer-Operate (BTO), Build-Own-Operate-Transfer (BOOT) and Build-Rehabilitate-Operate-Transfer (BROT).

<sup>7</sup> The Private Finance Initiative (PFI) model has many other names. In some cases, asset ownership may be transferred to, or retained by the public sector.

**Cons:**

- Efficiency gains may be limited and little incentive for the private sector to invest.
- Almost all risks are borne by the public sector.
- Applicable mainly to existing infrastructure assets.

**Turnkey**

Turnkey is a traditional public sector procurement model for infrastructure facilities. Generally, a private contractor is selected through a bidding process. The private contractor designs and builds a facility for a fixed fee, rate or total cost, which is one of the key criteria in selecting the winning bid.

The contractor assumes risks involved in the design and construction phases. The scale of investment by the private sector is generally low and for a short-term. Typically, in this type of arrangement, there is no strong incentive for early completion of the project. This type of private sector participation is also known as Design-Build.

The main pros and cons of this model include the following:

**Pros:**

- Well understood traditional model.
- Contract agreement is not complex.
- Generally, contract enforcement is not a major issue.

**Cons:**

- The private sector has no strong incentive for early completion.
- All risks except those in the construction and installation phases are borne by the public sector.
- Low private investment for a limited period.
- Only limited innovation may be possible.

**Affermage/Lease**

In this category of arrangement, the operator (the leaseholder) is responsible for operating and maintaining the infrastructure facility (that already exists) and services, but generally the operator is not required to make any large investment. However, often this model is applied in combination with other models such as build-rehabilitate-operate-transfer. In such a case, the contract period is generally much longer and the private sector is required to make significant investment.

The arrangements in an affermage and a lease are very similar. The difference between them is technical. Under a lease, the operator retains revenue collected from customers/users of the facility and makes a specified lease fee payment to the Nodal Agency. Under an affermage, the operator and the contracting authority share revenue from customers/users.

In the affermage/lease types of arrangements, the operator takes lease of both infrastructure and equipment from the government for an agreed period of time. Generally, the government undertakes the responsibility for investment and thus bears investment risks. The operational risks are transferred to the operator. However, as part of the lease, some assets also may be transferred

on a permanent basis for a period which extends over the economic life of assets. Fixed facilities and land are leased out for a longer period than for mobile assets. Land to be developed by the leaseholder is usually transferred for a period of 15-30 years.

Lease Renovate Operate and Transfer (LROT) is a variant of Lease contracts. This is a contractual arrangement whereby an existing infrastructure /facility is handed over to private parties on lease, for a particular period of time for a specific purpose of renovating the facility and operating it for a specific period of time; on such terms and conditions as may be agreed to with the Government for recovering of the costs with an agreed return and thereafter transferring the facility back to the Government.

The main pros and cons of this model include the following:

**Pros:**

- Can be implemented in a short time.
- Significant private investment possible under longer term agreements.
- In some countries, legally and politically more acceptable for strategic projects like ports and airports.

**Cons:**

- Has little incentive for the private sector to invest, particularly if the lease period is short.
- Almost all risks are borne by the public sector.
- Generally used for existing infrastructure assets.
- Considerable regulatory oversight may be required.

**Concessions**

In this form of PPP, the government defines and grants specific rights to an entity (usually a private company) to build and operate a facility for a fixed period of time. The government may retain the ultimate ownership of the facility and/or right to supply the services. In concessions, payments can take place both ways: concessionaire pays to government for the concession rights and the government may pay the concessionaire, which it provides under the agreement to meet certain specific conditions. Usually, such payments by the government may be necessary to make projects commercially viable and/or reduce the level of commercial risk taken by the private sector, particularly in a developing or untested PPP market. Typical concession periods range between 5 to 50 years.

The main pros and cons of this model include the following:

**Pros:**

- Private sector bears a significant share of the risks.
- High level of private investment.
- Potential for efficiency gains in all phases of project development and implementation and technological innovation is high.

**Cons:**

- Highly complex to implement and administer.
- Difficult to implement in an untested PPP market.
- May have underlying fiscal costs to the government.

- Negotiation between parties and finally making a project deal may require long time.
- May require close regulatory oversight.
- Contingent liabilities on government in the medium and long term.

In a Build-Operate-Transfer or BOT type of concession (and its other variants namely, Build-Transfer-Operate (BTO), Build-Rehabilitate-Operate-Transfer (BROT), Build-Lease-Transfer (BLT) type of arrangement), the concessionaire makes investments and operates the facility for a fixed period of time after which the ownership reverts back to the public sector. In a BOT modal, operational and investment risks can be substantially transferred to the concessionaire.

In a BOT model, the government has, however, explicit and implicit contingent liabilities that may arise during the course of the project.

By retaining ultimate ownership, the government controls the policy and can allocate risks to parties that are best suited to assume or remove them. BOT projects may also require direct government support to make them commercially viable.

The concessionaire's revenue in a BOT project comes from managing and marketing of the user facilities. Concessions for BOT projects can be structured on either maximum revenue share for a fixed concession period or minimum concession period for a fixed revenue share, a combination of both, or only minimum concession period.

There is very little difference between BOT and BOOT. In fact these terms at times are used interchangeably. A BOOT structure differs from BOT in that the private entity owns the works. During the concession period the private company owns and operates the facility with the prime goal to recover the costs of investment and maintenance while trying to achieve higher margin on project

### **Private Finance Initiative (PFI)**

In the private finance initiative model, the private sector remains responsible for the design, construction and operation of an infrastructure facility. In some cases, the public sector may relinquish the right of ownership of assets to the private sector.

In this model, the public sector purchases infrastructure services from the private sector through a long-term agreement. PFI projects, therefore, bear direct financial obligations to the government in any event. In addition, explicit and implicit contingent liabilities may also arise due to loan guarantees provided to the lenders and default of a public or private entity on non-guaranteed loans.

A PFI project can be structured on minimum payment by the government over a fixed contract tenure, or minimum contract tenure for a fixed annual payment, or a combination of both payment and tenure.



In the PFI model, asset ownership at the end of the contract period is generally transferred to the public sector. Setting up of a Special Purpose Vehicle (SPV) may not be always necessary (see discussion on SPV in the following section). A PFI contract may be awarded to an existing company. For the purpose of financing, the lenders may, however, require the establishment of an SPV. The PFI model also has many variants.

In a PFI project, as the same entity builds and operates the services, and is paid for the successful supply of services at a pre-defined standard, the SPV / private company has no incentive to reduce the quality or quantity of services. This form of contractual agreement reduces the risks of cost overruns during the design and construction phases or of choosing an inefficient technology, since the operator's future earnings depend on controlling the costs. The public sector's main advantages lie in the relief from bearing the costs of design and construction, the transfer of certain risks to the private sector and the promise of better project design, development and operation.

The main pros and cons of this model are summarized below:

**Pros:**

- Private sector may bear a significant share of the risks.
- High level of private investment.
- Potential for efficiency gains and innovation is high.
- Attractive to private investors in an untested or developing PPP market.
- Most suitable for social sector infrastructure projects (schools, dormitories, hospitals, community facilities, etc.).

**Cons:**

- Complex to implement and manage the contractual regimes.
- Government has direct financial liability.
- Negotiation between parties may require long time.
- Regulatory efficiency is very important.
- Contingent liabilities on the government in the medium and long term.

### 3.3 Which model to select?

The answer to this question needs careful assessment of many things. Each model has its own pros and cons and can be suitable for achieving the major objectives of private-private partnership to a varying degree. Special requirements and their technological development, legal and regulatory regimes, and public and political perception about the services in a sector can also be important factors in deciding the suitability of a particular model of PPP.

There is no single PPP model that can satisfy all conditions concerning a project's locational setting and its technical and financial features. As an example, for a new project, a BOT type of model may be quite suitable in a matured PPP market while a PFI or BOO type of models may be more appropriate in a developing/untested market.

However if we look at the NeGP requirements and the focus on the outcome of the project, BOT/BOOT model seems to be the most appropriate. The key benefit which the Government gets in this model is that the PPP Vendor gets paid on the basis of transactions. **Hence it is "outcome**

**focused mode” and all the risks related to the development and maintenance of the IT infrastructure is that of the private sector.**

However there is significant maturity required (and highlighted in this model documents) in the market and the procurer to make this model a success.

### 3.4 PPP Supporting Environment

PPPs, by nature, rely on a supporting environment that must be created and sustained by the public sector. This is a very important aspect of the public side of the partnership. In addition, there also are certain aspects in the private sector that are required to support a PPP. This chapter covers the main components of the PPP supporting environment. The presence and strength of these in the particular jurisdiction will have a large impact on how easily and successfully a PPP can be carried out.

The PPP Suitability supporting environment is dependent on:

- Public sector PPP capacity and experience
- Private sector appetite and capacity
- Legal environment and policy support for PPPs

#### 3.4.1 Public Sector PPP Capacity and Experience

PPPs create requirements on the public sector for the management of the whole PPP process. In order to enjoy the potential cost savings from a PPP the PPP process needs to be carried out efficiently and effectively.

The PPP development and management process entails costs of its own that are additional to the cost of traditional public sector procurement. The efficiency of the public sector capacity to manage the PPP process is improved when:

- There are clear, streamlined and **appropriate procedures** for the preparation, review and clearance / approval of a PPP
- Responsibility for the management of the process is clearly allocated
- The **Sponsoring Authority has access to the skills** required to procure PPPs, specifically legal, technical and financial expertise
- Staff within the **Sponsoring Authority is experienced** with the steps in the PPP process or have access to guidance
- Sponsoring Authorities have **access to supporting resources**, including advice and manuals
- A **PPP focal point** has been established that can provide advice and assistance on developing and managing PPPs. The focal point can take various forms such as a PPP Cell, Project Development Agency, line ministry team etc.
- Activities and functions that are common to PPPs (for example, across sectors) are centralised and streamlined so that wasteful duplication is avoided

- A **single window clearance** is available to speed up the clearance process
- The Sponsoring Authority has a clear plan for managing the PPP during the operation phase

Previous experience is considered to include PPP projects that have progressed to at least Bidding with all project documents concluded and approved and, ideally, where contracts have been successfully concluded. Another critical aspect is whether the Sponsor has experience with monitoring and enforcing a PPP contract during its operating life. This means monitoring the performance of the private partner against the requirements of the contract and enforcing the standards set forth in the contract, including any penalty and reward clauses.

Sponsoring agencies that have implemented PPPs in the past will naturally be better placed to implement a new one. However, PPPs are still possible for Sponsors with limited or no previous experience providing they have access to a range of assistance and advisors. In this way Sponsors will develop experience and capability in PPPs.

### 3.4.2 Institutional Framework

An **institutional framework** for PPPs should be in place. This framework will define the roles, responsibilities and decision-making authorities in the PPP process. The key institutional components of the framework often include:

- **Sponsoring Authorities** - Nodal departments located within the sponsoring agencies (State or municipal-level line departments, agencies and other administrative bodies empowered to implement PPPs in their activity area).
- A central **PPP agency for e-Governance projects**, a PPP Cell needs to be created for effective co-ordination of critical activities. The key functions of a PPP Cell include:
  - Creating coordinated, efficient machinery for PPPs whereby viable transactions are tendered to the market and, by bringing economies of scale to the process, lowering the costs of each transaction
  - Identifying, conceptualizing and creating a shelf of projects and recommending approval of suitable projects for implementation as PPPs
  - Ensuring rigorous adherence to managing effective and transparent Bidding processes
  - Developing internal evaluation guidelines in consultation with the respective Departments to evaluate and assess the projects
  - Inspecting, visiting, reviewing and monitoring any PPP Project under implementation
  - Conducting/recommending exposure visits and training programmes on PPPs
- A Project Management Unit (PMU) may be created to support the sponsoring agency with assistance and funding through the project development steps and contract management during operations stage.
- Funding initiatives such as **Project Development Funds, Viability Gap Funds** or **Infrastructure Funds**. Coordination with these funds is usually via the PPP Cell.

- **Approving Authorities**, usually consisting of a high-level final-approval committee and a lower-level clearance committee. Other associated entities may provide comments to these committees.

#### *3.4.2.1 Clearance / Approval Processes*

The clearance / approval process provides important oversight to the PPP process. Clearances and approvals should be required at several stages of the PPP development process and at different decision-making levels depending on the stage, value and type of project. The process should ensure that there are sufficient checks on the use of public resources in developing PPP projects and on the projects that are selected, while imposing as little additional cost on the PPP development process as possible (costs are incurred in preparing submissions and in time spent waiting for decisions).

A single clearance window can be provided to streamline and speed up the clearance process. The case studies provide examples of PPPs that were delayed because they required multiple or complex clearances. These cases provide examples of where a single clearance window, if one had been available, might have improved the efficiency of the PPP development process.

#### *3.4.2.2 Public Sector Funding Assistance for PPPs*

Viability Gap Funding (VGF) is designed to provide capital support to PPP projects which would not otherwise be financially viable. VGF has the effect of reducing the revenue required to recover costs and provide a financially attractive return for the private sector.

A Viability Gap Fund has been established at the Centre and some States have also established State-level VGF schemes for the Infrastructure projects. **However the e-Governance or ICT sector is not covered. Hence the same may be required to be budgeted separately by the concerned department or the State Government.** Alternatively, DIT (GoI) may like to discuss with Department of Economic Affairs and get it included as one of the sectors which can be taken up Viability Gap Funding.

#### *3.4.3 Private Sector Appetite and Capacity*

For a PPP to be successful and least-cost, there needs to be a healthy level of competition among potential bidders. This means there are a number of potential private partners actively participating in the market for PPP projects, each with the technical and financial capacity to undertake the project.

Assessments of private developer interest can be made from the response to previous PPP opportunities, either in the same State or authority or elsewhere in India for similar projects. The best indicator is the number of firms submitting bids following pre-qualification. The number of responses to pre-qualification notices can also be used to help assess interest. Where no similar

projects exist, then evidence of private sector interest might include the number of visits made by potential developers to discuss project opportunities and other enquiries received.

The risk that there won't be enough interest and competition for the PPP among the private sector has two clear consequences: failure at the procurement stage or a weakened procurement exercise that results in poor value for money for the public sector.

If the PPP fails to attract bidders at the procurement stage there will be a cost to the public sector in terms of the resources that were put into developing the project and preparing the bid. If very few bidders respond to the bid but procurement goes ahead it is much more likely that the value for money from the PPP will be reduced as a result of weakened competitive pressures. It should be noted that this can mean both a worsened financial outcome for the public sector and lower quality of services.

Three levels of private partners may be targeted: firms based locally to the project (in the same State or municipality), national firms, and international firms.

The Sponsoring Authority may invite bids from Indian firms active in other States and at the national level and from international firms. In addition to adding to the competitiveness of the market for PPPs, international firms can bring valuable experience and knowledge transfer to both public and private partners in India.

Potential private sector partners will be required to meet minimum criteria with regards to their ability to carry out the technical, financial and operational aspects of the project. The pool of potential private sector providers will be largest for small projects and those using PPP modes for which the transfer of roles and risks to the private sector is relatively lower, for example in management contracts.

#### **3.4.4 Legal Environment and Policy Support for PPPs**

PPP laws and regulations should cover the whole PPP cycle.

##### ***3.4.4.1 Functions of the Economic Regulator***

While typically the Nodal Department or the IT department acts as the economic regulator, it is better to have a common third party for all e-Governance projects at a State or Centre as the case may be. Typically, the economic functions of a regulator include the authority to:

- Issue, review and cancel licenses
- Establish standards for the terms and conditions of supplying ICT goods and services
- Regulate service charges
- Make market rules for the sector
- Monitor performance of the regulated entities.
- Arbitrate and settle disputes.

Normally, where the establishment of a regulatory entity can be justified on public interest grounds, independent regulation rather than regulation by a government department is generally favored. However, fully independent regulation is not always achievable in the short-term, but it should be an explicit or longer term objective and should be reflected in the way that service is regulated from the outset.

Even where independent regulation is established, experience suggests it can be ineffective, captured or subverted by special interest groups, including government. The basis of any proposed regulatory structure should be fully analyzed, namely:

- its real independence from special interests of any of the parties to the regulation, including any government-owned participants in the industry;
- the effectiveness of its legal rights and obligations to meet its regulatory objectives; and
- the skills and resources available to it to carry out its functions on a continuing basis. In some countries resource constraints may suggest the desirability of a multi-sector regulator or the contracting out of some regulatory functions.

Specialist Nodal Agencies or departments, and advisors should be created at State as well as National level and they should consider how to give support to governments to establish appropriate regulatory regimes. They should also try to ensure availability of financing and skills for at least a basic regulatory system:

- PPP procedures
- Asset valuation,
- Regulatory accounting methods,
- Efficiency measurement techniques,
- Consultation processes

Monitoring of regulatory performance should thereafter be an important part of the project monitoring.

#### ***3.4.4.2 How the Regulator Would Operate***

The regulator should:

- operate in a transparent manner and pro-actively provide information to stakeholders about regulatory matters under consideration, decisions taken and the rationale for decisions.
- encourage stakeholder participation in regulatory decision-making by convening public meetings on regulatory matters at which stakeholder comments would pro-actively solicited.
- set forth the principles and procedures by which it will review and approve tariffs.
- also help create an environment that encourages private sector participation (PSP) and PPPs.

#### ***3.4.4.3 Laws that Enable or Do Not Limit PPPs***

Since they are contractual arrangements, the legal environment is very important to PPPs. At a minimum, existing legislation and other legal requirements must not prohibit the use of PPPs. In particular, it must be permitted for private firms to provide the services that are the subject of the PPP.

The general legal structure may include aspects that prohibit PPPs or, while not prohibiting PPPs, create legal barriers that inhibit them. In cases where there is no prohibition on a particular PPP, private sector partners may still not find the project sufficiently attractive unless the legal framework is stronger and clearer, granting them sufficient comfort that their investment will be protected and the terms of the contract honoured.

This general legal enablement of PPPs can cover a wide range of areas, such as:

- regulation of tariffs
- award of the PPP
- what secondary approvals are required and how these can be obtained
- dispute resolution options (right to arbitration etc)
- right to sell/grant security over the assets
- rights to exclusive service (monopoly), existing or able to be assigned
- protections of foreign exchange convertibility, to enable repatriation of proceeds from the project (in the case of foreign investment)

Without a strong framework in some of these areas, bidder either will not be interested in the project, or may demand higher returns, government guarantees or other compensations for the legal and regulatory risk they perceive.

When a PPP policy is established a legal review should be carried out as part of an overall assessment of the enabling environment for PPPs. This involves analysis of legislation and other legal requirements governing all aspects of PPP schemes. The legal review will make an assessment of regulatory requirements (such as permissions) for, and any legal barriers to, implementation of the project as a PPP. It should also highlight where it may be necessary or desirable to introduce new legislation or amend existing legislation so as to enable the project to take place, to provide a clearer legal basis for the PPP scheme or to provide the necessary regulation of the infrastructure services. However, sufficient legal support can be achieved through reliance on the supporting legal framework embodied in existing laws, regulations and judicial decisions, often with amendments where necessary to ensure the necessary powers to participate in PPPs are vested in the public sector agencies.

Dispute resolution and arbitration processes are also an important part of the supporting legal environment.

International experience has proven that a well designed PPP enabling environment includes a legal and regulatory framework that clearly articulates government policy on PPP– and are usually in place in robust e- PPP programs at any level of government. The typical areas where it can assist are

:

- PPP Laws
- PPP Central Body
- PPP Guidelines
- Financial Instruments
- Contract Compliance and Dispute Resolution Procedures
- Asset Ownership Guidelines
- Labor Laws
- Tax Laws
- Digital Signature Laws
- Sector Regulations
- Independent Regulator
- Competition Law
- Stakeholder Consultation

#### *3.4.4.4 The Necessary Levels of Institutional and Regulatory Capacities*

The creation of a regulator alone (i.e., the passage of enabling legislation) is not enough where there is neither institutional history of regulation nor adequate training in regulatory principles for those who are charged with the responsibility of being regulators.

Thorough organizational planning, including the recruitment and training of regulators and their staffs should precede operationalization of the regulatory body. A principal objective of the independent regulator is the creation of an environment that will provide prospective private sector investors with a degree of security and that encourages investments critical to the nation's economic development through the PPP medium.

A newly constituted regulator including organizational issues such as insufficient or untrained staff and inadequate secondary legislation (rules, regulations and procedures) will convey to potential investors a high degree of risk that could have a negative impact on their interest in PPP projects. The timing of regulatory start-up is also important with respect to PPP projects that are well along in the pipeline. Serious investors who have been working with the Government for many months (or even years) to approach a deal with respect to an important ICT infrastructure project may be apprehensive about the possible implementation of a regulator. Without a track record, what certainty does the investor have that its long-term deal with the Government will survive under their purview? Bilateral contracts – i.e., Regulation by Contract – may address these concerns over the near term, but it is only over time and with dedication to implementing internationally accepted best practices that the regulator will develop the credibility that an effective regulatory framework is intended to provide.

Regardless of the interim structure, the elementary principles of freeing the conditions of market entry and the level of market pricing from unilateral control (either political, or the influence of one stakeholder group) are not in dispute. They form the generally accepted preconditions for the



attraction of investment in ICT infrastructure and e-Governance that are essential for national and regional development.

## 4 Overview of the PPP Process

Identifying, developing and implementing a project as a PPP involves a series of steps and should be undertaken following a clear process. This should cover specifically the following phases:

### 4.1 Identify and Structure Feasible PPP Projects

Carefully following the stages of the PPP Project Life Cycle is key to identifying and structuring feasible PPP projects, including distinguishing appropriate business models for operators and key considerations for governments. The stages of the PPP Project Life Cycle are as follows:

1. **Project Identification** – the Project Sponsor, which is the government body that proposes the project, identifies and prioritizes its list of potential PPP projects. At the **Project Identification** stage, the project sponsor performs the analysis outlined in Figure below. The output of this process is the “Indicative Implementation Plan”. Most PPP projects place a heavy emphasis on technical assistance to project sponsors at the project identification level so that they will be better able to generate a viable project. Much of such technical assistance is focused on business basics, because the government officials involved in procurement have traditionally focused on engineering and contracting, rather than on the business analysis required for PPP projects.



2. **Project Development** – with the technical assistance, the Project Sponsor conducts research and analysis to determine financial and economic feasibility. At the project development stage, the

feasibility analysis begins with a compilation and a basic updating of all previous studies, to create a prefeasibility study. If the pre-feasibility study indicates probable financial and economic viability, then the project sponsors will move forward into a feasibility study, for which new research and analysis will be required to build on the results of the pre-feasibility study.

The general contents of a feasibility study include:

- Market analysis and project scope, to assess the need for and appropriate scope of the project, building on the work already done at the strategic planning and pre-feasibility stage. This would include:
  - **Needs analysis** – does the project meet an end-user need? Does it contribute to meeting the objectives of the sponsoring authority? Who will the users be?
  - **Options analysis** – what is the best option for meeting the service need: a no-asset solution, existing assets, or new assets?
  - **Define the output** – what services will the project provide?
  - **Estimate and forecast demand** – what level of demand is there for the outputs / services from the project, and how much are users willing to pay (what is the value of the demand)?
- Social and environmental feasibility, including the requirements for impact assessments and for the associated mitigations
- Technical feasibility and technical parameters based on the market analysis, including specification of required facilities and scenarios of project size, for use in preliminary project design
- Risk studies and refined PPP mode – Assessment of the risks associated with the project, study of which party is best able to bear each risk, and refinement of the PPP mode selected at the pre-feasibility stage
- Preliminary cost assessment, to within a sufficient  $\pm\%$  range based on the technical specification and assessed project risks
- Financial analysis and due diligence, incorporating a projected revenue structure (eg. Proposed tariff, required annuity) and assessing any need for financial support from the public sector
- Economic feasibility – Assessment of overall net economic benefit of the project, incorporating estimated project benefits and costs including non-market factors such as those from the social assessment.
- Other PPP due diligence activities, including value-for money analysis if data is available

- Project implementation schedule, including an outline of the proposed PPP procurement and award process through to technical and financial close, an outline of the construction schedule and target operation date, and any phasing that is planned for project extensions or ongoing development.
3. **Project Assessment** – the Nodal Agency assesses the proposed project’s feasibility, and the Project Sponsor conducts a “market sounding” to gauge investor interest. At the **project assessment** stage, the results of the feasibility study are evaluated and the key inputs to the financial projections are manipulated to generate a sensitivity analysis. Key financial ratios will be evaluated. Realistic time frames and costs for concluding all necessary land acquisition, environmental clearances, extraction permits, etc. will be put into procurement documents and shared with prospective Bidders.
  4. **Project Structuring** – the Nodal Agency assists the Project Sponsor in structuring the risk allocation, contractual relationships, and financing arrangements. At the **project structuring** stage, the results of the “market sounding” will be used to structure the contractual relationships, risk allocation, and financing design. The output of this stage is the draft Contract Agreement (PPP), which will be shared with the bidders to inform them of the probable contractual obligations of the parties.
  5. **Procurement** – with assistance from the Nodal Agency, the Project Sponsor conducts fair, open, and competitive procurement via EOI and RFP. In the **project procurement** stage, a lot of information is received from the bidders, both in their technical proposals and in their financial proposals that will give the project sponsors considerable feedback on their feasibility analysis. Because PPP procurement is focused on service delivery rather than the engineering specifications of traditional procurement, the private sector innovation is enabled and the project sponsors can use the various approaches the bidders propose to achieve the service delivery in order to fine-tune the feasibility analysis.
  6. **Contract Management** – the Project Sponsor conducts contract negotiations and, with assistance from the Regulator, implements monitoring and enforcement. In the **contract management** phase, which begins with the contract negotiations, the project sponsors will get further feedback from the Bidders. The focus of the feasibility analysis, at this stage, will be on risk allocation and further refinement of the mechanisms by which the parties will manage their allocated risks in the contract.

## 4.2 Financial Assessment of PPP Projects

For PPP projects, financial analysis forms a key element of the due diligence to be undertaken. Both the private sector and contracting authority need to know the project's projected financial performance and for the public sector this is provided by the project analysis stage. The analysis will also indicate whether the project needs fiscal support and/or guarantees from Government.

Clearly, the assumptions used by the public and private parties may not/will not be the same. This would account for the differences in the results from financial analysis. Very likely these differences will be a basis for negotiation at a later stage.

Financial analysis uses costs and revenues and is focused on assessing the project from an investment viewpoint, usually from the point of view of the private sector or a corporation (sometimes referred to as a Special Purpose Vehicle or Company (SPV or SPC)), specially created for the execution of the project. The financial analysis is based on the standard methodology used by the private sector, and by the public sector for private sector oriented projects, in the analysis of project feasibility. The financial analysis uses debt service, the commercial weighted cost of capital, the return on equity and is expressed in current terms (i.e. with inflation/escalation). It therefore differs from the standard financial analysis used by donor agencies and public sector.

It should be assumed, at least initially, that PPP projects will either not need any financial support from the government, or if needed, such support will be targeted and minimized.

Based on its assumptions, the financial analysis is able to show:

- If the project is financially viable and sets out the financial performance, including direct financial risk, of the project over its life. It should be noted that all risks have a financial dimension. Direct here is used in the sense of sensitivity of the project's financial performance to the variables used in the model e.g. service charges, demand, costs etc.;
- What would be needed to make the project viable if it turns out to be only marginally viable; and
- The clear identification, approximate costing and timing of any proposed project support measures, and through which support may be provided, minimized and scheduled.

In order to assess a project in financial terms, it is necessary to develop a **Financial Model**.

## **1. Financial Model Inputs**

By necessity, this is usually more complicated than the economic analysis in that in particular (i) revenue streams and (ii) debt servicing need to be detailed and projected based on a number of scenarios and assumptions. However, economic analysis of large multi faceted development projects can be equally complex.

The following are the prime factors needed to be input to a financial model:

- Financial Project Costs (hardware, software development, data entry, site preparation etc.) and by the year incurred
- Demand (users, transactions)
- Annual Operating and Maintenance Costs (base year estimate plus an inflation related increase or can be related pro rata to the inflation related revenue)

- Types of Equity & Debt to Equity Ratio (usually varies between 80:20 and 60:40, commonly 70:30) – (even if internally funded, this analysis needs to be done to evaluate the financial viability)
- Weighted average (opportunity) cost of capital
- Tax rates (national corporate rates)
- Depreciation allowed

Costs can be calculated by building up direct, indirect and overhead costs based on historic data or more usually as a percentage of project costs or as a percent of revenue. It should be noted that historic/actual data is paradoxically usually quite unreliable (sometimes unavailable) and the percentage (rule of thumb) basis at least as good and much easier to generate at this stage.

All projects suffer from forecasting difficulties and this should be borne in mind at both the modeling stage and risk assessment stage where inaccuracies in demand forecasts may substantially outweigh uncertainties in other model inputs/assumptions.

Project costs will be initially in base year values (i.e. when the analysis is undertaken) but price contingency will be added for each solution development year and revenue and costs inflated by an appropriate index. The Request for Proposals (RFP) should include this proposed index, or the transaction, usage, subscription charges.

Transaction/usage charge escalation should be a criterion in bidder procurement allowing bidders to compete on initial as well as future rates.

## 2. Financial Model Outputs

The model then outputs the Profit and Loss statement and the Cash Flow statement providing estimates of the key data for each project year. (Other supplementary accounting outputs are usually needed later, such as balance sheets). These statements show:

- The **overall project cash flow**.
- The **cash flow available** to the equity participants (investors).
- **Profitability/Viability**: The Financial Internal Rate of Return/Return on Equity (project FIRR/or project ROE).
- **Cost recovery**; the number of years to pay back the equity investment (the norm is ~3 years for commercial and ICT/E-Gov projects)
- **Debt Service Cover Ratio** (the projected cash flow must, at a minimum, be adequate to finance the projected debt service. (The usual requirement is that the net cash flow each year must be at least 1.2 times (depends on the risk profile) the debt payment due in that year)
- **The estimated NPV**
- **Quantitative risk analysis** are also increasingly standard model outputs.
- Together, these make up most of the quantitative basis of bankability, although other aspects can also be important such as non-quantified risk.

### **3. Financial Model Assessments**

Models can be used to assess the:

- Length of contract needed to generate an acceptable return on equity.
- The financial impact of different types of debt and equity and thus the optimum debt equity ratio.
- Losses in early years (if applicable) that need to be met by the PPP concessionaire (and/or by fiscal support/guarantees).
- Fiscal support that may be needed (and as input to the projection of the cost of guarantees)
- The financial impact and the subsequent optimum timing of the 'claw back' of subsidies (fiscal support).
- Corporate Tax revenue to government (when profits are made).
- Impact of changing key variables such as transaction/usage costs, projects costs etc.
- Government returns if an equity participant (and if on different terms to the private sector e.g. secondary equity).

Hence key parameters are input to the model which then produces the financial estimates from which decisions on the PPP project can be made.

Generally, if a project is financially viable, it is usually economically viable. However, an economically viable project may or may not be financially viable as the revenue may not be adequate (user registration traffic or transaction charges or both).

## **TIPS FOR BID PROCESS FOR PPP PROJECTS**



## 5 Choosing The Best-Suited Procurement Method

### 5.1 Procurement Strategies

The objective of this section is to guide the project team in their selection of a transparent and objective procurement strategy which is suitable to the PPP mode selected for the project.

The diagram below presents the range of methods that may be used to procure a project as a PPP. The following section describes each generic procurement strategy and its suitability to specific PPP contract arrangement.

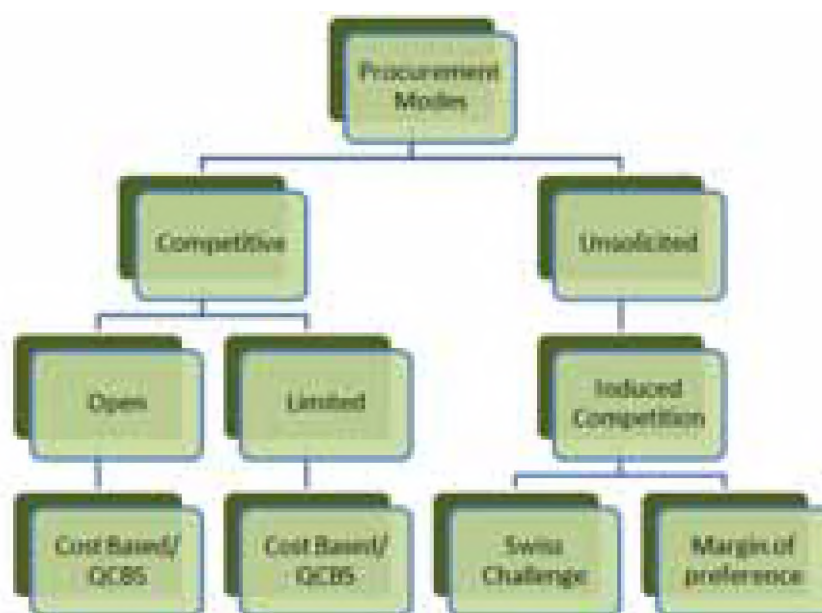


Figure 2 : Procurement Options

### 5.2 Generic Procurement Strategies

#### Competitive Procurement

Competitive procurement strategies are the most efficient strategy for large contracts and for when a large number of prospective bidders is expected. Competitive bidding is usually preferred for PPP projects. There are several alternative competitive bidding strategies available to suit the circumstances of the particular project. The approaches differ according to the breadth of bidders that they target. They include:

- International competitive bidding
- National competitive bidding
- Limited competitive bidding (bid by invitation based on a pre-qualified panel)

Each of these is briefly described below.

### **5.2.1 International Competitive Bidding (ICB)**

International competitive bidding (ICB) opens the procurement process to the widest potential market of bidders. Firms from around the world are invited to bid with equal opportunity.

Procuring internationally involves greater administrative and advertising cost than more local bidding strategies, such as those at the national level. For this reason, ICB tends to be the best suited procurement strategies when:

- The contract value is large, and
- The project requires specialised technical inputs which might only be available from leading firms internationally.

Because the benefits of ICB increase with project scale it is common for a threshold contract value to be set as a decision criterion. In this case ICB would typically only be used when the contract value is greater than this threshold.

Given the IT & ITeS competitiveness in India, it is unlikely that an international competitive bidding would provide any significant value in the bidding process as compared to the National Competitive Bidding.

### **5.2.2 Open Tender Competitive Bidding**

Open Tender Competitive bidding is less intensive than ICB. Open tender is suited to procurement of PPPs which, by their nature or scope, are unlikely to be attractive to foreign firms. This would tend to be the case where:

- The contract values are small
- Low/No skill gap between National and international firms
- The project is scattered geographically or spread over time
- The project is labour intensive

These factors imply the project can be developed within the nation at prices below the international market, and this would tend to give an advantage to domestic firms. In these cases the advantages of ICB are reduced and they are likely to be outweighed by the extra administrative and financial burden, making procurement at the national level more appropriate. It should be noted that national firms may still choose to include international expertise in their bid if they see fit.

### **5.2.3 Limited Tender Competitive Bidding (International and Domestic)**

Limited Tender Competitive Bidding is essentially direct invitation to a pre-qualified panel of firms without open advertisement. It may be an appropriate strategy for procurement where:

- The contract values are small
- There are only a limited number of Service providers
- Other exceptional reasons

#### **5.2.4 Unsolicited Bids**

In some cases, a potential PPP project might be brought to the public sector's attention through an unsolicited proposal from a private sector developer. Such proposals reduce the competitive process completely and expose the public sponsor to the risks associated with uncompetitive procurement. In these cases alternate procurement options based on 'induced competition' are often used to try to reintroduce some competitive pressure to the process. However, these approaches, known as the Swiss Challenge or Margin of Preference strategies, are still not strictly competitive.

Some of the Indian States, such as Andhra Pradesh, Bihar, Punjab, Gujarat and Karnataka permit unsolicited proposals in Infrastructure sector under specific circumstances. Specific circumstances may be referred to the individual PPP legislations / policies of the respective states. The VGF guidelines, however, explicitly state that a private sector company shall be eligible for VGF only if it selected on the basis of open competitive bidding.

#### **5.2.5 Swiss Challenge**

Swiss Challenge is a procurement strategy used specifically when the government authority receives an unsolicited proposal for a project. The private entity submitting the unsolicited proposal is termed as the Original Project Proponent (OPP). The government evaluates the proposal submitted by the OPP and, if it finds merit in the proposal, it invites other parties to submit competing proposals. The other parties are expected to match or better the terms of the OPP's proposal. In turn, and to compensate for its effort in bringing the original proposal, the OPP is given a chance to match or better any competing proposal at par with the original.

The Swiss Challenge system enables the public sector to introduce some competitive pressure, thereby avoiding some of the non-competitive concerns raised by unsolicited proposals. The private sector is invited to match or better the OPP's proposal through innovation, quality and efficiency. Despite this, the system is not entirely competitive since it is difficult to avoid a bias in the evaluation towards the OPP. Moreover, there could be some reluctance by competitors to make their best effort since they would expect the OPP to have an advantage. This could be because the OPP has more information than its competitors. Swiss Challenge might also not meet the conditions for procurement prescribed by relevant legislations. Both the World Bank and the Asian Development Bank, for instance, while recognizing the importance of likely innovation through the encouragement of unsolicited proposals, do not allow such procedures under their published procurement guidelines. However this method of procurement may be an option before awarding any project on nomination basis.

#### **5.2.6 Margin of Preference**

Margin of preference is also a procurement strategy used in response to unsolicited proposals. Under this approach the OPP is given a theoretical benefit during the bid evaluation, compensating him for the effort it has put in for developing the project. In this approach after the OPP has submitted its proposal, the government authority invites bids from competing suppliers. During the bid evaluation process, the OPP is evaluated with a theoretical margin of preference. This strategy

has been prevalent in South Korea and Chile. However this is still not recognized as a procurement option in India.

### 5.3 Design of the Procurement Process

As a part of the design for Technical evaluation, the Nodal Agency has to make decisions/choices on the following things, but not limited to:

- Evaluation model: lowest price/weighted attribute etc.
- Develop Rating Scale to guide evaluation panel scoring
- Determine panel decision making process: mathematical average/panel moderation
- Identify the information required from suppliers: supplier details/response to requirements/pricing/format etc.
- Identify any required additional steps: interview/presentation/site visit(s) etc.
- Identify any optional additional steps: reserve the right to interview/presentation/site visit etc.
- The need for Government department, Ministry due diligence requirements (if any).

#### 5.3.1 Integrity Pact

The pact essentially envisages an agreement between the prospective vendors/bidders and the buyer, committing the persons/officials of both sides, not to resort to any corrupt practices in any aspect/stage of the contract. Only those vendors/bidders, who commit themselves to such a Pact with the buyer, would be considered competent to participate in the bidding process. In other words, entering into this Pact would be a preliminary qualification. The essential ingredients of the Pact include:

- Promise on the part of the principal not to seek or accept any benefit, which is not legally available;
- Principal to treat all bidders with equity and reason;
- Promise on the part of bidders not to offer any benefit to the employees of the Principal not available legally;
- Bidders not to enter into any undisclosed agreement or understanding with other bidders with respect to prices, specifications, certifications, subsidiary contracts, etc.
- Bidders not to pass any information provided by Principal as part of business relationship to others and not to commit any offence under PC/IPC Act,
- Foreign bidders to disclose the name and address of agents and representatives in India and Indian Bidders to disclose their foreign principals or associates;
- Bidders to disclose the payments to be made by them to agents/ brokers or any other intermediary,
- Bidders to disclose any transgressions with any other company that may impinge on the anti-corruption principle.

Integrity Pact, in respect of a particular contract, would be operative from the stage of invitation of bids till the final completion of the contract. Any violation of the same would entail disqualification of the bidders and exclusion from future business dealings.

**Implementation procedure:**

- a. Adoption of IP is voluntary for any organization, but once adopted, it should cover all tenders /procurements above a specified threshold value.
- b. The threshold value for the contracts to be covered through IP should be decided after conducting proper ABC analysis and should be fixed so as to cover 90-95% of the total procurements of the organization in monetary terms.
- c. Apart from all high value contracts, any contract involving complicated or serious issues could be brought within the ambit of IP, after a considered decision of the management
- d. The Purchase / procurement wing of the organization would be the focal point for the implementation of IP.
- e. The Vigilance Department would be responsible for review, enforcement, and reporting on all related vigilance issues.
- f. It has to be ensured, through an appropriate provision in the contract, that IP is deemed as part of the contract so that the parties concerned are bound by its provisions.
- g. IP should cover all phases of the contract, i.e. from the stage of Notice Inviting Tender (NIT)/pre-bid stage till the conclusion of the contract, i.e. the final payment or the duration of warranty/guarantee.
- h. IP would be implemented through a panel of Independent External Monitors (IEMs), appointed by the organization. The IEM would review independently and objectively, whether and to what extent parties have complied with their obligations under the Pact.
- i. Periodical Vendors' meets, as a familiarization and confidence building measure, would be desirable for a wider and realistic compliance of the principles of IP.

Information relating to tenders in progress and under finalization would need to be shared with the IEMs on monthly basis.

A draft integrity pact has been included as a part of all Model RFPs. For further details pertaining to adoption of Integrity Pact, users are requested to refer to [CVC Circular No. 10/5/09](#).

**Implementation of fall clause:** For implementation of the fall clause, it is recommended that the Central Procurement Organization should maintain a repository of the eGovernance goods and BoM and associated costing for each item for the "Successful Bidders". An analysis of this data will enable the Purchaser to arrive at the benchmark price to ensure compliance of vendors to the fall clause. Wherever CPP Portal is used for procurement, the price of each item should be asked to be filled in the financial bid. This will provide a varied data base to provide this analysis.

### 5.3.2 Technical Evaluation Models and Methods

**Technical Evaluation Methods** define the process that would be adopted to select the most competent and bidder with the best value solution offering.

Snapshot of few Evaluation Methods	
Criterion	How it works?
<b>Cost Based Selection (CBS) / Lowest Cost per transaction</b>	<p>This method of selection may be used for the assignments of following nature:</p> <ol style="list-style-type: none"> <li>Assignment where any experienced PPP Vendor Agency / System Integrator can deliver the services without requirement of specific technology expertise.</li> <li>Under this category, the RFP is for projects where there is high level of clarity regarding the services to be offered.</li> <li>These would be typical implementation of citizen services OR any State MMPs . In e-Governance space, these projects would be services where the PPP Vendor takes care of the entire solution and the eco-system which can be created by the PPP vendor</li> </ol>
<b>Quality and Cost Based Selection (QCBS)</b>	<p>Under QCBS / CQQCBS, the technical proposals will be allotted weightage of 70% while the financial proposals will be allotted weightages of 30%.</p> <p>The following points may be noted :</p> <ol style="list-style-type: none"> <li>Under this category, the RFP is for projects where there is inadequate clarity on the expertise required in delivering the service.</li> <li>In such projects a due diligence should be done on the critical parameters of the project covering Financial Feasibility, Business models, Set of promoters, Access to capital, Identification of key risks and mitigation thereof, Technology proposed, Specific implementation experience, Training methodology, performance in Proof of concept (in case PoC is planned), Certifications, Past experience of the vendor in executing similar assignments, size of those assignments, profile of team members and Project Methodology.</li> <li>The Proposal Evaluation Committee in this case should have expertise or should have access to expertise to objectively evaluate &amp; compare the various solutions components proposed by the bidders.</li> </ol>

Snapshot of few Evaluation Methods	
Criterion	How it works?
<b>Value for Money Procurement (VfM)</b>	<p>In such a procurement asking the following questions assists to assess value for money:</p> <ul style="list-style-type: none"> <li>• Which option will contribute the most to advancing particular Government priorities?</li> <li>• What non-cost factors can benefit the Government and affect value for money?</li> <li>• What is the real cost of the goods and/or services versus that being offered?</li> </ul> <p>The Points as mentioned in QCBS, are applicable in this case also.</p>

### 5.3.2.1 Cost Based Selection

This method will be used when the assignment is simple and can be precisely defined, and when the budget is fixed. The RFP should indicate the available budget and request the PPP Vendor to provide their best technical and financial proposals in separate envelopes, within the budget. TOR should be particularly well prepared to make sure that the bidders are able to estimate the costs and monetize the risks.

In this case, the Nodal Agency should be cautious about the risk that bidders who have not understood the scope of work OR may be targeting to get the work order without having the technical competence to execute the project. This risk can be mitigated by having a rigorous evaluation of the technical bid and fixing a high score as minimum qualification for opening of financial bid.

### 5.3.2.2 Quality Cum Cost Based Selection

QCBS uses a competitive process among firms that takes into account the quality of the proposal and the cost of the services in the selection of the successful firm. Cost, as a factor of selection, is to be used judiciously. The relative weight to be given to the quality and cost will be determined for each case, depending on the nature of the assignment.

The weight associated with Quality i.e. Technical Proposal may be as high as 80% and that associated correspondingly with cost i.e. Financial Proposal may be 20%. However the most common & effective QCBS which may be used in 70:30 (Technical Score weightage: Financial Score Weightage)



### 5.3.2.3 Value for Money Based Selection

This is an advanced and mature way of procurement, where the focus is on the comparison of the total cost/benefit. In such procurement asking the following questions assists to assess value for money:

- Which option will contribute the most to advancing particular Government priorities?
- What non-cost factors can benefit the Government and affect value for money?
- What is the real cost of the goods and/or services versus that being offered?
- What is the Overall Power Consumption (in both ideal and running condition).
- What is the Overall TCO (including all the licensing costs)
- What is the Ruggedness/quality of chassis used
- What is the max up-time quoted by OEMs for servers
- What is the future roadmap of quoted product by OEMs.

In this manner of procurement, the technical and financial bids are open simultaneously and evaluated. This should be applied in selective cases for large & complex projects and where the exact budget is yet to be finalized.

### 5.3.3 Type of Procurement Processes

There are a range of procurement processes that can be implemented by the project team. The choice is essentially between a single stage process or a multi-stage process.

#### Single Stage Process

Given that the PPP bids would be over and above the threshold limit prescribed for the single stage tender (refer ***Guidance note for Implementation Agencies, Pg 9***), this may not be an appropriate process for selection for PPP bids.

#### Multi Stage Process

A multi-stage process has distinct Expression of Interest and Request for Proposal stages to short-list bidders and to seek their financial quotes. The Ministry of Finance, Government of India has mandated the adoption of a two-stage bidding process for central sector PPP projects. A multi-stage process can have the following stages:

- Expression of Interest (EOI) stage – to identify a shortlist of *qualified* bidders
- Request for Proposals (RFP) stage – to invite comprehensive technical and financial proposals from shortlisted bidders and to select the preferred bidder.

The EOI stage should be used to reduce the uncertainty in project definition and identify bidders that are likely to be interested and qualified.

The important criteria that should be considered when choosing among the options for the procurement process are shown in the table below.





## 6 Designing Service Performance Specifications

SLAs define the quality, efficiency and timeliness of service being delivered as part of a PPP project. They help the Government sustain the planned business outcomes from the solution deployed on a continued basis over a long period of time.

Some of the SLA based guidelines to be followed are:

- SLAs should be performance and service outcome driven
- SLAs should be realistic, solution specific/compatible and evolving in nature
- SLAs should be consistent with and match the functional and technical specifications of application software, hardware, network and other installations’– it should not be developed in isolation
- In the instance of failure of a single equipment affecting the ability of solution to perform, SLA penalty should be calculated for each affected equipment and only the highest applicable penalty should be levied. Failure time of other equipment should be taken out while levying the penalty (only for cases where SLA penalty is applicable on individual equipments. Typically the PPP SLAs are based at an overall level and not calculated on equipment.
- SLA penalties must be applicable only in post-implementation phase (Post Go-Live). Liquidated Damages can be levied on failures in service in pre-implementation stages.

Performance Benchmarking and Value for Money, go a few steps further:

- Service Level Agreements (SLA’s)
- Key Performance Indicators (KPI’s)
- Incentive payment mechanisms

### 6.1 Severity Weights

Each Service Level should be assigned a Severity, which is used in the calculation of the Service Credits. Severity Weights are expressed as percentages, totaling one hundred percent (100%) for all Service Levels within a Service Category, and approximate the relative severity of the impact on Government entity/department’s operations of failures to meet the respective Service Levels. Upon ninety (90) days’ advance notice to Service Provider, Government entity/department may adjust the Severity Weights of the respective Service Levels, as Government entity/department deems appropriate, so long as the total of such percentages does not exceed one hundred percent (100%).

### 6.2 Service Level Changes

From time to time, Government entity/department may add or delete Service Levels or assign or adjust Severity Weights, but the aggregate of all Severity Weights may not exceed 100% within a Service Category. New Service Levels are Changes authorized through the Change Control Procedures. Changes that add Service Levels shall be effective within ninety (90) days after Government entity/department proposes the Change, or as otherwise agreed.

### 6.3 Service Level Classifications

Each Service Level may specify up to three different performance standards:

- Target Service Levels, which are goals. Service Credits are not payable for failures to meet Target Service Levels.
- Minimum Service Levels, which are expected to be achieved. Service Credits are payable for unexcused failures to meet Minimum Service Levels, as provided below.
- Increased Impact Service Levels, which are lower, inferior standards involving more serious impact upon Government entity/department's business. Service Credits for unexcused failures to meet Increased Impact Service Levels are determined as provided below.

### 6.4 Service Level Failures

Failures to achieve Minimum Service Levels or Increased Impact Service Levels may be excused in accordance with Agreement, and not otherwise. For convenience, unexcused failures are sometimes referred to as "Service Level Failures" (for failures to meet either [i] Minimum Service Levels or [ii] Minimum and Increased Impact Service Levels) or "Increased Impact Failures" (for failures to meet Increased Impact Service Levels only).

### 6.5 Service Levels – Establishment and Validation

#### 6.5.1 SLA Identification / Definition

Objective performance metrics are the basis for creating successful service level agreements. This section describes **key principles** for selecting metrics that truly work as well as a **overview of practical metrics** that can be incorporated in IT outsourcing agreements.

A Service Level Agreement (SLA) is an essential part of any outsourcing project. It defines the boundaries of the project in terms of the functions and services that the service provider will give to its client, the volume of work that will be accepted and delivered, and acceptance criteria for responsiveness and the quality of deliverables. A well-defined and crafted SLA correctly sets expectations for both sides of the relationship and provides targets for accurately measuring performance to those objectives.

At the heart of an effective SLA is its performance metrics. During the course of the outsourcing engagement, these metrics will be used to measure the service provider's performance and determine whether the service provider is meeting its commitments. When properly chosen and implemented, the SLA metrics:

- measure the right performance characteristics to ensure that the Department is receiving its required level of service and the service provider is achieving an acceptable level of profitability
- can be easily collected with an appropriate level of detail but without costly overhead, and
- tie all commitments to reasonable, attainable performance levels so that "good" service can be easily differentiated from "bad" service, and giving the service provider a fair opportunity to satisfy its client.

This section focuses on the issues surrounding the selection and implementation of SLA metrics. This section does not attempt to define an exhaustive list of metrics that should be included in a SLA; the topic is too large and project variations are too great. Rather, it concentrates on the principles for selecting metrics, the categories of metrics, and how those metrics should be represented in a SLA. These topics are necessarily presented in an introductory manner. Organizations without extensive metrics experience are urged to consider professional assistance to guide them through the process of creating their first few SLAs.

Selecting the appropriate metrics to gauge project performance is a critical preparatory step for any outsourcing engagement. A variety of metrics is required to manage the numerous aspects of an outsourcing project. While some metrics will be unique to a given project, many are common to all outsourcing projects. Often, a metric that works well on one project may be ineffective, inaccurate or too costly to collect on another project. A poor choice of metrics will result in SLAs that are difficult to enforce and may motivate the wrong behavior or even cause a dispute that ends up in court.

The selection process is complicated by the enormous number of potential metrics and must be tempered by considerations such as organizational experience with metrics, the type of behaviors to be motivated and cost and effort of collection. Common sense must prevail when selecting metrics. Remember that the goal is to ensure a successful and positive working relationship between the Vendor and the department. To meet these goals, organizations should consider the following key principles.

Avoid choosing an excessive number of metrics, or metrics that produce a voluminous amount of data. At the outset of drafting the SLA, an Department may be tempted to include too many metrics, reasoning that the more measurement points it has, the more control it will have over service provider performance. In practice, this rarely works. Instead choose a select group of metrics that will produce information that can be simply analyzed, digested and used to manage the project. If the metrics generate an inordinate amount of data, the temptation will be to ignore the metrics, or subjectively interpret the results, negating their value in the SLA.

## 6.5.2 Go-Live / Base Services Commencement Date

Go-live means to make a system, which has been under development or operating in a limited test mode, fully active. Different e-Governance projects can have different definition of Go-Live on the basis of nature and scope of work of the project. In the past, several e-Governance projects have suffered on account of a subjective definition of go-live. Purchaser organizations are encouraged to objectively structure the definition of G—Live for turnkey engagements. Some sample definitions are provided below.

Example	Definition of “go-live”
<b>World Bank RFP for Information Systems</b>	<p><b>27.1 Commissioning</b></p> <p>27.1.1 Commissioning of the System (or Subsystem if specified pursuant to the SCC for GCC Clause 27.2.1) shall be commenced by the Supplier: (a) immediately after the Installation Certificate is issued by the Project Manager, pursuant to GCC Clause 26.2; or (b) as otherwise specified in the Technical Requirement or the Agreed and Finalized Project Plan; or (c) immediately after Installation is deemed to have occurred, under GCC Clause 26.3. 27.1.2 The Purchaser shall supply the operating and technical personnel and all materials and information reasonably required to enable the Supplier to carry out its obligations with respect to Commissioning. Production use of the System or Subsystem(s) shall not commence prior to the start of formal Operational Acceptance Testing.</p> <p><b>27.2 Operational Acceptance Tests</b></p> <p>27.2.1 The Operational Acceptance Tests (and repeats of such tests) shall be the primary responsibility of the Purchaser (in accordance with GCC Clause 10.9), but shall be conducted with the full cooperation of the Supplier during Commissioning of the System (or major components or Subsystem[s] if specified in the SCC and supported by the Technical Requirements), to ascertain whether the System (or major component or Subsystem[s]) conforms to the Technical Requirements and meets the standard of performance quoted in the Supplier’s bid, including, but not restricted to, the functional and technical performance requirements. The Operational Acceptance Tests during Commissioning will be conducted as specified in the SCC, the Technical Requirements and/or the Agreed and Finalized Project Plan. At the Purchaser’s discretion, Operational Acceptance Tests may also be performed on replacement Goods, upgrades and new version releases, and Goods that are added or field-modified after Operational Acceptance of the System.</p> <p>27.2.2 If for reasons attributable to the Purchaser, the Operational Acceptance Test of the System (or Subsystem[s] or major components, pursuant to the SCC for GCC Clause 27.2.1) cannot be successfully completed within the period specified in the SCC, from the date of Installation or any other period agreed upon in writing by the Purchaser</p>

Example	Definition of “go-live”
	<p>and the Supplier, the Supplier shall be deemed to have fulfilled its obligations with respect to the technical and functional aspects of the Technical Specifications, SCC and/or the Agreed and Finalized Project Plan, and GCC Clause 28.2 and 28.3 shall not apply.</p> <p><b>27.3 Operational Acceptance</b></p> <p>27.3.1 Subject to GCC Clause 27.4 (Partial Acceptance) below, Operational Acceptance shall occur in respect of the System, when (a) the Operational Acceptance Tests, as specified in the Technical Requirements, and/or SCC and/or the Agreed and Finalized Project Plan have been successfully completed; or (b) the Operational Acceptance Tests have not been successfully completed or have not been carried out for reasons that are attributable to the Purchaser within the period from the date of Installation or any other agreed-upon period as specified in GCC Clause 27.2.2 above; or (c) the Purchaser has put the System into production or use for sixty (60) consecutive days. If the System is put into production or use in this manner, the Supplier shall notify the Purchaser and document such use. 27.3.2 At any time after any of the events set out in GCC Clause 27.3.1 have occurred, the Supplier may give a notice to the Project Manager requesting the issue of an Operational Acceptance Certificate.</p> <p>27.3.3 After consultation with the Purchaser, and within fourteen (14) days after receipt of the Supplier’s notice, the Project Manager shall: (a) issue an Operational Acceptance Certificate; or (b) notify the Supplier in writing of any defect or deficiencies or other reason for the failure of the Operational Acceptance Tests; or (c) issue the Operational Acceptance Certificate, if the situation covered by GCC Clause 27.3.1 (b) arises.</p> <p>27.3.4 The Supplier shall use all reasonable endeavors to promptly remedy any defect and/or deficiencies and/or other reasons for the failure of the Operational Acceptance Test that the Project Manager has notified the Supplier of. Once such remedies have been made by the Supplier, the Supplier shall notify the Purchaser, and the Purchaser, with the full cooperation of the Supplier, shall use all reasonable endeavors to promptly carry out retesting of the System or Subsystem. Upon the successful conclusion of the Operational Acceptance Tests, the Supplier shall notify the Purchaser of its request for Operational Acceptance Certification, in accordance with GCC Clause 27.3.3. The Purchaser shall then issue to the Supplier the Operational Acceptance Certification in accordance with GCC Clause 27.3.3 (a), or shall notify the Supplier of further defects, deficiencies, or other reasons for the failure of the Operational Acceptance Test. The procedure set out in this GCC Clause 27.3.4 shall be repeated, as necessary, until an Operational Acceptance Certificate is issued. 27.3.5 If the System or Subsystem fails to pass the Operational Acceptance Test(s) in accordance with GCC Clause 27.2, then</p>

Example	Definition of “go-live”
	<p>either:</p> <p>(a) the Purchaser may consider terminating the Contract, pursuant to GCC Clause 41.2.2; or (b) if the failure to achieve Operational Acceptance within the specified time period is a result of the failure of the Purchaser to fulfill its obligations under the Contract, then the Supplier shall be deemed to have fulfilled its obligations with respect to the relevant technical and functional aspects of the Contract, and GCC Clauses 30.3 and 30.4 shall not apply.</p> <p>27.3.6 If within fourteen (14) days after receipt of the Supplier’s notice the Project Manager fails to issue the Operational Acceptance Certificate or fails to inform the Supplier in writing of the justifiable reasons why the Project Manager has not issued the Operational Acceptance Certificate, the System or Subsystem shall be deemed to have been accepted as of the date of the Supplier’s said notice.</p> <p>27.4 Partial Acceptance 27.4.1 If so specified in the SCC for GCC Clause 27.2.1, Installation and Commissioning shall be carried out individually for each identified major component or Subsystem(s) of the System. In this event, the provisions in the Contract relating to Installation and Commissioning, including the Operational Acceptance Test, shall apply to each such major component or Subsystem individually, and Operational Acceptance Certificate(s) shall be issued accordingly for each such major component or Subsystem of the System, subject to the limitations contained in GCC Clause 27.4.2.</p> <p>27.4.2 The issuance of Operational Acceptance Certificates for individual major components or Subsystems pursuant to GCC Clause 27.4.1 shall not relieve the Supplier of its obligation to obtain an Operational Acceptance Certificate for the System as an integrated whole (if so specified in the SCC for GCC Clauses 12.1 and 27.2.1) once all major components and Subsystems have been supplied, installed, tested, and commissioned.</p> <p>27.4.3 In the case of minor components for the System that by their nature do not require Commissioning or an Operational Acceptance Test (e.g., minor fittings, furnishings or site works, etc.), the Project Manager shall issue an Operational Acceptance Certificate within fourteen (14) days after the fittings and/or furnishings have been delivered and/or installed or the site works have been completed. The Supplier shall, however, use all reasonable endeavors to promptly remedy any defects or deficiencies in such minor components detected by the Purchaser or Supplier.</p>
<b>RFP for e-Governance in Migration issued by Ministry of Overseas Indian Affairs</b>	<p>Date on which the e-Migrate solution is made operational on the production environment and becomes available for use to all the identified stakeholders of the project post successful completion to the satisfaction of MOIA of acceptance testing by the 3rd party audit agency or any other agency/ group designated by MOIA.</p>

Example	Definition of “go-live”
<b>RFP for State Service Delivery Gateway, Govt. of West Bengal</b>	<p><b>“Go-Live”</b> will mean:</p> <ul style="list-style-type: none"> <li>• Successful deployment, commissioning and UAT of the SSDG application modules implemented during the phase</li> <li>• Successful deployment and commissioning of the Hardware and Networking equipment in order to make the State Portal operational during the phase</li> <li>• Site Preparation including civil works, creation of LAN, electrical works, etc. during that phase after verification and approval by Nodal Agency or its constituted committees or representatives</li> <li>• Successful content contribution on the State Portal after verification and approval by Nodal Agency or its constituted committees or representatives</li> <li>• Training and Certification of all the trainees, trained on the SSDG application modules of that Phase</li> <li>• Procurement, deployment and commissioning of the hardware at the desired locations required to support the functioning of modules of that Phase</li> <li>• Procurement, deployment and commissioning of the networking equipment and provisioning of desired connectivity required to support the functioning of modules of that Phase</li> <li>• Achievement of the Service Levels as expected during that Phase</li> <li>• Acceptance / Sign off from Nodal Agency or its constituted committees or representatives</li> </ul>
<b>RFP for State Service Delivery Gateway for selection of System Integrator, Government of Manipur</b>	<p>The portal should be available for citizen usage with required facilities like e-Forms, routing of application to appropriate stakeholders for processing and status update of application request after completion of each event e.g. “process initiation” to “ready for delivery”. As per typical SDLC, the following should have been completed before the Go live;</p> <ol style="list-style-type: none"> <li>1. Approval of SRS</li> <li>2. High level design document</li> <li>3. Low level design document</li> <li>4. Development and Implementation (pref. on stage server)</li> <li>5. Training</li> <li>6. User Acceptance testing</li> <li>7. STQC Certification (Tender specific)</li> <li>8. Go live – Production server available for citizen</li> </ol>
<b>RFP for selection of System Integrator for Implementation of CCTNS, Department of Police, Government of Kerala</b>	<p><b>“Successful Implementation / Go-Live”</b> will mean:</p> <ul style="list-style-type: none"> <li>• Successful deployment, commissioning and UAT of the CCTNS application modules implemented during the Phase.</li> <li>• Site Preparation including creation of LAN, electrical works, etc. during that phase after verification and approval by Kerala Police or its constituted committees or representatives.</li> <li>• Successful Data digitization / migration after verification and approval by Kerala Police or its constituted committees or representatives.</li> <li>• Training and Certification of all the trainees, trained on the CCTNS application modules of that Phase.</li> </ul>



Example	Definition of “go-live”
	<ul style="list-style-type: none"> <li>• Procurement, deployment and commissioning of the hardware at Police Stations, Higher Offices, PHQ, Data Centre, DR Site and other locations required to support the functioning of modules of that Phase.</li> <li>• Procurement, deployment and commissioning of the networking equipment’s and provisioning of desired connectivity required to support the functioning of modules of that Phase.</li> <li>• Achieving Information Security Standards based on guidelines from CERTIN, DIT and IT Department, Govt. of Kerala.</li> <li>• Achievement of the Service Levels as expected during that Phase.</li> <li>• Acceptance / Sign off from Kerala Police or its constituted committees or representatives.</li> </ul>
<b>RFP for selection of System Integrator for e-Governance Systems issued by Archaeological Survey of India</b>	<b>“Go-Live” or “Go Live”</b> means commissioning and integration of all the hardware including Data Center, Disaster Recovery Center, the networks, the client side computing devices and all the software applications, including the E-governance solutions configured, customized and used successfully by all the intended users of the BUYER for successfully executing all the intended transactions as mentioned in the Article 3 at mutually agreeable levels.

### 6.5.3 Choose Measurements that Motivate Right Behavior (Service Level Title)

The first goal of any metric is to motivate the appropriate behavior on behalf of the Department and the Vendor. Each side of the relationship will attempt to optimize their actions to meet the performance objectives defined by the metrics. If the wrong metrics are selected, the relationship can go astray quickly. For example, paying programmers by the number of lines of code they produce will certainly lead to an increase in production, but may play havoc with quality and the true quantity of real work accomplished.

To motivate the right behavior, each side must understand the other side, its expectations and its goals, and the factors that are within its control. Realism must prevail. Departments have to anticipate that Vendors will want to make a profit; Vendors have to expect that Department will want to control costs.

When choosing metrics, one should first focus on the behavior that one wants to motivate. What factors are most important to your organization? Reducing costs and/or defects? Increasing turnaround time? Which factors are you willing to trade for improvements in another area? Pick an initial set of metrics that measure performance to these behaviors.

Put yourself in the place of the other side and test the selected metrics. How would you optimize your performance?

Often, secondary metrics are needed to provide checks and balances to avoid missteps. Also, consider whether the metrics are truly objective or are subjective enough to leave room for interpretation. Metrics that are based upon a subjective evaluation are open to different interpretations, and will likely lead to disagreement over whether a service provider has met its commitments. For example, state that "the server should be up and running during the requirement period". Instead it should be "the server should be up and running between 10 AM to 6 PM from Monday to Saturday".

#### **6.5.4 Ensure Metrics Reflect Factors within Service Provider's Control**

Ensure that the metrics measure items within the other party's control. Continuing the example from above, the service provider has control over the server uptime, but has no control over the State Data Centre uptime. Thus, a requirement that "server uptime of 99.5%" is unfair and likely to be de-motivating to the service provider.

Service providers should ensure that the SLA is two-sided. If the service provider's ability to meet objectives is dependent on an action from the Department or any other agency of the Department (for e.g SWAN, SDC etc.) the performance of these agencies / infrastructure must also be measured. Conversely, refrain from choosing SLA metrics that attempt to dictate how the service provider is to do its job. Presumably, an outsourcing provider's core competence is in performing IT tasks, and embodies years of collected best practices and experience. Attempting to regulate these tasks will only introduce inefficiencies. Instead, concentrate on ensuring that the delivered work products meet quality, time and cost expectations.

#### **6.5.5 Choose Measurements Easy to Collect/Capture**

If the metrics in the SLA cannot be easily gathered, then they will quickly lose favor, and eventually be ignored completely. No one is going to spend an excessive amount of time to collect metrics manually. Ideally, all metrics will be captured automatically, in the background, with minimal overhead; however, few organizations will have the tools and processes in place to do so. A metric should not require a heavy investment of time and money; instead use metrics that are readily available, compromising where possible. In some cases, it will be necessary to devise alternative metrics if the required data is not easily obtainable. For example, measuring whether a newly written program meets published IT standards require an arduous manual review. Conversely, a commercially available metric analysis tool can quickly and automatically calculate the program's technical quality. While the end result is not identical, the underlying goal -- motivating enhanced quality -- is met at a fraction of the manual cost.

#### **6.5.6 Proper Base-lining (Hours of Support, Target & Minimum Service Levels)**

Defining the right metrics is only half of the battle. To be useful, the metrics must be set to reasonable, attainable performance levels. It may be difficult to select an initial, appropriate setting for a metric, especially when a Department does not have any readily available performance metrics

or a historical record of meeting those metrics. The MMPs / e-Governance projects in a similar environment which are already live will have the data needed to set a proper baseline. Others will have to perform an initial assessment to establish that baseline. **Unless strong historical measurement data is available, be prepared to re-visit and re-adjust the setting at a future date through a pre-defined process specified in the SLA. Further, include a built-in, realistic tolerance level.**

Consider the example of a Department that selects a Vendor to run its IT O&M. An important Department objective is to keep application uptime 100%. To that end, a metric is selected requiring the service provider to achieve an “application uptime”. It would be tempting to set the metric so that the Vendor had to meet the threshold 100% of the time. But why require the Vendor to keep the application up & running during the non-office hours, especially since it will cost the Department to do so? A better way would be to define a metric that accommodated different comfort levels at different times. In addition, since the Department (or an MMP, working in a similar environment) has historically been able to maintain provide application uptime 95% of the time, it would be reasonable to grant the service provider the same tolerance level. By taking the time to weigh expectations and set reasonable, attainable performance goals, the Department is able to achieve its goal of comfort at a lesser cost while the Vendor is motivated to do its best to meet those needs. The following approach is suggested for determining the SLAs.

Government entity/department will provide six (6) months of Service Level history prior to the transition to Service Provider, where available. Government entity/department and Service Provider agree to establish (i) Minimum Service Levels based on the second lowest Service Level measurement within the six (6) month period and (ii) Increased Impact Service Levels for each Service based on the lowest Service Level measurement within the six (6) month period.

If Government entity/department does not have six (6) months of Service Level history, then:

- The Parties will agree on a Target Service Level.
- If, before the Service Provider begins providing the relevant Service after the pilot phase, six (6) months of history is achieved, then the methodology above will be used.
- If six (18) months of history is not achieved prior to Service Provider providing the Service after the pilot phase, then the Service Level will be established based on six (6) months of performance by Service Provider excluding the pilot phase. The second lowest Service Level during the six (6) month period will become the Minimum Service Level and the lowest Service Level will become the Increased Impact Service Level.

A Service Level measurement may be eliminated from the foregoing analyses if both Parties agree that the Service Level measurement in question resulted from abnormal circumstances.

Except as otherwise expressly provided below, Service Levels will be measured, reported and subject to payment of Service Credits for Service Level Failures at the conclusion of the Pilot Phase for the relevant Service Category. For ease of clarity the relevant targets should be set.

## 6.6 Calculating Penalties as Service Credits

### 6.6.1 Service Credits and Amount at Risk

The SLA should provide for a system of “**service credits**” where if you fall below the agreed service levels, your only “punishment” should be that you give a credit to your client against the next period’s service fees. This clause must be very carefully drafted so that it limits your client’s remedy to a credit and does not become a “penalty”. The formula for calculation of service credits must be clearly and unambiguously set out and must cover the different types of failure, including single extended outages and cumulative periods of downtime within a fixed period.

The SLA must clearly exclude a range of outages from the ambit of service credits where the outages occur, for example, as a result of necessary scheduled maintenance to the servers or upgrades to the software. The SLA must also set out the maximum credit available in respect of any period and that the service credits cannot give rise to a refund or credit against fees due under any other agreement in place between the parties.

Service Credits are calculated as provided below, but the aggregate amount of such Service Credits paid or credited for any given month will not exceed the following limitations (“**Amount at Risk**”):

- For Service Level Failures and Service Credits within a Service Category, twelve percent (12%) of Fees for Services (excluding pass-through expenses and other expense reimbursements, if any) within that Service Category during the relevant month.
- For Service Level Failures in all Service Categories, ten percent (10%) of Fees for Services (excluding pass-through expenses and other expense reimbursements, if any) within all Service Categories during the relevant month.

Service Credit amounts in excess of the foregoing limitations do not carry forward into subsequent months or measurement periods. Service Credits will be applied to the invoice in the month immediately following the Service Level Failure(s) or paid in cash for the final month when the Agreement expires or terminates.

### 6.6.2 Reporting of Service Levels and Credits

Service Level performance and (if applicable) Service Credits are measured and reported monthly (or at other mutually agreed intervals) in Service Provider’s regular reports. The monthly reports shall also describe all failures to achieve Service Levels for the month, reasons for any excused failures, results of root cause analyses, and corrective action proposed and taken to prevent recurrence of failures to meet Service Levels.

### 6.6.3 Calculation of Service Credits

Service Credits are calculated as follows: the Amount at Risk for the relevant Service Category times the relevant Severity Weight. Service Credits for Increased Impact Failures shall be two hundred percent (200%) of the amount otherwise payable for less severe Failures.

### **Example**

#### **Minimum Service Level Failure**

Assume that:

- Service Provider misses the Minimum Service Level Application uptime.
- Failure is unexcused.
- Monthly Fees for the relevant Service Category total INR 100,000 (in case there is a consolidated monthly fee payable to the vendor, then the entire fee has to be broken up into various elements and divided for each SLA, without exceeding 100%)
- Amount at Risk for Service Category is INR 12,000.
- Severity Weight is 30%.

#### **Credit Calculation:**

- Service Credit = Amount at Risk times Severity Weight
- INR 3,600 = INR 12,000 x 30%

#### **Increased Impact Failure**

Same assumptions as above, except

- Performance below “Increased Impact” level.

Credit Calculation:

- Increased Impact Service Credit = Amount at Risk times Severity Weight times 200%
- INR 7,200 = [INR 12,000 x 30%] x 2

## **6.7 Earn-Backs**

Service Credits paid for Service Level Failures related to Minimum Service Levels shall be refunded if Service Provider meets or exceeds the relevant Minimum Service Levels for the six (6) consecutive months (or other reporting periods) following the relevant Service Level Failure. Service Credits for Increased Impact Failures are not refundable in any circumstances.

## **6.8 Unacceptable Service**

The following Service Level Failures or combinations of Service Level Failures constitute Unacceptable Service, and grounds for termination of the Agreement, in whole or in part, if Service

Provider becomes obligated to pay the following amounts of Service Credits (whether or not such Credits are actually collected):

- One Hundred Percent (100%) of the Amount at Risk for any two Service Categories within any rolling period of twelve (12) months or less; or
- Seventy-five percent (75%) of the Amount at Risk for the Agreement as a whole within any rolling period of twelve (12) months or less

Identification of the foregoing circumstances as Unacceptable Service (and subsequent identification of any other circumstances as Unacceptable Service) are without prejudice to contentions that other or different circumstances, individual Service Level Failures, or combinations of Service Level Failures may also, by themselves or in combination with other facts or circumstances, constitute material breach of the Agreement, and grounds for termination.

## **6.9 Continuous Improvement**

Minimum Service Levels and Increased Impact Service Levels will be modified at twelve (12) month intervals for each Service Category promptly following the anniversary of the date related Service Levels were first effective. Upon Government entity/department's request, (i) Minimum Service Levels may be increased/decreased (whichever is the improvement) to the average figure for the preceding six (6) months; and Increased Impact Service Levels may be increased/decreased (whichever is the improvement) to the second lowest/highest measurement within the preceding six (6) months, provided that neither increase shall exceed five percent (5%) of the difference between Impact Service Level then in effect and 100%.

## **6.10 General Provisions**

### **6.10.1 Maximum Service Credits**

The maximum amount payable as Service Credits for any single month shall not exceed the Amounts at Risk (but this limitation does not limit Government entity/department's right to recover damages for material breach, or other remedies, subject to the notice, cure periods, limitations of liability and other applicable provisions of the Agreement).

### **6.10.2 Waivers**

Government entity/department may waive any Service Level Failure or Service Credit, but no such waiver shall be binding or effective unless given in writing, and no such waiver shall constitute a continuing waiver of similar or other such Service Level Failures or other breaches of the Agreement. Government entity/department may at any time direct future compliance with any waived requirement.

## 6.11 Escrow Agreement

Software Escrow is typically requested by a Nodal Agency, to ensure maintenance of the software. The software source code is released to the Nodal Agency if the System Integrator files for bankruptcy or otherwise fails to maintain and update the software as per the agreement signed.

In most PPP projects, services are citizen-centric in nature and their continuity is essential in any situation, software escrow is mandatory in such projects. Source code is the sequence of logical statements and operations written in a human-readable computer programming language that controls the processing of data and the functionality of software. The source code itself can be hundreds of thousands of lines of code and is normally designed and written by software programmers in programming languages. When completed, the source code is compiled into "executable code" that can be downloaded, installed and run on a computer. However, with only the executable code, customers have no ability to see how the software is processing data or performing functions and, for the most part, have no ability to change the operation of the software.

Because repairing problems or changing functionality is only possible with the source code, the escrow of source code is common in large software transactions involving custom developed or operationally critical applications. In a source code escrow arrangement, the source code and documentation are held in escrow by a trusted third party, the escrow agent. **The source code and related documentation are to be released upon the occurrence of a "release event" such as the software developer filing bankruptcy or failing certain obligations under the license.**

Following a release event, the promise of a source code escrow is that the customer can obtain the code to maintain the software without the original developer. This maintenance involves fixing bugs, ensuring compatibility with other system upgrades and adding the functionality required in the customer's changing business.

Software maintenance is essential to enterprise applications. Because the customer has no assurance that the software developer will always be around to perform software maintenance, and since such maintenance cannot be performed without the source code, escrow is considered a necessary part of certain software deals.

*Software OEMS spend a lot in development, they may be reluctant to share source code with third party in Escrow format. Nonetheless different OEMs may have different position on sharing source code. The Nodal Agency may decide if an Escrow should be entered on the basis of financial strength and background of the OEM.*

The service provided by the escrow agent – generally a business dedicated to that purpose and independent from either party – consists principally in taking custody of the source code from the licensor and releasing it to the licensee only if the conditions specified in the escrow agreement are met.

**Inclusion of a provision for escrow adds to the procurement cost, as the escrow agent is paid an annual fee for maintenance of the Escrow. An Escrow clause must be retained in the Agreement when the continued operation and maintenance of custom software is critical and there is an apprehension of the licensor becoming unable to do so, for reasons such as bankruptcy. The licensor, however, will often be unwilling to agree to this, as the source code will generally represent one of their most closely guarded trade secrets.**

## **6.12 Resale of Network Bandwidth**

When Nodal Agency wants to delegate procurement of network to the Implementing Agency, then a Tripartite Agreement can be signed between Nodal Agency, Implementing Agency and ISP. This would ensure adherence to TRAI guidelines on 'Resale of Bandwidth'. A template for Tripartite Agreement has been provided in model RFP for System Integrators.

However, in case the PPP project executed through a Special Purpose Vehicle (SPV), a tripartite agreement may not be required as the scenario for resale of bandwidth may not arise.

## **6.13 Illustrative template for SLA**

A template of SLAs for a PPP RFP is provided. The same may be used as templates and customized. It may be noted that the SLAs are "output" focused and not concerned about the "inputs" into the system.



No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
A. Helpdesk (Severity Weight = 15) <sup>8</sup>						
For the following Helpdesk SLAs, calls made between vendor’s own operators / personnel shall not be considered for calculation of SLAs						
1.	Average Operator Availability (Sum of minutes for which all Helpdesk operators are available / Sum of minutes scheduled for availability of all Helpdesk operators)*100	100%	2	Slippage a. .01-15.00% b. 15.01-30.00% c. >30.00%	a. 1 b. 2 c. 4	MIS reports generated from the Helpdesk System deployed, operated and maintained by the Selected Vendor.  Further there can be random checks for verifying the availability of all the Help Desk operators by a team of Department representatives.
2.	Average Handle Time Handle Time = Talk Time + Hold Time + After Call Wrap up time  Average Handle Time = Sum of Handle time for all calls/Total No. of Calls	180 Secs	4	Slippage a. .01 to 45 secs b. 45.01 to 90 secs c. >90 secs	a. 2 b. 4 c. 8	MIS reports generated from the Helpdesk System deployed, operated and maintained by the Selected Vendor.  Audit of Voice recording of calls by Department officials / Third Party.
3.	Average Speed of Answer Speed of answer = Time taken to receive a call  Average Speed of Answer = (Sum	10 secs	2	Average Speed of Answer a. 10.01 to 20 secs b. 20.01 secs to 30	a. 1 b. 2	MIS reports generated from the Helpdesk System deployed, operated and maintained by the Selected Vendor.

<sup>8</sup> In this sub-category, the amount at risk will be 12% of the amount payable under this service – let's assume INR 1,00,000. Hence in case, the PPP Vendor breaches at maximum level in all areas of service credit, the Service credits would aggregate to 30 points and the amount payable would be 12% \* INR 1,00,000 = INR 12,000

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
	of Speed of answer of all calls)/Total No. of calls			secs c. >30 secs	c. 4	
4.	Average Call Lost Rate (Total No. of calls lost because they were not attended by an operator / Total incoming calls )*100	1%	3	Call Lost Rate a. 1.01-2.00% b. 2.01-4.00% c. >4.00%	a. 1.5 b. 3 c. 6	MIS reports generated from the Helpdesk System deployed, operated and maintained by the Selected Vendor.
5.	Call Handling Accuracy					
5a.	Call Handling Accuracy (No. of calls correctly handled at first level/ Total no. of calls answered)*100	99%	2	Slippage a. 99% to 95.01% b. 95% to 90.01 c. 90% to 85.01%	a. 1 b. 2 c. 4	Audit of Voice recording of calls by Department officials / Third Party.
5b.	No. of re-escalations of a particular issue already escalated once	0	2	a. 1 – 2 b. 3 – 5 c. > 5	a. 1 b. 2 c. 4	MIS Reports from the Help Desk Software as well as Audit of Voice recording of calls by Department officials / Third Party.
<b>B. Front Window (Severity Weight = 10)</b>						
1.	Average Operator Availability (Total minutes for which all Front window operators are available / Total minutes scheduled for availability of all Front window operators)*100	100%	2	a. 99.99 to 98.00% b. 97.990 to 95.00% c. <95%	a. 1 b. 2 c. 4	MIS reports generated from the system deployed, maintained and operated by the vendor at the Front Window  Operator Availability = Sum of (Re Log-in time of Operator after system auto log off – System auto log-off time + 10) over the period. +

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
						Sum of (First Log-in time of Operator – Start time of the Front Window) over the period)  System will automatically log-off when idle for 10 minutes.
2.	Average Token Call Time (to be measured only at Front Window)	30 secs	1	a. 30.01 to 45 secs b. 45.01 to 60 secs c. >60 secs	a. 0.5 b. 1 c. 2	Token Call Time = Time of call of next token - Time of generation of receipt for previous request  Average Token Call Time = Sum of all Token Call Times – Schedule break /Total No. of Tokens (to be calculated only when there are pending tokens in the system)  MIS reports generated from the system deployed, maintained and operated by the vendor at the Front Window.
3.	Token Processing Time (to be measured only at Front Window) = Time between generation of a token to generation of the acknowledgement for the request against that token					
3a.	<b>Service Type 1:</b>	1min	1			MIS reports generated from the system

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		
				Metric	Service Credits	Measurement
				a. 60.01 to 75 secs b. 75.01 to 90.00 secs c. >90 secs	a. 0.5 b. 1 c. 2	deployed, maintained and operated by the vendor at the Front Window.
3b.	<b>Service Type 2:</b>	10 mins	2	a. 10.1 mins to 11 mins b. 11.01 to 12 mins c. >12 mins	a. 1 b. 2 c. 4	MIS reports generated from the system deployed, maintained and operated by the vendor at the Front Window.
3c.	<b>Service Type 3:</b>	25 mins	2	a. 25.01 mins to 26 mins b. 26.01 mins to 27 mins c. >27 mins	a. 1 b. 2 c. 4	MIS reports generated from the system deployed, maintained and operated by the vendor at the Front Window.
4.	<p>Average Delay in Document Submission Time</p> <p>Delay in Document Submission = Day of submission of documents by Vendor to Dept - Day /Time of submission of documents by Citizen/Applicant at Front Window</p> <p>Average Delay in Document Submission Time = Sum of delay in document submission for all documents / Total no. of</p>	0	1	<p>Slippage = s</p> <p>a. <math>s \leq 1</math> day b. <math>1 \text{ day} &lt; s \leq 2</math> days c. <math>s &gt; 2</math> days</p>	a. 0.5 b. 1 c. 2	<p>(For Front Window the bidder is required to submit the documents on daily basis.</p> <p>MIS reports acknowledging the receipt of such documents by the authorized officer in the District.</p> <p>For the purpose of calculation of delay, time between 12 noon on a day to 12 noon the next day will be considered "1 day".</p> <p>Eg, Citizen/Applicant submits document at</p>

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
	<p>documents submitted</p> <p>This includes all application and their supporting documents etc collected from Citizens at the Front Window</p> <p>Note: Time of submission of document: 12 noon the next working day</p>					<p>Front Window on &lt;Date&gt; at &lt;time&gt;</p> <p>To fully meet the SLA vendor is required to submit the documents to the Department by &lt;Date and time&gt;,,</p> <p>If he submits the documents to Department on &lt;Date and time&gt;,, the delay is counted as:</p> <p>&lt;Date and time&gt; to &lt;Date and time&gt; = 1 Day</p> <p>&lt;Date and time&gt; to &lt;Date and time&gt; = 2 Day</p> <p>&lt;Date and time&gt; to &lt;Date and time&gt; = 3 hrs.</p> <p>Total Delay = &lt;Days &amp; hours&gt;.</p> <p>Service Credits deducted: &lt;&gt;</p>
5.	Quality of Service at Front Window	Atleast 8 points out of 10	1	<p>Average Score</p> <p>a. 7</p> <p>b. 6</p>	<p>a. 0.5</p> <p>b. 1</p> <p>c. 2</p>	<p>Feedback collected from citizens through feedback forms designed by the vendor, approved and administered by the Department.</p>

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
				c. <5		<p>Inspections by the designated departmental officials</p> <p>Sample Size for the same will be decided by &lt;Nodal Agency&gt; at time of implementation</p> <p>Parameters for feedback:</p> <p>Upkeep and Cleanliness of Front Window (4 points out of 10)</p> <p>Courteousness and behaviour of Staff (4 points out of 10)</p> <p>Compliance to Department's guidelines on the Signage and Display requirements etc (2 points out of 10)</p>
<b>C. Dispatch (Severity Weight = 5)</b>						
1.	Average Delay in Dispatch	0	3	<p>Slippage</p> <p>a. 1 day</p> <p>b. 2 days</p> <p>c. &gt; 2 days</p>	<p>a. 1.5</p> <p>b. 3</p> <p>c. 6</p>	<p>Delay in Dispatch = No. of days of delay from the scheduled day of dispatch</p> <p>Average Delay in Dispatch = Sum of Delay in Dispatch for all documents/Total no. of Documents scheduled for Dispatch</p> <p>Note: Schedule day of dispatch for a document: Same day of receipt of document</p> <p>e.g. if a document is submitted for dispatch</p>

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
						<p>on day 1 (9am to 4 pm)</p> <p>The scheduled day of dispatch is day 1</p> <p>Say, the actual time of dispatch is day 3 then the delay in dispatch = day 3 -day 1 = 2 days</p> <p>MIS reports regarding the date, time and consignment no. of dispatch of documents submitted by the Department officials to the vendor.</p>
2.	<p>Delivery Timeliness</p> <p>= (A+B)/2</p> <p>A. For Documents within &lt;State&gt; :</p> <p>(No. of documents for which the first delivery attempt has been made within 1 day of dispatch of document/No. of documents dispatched)*100</p> <p>B. For Documents Outside</p>	100%	2	<p>Slippage</p> <p>(as % of Base metric)</p> <p>a. 0.01-5.00%</p> <p>b. 5.01-20.00%</p> <p>c. &gt; 20%</p>	<p>a. 1</p> <p>b. 2</p> <p>c. 4</p>	<p>MIS reports regarding the status of delivery of the documents dispatched by the vendor.</p>

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
	<State>: (No. of documents for which the first delivery attempt has been made within 3 days of dispatch of document/No. of documents dispatched)*100					
<b>D. Record Room (Severity Weight = 5)</b>						
1.	Average delay in File Retrieval  Note: The vendor is allowed 30 mins to deliver the file to the requestor  Delay in file retrieval = Time of Request for file (in minutes)+ 30 – Time of delivery of file  Average delay in file retrieval = Sum of Delay in File Retrieval for all file retrieval requests/ Total no. of file retrieval requests in the period.	0	3	Time taken to deliver the file :  a. 30.01- 45 mins  b. 45.01 to 60 mins  c. > 60 mins	a. 1.5 b. 3 c. 6	Reports regarding the File request time, time of delivery etc maintained in the system deployed by the Vendor.
2.	Quality of Service – Record Room	Score of atleast	2	A score of		Surprise checks by authorized officers in the



No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
		80%		a. 75-80% b. 65-75% c. <65%	a. 1 b. 2 c. 4	Department to check  Up-to-date inventORIZATION of files  Upkeep and cleanliness of Record Room  Accessibility of files  Feedback collected from Departmental Staff through feedback forms designed by the vendor, approved and administered by the Department. Parameters for feedback:  Upkeep and Cleanliness of Record Room  Maintenance of files (File numbering, labelling, indexing, overall condition of file etc.).  Sample Size for the same will be decided by <Nodal Agency> at time of implementation
<b>E. Application (Severity Weight = 30)</b>						
1.	Average Home Page opening time	< 2 seconds	5	a. 2.01 - 3.0 secs b. 3.01-5.0 secs c. >5 secs	a. 2.5 b. 5 c. 10	MIS reports generated from the system deployed, maintained and operated by the vendor

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
2.	Average time for User Login	< 2 seconds	5	a. 2.01 - 3.0 secs b. 3.01-5.0 secs c. >5 secs	a. 2.5 b. 5 c. 10	MIS reports generated from the system deployed, maintained and operated by the vendor
3.	Average time for submission of forms/ data by Citizen/Applicants (Time between pressing the 'submit' button and generation of acknowledgement of successful or unsuccessful submission from the system)	< 1 min	5	a. 1.01 – 1.5 mins b. 1.51 – 2.5 mins c. > 2.5 mins	a. 2.5 b. 5 c. 10	MIS reports generated from the system deployed, maintained and operated by the vendor
4.	Average time to throw by results of queries by a Citizen/Applicant	< 5 seconds	5	a. 5.01 - 7.0 secs b. 7.01-10.0 secs c. >10 secs	a. 2.5 b. 5 c. 10	MIS reports generated from the system deployed, maintained and operated by the vendor
5.	Average report generation time by internal users on historical data	Centre / Statewide Data Upto 1 quarter  Leased line, Peak Hours: < 2 mins  Leased line, Non-Peak Hours: < 1 mins	6	Instances of not meeting the Baseline Figure a. <2% b. 2.01 – 5% c. >5%	a. 3 b. 6 c. 12	MIS reports generated from the system deployed, maintained and operated by the vendor  Returns Mismatch Report is the Citizen/Applicant-wise report of mismatches obtained after sales purchase reconciliation of the transaction data submitted by a Citizen/Applicant in his return

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
		Other connectivity, Peak Hours: < 4 mins				
		Other connectivity, Non-Peak Hours: < 2 mins				
		<u>Statewide Data</u> <u>Upto 1 Year</u>				
		Leased line, Peak Hours: < 4 mins				
		Leased line, Non-Peak Hours: < 2 mins				
		Other connectivity, Peak Hours: < 8 mins				

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
		<p>Other connectivity, Non-Peak Hours: &lt; <b>4 mins</b></p> <p><u>Statewide Data more than 1 year</u></p> <p>Leased line, Peak Hours: &lt; <b>6 mins</b></p> <p>Leased line, Non-Peak Hours: &lt; <b>3 mins</b></p> <p>Other connectivity, Peak Hours: &lt; <b>10 mins</b></p> <p>Other connectivity, Non-Peak Hours: &lt; <b>6 mins</b></p>				

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
		<u><b>Report 2</b></u>  Leased line, Peak Hours: < <b>30 mins</b>  Leased line, Non-Peak Hours: < <b>15 mins</b>  Other connectivity, Peak Hours: < <b>1 hour</b>  Other connectivity, Non-Peak Hours: < <b>30 mins</b>				
6.	Average time for submission of forms/ data by internal Staff (Time	<5 secs	4	a. 5.01 - 7.0 secs	a. 2 b. 4	MIS reports generated from the system deployed, maintained and operated by the

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
	between pressing the 'submit' button and generation of acknowledgement of successful or unsuccessful submission from the system)			b. 7.01-10.0 secs c. >10 secs	c. 8	vendor
<b>F. System Uptime (Severity Weight = 35)</b>						
1	Average System Uptime	99.9%	15	Slippage a. 0.1-5.00% b. 5.01-15.00% c. 15.01-30.00% d. >30%	a. 5 b. 10 c. 15 d. 30	<p><b>"System Uptime"</b> shall mean the time period for which the specified application, portal and other IT Components are available to the internal and external users of the system. Uptime, in percentage, of any component (Non IT &amp; IT) can be calculated as:</p> $\text{System Uptime} = \{1 - \frac{[(\text{System Downtime}) / (\text{Total Time} - \text{Planned Maintenance Time})] * 100\}$ <p>For purpose of calculation of SLAs, following hours will be used:</p> <p>DC, DR,: 24 X 7</p> <p>Front office: 6 working days of week, excluding Government Holidays</p> <p>All other locations: 8 AM to 8PM excluding Saturdays, Sundays and Government holidays</p> <p><b>"System Downtime"</b> shall mean the time</p>

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
						<p>period for which the specified services / components with specified technical and service standards are not available to the departmental users and excludes the scheduled downtime for preventive maintenance</p> <p>This includes Servers, storage, Backup, LAN, OS, Application, any other IT and non-IT infrastructure, their sub-components etc at all Project locations etc).</p> <p>The selected vendor will be required to schedule 'planned maintenance time' with prior approval of the Department. This will be planned outside working time. In exceptional circumstances, Department may allow the vendor to plan scheduled downtime in the working hours. In any case this should not exceed 0.5% of the total time.</p> <p>MIS reports generated from the monitoring system deployed and maintained by the Vendor will be used to monitor this SLA</p>
2.	System Uptime at each location	99.5% at each location	5	Slippage	a. 2.5 b. 5	Location System Uptime = {1- {[(System

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		
				Metric	Service Credits	Measurement
				a. Less than 99.5% uptime at zero locations b. Less than 99.5% uptime at upto 5 locations c. Less than 99.5% uptime at 6 to 10 locations	c. 10	$\text{Downtime at that Location} / (\text{Total Time} - \text{Planned Maintenance Time}) * 100$ System Downtime at a location = Time for which system's users are not able to access the application, portal or any other IT components of the system at that location to perform day to day operations/transactions. This includes Servers, storage, Backup, LAN, OS, Application, any other IT and non-IT infrastructure, their sub-components etc at / for that Project location etc). MIS reports generated from the monitoring system deployed and maintained by the Vendor.
3.	<b>WAN availability</b> This includes: a) Availability of Connectivity of Data Centre with <Department offices> and upcoming locations. b) Internet Bandwidth Availability	99.5%	10	Slippage a. 0.1-5.00% b. 5.01-15.00% c. 15.01-30.00% d. >30%	a. 2.5 b. 5 c. 10 d. 20	MIS reports generated from the monitoring system deployed and maintained by the Vendor.
4.	<b>Instances of not meeting Issue resolution time</b>	0%	5	Slippage	a. 2.5	Resolution time is defined as time from generation of Call No. to time of closure of



No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		Measurement
				Metric	Service Credits	
	(No. of equivalent instances of not meeting issue resolution time / Total equivalent instances of reported issues)*100			a. 0.01-10.00% b. 10.01-20.00% c. >20.00%	b. 5 c. 10	<p>call as reported in the Helpdesk Application deployed and maintained by vendor.</p> <p>Resolution time for various types of problems</p> <ul style="list-style-type: none"> <li>▶ Severity Level 1 (S1): Problems affecting the data centre or DR site: 2 hours</li> <li>▶ Severity Level 2 (S2): Problems affecting more than one location (other than the Data Centre related problems) or any one ICC or one Front Window: 4 hours</li> <li>▶ Severity Level 3 (S3): Problems affecting more than five users within a location or all users at a single location (other than ICC and Front Window): 8 hours</li> <li>▶ Severity Level 4 (S4): Problems affecting less than five users within one location (provided there are 5 or more users at that location): 18 hours</li> </ul> <p>Equivalent instances are calculated as:</p>

Performance level								
No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Metric	Service Credits	Measurement		
						Severity	Weightage	
						S1	1	
						S2	¼	
						S3	1/8	
						S4	1/16	
						For example, 3 instances of overshooting Issue resolution time for S2 type complaints would result in ¾ “Equivalent Instances of not Meeting Issue Resolution Time”.		
Training (Severity Weight = 15)								
1.	Participant Pass Rate  (No. of Participants who score at least 80% marks in the first Assessment Test / No. of Participants who took the test)*100  (This SLA is valid only for the first training and not for retraining)	90%	5	a. 89.99 % to 80% b. 79.99% to 70% c. <70%	a. 1 b. 3 c. 5	Score on Assessments done after completion of training. Tests designed by the vendor, approved by the department and administered and assessed by the Department directly or through any third party appointed by the department. Participants who do not pass have to be retrained once by the Vendor at no additional cost.		
2.	Training Timeliness	100%	5	a. 99.99 % to 90%	a. 1 b. 3	MIS reports generated from the System		

No.	Service Metric Parameter	Target Service Level	SLA specific Severity Weight	Performance level		
				Metric	Service Credits	Measurement
	(No. of participants trained within timelines prescribed in this RFP / No. of Participants who are to be trained in a time period)*100			b. 89.99% to 75% c. <75%	c. 5	deployed, operated and maintained by the Selected Vendor.
3.	Quality of Training Average score of at least 80%	80%	5	a. 79.99% to 70% b. 69.99 % to 60% c. <60%	a. 1 b. 3 c. 5	Feedback collected from trained participants through feedback forms designed by the vendor, approved and administered by the Department.  Parameters for feedback: Relevance of course content / coverage, quality of presentation, quality of training material provided, relevant examples / practice sessions, quality of faculty, administrative arrangements done for the training.  Sample Size for the same will be decided by <Nodal Agency> at time of implementation

SLAs for Business Continuity			
S. No.	Service Metric Parameters	Penalty	Measurement
1	Maximum Data Lost	<ul style="list-style-type: none"> <li>No data lost: No penalty</li> </ul>	MIS reports generated from the System

SLAs for Business Continuity			
S. No.	Service Metric Parameters	Penalty	Measurement
	Maximum Data Lost at any point of time in the system	<ul style="list-style-type: none"> <li>Upto 30 mins: 2 Lakhs</li> <li>30 mins to 2 hours: 5 Lakhs per half hour till 2<sup>nd</sup> hour</li> <li>&gt; 2 hours: 10 Lakhs per hour</li> </ul>	<p>deployed, operated and maintained by the Selected Vendor.</p> <p>E.g. 5 hours data is lost, penalty imposed will be: 11 Lakhs</p> $(2) + (3 \times 5) + (3 \times 10) = 47 \text{ Lacs}$
2	<b>Latency of data replication at Disaster Recovery Site</b>	<ul style="list-style-type: none"> <li>&lt; 1 hour: No penalty</li> <li>1 to 2 hours: 2 Lakhs per hour of delay till 2<sup>nd</sup> hour</li> <li>2 to 4 hours: 5 Lakhs per hour of delay till 4<sup>th</sup> hour</li> <li>&gt; 4 hours: 10 Lakhs per hour of delay</li> </ul>	<p>MIS reports generated from the System deployed, operated and maintained by the Selected Vendor.</p> <p>E.g. Data was last replicated on the DR site 11 hours ago, penalty imposed will be:</p> $(1 \times 2) + (2 \times 5) + (7 \times 10) = 82 \text{ Lacs}$
3	<b>Time for recovery of Primary Data Centre (RTO)</b>	<ul style="list-style-type: none"> <li>&lt; 1 hour: No penalty</li> <li>1 to 2 hours: 2 Lakhs per hour of delay till 2<sup>nd</sup> hour</li> <li>2 to 4 hours: 5 Lakhs per hour of delay till 4<sup>th</sup> hour</li> <li>&gt; 4 hours: 10 Lakhs per hour of delay</li> </ul>	<p>MIS reports generated from the System deployed, operated and maintained by the Selected Vendor.</p> <p>E.g. DC site was recovered in 11 hours, penalty imposed will be:</p> $(1 \times 2) + (2 \times 5) + (7 \times 10) = 82 \text{ Lacs}$

## 7 First Draft of Key Project Documents

The first draft of key project documents should be prepared prior to the application for In-principle Clearance. These would typically include a draft of the Contract Agreement (PPP), as well as drafts of the first-stage bid documents (EOI).

The draft project documents will support the in-principle Clearance application by providing additional detail to the clearance authority. These rough drafts will also be needed in advance of issuing the EOI. The structure and critical details of the draft documents will flow from the findings in the feasibility study.

An **EOI** will typically include the following:

- **Description of key project details, including:**
  - Description of the project scope and objectives, with a focus on the services to be provided including indication of performance levels
  - Envisaged PPP mode and financing mechanism
  - Payment mechanism (eg, user charges, government payment, other source, or a combination)
  - Project timeframe and indicative schedule
- **Details of the procurement, including:**
  - Qualifying criteria for the evaluation and selection of shortlisted bidders
  - Process for submission and evaluation
  - Details of pre-submission conference or meeting and of other opportunities to ask questions or seek clarifications
  - Indicative procurement schedule
  - Other general instructions to applicants
  - Application forms (as annexes)

An EOI would also include enough description of the project so that potential bidders are able to assess whether they would be interested.

- **The standard clauses in a Contract Agreement (PPP) include:**
  - Contract date and key dates in the concession life (including termination)
  - Obligations, rights and restrictions on the private partner (concessionaire), including a description of the services to be provided and performance obligations
  - Obligations and rights of the public partner
  - Mechanisms for payment, including the rights (if any) of the concessionaire to gather direct or indirect revenue from the project
  - Rules and procedures for making changes to the scope during the life of the project
  - Requirements and procedures for auditing and monitoring performance
  - Penalties in case of non-performance
  - Step-in and substitution rights
  - What happens at the end of the project (termination) including, if appropriate, transferring assets to the public sector

- What happens if the project is terminated early
- Arrangements for dispute resolution
- Other standard clauses such as change in law, force majeure etc

The details of the EOI and the Contract Agreement (PPP) will depend on the particular details of the project. However, as indicated by the lists above, there are broadly standard contents that are common across projects. This makes it possible to start with a model document and add project-specific details to this as required.

Getting the **Contract Agreement (PPP)** right is critical to a sustainable and successful PPP project. It should spell out the rights, responsibilities and obligations of all parties. This makes it vital not just as a bidding document but as the foundation for the management of the contract throughout the life of the PPP. For this reason, the process of preparing to manage the PPP contract should begin early and continue till when the Contract Agreement (PPP) is finalized.

Drafting project documents is a specialist task and advisors should/would ordinarily be engaged to do this. Where model agreements are used they may be adapted in-house by the Sponsor if it has the necessary expertise. However, even in this case it may still be preferable to seek external advice, particularly if the project is complex or innovative.

## 8 Approvals: Process for In-principle Clearance

The clearance process and the institutions that support this will vary from State to State and Ministry to Ministry. An institutional arrangement for PPP in Infrastructure is in place at Central level and some States (for example Assam, Orissa, Madhya Pradesh) have similar approaches.

However, other States have different arrangements and in some States and especially at the municipal level the procedures may not yet be developed. Project Officers should check the requirements that apply in their jurisdiction (for example by consulting the relevant PPP nodal agency, or any other relevant institutions' websites and guides).

For projects at the **Centre**, an application for clearance is submitted to the PPP Cell in DEA which passes it on for in-principle clearance by PPPAC, the Standing Finance Committee, Expenditure Finance Committee, or Administrative Ministry as required (the competent Authority for appraisal and clearance depends on the level of project cost). The process is detailed in DEA's approval guidelines. However whether the PPP sector investment would require the approval of this Committee needs to be finalized between DIT and PPP Cell in DEA.

For Centre level projects DEA has provided *pro-forma* memoranda to accompany the pre-feasibility report in applications (see DEA Compendium of Approval Guidelines, 2008, Annexes). These include summary details such as project description, financing arrangements, IRR, other clearances etc.

For **state**-level projects, the committee or agency empowered to make in-principle clearance will depend on the particular institutional set-up of the state.

In some cases the PPP Cell may be empowered to give in-principle clearance without application to a competent authority. For example, at the Centre level the PPP Cell can give in-principle clearance for proposals submitted on the basis of Model Contract Agreement (PPP)s. (See DEA Guidelines)

### 8.1 Preparing for Procurement

Preparation should always be the first step. Key preparation activities include:

- Forming a team to lead the procurement and evaluation process
- Reviewing project information and making any necessary updates
- Appointing an independent monitor to ensure quality and process oversight

### 8.2 Forming a Procurement and Evaluation Team

The Sponsoring Authority should select and form a team of people who will carry out and manage the procurement process. A Project Team will have been formed early in the PPP process and may have been expanded for the detailed analysis during a subsequent phase. This team may now be further adapted to become the procurement and evaluation team.

The **Procurement and Evaluation (P&E) team** should have expertise covering financial, legal, technical, operational and commercial aspects of the project. The team should also have managerial capability to lead the procurement process.

It is natural for the Project Officer to lead the P&E team if this person has the experience and skills needed to manage the procurement process. The team should include individuals from within the Sponsoring Authority and may also include external advisors where expertise is not available internally. The team can further engage external technical advisors for specific tasks as needed.

The P&E team will have the following roles, using external advisors as needed:

- Provide overall management of the procurement process
- Prepare the EOI notice
- Provide a contact point for communications with interested parties
- Evaluate EOI
- Develop RFP documents
- Provide a contact point for communications with bidders
- Evaluate bid submissions and select preferred bidder
- Finalize the contract with preferred bidder

Each member of the P&E team must be required to declare that they have no conflict of interest in the project and to disclose any conflict that arises during the procurement process. The same must also be true of any advisors engaged during the process.

### **8.3 Reviewing and Updating Project Information**

At the start of the procurement phase it is worth reviewing the project information developed during Phase 2. This will be especially useful if there has been a delay since receiving In-principle Approval and if new people have joined the Sponsor's project team.

The project information will include:

- Description of services required
- Detailed technical scope
- Economic and financial appraisals of the project
- Environmental and social safeguard information
- Risk allocation and PPP mode
- Project implementation schedule
- Selected procurement strategy and process
- First drafts of the EOI document and Contract Agreement (PPP)

A decision on the procurement strategy and type of procurement process will have been made earlier. First drafts of the EOI document and Contract Agreement (PPP) will also have been developed.

The In-principle Approval will have been given on the basis of the project information from this phase. If the Clearance committee requested any changes to the project details then these updates should now be made. The implementation schedule should also be reviewed and updated if the timeline has changed.



Substantive changes to the project description that was agreed by the Clearance committee, particularly to the scope and risk allocation, should not now be made. If changes are required these would need to be brought to the attention of the Approving Authority and justified.

## **8.4 Appointing an Independent Monitor**

The sponsor agency may consider appointing an independent monitor to oversee the process and to ensure the transparency of the project Bidding and public budget allocation processes. This person should be able to critically and objectively evaluate the process and comment on inadequacies and potential conflicts of interest as they arise. The use of an independent monitor is a good practice to adopt, particularly for financially large projects.

To carry out this role he or she should have an independent position in relation to the Sponsoring Authority. The independent monitor should, ideally be a representative from the Ministry of Finance or from the Ministry of Law or from an independent audit firm.

The role of the independent monitor will be to monitor and record the conduct of the participants and the proceedings particularly during the Bidding and procurement and contract finalization stages. The independent monitor will review all documentation and attend all internal and external meetings. The independent monitor would not approve any decision or document, but only certify that the proceedings had been conducted with the desired standard of transparency and accountability.

The independent monitor would report directly to the Approving Authority that is empowered to make the Final Approval decision. The Monitor should submit an independent report to the Approving Authority to verify that activities were conducted as per acceptable practices.

The independent monitor's assessment of the Bid process should be an important input into the approval process. The monitor would also provide advice on Bid procedures to the procurement and evaluation team.

## 9 Bid Preparation: EOI and RFP Process

### 9.1 EOI Process

EOI is extremely important for PPP in ICT and E-Governance space; reason being that PPP is relatively new in ICT/E-Governance and solution delivery does not comprise just of simple purely commoditized goods and basic deployment services. PPP in ICT/E-Governance can very well be complex involving a good mix of software, hardware, networking, application development and O&M services. All of this, within the brackets of financial feasibility, output specification benefits to the Citizen/Government and economic returns to the Vendor, is a risky business proposition. Hence, it is important that the right profile of bidders are shortlisted who have the capability to deliver the project in the most efficient manner.

The EOI process would typically include the following steps:

- Preparation of the EOI
- Public notification and issuing the EOI notice
- Allowing for questions from interested parties
- Receipt of EOI submissions
- Assessment of level of interest and compilation of list of interested firms

For detailed guidance on this section please refer **Section 1 : Guidance Notes : Model RFP Templates for Implementation Agencies**.

### 9.2 RFP & Contract Design

First drafts of the key bidding documents will be available from the In-principle Approval application. Further development can begin before the RFP stage, to allow a draft to be included with the RFP, or during the RFP stage to save time between RFP and Final Approval. In any case, the final drafts must be ready ahead of the application for Final Approval.

The key bidding documents are:

- The Request for Proposal (RFP) for the bid, which includes the Terms of Reference (TOR)
- The Contract Agreement (PPP) that will govern the PPP

The Draft Contract Agreement would be included with the RFP.

The final drafts will be based on the first drafts and details from:

- The project specifications from the feasibility study
- The results from the In-principle Approval, including Viability Gap funding or other grant approval and any added requirements or requested changes
- The qualification criteria developed at the RFQ stage

The RFP, which includes the Draft Contract Agreement (PPP), is the most important document in the bidding process. It is well worth taking care to develop the document carefully, clearly and thoroughly.

The RFP and Contract Agreement specify the main terms of the project and ordinarily these would be non-negotiable at the award stage. It is critically important that these terms are clear and well understood. The Contract Agreement also lays the foundation for the contract management process throughout the life of the PPP.

A quality RFP will provide bidders with clarity on the requirements of the project and encourage them that the public partner is credible and well organised. This will make them more likely to devote resources to the bid. It will also reduce the likelihood of delays to the bidding process as a result of subsequent changes to the RFP.

Model documents can provide a useful starting point and guidance on the contents and format of typical RFPs and CAs. Unless the Sponsor has the necessary in-house expertise transaction advisors would need to be engaged to complete the detailed document preparation.

For a Model RFP Template for PPP please refer ***Model RFP Template for Public Private Partnership***

For further guidance on RFP drafting section please refer ***Section 2 : Guidance Notes : Model RFP Templates for Implementation Agencies.***

For a draft PPP Contract Agreement, please refer ***Annexure I : Agreement for Selection of Implementation Agencies for PPP (Transaction Based Pricing Model) Vendor***

For further guidance on PPP Contract Agreement, please refer ***Additional Reference for Good Practices : Model RFP Templates for Public Private Partnership.***

### **9.3 Readiness Check and Final Approval**

Before going on to the bidding stage the Sponsor must seek Final Approval for the PPP procurement from the relevant Authority. The Sponsor should carry out a **readiness check** before submitting the project for Final Approval.

This readiness check is designed to test that the project is well prepared for the Approval application and for bidding. A project that has been thoroughly and successfully checked for readiness has the best chance of being successfully Approved.

The readiness check should be carried out by the Sponsor internally using a **Readiness Filter**. The Readiness Filter consists of a series of validating questions (checks), each related to an important part of preparation for Approval and for bidding. There is one Readiness Filter for each Readiness

Check. The Readiness Checks happen at key milestones in project development. As the name suggests, the purpose of the Readiness Checks is to help make sure that the PPP project is ready for the next stage and to highlight areas where the quality of preparation can be improved.

A senior person within the Sponsor should be appointed as a reviewer for the readiness check. Ideally, this person would be in a position related to oversight of the Sponsor's financial activities. This person should not be a member of the P&E team.

The Project Officer and the P&E team would be required to complete the Readiness Filter and submit them to the reviewer. An internal meeting would then take place chaired by the reviewer in which the P&E team would be expected to defend the readiness of the project.

**Each Readiness Check is intended to assist the Project Officer at key stages of the process by providing an informal assessment of:**

- The completeness of the material to be submitted for review and approval.
- Any weaknesses in the PPP project design that should be addressed.
- The likelihood that the PPP project will receive clearance or approval following submission.
- The readiness of the project to proceed to the next step, including the availability of the necessary resources.

**The specific purpose and timing of each Readiness Check is:**

***Readiness Check 1: Internal Quality Review*** This check happens after the completion of the Pre-Feasibility Study Report in Phase 1. Readiness Check 1 is part of the application for **internal clearance** to move to detailed PPP development in Phase 2. It focuses on the project's suitability as a PPP and the identification of aspects of the project that will need particular attention during its further development.

***Readiness Check 2: Project Feasibility*** This check follows the completion of the Feasibility Study Report and first drafts of bid documents in Phase 2. It happens before the submission of the report and documents for **in-principle clearance**. The purpose of Readiness Check 2 is to check that the project is ready for to apply for in-principle clearance. Readiness Check 2 focuses on assessing whether the Feasibility Study Report is sufficiently complete and whether clearance is likely to be granted given the current project design.

***Readiness Check 3: Procurement Readiness*** This check follows the completion of shortlisting of bidders and final drafts of project documents in Phase 3 and happens before the submission of the project for **final approval**. The purpose of Readiness Check 3 is to check that the project is ready for final approval in order to maximize the likelihood that final approval will be granted.

The Readiness Check is not intended to replace the external clearance and approval requirements built into the process. Decisions on whether to submit the proposed PPP project for subsequent formal clearance and approval will be taken by the Project Officer and are not

dependent on the conclusions of the Readiness Check. The review and approval process may reach different conclusions to those of the Readiness Check. However, the Readiness Check will help the Project Officer in deciding whether to submit the project or to further improve its readiness prior to submission.

## 9.4 Application for Final Approval

If the internal reviewer signs off on the readiness check then an application can be made for Final Approval to procure the project as a PPP. This application would be made to the relevant Approving Authority, which depends on the jurisdiction governing the PPP.

The Approving Authority would assess the key documents prepared for the bidding stage, and review the results of the qualifying stage. It would also take account of the in-principle recommendation made by the Clearance Authority.

## 9.5 Bidding - RFP and Bid Evaluation

After Final Approval has been granted the PPP procurement can progress to the bidding stage. For further guidance on this section please refer ***Section 2 : Guidance Notes : Model RFP Templates for Implementation Agencies.***

### 9.5.1 Site Visit

If the project involves important site-related issues a site visit should be organized early in the bid preparation. All bidders would be invited to attend and it would be expected that they would do so. Bidders will be free to ask site-related questions and these should be minuted and circulated to all participants.

### 9.5.2 Data Room

A data room is a way for the Sponsor to provide bidders with access to confidential project-specific information for a period while they are preparing their bids. It is usually a single location where bidders may come to view documents that are not otherwise allowed to be distributed.

The location and rules for accessing the data room should be stated in the RFP.

As an alternative to a physical location, it is becoming increasingly common for procurement authorities to provide a virtual data room. This is a secure website where project documents can be provided to authorized viewers online. Virtual data rooms often have restrictions on how documents can be viewed and used, for example by using digital rights management to limit the ability to save, print and distribute confidential material.

Non-confidential information relevant to the bid may be provided with the RFP or made available at the request of bidders.

## 10 Best Practices in Bidding, Evaluating, and Negotiating PPP Transactions

Bidding and evaluation of PPP projects include the usual project appraisal activities of research and analysis to prepare pre-feasibility studies and feasibility studies. But for PPP projects several distinct sequential steps should be followed:

1. **Affordability:** Conduct consumer demand, affordability, and willingness to pay surveys to determine whether the tariff rates required for the project to be financially viable are acceptable and affordable to people who will be the consumers of the services provided by the project; and (b) perform a review of budget resources for government's projected share of costs in the project; if there are not sufficient resources in the current budget, determine whether the required amount can be put into the next fiscal budget.

2. **Risk Allocation:** Does the proposed PPP project appropriately transfer risk to the private sector, and does the resulting risk allocation matrix appropriately match each category of risk with the partner best able to manage that kind of risk? The general principle is that the public sector partner manages political risks while the private sector partner manages commercial risks. In practice, there are always a few categories of risk that the partners must share, like tariff risk, which fluctuates based on both commercial demand/supply factors and political factors.



3. **Value for Money:** The proposed PPP project must give the government more value for money than it would get if it did the project without a private sector partner. It will be necessary to develop a "base case" scenario, in which the cost of doing the project with no private partner is estimated. Then, a "public sector comparator" is calculated to give a figure that can be

compared to the cost of doing the project with a private sector partner. In the final stage of selecting which partner to accept, the financial proposals will be evaluated and ranked based largely on this value for money criterion. As the PPP project moves through the tender/bid process, the 3-stage appraisal criteria described above are applied in the following manner:

- I. Expression of interest (EOI): The tender/ bid process begins with the EOI, unless the requirement is consulting services, in which case the process begins with a Request for Expressions of Interest, and within the EOI information about the project must be presented. At this stage, the pre-feasibility study must have been completed, so that such information can be provided, and the affordability test must have been passed. Usually, a Nodal Agency performs this test, and provides guidance to the project sponsor regarding the tender/bid process.
- II. Request for Proposals: While the submissions in response to the EOI are being received and evaluated, the project sponsor, the government body proposing the PPP project, should develop the pre-feasibility study into a full feasibility study. At the same time, the Nodal Agency should be completing its risk allocation review, the result of which should be a draft contract, or Draft Contract Agreement (PPP), revealing the proposed allocation of contractual obligations between the partners. The results of the feasibility study should be included, in summary form, in the Request for Proposals (RFP) along with a disclaimer that the project sponsor, or the Contracting Authority that will execute the Contract, does not represent or warrant that any of the information is accurate, and that proposed private partners must conduct their own due diligence.
- III. Bidder Selection: After the technical proposals have been evaluated and scored the financial proposals will be opened. The information contained in the financial proposals will enable the Bid committee to make its selection, and will also enable the Nodal Agency to determine which proposal offers the government the best value for money, for the amount of financial resources the government must contribute to the PPP project, and which bidder offers the most benefits in return for such contribution. The interpretation of “benefits” can include both financial and economic benefits, usually expressed in terms of service delivery.
- IV. Negotiation begins after the preferred bidder is selected via the process described above. The focus is the draft contract, or Contract Agreement (PPP), that was included in the RFP. The government should take care to ensure that members of the negotiation committee have experience in PPP transactions and understand the business aspects of the project. This requires skills that are not usually found in negotiation committees for standard project procurement. Non-PPP projects do not carry the complex business partnership aspects of a PPP project, in particular the risk allocation that is a cornerstone of PPP transactions.

The focus of the contract negotiations for PPP projects is Service Delivery Standards, in terms of both quantity and quality of service, which represent an essential part of the contract. In traditional procurement, the focus is on getting what the government wants to buy, at the lowest price and the least risk necessary. In PPP procurement, the focus is on

getting the highest quantity and quality of service for consumers, within the budget that the government has allocated for the project. Value for money, rather than cost savings, should be the primary objective of contract negotiations.

#### ***10.1.1.1 Preference to domestically manufactured electronic products in Government procurement (PMA)***

Purchaser reserves the right for providing preference to domestically manufactured electronic products in terms of the Ministry of Electronics and Information Technology (MeitY) Notification No.33(3)/2013-IPHW dated 23.12.2013 and Guidelines issued thereunder through Notification No. 33(7)/2015-IPHW dated 15.11.2015.

The tender conditions would ensure that domestically manufactured electronic products are encouraged and are not subjected to restrictive product specifications or mandatory requirement of prior experience. The procuring agency may also rationally identify and evaluate predatory pricing by any bidder. However procuring Department or Agency may incorporate such stipulations as may be considered necessary to satisfy themselves of the security, production capability and product quality of the domestic manufacturer.

**In case of turnkey/ system-integration** projects, eligibility of a bidder as a domestic manufacturer would be determined on the domestic value addition calculated only for the value of notified Domestically Manufactured Electronic Products (DMEPs) i.e. forming part of the turnkey/system-integration project and not on the value of whole project.

The products notified by MeitY & Department of Telecommunications (DoT) for providing preference to domestic manufacturers are as follows:

##### **By MeitY**

- |                            |  |
|----------------------------|--|
| 1. Desktop PCs             | 7. LED Products                                    |
| 2. Dot Matrix Printers     | 8. Biometric Access Control/Authentication Devices |
| 3. Tablet PCs              | 9. Biometric Finger Print Sensors                  |
| 4. Laptop PCs              | 10. Biometric Iris Sensors                         |
| 5. Contact Smart Cards     |  |
| 6. Contactless Smart Cards |  |

##### **By DoT**

- |  |  |
|--|--|
| 1 Encryption/UTM platforms (TDM and IP)  | 9 SDH/ Carrier- Ethernet/ Packet Optical Transport equipment       |
| 2 Core/ Edge/ Enterprise routers   | 10 DWDM/CWDM systems   |
| 3 Managed Leased line Network equipment  | 11 GPON equipment  |
| 4 Ethernet Switches (L2 and L3), Hubs, etc.  | 12 Digital Cross- Connects/MUXs                                    |
| 5 IP based Soft Switches, Media gateways   | 13 Small size 2G/ 3G GSM based Base Station Systems                |
| 6 Wireless/ Wireline PABXs   | 14 LTE based broadband wireless access systems (eNodeB, EPC, etc.) |
| 7 CPE (Including WiFi Access points and Routers, Media Converters), 2G/3G Modems, Leased - line Modems, etc. | 15 (Access Point, Aggregation Block, Core Block, etc.)             |
| 8 Set - Top Boxes  | 16 Microwave Radio systems (IP/Hybrid)                             |



- 17 Software Defined Radio, Cognitive Radio systems
- 18 Repeaters (RF/RF- over- optical), IBS, and Distributed Antenna system
- 19 Satellite based systems - Hubs, VSAT etc.
- 20 Copper access systems (DSL/DSLAM)
- 21 Network Management systems
- 22 Security and Surveillance communication systems(video and sensors based)
- 23 Optical Fiber Cable

A copy of the aforesaid Notifications/Guidelines can be downloaded from MeitY website i.e. URL [www.meity.gov.in/esdm](http://www.meity.gov.in/esdm). Purchase preference for domestic manufacturer, methodology of its implementation, value addition to be achieved by domestic manufacturers, self-certification, and compliance and monitoring shall be as per the aforesaid Guidelines/ Notifications. The Guidelines may be treated as an integral part of the tender documents.

#### **Tender procedure for procurement**

1. The procuring agencies, whether Government Ministries/Departments or other government agencies, shall follow standard procurement procedures, in accordance with instructions of Ministry of Finance and CVC, while providing preference to DMEP.
2. The tender document for procuring notified electronic products should explicitly specify the modalities through which the preference for DMEP shall be operated. The details, apart from usual tender conditions, should specify the following:
  - a. The electronic products for which preference will be provided to bidders of DMEP.
  - b. Total quantity of procurement and the quantity of procurement for which the preference will be provided to bidders of DMEP.
  - c. Percentage of domestic value addition which qualifies the electronic product to be classified as domestically manufactured.
  - d. The procedure for certification and assessment of the percentage of domestic value-addition in an electronic product.
  - e. The preference to DMEP shall be subject to meeting technical specifications and matching the L1 price.
  - f. The procedure for awarding the contract to bidder of DMEP and the treatment of the quantity earmarked for the bidders of DMEP if no bidder of DMEP is available, in accordance with the clause 4.2.2 of the policy.
  - g. For each electronic product proposed to be procured, among all technically qualified bids, the lowest quoted price will be termed as L 1 and the rest of the bids shall be ranked in ascending order of price quoted, as L2, L3, L4 and so on. If L 1 bid is from the bidder of DMEP, the said bidder will be awarded full value of the order. If L 1 bid is not from the bidder of DMEP, the value of the order awarded to L 1 bidder will be the balance of procurement value after reserving specified percentage of the total value of the order for the eligible bidder of DMEP. Thereafter, the lowest bidder among the bidders of DMEP, whether L2, L3, L4 or higher, will be invited to match the L 1 bid in order to secure the procurement value of the order earmarked for the DMEP. In case first eligible bidder of DMEP fails to match L 1 bid, the bidder of DMEP with next higher bid will be invited to match L 1 bid and so on. However, the procuring agency may choose to divide the order amongst more than one successful bidder as long as all such bidders match L 1 and the criteria for allocating the tender quantity amongst a number of successful bidders is clearly articulated in the tender document itself. In case all eligible bidders of DMEP fail to match the L 1 bid, the actual bidder holding L 1 bid will secure the order for full procurement value. Only those bidders of DMEP whose bids are within 20% of the L 1 bid would be allowed an opportunity to match the L 1 bid.

## 11 Public Disclosers and Audit Requirements

### 11.1 Public Disclosure of The PPP Agreement

Transparency is an important part of procurement. Whenever possible, documents relating to PPP projects and the procedures followed for awarding PPPs should be available for review. If public review is not possible it will raise concerns that

- The PPPs did not adequately consider the public interest and
- May not appropriately allocate risks between infrastructure service users, the public sector and private sector contractors.

**The primary objective of PPP contract publication is to increase transparency** in the award and implementation of PPPs, and thereby to increase accountability for decisions taken under the PPP process and public trust in the outcomes of the process.

**A secondary objective is to assist in the monitoring and enforcement of PPPs**, by allowing members of the public to verify compliance with the contractual terms under which infrastructure services from a PPP project are to be provided.

In awarding a PPP the public sector is acting on behalf of the public, and it follows from this that the public has a natural right of access to the contractual terms that have been agreed on its behalf by the government.

Contract publication serves a number of objectives. In cases where there is public distrust or suspicion of government officials or private companies with respect to PPP projects, the publication of contract terms can serve to allay those concerns and improve public confidence in the governance of PPP projects.

Contractual transparency also allows the public to compare the total costs of PPP projects within India and with other countries, by revealing the flow of monies between the public sector Sponsor, the private sector provider and the users of infrastructure services including both user charges and public sector payments. While there are no doubt many legitimate reasons that costs may differ between countries, the publication of contractual terms will allow members of the public, donor agencies and other entities with an interest in infrastructure services to make more informed comparisons.

Making contract terms from previous PPP projects available will improve the competitive environment for future PPP projects by making the market more readily accessible to more competing firms. It does this by improving the flow of information to prospective bidders and by increasing the confidence of bidders in the predictability of the entire procurement and contracting process. Knowing that the contract terms would be published, a bidder will also be more conscious of the need to propose a justifiably cost-reflective price.

Contractual transparency also allows interested parties, other than the Sponsoring Authority, to challenge actions that they believe violate the terms of a contract or to challenge aspects of a contract that they believe contravene the legal framework. Infrastructure service users and other interested entities are therefore able to support the Sponsoring Authority in holding the infrastructure service provider accountable under the terms of the PPP contract.

This will not necessarily lead to increased legal action. The most likely effect of contractual transparency is to increase the level of care with which both the public and private sector parties to PPP contracts draw up and abide by PPP contracts and require greater justification of the contract terms. This will improve the value for money of PPP projects, help ensure fairness in the procurement process and protect the public interest.

## **11.2 Approach to Publication**

The Sponsoring Agency should publish all PPP contracts in full on its website, or on the website of the appropriate PPP-related Authority (eg, the PPP Cell). This will help minimize cost and maximize public access. Recognizing that legitimate concerns exist over the publication of commercially sensitive or proprietary information, the Sponsoring Authority and the PPP vendor may mutually agree on confidential information to be placed in a separate annex to the contract.

It is up to the PPP vendor to demonstrate that information should be considered confidential. Contractual terms relating to the flow of monies between the private sector PPP vendor, the government and the users of the infrastructure services should be published at all times.

Members of the public may request the Sponsoring Authority to provide a hard copy, in which case the costs of printing and postage should be paid by the person or organization requesting the copy.

## **11.3 Preserving Commercial Confidentiality**

PPP contracts may contain information that is commercial or proprietary in nature. Such information is considered to be the property of the private sector party involved in the provision of infrastructure, is not in the public domain and provides the company with part of its competitive advantage in the market. Requiring publication of this information is likely to reduce the number of potential bidders, and potentially drive away companies with innovative approaches that could maximize value for money for users of infrastructure services. At the same time, it is in the interests of infrastructure service users and the wider public to disclose all contractual information.

As part of the process of finalizing the PPP contract, the Sponsoring Authority and the PPP vendor should agree on which elements of the contract are considered to be commercially confidential. The assumption should be that all information should be published unless it is possible to demonstrate that its publication will cause damage to the PPP vendor. In particular the contractual terms regarding payments associated with the project between the private sector PPP vendor, the public Sponsor and the users of the infrastructure services should always be published.

Those elements of the PPP contract that are confidential should be contained in a separate annex to the main contract. This will allow the main contract to be read as a whole, helping interested parties in understanding and monitoring it

### **11.4 Auditing of PPP Projects**

The Comptroller and Auditor General of India has published Public Auditing guidelines for PPP projects. The Guidelines have been primarily framed for use by the Indian Audit & Accounts Department.

These guidelines are intended to provide a framework in auditing PPP projects to determine whether Government and other public authorities have got the best possible value for money.

## Appendix

### Case I :Typical Cases like SWAN, SDC etc.

#### Typical profile

- Scope of work involves - IT Infrastructure delivery, commissioning and maintenance
- Payments are as per defined frequency as “Guaranteed revenue” (for e.g. Quarterly Guaranteed Revenue for SWAN projects)
- Generally do not have clause on “technology refresh” (however “technology update” can be included)
- Time period generally 3-5 years.

No.	Risks	Mitigation	Allocation
1.	<b>Pre-Go Live risks</b>	Institutionalized PPP management process, regulations, laws and clear agreement on project outcomes.	<ul style="list-style-type: none"> <li>• Institutionalized project management process, regulations etc: private sector</li> <li>• Project outcomes: Both Parties</li> </ul>
2.	<b>Technology risk</b>	Obligation to refresh technology as required from time to time to meet the output specifications. Penalty Deductions for failure to meet output specifications.	By the private partner
3.	<b>Latent defect risk</b>	<p>Wherever possible, the design and development of the Facilities required for a Project must be performed or procured by the Private Party.</p> <p>If, however, the Project involves the take-over by the Private Party of existing Facilities, then the Private Party must undertake a thorough due diligence of these Facilities to uncover defects before the Signature Date. The procedure for and cost of the remediation of such discovered defects can then be pre-agreed.</p> <p>Reporting obligation on Private Party to promptly disclose discovered defects.</p>	<p>If the Private Party (or any of its subcontractors) designs and constructs the Facilities, the Private Party.</p> <p>If not, then the Nodal Agency</p>
4.	<b>Completion risks</b>	Efficient project Management Timely approvals on the design documents	Private Party, unless delay caused by Public sector
5.	<b>Design risk</b>	Clear output specifications.  Design warranty.	Private Party.

No.	Risks	Mitigation	Allocation
		<p>Patent and latent defect liability.</p> <p>Consultation with and review by Nodal Agency (but review must not lead to input specifications by Nodal Agency).</p> <p>Independent Expert appointment to resolve disputes on expedited basis.</p>	
6.	<b>Cost over-run risk</b>	<p>Fixed price development contracts.</p> <p>Contingency provisions.</p> <p>Standby debt facilities; provided that these commitments are made upfront and therefore anticipated in the base case Financial Model.</p> <p>However, if the Project is not performing as anticipated in the base case Financial Model, then (to effect a rescue of the Project) these commitments may be implemented, but the prior approval of the Nodal Agency is required if such commitments will increase its liabilities on termination.</p>	Private Party.
7.	<b>Planning risk</b>	<p>The Nodal Agency must identify at the feasibility phase any planning approvals that can be obtained by the Nodal Agency before the detailed designs for the Project are finalized. These approvals must then be obtained before the Project is put to tender/bid.</p> <p>The Private Party must identify before the Signature Date all planning approvals that are required for the Project having regard to the specific design inputs proposed by the Private Party. The Private Party must make adequate provision in its development programme for such approvals.</p>	<p>In relation to any non-design and construction of the solution, the Nodal Agency.</p> <p>In relation to any design, the Private Party</p>
8.	<b>Availability risk</b>	<p>Clear output specifications.</p> <p>Performance monitoring.</p> <p>Penalty regime.</p>	Private Party.
9.	<b>Market, demand or volume risk</b>	The demand estimation was done by the Nodal Agency prior to the bidding process, hence the risk is to be mitigated by the Nodal Agency by refreshing the technology, as and when required through a separate tender	By the Nodal Agency.

No.	Risks	Mitigation	Allocation
10.	<b>Utilities supply risk</b>	Emergency back-up facilities, e.g. generators.  Emergency supply contracts. Special insurance.	Private Party unless the utilities are supplied by the Nodal Agency and such supplies are not covered by the special insurance.
11.	<b>Insolvency and outside creditor risk</b>	Security over necessary Project Assets.  Limitations on debts and other funding commitments of the Private Party including any outside the Project.  Reporting obligations in respect of any litigation; financial information; disputes with creditors.  Substitution of Private Party in terms of Direct Agreement.	Private Party.
12.	<b>Sub-contractor risk</b>	Subcontractors must have expertise, experience and contractual responsibility for their performance obligations.  Substitution of subcontractors.  Due diligence by the Nodal Agency must include review of first tier subcontracts to confirm that pass through of risks down to the first tier subcontractors and their subcontractors is provided for in the Project subcontracts.	Private Party.
13.	<b>Operating risk (technology, environmental, cost and management)</b>	Clear output specifications.  Penalty regime and performance monitoring.  Adequate O&M contract.  Substitution rights.  Security and special insurance.	Private Party.
14.	<b>Maintenance risk</b>	As above.	Private Party.
15.	<b>Force Majeure (act of God) risks</b>	Define "Force Majeure" narrowly to exclude risks that can be insured against or are dealt with more adequately by other mechanisms such as Relief Events or Compensation Events.  Relief and Compensation Events.  Termination.	If risks are insurable, risk allocated to Private Party.  If risks are not insurable, then risk is shared insofar as Nodal Agency may pay some compensation.



No.	Risks	Mitigation	Allocation
16.	<b>Political risk</b>	<p>Limit risk to Changes in Law and to expropriation, nationalization or privatization (collectively, “expropriating actions”) of the Nodal Agency, services or assets of the Private Party.</p> <p>Distinguish between General and Discriminatory Changes in Law.</p> <p>In relation to Discriminatory Changes in Law, termination by Private Party with compensation.</p>	<p>In relation to Discriminatory Changes in Law and expropriating actions, the Nodal Agency.</p> <p>In relation to General Changes in Law, the Private Party.</p>
17.	<b>Regulatory risk</b>	<p>Legal scan undertaken to be by the Nodal Agency at the feasibility phase of the Project to identify all such approvals.</p> <p>Implementation by the Nodal Agency of an intergovernmental liaison process with the responsible government authorities before the procurement phase.</p> <p>Due Diligence by Private Party to identify approvals its requires for its operating requirements.</p> <p>If permitted under applicable law, obtain all such approvals before the Signature Date.</p>	<p>If any such approvals (other than those relating to Private Party’s operating requirements) can be obtained before the Signature Date, the Nodal Agency.</p> <p>In relation to the Private Party’s operating requirements, the Private Party.</p>
18.	<b>Tax rate change risk</b>	Compensation for tax increases or new taxes arising from Changes in Law.	In relation to tax increases or new taxes, the Nodal Agency.
19.	<b>Inflation risk</b>	Index linked adjustment to Unitary Payments or user charges. However, index-linking not blanket, but only to specified input items.	Private party
20.	<b>Residual value risk</b>	<p>Obligations on Private Party to maintain and repair.</p> <p>Audit towards the end of Project Term.</p> <p>Security by the Private Party in favour of the Nodal Agency, e.g. final condition bond, or deduction from Unitary Payment.</p> <p>Reinstatement obligations on Private Party.</p>	Private Party.

Case II : BOOT model, Typical Cases like Central Processing Centre (Income Tax), Passport etc.

- a. Focus on delivery of services
- b. Payments based on the number of service transactions

- c. Has the clause pertaining to “technology refresh”, if required to meet the SLAs
- d. Time period generally 7-10 years.

No.	Risks	Mitigation	Allocation
1.	<b>Pre-Go Live risks</b>	Institutionalized PPP management process, regulations, laws and clear agreement on project outcomes.	<ul style="list-style-type: none"> <li>• Institutionalized PPP management process, regulations etc: Public sector</li> <li>• Project outcomes: Both Parties</li> </ul>
2.	<b>Technology risk</b>	Obligation to refresh technology as required from time to time to meet the output specifications. Penalty Deductions for failure to meet output specifications.	Largely by the Public Sector, as the private partner did not define the Bill-of-material However private partner is responsible for technology update.
3.	<b>Latent defect risk</b>	<p>Wherever possible, the design and development of the Facilities required for a Project must be performed or procured by the Private Party.</p> <p>If, however, the Project involves the take-over by the Private Party of existing Facilities, then the Private Party must undertake a thorough due diligence of these Facilities to uncover defects before the Signature Date. The procedure for and cost of the remediation of such discovered defects can then be pre-agreed.</p> <p>Reporting obligation on Private Party to promptly disclose discovered defects.</p>	<p>If the Private Party (or any of its subcontractors) designs and constructs the Facilities, the Private Party.</p> <p>If not, then the Nodal Agency</p>
4.	<b>Completion risks</b>	Efficient project Management Timely approvals on the design documents	Private Party, unless delay caused by Public sector
5.	<b>Design risk</b>	<p>Clear output specifications.</p> <p>Design warranty.</p> <p>Patent and latent defect liability.</p> <p>Consultation with and review by Nodal Agency (but review must not lead to input specifications by Nodal Agency).</p> <p>Independent Expert appointment to resolve</p>	Private Party.

No.	Risks	Mitigation	Allocation
		disputes on expedited basis.	
6.	<b>Cost over-run risk</b>	<p>Fixed price development contracts.</p> <p>Contingency provisions.</p> <p>Standby debt facilities; provided that these commitments are made upfront and therefore anticipated in the base case Financial Model.</p> <p>However, if the Project is not performing as anticipated in the base case Financial Model, then (to effect a rescue of the Project) these commitments may be implemented, but the prior approval of the Nodal Agency is required if such commitments will increase its liabilities on termination.</p>	<p>Shared depending on the nature of cost over run. In case cost over run is due to score increase, then Nodal Agency.</p> <p>In case the cost over-run is due the Private party, then private party.</p>
7.	<b>Planning risk</b>	<p>The Nodal Agency must identify at the feasibility phase any planning approvals that can be obtained by the Nodal Agency before the detailed designs for the Project are finalized. These approvals must then be obtained before the Project is put to tender/bid.</p> <p>The Private Party must identify before the Signature Date all planning approvals that are required for the Project having regard to the specific design inputs proposed by the Private Party. The Private Party must make adequate provision in its development programme for such approvals.</p>	<p>In relation to any non-design and construction of the solution, the Nodal Agency.</p> <p>In relation to any design, the Private Party</p>
8.	<b>Availability risk</b>	<p>Clear output specifications.</p> <p>Performance monitoring.</p> <p>Penalty regime.</p>	Private Party.
9.	<b>Market, demand or volume risk</b>	The demand estimation was done by the Nodal Agency prior to the bidding process, hence the risk is to be mitigated by the Nodal Agency by refreshing the technology, as and when required through a separate tender	In case the demand varies within a particular band, then private sector, else it is shared.
10.	<b>Utilities supply risk</b>	<p>Emergency back-up facilities, e.g. generators.</p> <p>Emergency supply contracts.</p> <p>Special insurance.</p>	Private Party unless the utilities are supplied by the Nodal Agency and such supplies are not covered by the special insurance.
11.	<b>Insolvency and outside creditor</b>	Security over necessary Project Assets.	Private Party.

No.	Risks	Mitigation	Allocation
	<b>risk</b>	<p>Limitations on debts and other funding commitments of the Private Party including any outside the Project.</p> <p>Reporting obligations in respect of any litigation; financial information; disputes with creditors.</p> <p>Substitution of Private Party in terms of Direct Agreement.</p>	
12.	<b>Sub-contractor risk</b>	<p>Subcontractors must have expertise, experience and contractual responsibility for their performance obligations.</p> <p>Substitution of subcontractors.</p> <p>Due diligence by the Nodal Agency must include review of first tier subcontracts to confirm that pass through of risks down to the first tier subcontractors and their subcontractors is provided for in the Project subcontracts.</p>	Private Party.
13.	<b>Operating risk (technology, environmental, cost and management)</b>	<p>Clear output specifications.</p> <p>Penalty regime and performance monitoring.</p> <p>Adequate O&amp;M contract.</p> <p>Substitution rights.</p> <p>Security and special insurance.</p>	Private Party.
14.	<b>Maintenance risk</b>	As above.	Private Party.
15.	<b>Force Majeure (act of God) risks</b>	<p>Define “Force Majeure” narrowly to exclude risks that can be insured against or are dealt with more adequately by other mechanisms such as Relief Events or Compensation Events.</p> <p>Relief and Compensation Events.</p> <p>Termination.</p>	<p>If risks are insurable, risk allocated to Private Party.</p> <p>If risks are not insurable, then risk is shared insofar as Nodal Agency may pay some compensation.</p>
16.	<b>Political risk</b>	<p>Limit risk to Changes in Law and to expropriation, nationalization or privatization (collectively, “expropriating actions”) of the Nodal Agency, services or assets of the Private Party.</p> <p>Distinguish between General and Discriminatory Changes in Law.</p>	<p>In relation to Discriminatory Changes in Law and expropriating actions, the Nodal Agency.</p> <p>In relation to General Changes in Law, the</p>

No.	Risks	Mitigation	Allocation
		In relation to Discriminatory Changes in Law, termination by Private Party with compensation.	Private Party.
17.	<b>Regulatory risk</b>	<p>Legal scan undertaken to be by the Nodal Agency at the feasibility phase of the Project to identify all such approvals.</p> <p>Implementation by the Nodal Agency of an intergovernmental liaison process with the responsible government authorities before the procurement phase.</p> <p>Due Diligence by Private Party to identify approvals its requires for its operating requirements.</p> <p>If permitted under applicable law, obtain all such approvals before the Signature Date.</p>	<p>If any such approvals (other than those relating to Private Party's operating requirements) can be obtained before the Signature Date, the Nodal Agency.</p> <p>In relation to the Private Party's operating requirements, the Private Party.</p>
18.	<b>Tax rate change risk</b>	Compensation for tax increases or new taxes arising from Changes in Law.	In relation to tax increases or new taxes, the Nodal Agency.
19.	<b>Inflation risk</b>	Index linked adjustment to Unitary Payments or user charges. However, index-linking not blanket, but only to specified input items.	Nodal Agency
20.	<b>Residual value risk</b>	<p>Obligations on Private Party to maintain and repair.</p> <p>Audit towards the end of Project Term.</p> <p>Security by the Private Party in favour of the Nodal Agency, e.g. final condition bond, or deduction from Unitary Payment.</p> <p>Reinstatement obligations on Private Party.</p>	Private Party.

Case III :Typical Cases like Turnkey Project implementation (VAT Implementation projects in most States).

- Scope of work is defined by the Nodal Agency resulting into a Bill of Material pertaining to IT Infrastructure, Application, Networking, Data digitization, training, site preparation etc.
- The payment partly is made upfront to meet the capital expenditure put in by the Vendor and partly is to be paid on the quality of services provided on the maintaining the infrastructure and handholding support.
- Generally does have "technology refresh" clause (however "technology update" can be included)
- Time period generally around 5 years.

No.	Risks	Mitigation	Allocation
1.	<b>Pre-Go Live risks</b>	Institutionalized PPP management process, regulations, laws and clear agreement on project outcomes	<ul style="list-style-type: none"> <li>• Institutionalized project management process, regulations etc: Public sector</li> <li>• Project outcomes: Both Parties</li> </ul>
2.	<b>Technology risk</b>	Obligation on Private Party to refresh technology as required from time to time to meet the output specifications. Penalty Deductions for failure to meet output specifications.	Public Sector.
3.	<b>Latent defect risk</b>	<p>Wherever possible, the design and development of the Facilities required for a Project must be performed or procured by the Private Party.</p> <p>If, however, the Project involves the take-over by the Private Party of existing Facilities, then the Private Party must undertake a thorough due diligence of these Facilities to uncover defects before the Signature Date. The procedure for and cost of the remediation of such discovered defects can then be pre-agreed.</p> <p>Reporting obligation on Private Party to promptly disclose discovered defects.</p>	<p>If the Private Party (or any of its subcontractors) designs and constructs the Facilities, the Private Party.</p> <p>If not, then the Nodal Agency, but only if there is no or insufficient insurances available to mitigate this risk and if the Nodal Agency's liability is capped (subject to VFM considerations).</p>
4.	<b>Completion risks</b>	Efficient project Management Timely approvals on the design documents	Private Party, unless delay caused by Public sector
5.	<b>Design risk</b>	<p>Clear output specifications.</p> <p>Design warranty.</p> <p>Patent and latent defect liability.</p> <p>Consultation with and review by Nodal Agency (but review must not lead to input specifications by Nodal Agency).</p> <p>Independent Expert appointment to resolve disputes on expedited basis.</p>	Private Party.



No.	Risks	Mitigation	Allocation
6.	<b>Cost over-run risk</b>	<p>Fixed price development contracts.</p> <p>Contingency provisions.</p> <p>Standby debt facilities / additional equity commitments (Shareholder and other funder commitments); provided that these commitments are made upfront and therefore anticipated in the base case Financial Model.</p> <p>However, if the Project is not performing as anticipated in the base case Financial Model, then (to effect a rescue of the Project) these commitments may be implemented, but the prior approval of the Nodal Agency is required if such commitments will increase its liabilities on termination.</p>	Private Party.
7.	<b>Planning risk</b>	<p>The Nodal Agency must identify at the feasibility phase any planning approvals that can be obtained by the Nodal Agency before the detailed designs for the Project are finalized. These approvals must then be obtained before the Project is put to tender/bid.</p> <p>The Private Party must identify before the Signature Date all planning approvals that are required for the Project having regard to the specific design inputs proposed by the Private Party. The Private Party must make adequate provision in its development programme for such approvals.</p> <p>Relief Event.</p>	<p>In relation to any non-design and construction specific planning approval, the Nodal Agency.</p> <p>In relation to any design or construction specific planning approval, the Private Party</p>
8.	<b>Availability risk</b>	<p>Clear output specifications.</p> <p>Performance monitoring.</p> <p>Penalty regime.</p>	Private Party
9.	<b>Market, demand or volume risk</b>	Since the demand estimations are provided in the RFP, the private agency cannot be held accountable for any subsequent variations.	The Nodal Agency.
10.	<b>Utilities supply risk</b>	<p>Emergency back-up facilities, e.g. generators.</p> <p>Emergency supply contracts.</p> <p>Special insurance.</p>	Nodal Agency (most of the time, it is the Nodal Agency which is responsible to provide)
11.	<b>Insolvency and outside creditor risk</b>	<p>SPV structure to ring-fence project.</p> <p>Security over necessary Project Assets.</p>	Private Party.

No.	Risks	Mitigation	Allocation
		<p>Limitations on debts and other funding commitments of the Private Party including any outside the Project.</p> <p>Reporting obligations in respect of any litigation; financial information; disputes with creditors.</p> <p>Substitution of Private Party in terms of Direct Agreement.</p>	
12.	<b>Sub-contractor risk</b>	<p>Subcontractors must have expertise, experience and contractual responsibility for their performance obligations.</p> <p>Substitution of subcontractors.</p> <p>Due diligence by the Nodal Agency must include review of first tier subcontracts to confirm that pass through of risks down to the first tier subcontractors and their subcontractors is provided for in the Project subcontracts.</p>	Private Party.
13.	<b>Operating risk (technology, environmental, cost and management)</b>	<p>Clear output specifications.</p> <p>Penalty regime and performance monitoring.</p> <p>Adequate O&amp;M contract.</p> <p>Substitution rights.</p> <p>Security and special insurance.</p>	Private Party.
14.	<b>Maintenance risk</b>	As above.	Private Party.
15.	<b>Force Majeure (act of God) risks</b>	<p>Define “Force Majeure” narrowly to exclude risks that can be insured against or are dealt with more adequately by other mechanisms such as Relief Events or Compensation Events.</p> <p>Relief and Compensation Events.</p> <p>Termination.</p>	<p>If risks are insurable, risk allocated to Private Party.</p> <p>If risks are not insurable, then risk is shared insofar as Nodal Agency may pay some compensation.</p>
16.	<b>Political risk</b>	<p>Limit risk to Changes in Law and to expropriation, nationalization or privatization (collectively, “expropriating actions”) of the Nodal Agency, services or assets of the Private Party.</p> <p>Distinguish between General and Discriminatory Changes in Law.</p>	<p>In relation to Discriminatory Changes in Law and expropriating actions, the Nodal Agency.</p> <p>In relation to General Changes in Law, the</p>



No.	Risks	Mitigation	Allocation
		In relation to Discriminatory Changes in Law, termination by Private Party with compensation.	Private Party.
17.	<b>Regulatory risk</b>	<p>Legal scan undertaken to be by the Nodal Agency at the feasibility phase of the Project to identify all such approvals.</p> <p>Implementation by the Nodal Agency of an intergovernmental liaison process with the responsible government authorities before the procurement phase.</p> <p>Due Diligence by Private Party to identify approvals its requires for its operating requirements.</p> <p>If permitted under applicable law, obtain all such approvals before the Signature Date.</p>	<p>If any such approvals (other than those relating to Private Party's operating requirements) can be obtained before the Signature Date, the Nodal Agency.</p> <p>In relation to the Private Party's operating requirements, the Private Party.</p>
18.	<b>Tax rate change risk</b>	Compensation for tax increases or new taxes arising from Changes in Law.	In relation to tax increases or new taxes, the Nodal Agency.
19.	<b>Inflation risk</b>	Index linked adjustment to Unitary Payments or user charges. However, index-linking not blanket, but only to specified input items.	Private party
20.	<b>Residual value risk</b>	<p>Obligations on Private Party to maintain and repair.</p> <p>Audit towards the end of Project Term.</p> <p>Security by the Private Party in favour of the Nodal Agency, e.g. final condition bond, or deduction from Unitary Payment.</p> <p>Reinstatement obligations on Private Party.</p>	Private Party.



# **ADDITIONAL REFERENCES FOR GOOD PRACTICES FOR PPP**

**Ministry of Electronics & Information Technology**

**2017**

*This document is advisory in nature and aim to sensitize the bid management teams on good practices and harmonize/standardize the RFP clauses and terms & conditions.*

*The documents are based on existing Central Government Guidelines, feedback from stakeholders and prevalent international practices. However it is possible that the State Government / Nodal Agencies may have their own specific procurement Guidelines which may or may not be consistent with the clauses of the RFP, Guidance notes or Contract Agreement.*

*It may be noted that these documents do not substitute or overrule any approvals currently required by the concerned Department/State Government Nodal Agency for finalization of the RFP. Accordingly it is advised that all necessary approvals are taken from appropriate authorities, as done before publishing of these model documents.*

1.	ADB	Asian Development Bank
2.	BOO	Build Own Operate
3.	BOOT	Build Own Operate Transfer
4.	BOT	Build Operate Transfer
5.	CVC	Central Vigilance Commission
6.	DFID	Department for International Development
7.	DIT	Department of Information Technology, Government of India
8.	EOI	Expression of Interest
9.	GFR	General Financial Rules, 2017
10.	Gol	Government of India
11.	ICT	Information and Communication Technology
12.	LROT	Lease Renovate Operate and Transfer
13.	MMP	Mission Mode Project
14.	NeGP	National e-Governance Plan
15.	NICSI	National Informatics Centre Services Inc.
16.	O&M	Operations and Maintenance
17.	OP	Outright purchase
18.	OPE	Out-of-pocket expenses
19.	PPP	Public Private Partnerships
20.	RFE	Request for Empanelment
21.	RFP	Request for Proposal
22.	SOW	Scope of Work
23.	T&M	Time and Material

## Key Reference Documents

1. Standardization of Public Funded Initiatives (PFI) Contracts (Version 4), HM Treasury, © Crown Copyright 2007, which allows to be “reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading context”
2. Public-Private Partnerships in e-Government: Knowledge Map An Infodev Publication Prepared By: The Institute for Public-Private Partnerships, June 2009
3. The Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects, European PPP Expertise Centre (EPEC)
4. Public-Private Partnership Handbook, Asian Development Bank (ADB)
5. PPP In India, Ministry of Finance, Government of India - <http://www.pppinindia.com/>
6. Toolkit for PPP in Roads and Highways, Public-Private Infrastructure Advisory Facility (PPIAF)
7. Risk Allocation – CRISIL

## Table of Contents

### Table of Contents

<b>1. INTRODUCTION .....</b>	<b>9</b>
1.1. Key considerations.....	9
1.2. Assumptions .....	9
1.3. Terminology .....	10
1.4. Interpretation .....	10
<b>2. DURATION OF CONTRACT .....</b>	<b>13</b>
2.1. Introduction.....	13
2.2. Factors To Consider .....	13
<b>3. SERVICE COMMENCEMENT .....</b>	<b>15</b>
3.1. Introduction.....	15
3.2. Nodal Agency's Role – General .....	15
3.3. Critical Dates .....	17
3.4. Submission of Designs & Information to Nodal Agency .....	17
3.5. Quality Management Systems .....	18
3.6. Acceptance and Service Commencement .....	19
3.7. Existing Services.....	21
3.8. Range of Services to be provided .....	23
3.9. Capital Contributions .....	23
3.10. Early Works Agreements.....	23
<b>4. PROTECTIONS AGAINST LATE SERVICE COMMENCEMENT.....</b>	<b>25</b>
4.1. Introduction.....	25
4.2. Liquidated Damages .....	25
4.3. Performance Guarantee .....	27
4.4. Parent Company Guarantees .....	27
4.5. Long-Stop Date .....	27
4.6. Bonus Payments For Early Service Commencement.....	28
<b>5. SUPERVENING EVENTS.....</b>	<b>30</b>
5.1. Introduction.....	30
5.2. Compensation Events .....	31
5.3. Relief Events .....	38
5.4. Force Majeure Events .....	42
<b>6. WARRANTIES.....</b>	<b>45</b>
6.1. Introduction.....	45
6.2. Due Diligence.....	45
6.3. Nodal Agency Warranties .....	45
6.4. Benefit of Surveys and Reports.....	46
6.5. Latent Defects Risk .....	47
<b>7. PRICE AND PAYMENT MECHANISM .....</b>	<b>48</b>
7.1. Introduction.....	48
7.2. Features of the Payment Mechanism .....	48
7.3. Structuring the Payment Mechanism.....	50
7.4. Usage-Based Systems .....	51
7.5. Calibration .....	53

7.6.	Financial Risks of the PPP Vendor .....	58
7.7.	Flexibility .....	58
7.8.	Other Remedies for Poor Performance .....	59
7.9.	Qualitative Factors and User Satisfaction .....	61
<b>8.</b>	<b>AVAILABILITY REQUIREMENTS.....</b>	<b>64</b>
8.1.	Introduction.....	64
8.2.	Definition of Availability .....	64
8.3.	Examples of Unavailability.....	65
8.4.	Payment for availability and Weighting of Critical Areas .....	65
8.5.	When does availability commence?.....	65
8.6.	When does unavailability commence?.....	66
8.7.	Rectification of Unavailability .....	66
8.8.	Service Unavailable but used .....	67
8.9.	Restoration of Availability .....	68
8.10.	Planned Maintenance.....	68
<b>9.</b>	<b>PERFORMANCE REQUIREMENTS.....</b>	<b>69</b>
9.1.	Introduction.....	69
9.2.	Setting the Performance Level .....	69
9.3.	Replacement of Sub-Contractors .....	70
9.4.	Monitoring of Sub-Contractors .....	71
9.5.	Consequences of Poor Performance .....	71
<b>10.</b>	<b>PAYMENT MECHANISM MANAGEMENT AND MONITORING.....</b>	<b>74</b>
10.1.	Contract Management .....	74
10.2.	Monitoring against the Payment Mechanism .....	75
10.3.	Commencement of Monitoring.....	76
10.4.	Who does the monitoring? .....	76
10.5.	Who pays for the monitoring? .....	77
10.6.	Reporting the results of Monitoring .....	77
<b>11.</b>	<b>MAINTENANCE .....</b>	<b>79</b>
11.1.	Introduction.....	79
11.2.	Sinking Fund .....	80
11.3.	Expiry of the Contract .....	80
11.4.	Transfer of Assets at end of Contract.....	80
11.5.	Technical Assessments.....	81
<b>12.</b>	<b>PAYMENTS AND SET-OFF .....</b>	<b>83</b>
12.1.	Introduction.....	83
12.2.	Scope of Nodal Agency's Right to Set Off.....	83
12.3.	Timing of Set-Off.....	84
12.4.	VAT on Payments.....	84
<b>13.</b>	<b>CHANGE IN SERVICE .....</b>	<b>86</b>
13.1.	Introduction.....	86
13.2.	Typology of Changes.....	87
13.3.	Change Protocols.....	90
13.4.	Transparency of Pricing and Value for Money .....	95
13.5.	Incentivisation .....	100
<b>14.</b>	<b>CHANGE IN LAW .....</b>	<b>102</b>
14.1.	Introduction.....	102
14.2.	PPP Vendor's and Nodal Agency's Concerns .....	102
14.3.	Definition of Change in Law .....	103
14.4.	Allocation of Risk of Change in Law .....	103
14.5.	Mitigation .....	103
14.6.	Discriminatory, Specific and General Changes in Law .....	104
14.7.	General Change in Law at PPP Vendor's Risk .....	104

14.8.	General Change in Law as a Shared Risk .....	105
14.9.	Changes in Tax Law .....	109
14.10.	Changes in VAT .....	109
15.	<b>PRICE VARIATIONS</b> .....	111
15.1.	Introduction.....	111
15.2.	Inflation Indexation .....	111
15.3.	Value Testing of Operating Costs .....	112
15.4.	Market Testing .....	115
15.5.	Benchmarking.....	118
16.	<b>SUB-CONTRACTING, EMPLOYEES AND DOCUMENTARY CHANGES</b> .....	120
16.1.	Control over Sub-Contractors .....	120
16.2.	Control over Employees.....	121
16.3.	Consequences of Control .....	121
16.4.	Changes to Project Documents .....	121
17.	<b>ASSIGNMENT</b> .....	123
17.1.	Introduction.....	123
17.2.	Restrictions on the PPP Vendor .....	123
17.3.	Restrictions on the Nodal Agency .....	123
17.4.	Restrictions on the PPP Vendors.....	124
18.	<b>TREATMENT OF ASSETS ON EXPIRY OF SERVICE PERIOD</b> .....	125
18.1.	Introduction.....	125
18.2.	Assets where the Nodal Agency retains Residual Value on Expiry .....	125
18.3.	Preserving the Condition of the Assets on Expiry.....	127
18.4.	Handover Provisions for Assets which Transfer to Nodal Agency.....	127
18.5.	Transfer of Residual Value Risk.....	128
18.6.	Valuation of Terminal Payments where Residual Value Risk has been Transferred .....	130
19.	<b>EARLY TERMINATION</b> .....	131
19.1.	Termination On Nodal Agency Default .....	131
19.2.	Termination on PPP Vendor Default .....	134
19.3.	Termination on Force Majeure .....	139
19.4.	Termination on Corrupt Gifts and Fraud .....	142
19.5.	Voluntary Termination by Nodal Agency .....	145
20.	<b>CALCULATION &amp; PAYMENT OF EARLY TERMINATION PAYMENTS</b> .....	147
20.1.	Introduction.....	147
20.2.	Method of Payment.....	147
20.3.	Retention of Assets by PPP Vendor on Termination .....	147
21.	<b>INDEMNITIES, GUARANTEES AND CONTRACTUAL CLAIMS</b> .....	149
21.1.	Introduction.....	149
21.2.	Guarantees .....	149
21.3.	Indemnities.....	150
21.4.	Collateral Warranties.....	152
21.5.	Damages Claims.....	152
22.	<b>INSURANCE</b> .....	154
22.1.	Introduction.....	154
22.2.	Nodal Agency's Requirements .....	155
23.	<b>INFORMATION AND CONFIDENTIALITY</b> .....	159
23.1.	Introduction.....	159
23.2.	PPP Vendor's Records and Provision of Information .....	159
23.3.	Public Relations and Publicity .....	160
23.4.	Confidentiality .....	161
23.5.	Government Openness .....	161
23.6.	Related Matters.....	161



23.7.	Freedom of Information .....	164
24.	<b>INTELLECTUAL PROPERTY RIGHTS .....</b>	<b>166</b>
24.1.	Introduction.....	166
24.2.	Infringement of IPR by the PPP Vendor .....	166
24.3.	Infringement of IPR by the Nodal Agency .....	166
24.4.	Rights to IPR on Expiry or Termination .....	167
25.	<b>DISPUTE RESOLUTION .....</b>	<b>169</b>
25.1.	Introduction.....	169
25.2.	Dispute Resolution Procedure .....	169
25.3.	Joinder of Sub-Contract Disputes.....	169
25.4.	Delays Caused by Disputes .....	170
26.	<b>NODAL AGENCY STEP-IN .....</b>	<b>175</b>
26.1.	Introduction.....	175
26.2.	Step-In – General .....	175
26.3.	Step-in without PPP Vendor Breach .....	176
26.4.	Step-in on PPP Vendor Breach .....	176
26.5.	Related Issues.....	177
26.6.	Rights of Access .....	178
27.	<b>MISCELLANEOUS PROVISIONS.....</b>	<b>180</b>
27.1.	Waiver .....	180
27.2.	Severability.....	180
27.3.	Counterparts.....	180
27.4.	Law of the Contract and Jurisdiction .....	180
27.5.	Third Party Rights .....	180
27.6.	Interest on Late Payments .....	180
27.7.	Continuing Obligations .....	180

## 1. INTRODUCTION

### 1.1. Key considerations

Contract design & monitoring procedures are key components of a successful PPP project. Contracting agencies and regulatory bodies must be vigilant in proactively designing a “near leak-proof contract” and thereafter monitoring the technical and financial requirements of all PPP projects to ensure appropriate performance and mitigate stakeholder complaints. A Government agency considering PPP models for e-government projects should bear in mind the following:

1. Contract design is the most important part of contract compliance. A poorly designed contract will be difficult to enforce, leaving the government, consumers, and the private partner open to unnecessary risk. Clearly established guidelines for PPP arrangements are a critical component to the legal framework.
2. Contracts must contain the necessary contract monitoring clauses. Specifically, the contract should clearly articulate: how the technical performance of the private partner will be evaluated (SLAs); procedures for collecting, managing, and reporting data for internal and external use.
3. Contracts should clearly specify who is responsible for monitoring. A good e-government PPP contract identifies the individual, department, or agency with oversight responsibilities so that the private partner knows who to talk to about when any issues or challenges in project implementation arise. Many governments choose to set up a contract-monitoring unit (CMU) for large-scale PPP projects.
4. Contracts must include dispute resolution procedures. Dispute resolution procedures define the context under which contracts can be renegotiated, under which the government or private sector can default on the agreement, such as “force majeure”, and what third party body will arbitrate, in the event that disputes cannot be resolved between the private partner and the government contracting agency.

### 1.2. Assumptions

1.2.1. The following assumptions apply to the guidance, unless otherwise indicated:

- the party contracting with the public sector is a company registered under The Companies Act’ 1956 or (a special purpose company) with Sub- Contractors providing the actual performance on its behalf;
- the project involves a development, followed by an operational phase during which the full Service is provided; and
- the project is wholly financed by PPP Vendor

1.2.2. These assumptions are relevant because: (a) that is how the majority of PPP transactions continue to be structured and (b) such a contractual structure is inherently complicated and thus large parts of the guidance will be particularly helpful to users.

1.2.3. Use of these assumptions does not mean however that one financial structure is inherently preferable to another. The suitability of various structures, including trade-offs between cost,

complexity and risk, should naturally form part of the public sector's overall appraisal of bidders' proposals. Accordingly, no conclusion may be drawn in advance of such appraisal as to which form of financial structure is most appropriate, including whether a special purpose company will be required.

### 1.3. Terminology

In this guidance, the public sector party buying the Service is referred to as the "Nodal Agency" and its counterpart as the "PPP Vendor" or "Contractor", with the overall scheme referred to as the "Project". The agreement entered into between the Nodal Agency" and the "PPP Vendor" is referred to as the "Contract".

### 1.4. Interpretation

1.4.1. Set out below is required wording for the following general definitions which are used at various stages in the guidance:

**"Affiliate"**

means in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and "holding company" and "subsidiary"

**"Assets"**

means all assets and rights to enable the Authority or a successor contractor to own, operate and maintain the Project in accordance with this Contract, including:

- (a) any land or buildings;
- (b) any equipment;
- (c) any books and records (including operating and maintenance manuals, health and safety manuals and other know-how);
- (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (e) any revenues and any other contractual rights; and
- (f) any intellectual property rights, but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner;

**"Associated Company"**

means in respect of a relevant company, a company which is a subsidiary, a Holding Company or a company that is a subsidiary of the ultimate Holding Company of that relevant company,

**"Base Case"**

means the financial model agreed between the parties prior to the date of this Contract (as updated from time to time in accordance with the terms of this Contract) for the purpose of, amongst other things, calculating the Unitary Charge;

**"Termination Amount"**

means,:

(a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date from the PPP Vendor; and

(b) all amounts including costs of early termination and other breakage costs payable by the PPP vendor (including prepayment in respect of permitted Borrowing, subject to the Contractor mitigating all such costs to the extent reasonably possible; less, to the extent it is a positive amount, the aggregate of:

(i) all credit balances on any bank accounts held by or on behalf of the Contractor on the Termination Date;

(ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;

(iii) all amounts, including costs of early termination; and

(iv) all other amounts received by the PPP vendor on or after the Termination Date and before the date on which any compensation is payable by the Authority to the Contractor as a result of enforcing any other rights they may have;

**"Business Day"**

means a day (other than a Saturday or Sunday) on which banks are open for domestic business;

**"Capital Expenditure"**

means any expenditure which falls to be treated as capital expenditure in accordance accounting principles in the India from time to time;

**"Consents"**

means all permissions, consents, approvals, certificates, permits, licenses and authorisations of a Relevant Authority required for the performance of any of the PPP Vendor's obligations under this Contract;

**"Planned Service Commencement Date"**

means [fixed date by [on] which Service Commencement is planned to occur] or such other date as the parties may agree;

**"Project"**

means [ ];

**"Project Documents"**

means the agreements entered into by the Contractor for the performance of the obligations under this Contract which are listed in [ ] copies of which have been initialed by the parties for the purposes of identification;

**“Sub-Contractors”**

means each of the counterparties of the PPP Vendor to the Project Documents or any person engaged by the PPP Vendor from time to time as may be permitted by this Contract to procure the provision of the Services (or any of them). References to subcontractors means sub-contractors (of any tier) of the Contractor;

**“Sub-Contracts”**

means the contracts entered into between the Contractor and the Sub-Contractors;

**“Tax”**

means any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the date of the Contract and whether imposed by a local, governmental or other Relevant Authority;

**“Termination Date”**

means any date of early termination of this Contract in accordance with Section 19 (Early Termination);

**“Unitary Charge”**

means the payment calculated in accordance with [Section 7 (Price and Payment Mechanism)];

**“VAT”**

means any value added taxes.

## 2. DURATION OF CONTRACT

### 2.1. Introduction

2.1.1. The Contract must specify its duration. It will usually also specify a Service Commencement Date to distinguish the time (if any) from the signing of the Contract and before the Service Period from the Service Period itself. The choice of duration should be considered in the light of the issues set out in Section 2.2 (Factors to Consider).

### 2.2. Factors To Consider

2.2.1. The Nodal Agency will wish to specify a duration which is expected to result in the best value for money solution for the Project. Factors to be taken into account when deciding on the duration of the Contract will include:

- the Service requirements of the Nodal Agency (see Section 7 (Price and Payment Mechanism)) and the Nodal Agency's ability to forecast quality and quantity outputs in the longer term;
- the expected life of the assets underpinning the Service and any possible residual value (see Sections 2.2.2 and 18 (Treatment of Assets on Expiry of Service Period)) and the need for and timing of major refurbishment or asset refreshment programmes during the Contract (see Section 11 (Maintenance));
- the importance of continuity in the delivery of the Service, including the degree of transition difficulties and inefficiencies that might be caused by changing Contractors;
- the importance of maintaining performance incentives over time;
- the viability of re-competing the Contract regularly, including private sector capacity and bidders' likely willingness to bid against the incumbent;
- the ability of the PPP Vendor accurately to forecast its base cost; and
- the possibility of an option to extend the term of the Contract by entering into a further contract period with the initial PPP Vendor (this can equally be structured as a no cost early termination option – see Sections 18.2.5 and 18.6 (Valuation of Terminal Payments on Expiry where Residual Value Risk has been transferred)) even if there is no alternative use.

2.2.2. Some assets (e.g Servers, Desktops etc.) may have an alternative use which means that they can generate revenue for the PPP Vendor after the Contract expires (see Section 18 (Treatment of Assets on Expiry of Service Period)). If this is the case, the PPP Vendor should not expect to recover the full cost of financing its investment over the life of the Contract, as it will be able to recover the balance by putting the assets to such alternative use after the Contract expires (e.g. selling them). The price the PPP Vendor charges to the Nodal Agency can therefore be lower and the Contract duration shorter than would be the case if the PPP Vendor needed to recover all of its costs over the life of the Contract (see Section 18.2 (Assets where the Nodal Agency retains Residual Value on Expiry)). However for it may be noted that given the short lifespan of the IT projects, the value of such assets may not be significant. However the same needs to be established.

2.2.3. Given the rapid pace of both technological change in IT and Nodal Agency functions, the Nodal Agency should ensure that the Contract is sufficiently flexible to allow changes to the Service over time (see Section 13 (Change in Service)). If, however, the Nodal Agency is concerned that changes will be so radical that the Service in its present form may become redundant it may wish to retain some flexibility by having shorter Contract periods, consistent with an affordable financing plan.

2.2.4. The impact of certain events on the duration of a Contract is dealt with in the Sections on Compensation Events (see Section 5.2 (Compensation Events)), Relief Events (see Section 5.3 (Relief Events)) and Force Majeure (see Section 19.3 (Termination on Force Majeure)). A delay in the Service Commencement Date should not lead to an extension of the Contract (see Section 5 (Supervening Events)).

### **ILLUSTRATIVE DRAFTING**

#### **Duration of Contract**

- a) This Contract and the rights and obligations of the parties to this Contract shall take effect on the [date of this Contract][Effective Date].
- b) The Service Period will commence on the Service Commencement Date and terminate on the earlier of:
  - i. the Expiry Date; and
  - ii. the Termination Date.

## **3. SERVICE COMMENCEMENT**

### **3.1. Introduction**

3.1.1. After the Contract is signed and in force, there is usually a solution development or development period during which the PPP Vendor carries out its solution development or development obligations and puts in place the operational procedures which it believes will meet the Service requirement.

3.1.2. During this period, the Nodal Agency naturally wants to know if the PPP Vendor is going to deliver the Service on time and in a way which meets all the Nodal Agency's contracted requirements. The PPP Vendor will not wish to be unnecessarily hampered by the Nodal Agency, but it will also want to be reassured that what it is developing will meet the Nodal Agency's requirements.

3.1.3. The key issue here is the extent to which the Nodal Agency should be involved during this period and what rights, if any, the Nodal Agency should have to approve or monitor the PPP Vendor's progress prior to and on Service Commencement.

3.1.4. There must be a clear limit to the extent of Nodal Agency participation as involvement to a greater extent than is appropriate may lead to the Nodal Agency taking back both a risk it is paying the PPP Vendor to accept and a management role it is paying the PPP Vendor to deliver. It will not be appropriate for the Nodal Agency to adopt the type of overseeing role it might traditionally expect to have when procuring stand-alone solution development or development services.

### **3.2. Nodal Agency's Role – General**

3.2.1. The design, solution development, integration, installation, testing, commissioning, operation, maintenance and ultimate performance of any asset procured or developed for the purposes of meeting the requirements of the output specification are all the PPP Vendor's responsibility and the Nodal Agency should not (save in exceptional circumstances) take any responsibility for this risk.

3.2.2. Correspondingly, the PPP Vendor should be afforded the freedom to manage its activities without interference from the Nodal Agency. It is the PPP Vendor's risk whether the design and development it has carried out and the operational procedures it has put in place are capable of satisfying the Nodal Agency's service requirements. The Nodal Agency should not, save in exceptional circumstances (for example, those giving rise to Nodal Agency step-in (see Section 26 (Nodal Agency Step-In)), agree to any role before or following Service Commencement which involves the Nodal Agency taking back any part of the PPP Vendor's risk. In this context, the issues referred to in Section 3.3.2 are important.

3.2.3. The Nodal Agency's role prior to signature of the Contract includes:



- defining the output requirements and any constraints within which the output requirements must be achieved;
- reviewing the PPP Vendor's proposals for achieving the outputs in terms of approach, methods, resources, timetable, management and organisation (including design, maintenance and operational procedures and method statements); and
- negotiating and agreeing with the PPP Vendor all contractual terms, including the procedure for either party proposing and implementing a change in Service (see Section 13 (Change in Service)), the consequences of a failure to meet the Service Commencement Date (see Section 4 (Protections Against Late Service Commencement)), and the procedure for accepting the Service Commencement (see Section 3.6 (Acceptance and Service Commencement)).

In accordance with the principle outlined in Section 3.2.1, the Nodal Agency should not confirm to the PPP Vendor that the PPP Vendor's proposals will meet the Service requirement. In practice, however, the Nodal Agency should be confident before signing the Contract that the PPP Vendor's proposals (including method statements) will be capable of delivering the Service once fully developed and implemented. The Nodal Agency should also ensure that the PPP Vendor's basic design proposal is incorporated into the Contract (see Section 3.4 (Submission of Designs and Information to the Nodal Agency)).

3.2.4. The Nodal Agency's role after signature of the Contract and prior to Service Commencement will normally include:

- reviewing and commenting upon the PPP Vendor's solution designs, maintenance and operational procedures and method statements as they are developed (see Section 3.4 (Submission of Designs and Information to the Nodal Agency));
- viewing and observing tests of any equipment being developed;
- administering the agreed process for either the PPP Vendor or itself to propose and implement changes to the output requirements, constraints on inputs or the PPP Vendor's proposals (see Sections 3.5 (Quality Management Systems) and 13 (Change in Service));
- following the agreed procedure by which the PPP Vendor demonstrates to the Nodal Agency that Service Commencement can be accepted (see Section 3.6 (Acceptance and Service Commencement));
- following the agreed procedure in relation to a failure to meet the Service Commencement Date and agreeing with the PPP Vendor the measures to be taken and the financial consequences (see Sections 4 (Protections Against Late Service Commencement) and 5 (Supervening Events)); and
- auditing the PPP Vendor's activities in accordance with an acceptable Quality Management Systems regime (see Section 3.5 (Quality Management Systems)).

3.2.5. The Nodal Agency should require enough management information to be reassured that the delivery timetable is on track and any overriding safety issues are being satisfactorily addressed. This will involve having access to the site.

3.2.6. The principle outlined in Section 3.2.1 must be upheld to ensure the appropriate risk transfer during the pre-Service Commencement period. The Nodal Agency should not, for example, retain any rights to approve or accept interim stages such as practical completion of solution development or detailed design prior to acceptance of Service Commencement, as this may dilute any risk transfer (unless, of course, the Nodal Agency takes the risk of commissioning as the NHS does for clinical services in relation to the technical interface in hospital projects). This is different to the point made in Section 3.6.4 in relation to accepting Service Commencement before all solution development requirements are completed. In the case of certain defence projects involving very specialised or necessarily subjective requirements there may be a case for the Nodal Agency to accept some aspects of the design by agreeing a methodology for meeting such requirements in the Contract (see Section 3.6.2). This should only be contemplated where transfer of all aspects of the design risk would clearly not offer the best value for money.

### 3.3. Critical Dates

3.3.1. In many projects the effects of late Service Commencement can be handled through the payment mechanism (see Section 7 (Price and Payment Mechanism)). In some cases, however, there will be a critical date beyond which the adverse consequences of non-provision of the Service are greatly magnified (see Section 4 (Protections Against Late Service Commencement)). Where failure to provide the Service by a critical date would be unacceptable, the Nodal Agency must develop a contingency plan (and this could be implemented at the PPP Vendor's expense).

3.3.2. As a last resort, the Nodal Agency would usually expect to have the ability to terminate the Contract so that it can use another PPP Vendor (see Section 19 (Early Termination)). In Section 19.2.2.1 (Events Leading to Termination), paragraphs (j) and (k) of the definition of PPP Vendor Default give the Nodal Agency the right to terminate during the solution development or development period. Section 19.2 (Termination on PPP Vendor Default) makes it clear that termination for failure to achieve a milestone during that period is not recommended.

### 3.4. Submission of Designs & Information to Nodal Agency

3.4.1. The key aspects of the PPP Vendor's tender should be incorporated into the Contract schedules so as to ensure that the PPP Vendor is bound to deliver the Project in accordance with its tender submission. However, the incorporation of the PPP Vendor's tender submission in the Contract should not be interpreted as representing any form of approval by the Nodal Agency that the plan will satisfy the requirements of the output specification<sup>1</sup>.

3.4.2. The basic design proposal must be set out in the Contract and will be developed further by the PPP Vendor after signature<sup>2</sup>. The procedure for developing the design must also be specified in

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<sup>1</sup> This can be achieved by setting out in the Contract that the output specification takes priority over the technical solution being provided by the PPP Vendor. Under no circumstances should the output specification be amended to reflect the PPP Vendor's solution

<sup>2</sup> Depending on the nature of the Contract, the Nodal Agency may also wish to include (amongst other things) the PPP Vendor's operational procedures, key asset proposals or manpower and spares policies in the Contract

the Contract so that changes beyond the permitted parameters of further design development can be distinguished from permitted design developments. The Contract should also specify the extent (if at all) to which other minor changes<sup>3</sup> may be made without triggering the change in Service mechanism (see Section 13 (Change in Service)).

3.4.3. Although the PPP Vendor is responsible for the design development, the Nodal Agency knows its own service requirement and the means by which it has been delivered in the past and this should not be lost to the development process<sup>4</sup>. Consultation with the Nodal Agency and subsequent adoption of any comment made by the Nodal Agency must, however, remain firmly at the PPP Vendor's risk. The PPP Vendor should accept that it is not in the Nodal Agency's interests to watch without comment as a design is developed and implemented which it knows will not be able to deliver the Service. The procedure for submitting and commenting on design issues should be capable of giving all parties the reassurance they need.

3.4.4. The Contract should therefore set out a mechanism for:

- the PPP Vendor to submit designs and information to the Nodal Agency and its representatives. Such designs should be in a package and format and submitted to a timetable to be agreed between the parties;
- the PPP Vendor to submit minor design changes which do not have any impact on cost or the Service and which the Nodal Agency can accept without the change in Service mechanism having to be implemented (see Section 13 (Change in Service));
- the Nodal Agency to comment (if it wishes) on such submissions within an agreed time period<sup>5</sup> (see Section 5.2 (Compensation Events)); and
- the discussion of and, if appropriate, adoption by the PPP Vendor of any comments by the Nodal Agency.

## 3.5. Quality Management Systems

3.5.1. One central source of comfort for the Nodal Agency that assets and services are being provided in accordance with good industry practice should be the PPP Vendor's quality management system (such as ISO 9000 or an equivalent standard).

3.5.2. The Nodal Agency should retain the right to audit the PPP Vendor's quality management system which should include the right to examine or inspect works or activities on or off-site to establish the adequacy and accuracy of the system documentation. The Contract should provide for the PPP Vendor and Sub-Contractors to provide such assistance and access as the Nodal Agency requires and include provisions setting out the obligations upon the PPP Vendor and Sub-Contractors to respond to any recommendations which result from an audit. No other rights or

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<sup>3</sup> Such changes will include, for example, changes which have no financial impact or which do not affect the pre-agreed risk allocation

<sup>4</sup> It may be acceptable for an Nodal Agency to accept a limited degree of design responsibility insofar as it relates solely to the ability of the Nodal Agency to carry out its functions

<sup>5</sup> Irrespective of the Nodal Agency's comments (if any) on the minor design changes submitted by the PPP Vendor which do not have any impact on cost, level of fit-out, quality of the scheme or the Service, the PPP Vendor may choose to adopt such changes, albeit at its own risk, to ensure that it satisfies the Nodal Agency's service requirement.

remedies (e.g. rights to terminate for default) should arise from such an audit since deficiencies in the quality management system will manifest themselves through poor performance (see Section 9.5 (Consequences of Poor Performance)). The audit is essentially a due diligence tool available to the Nodal Agency.

### 3.6. Acceptance and Service Commencement

3.6.1. Before Service Commencement and at points in the Contract where the Service changes significantly (for example on the introduction of a new asset or new operational procedures), the PPP Vendor should be under an obligation to demonstrate that the arrangements put in place will meet the output specification in the Contract. The method of demonstration by the PPP Vendor will be dependent on each situation but may take the form of:

- a completion inspection of any asset built or developed with demonstration of principal facilities and services;
- completion of acceptance trials for new services; and
- other performance tests or inspections.

3.6.2. The Contract should set out in detail:

- the form of the tests, inspections or demonstrations (“Tests”) to be carried out by the PPP Vendor;
- the timetable for the Tests – it may be appropriate to undertake partial Tests over a period rather than a single Test;
- the consequences of a failure to pass a Test;
- the notice of the Tests to be given by the PPP Vendor to the Nodal Agency – this is particularly important if the Nodal Agency has to roster staff and resources to participate. If it is essential for the Nodal Agency to attend the Tests, the Contract should specify a time period for the Nodal Agency to respond to the notice and, to the extent that the Nodal Agency does not respond in time, a Compensation Event will have occurred (see Section 5.2 (Compensation Events)) although the Nodal Agency can still attend once it has responded; the responsibility for the cost and organisation of resources for the Tests. Again this is particularly important if the Nodal Agency’s staff and resources are to be involved (also the responsibility for costs if Tests have to be repeated should be considered);
- the access for the Nodal Agency to witness the Tests (if the Nodal Agency does not control the site);
- the documentation required by the Nodal Agency as evidence of the results of the Tests;
- who is responsible for assessing satisfaction of the Tests – this should, in most cases, be done by joint assessment by the Nodal Agency and the PPP Vendor or by an independent third party, although there will be cases where both parties accept that the Nodal Agency is the best judge (e.g. with defence equipment projects the best judge of whether the equipment behaves like it should are its users). The Nodal Agency should in no circumstances rely on any technical or other adviser appointed solely on behalf of the PPP Vendor, but may accept an adviser that has been jointly appointed and owes duties to all sets of interested parties; and the timing and procedure for acceptance of Service

Commencement if the results of the Tests are satisfactory. Acceptance may be confirmed by the third party tester or by the Nodal Agency, in which case again the Compensation Event consequence of being late should be borne in mind if the Service cannot commence before any such confirmation is issued.

3.6.3. At the time of acceptance of the Service, there must be no “approval” of the means of delivery of the Service, as this may involve the Nodal Agency in taking back part of the PPP Vendor’s risk. Rather, acceptance should be based as far as possible on satisfaction by the PPP Vendor of objective Service Commencement based tests.

3.6.4. As stated in Section 3.2.5, the Nodal Agency should not generally accept stages of work (e.g. by signing off milestones) prior to the Service Commencement Date and delivery of the full Service as this dilutes risk transfer<sup>6</sup>. In certain projects, however, it may be appropriate for the Nodal Agency to commence payment before a complete service is available. The principal examples of these are as follows:

- where certain priority module impacting citizen services are rolled out first
- where the PPP Vendor start collecting “Unitary Charges” from the citizen on behalf of the Nodal Agency
- where certain costs of the Nodal Agency are reduced due to the implementation of the project

In these projects there may be aspects of the project for which the Nodal Agency retains a part of the risk deliberately, as it will ultimately retain responsibility for a part of the overall Service; and in certain other projects in which Service Commencement is phased, then an appropriate phasing in the introduction of payments (again with built-in incentives) may be appropriate.

3.6.5. In projects where Service Commencement is phased, there are two clear alternatives available to the Nodal Agency:

- to stipulate that full Service Commencement will only be accepted when all phases in the scheme reach the required output specification level, which would incentivise the PPP Vendor to bring them all up to the output specification standard as quickly as possible. This would mean, however, that the Nodal Agency would receive the full output specification level of service for some phases without paying for it; or
- to accept full Service Commencement as each phase reaches the output specification standard, so that payments reflect the service received. A slight variant to this that may be adopted in very large grouped schemes, where it would be administratively cumbersome to have phase by phase Service Commencement, would be to accept Service Commencement in batches as full service availability is confirmed. If this approach is adopted, some of the incentive effect of the first alternative above can still be achieved if payment is not increased pro rata as phases reach the output specification, so that there is in effect an amount retained or abated until the last phase reaches Service Commencement.

3.6.6. **3.6.6** The overall time period until the planned completion and service commencement of the last phase is likely to have a significant impact on the relative value for money of these two

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<sup>6</sup> Neither should the Nodal Agency seek to impose any milestones during the solution development phase.

alternatives - the longer the period, the more reluctant the PPP Vendor is likely to be to accept the delayed payment involved in the first alternative above.

### 3.7. Existing Services

3.7.1. The approval/acceptance procedure raises other issues if the PPP Vendor is taking over existing services as well as undertaking additional services. The Nodal Agency should structure the payment mechanism and any termination compensation so as to incentivise the PPP Vendor to commence delivery of the new service on time, so that it cannot simply choose to provide the existing service only. This is the case even where provision of the existing service is more important to the Nodal Agency from an operational perspective than provision of the new service.

3.7.2. The first question to address is, when does the PPP Vendor take over full or partial responsibility for service delivery? Nodal Agency should recognise that any movement of staff that may arise out of the Contract are likely to take effect from the time at which the PPP Vendor takes over provision of the relevant service. There are therefore three options open to the Nodal Agency:

- responsibility for all sites in the Contract is taken over by the PPP Vendor following financial close, commonly after a brief mobilisation period. This provides a clean start and minimises ambiguity about responsibilities between the Nodal Agency and the PPP Vendor, and is therefore the recommended approach.;
- phase the handover so that the PPP Vendor takes over responsibility for the sites when it has planned to start works on them to bring them up to the full output specification standard. This would leave the Nodal Agency responsible for some sites between financial close and the programmed start date of the PPP Vendor's work on site. For a large grouped scheme this may well create some greater complexity in the management arrangements throughout the transitional phase from financial close to the point at which all of the sites have reached full Service Commencement, but is recommended where the first approach above does not provide value for money; and
- only hand the sites over to the PPP Vendor once they have been brought up to the full output specification standard. This would cause an additional complexity as the pre-contract arrangements, involving in-house provision or a separate PPP Vendor, would continue in relation to facilities management (if relevant), whilst the PPP Vendor was carrying out works to bring the sites up to the output specification standard. Scope for disputes over responsibility for problems that arise suggest that this would not be an attractive option, and it is therefore not recommended.

In some cases, the existing condition of Hardware and site infrastructure may be such that there is a risk (however remote) of criminal prosecution, for example under security breaches. The output specification will generally require the IT Infrastructure solution to be in a condition that complies with all applicable law. In some schemes prospective shareholders of a PPP Vendor will be understandably nervous about taking on such a risk for the period before Service Commencement. In such circumstances, Nodal Agency should consider retaining legal responsibility for the IT Infrastructure solution until planned Service Commencement, and so any Existing Services provided by the PPP Vendor may be in the form of a maintenance and/or FM contract.

3.7.3. In relation to the first two options, a specification will be needed for the service level that is expected for the period while the PPP Vendor is responsible for each site, but has not yet reached full Service Commencement. The specification should include requirements in relation to individual FM services that the PPP Vendor will be required to provide (if relevant), and a reactive and responsive maintenance and repair service that at least keeps the sites open to the standard they are when the Contract starts. It is important for all parties that there is a common understanding of the Service required during this period. This will assist in minimising dispute if under performance occurs. There are generally two options available to the Nodal Agency:

- use the output specification that will apply from Service Commencement for the transitional period as well, albeit with a relaxed payment and performance regime (including default termination thresholds). However, this may lead to regular performance failures due to the pre-existing condition of the Facility and cause disputes between the parties; or
- tailor a bespoke specification for the transitional period which sets out the Nodal Agency's requirements and is realistic in terms of delivery. In relation to some individual service requirements however, the Contract output specification may be relevant and sufficient for the transitional period (e.g. response and rectification periods, or if it is reasonable to expect individual "soft" FM services to be provided to the output specification standard from the award of the Contract). However, where the output specification for the Service Period cannot be met by the PPP Vendor during the transitional period, bespoke outputs will need to be tailored.

3.7.4. There are two approaches that the Nodal Agency can take in relation to payment for delivery of services during the transitional period and the Nodal Agency should assess which of these approaches to adopt depending on the value for money they provide:

- Nodal Agencies can have transaction based payments before full Service Commencement on their current expenditure, pre-contract, and then applied a performance regime so that, in accordance with the principles of the full payment mechanism, there would be no payment if, for example, a Facility was unavailable and could not be used, and deductions from the payments if there was poor performance, for example a failure to meet response or rectification periods that did not lead to non-availability. Payment for those parts of the services being delivered will not diminish the significance of full Service Commencement provided the Unitary Charge is structured to incentivise the PPP Vendor to achieve this standard; or
- an alternative to the approach described above would be for the Nodal Agency to make payments for the capital infrastructure created. However in this case, no transaction payments should be made. This would maximise the incentive on the PPP Vendor to bring the facilities up to the Service Commencement level as quickly as possible and the risk would be equitably shared between the two parties.

As the two approaches will lead to different funding requirements and cash flows for the PPP Vendor, it may well have a significant impact on price.

### **3.8. Range of Services to be provided**

3.8.1. Nodal Agency should consider carefully, at an early stage in their procurement planning, the range of services which need to be provided through the Contract. In particular they should consider whether or not it offers value for money to include soft services as part of the range of services to be provided. Where hard services only are procured, adjustments will need to be made to the Contract and in particular (a) any benchmarking/market testing provisions are unlikely to be applicable, though some sort of value testing for the Contract could still apply (see Section 15 (Price Variations)), (b) the Sub-Contracting provisions (see Section 16 (Sub- Contracting, Employees and Documentary Changes) and Section 9.3 (Replacement of Sub- Contractors)) may need consideration, and (c) Nodal Agency will need to give particular attention to any interface issues which might arise with the providers of other services.

### **3.9. Capital Contributions**

3.9.1. In the ordinary course of events, no public sector capital contributions should be made to the Project, and no Unitary Charge should be payable, until the Works have been completed and accepted. In certain exceptional circumstances however an Nodal Agency may want to make a capital contribution of its own to the Project. Nodal Agency should always discuss any such proposal at an early stage with relevant Government department for taking the permission. Any capital contributions, if approved, should be kept to a modest size. PPP is concerned with payments for Services rather than public sector capital financing. A large contribution may upset the risk transfer balance and incentives of the Project (especially where the Project gets into difficulty). Any contributions should be scheduled to, or towards, the end of the Solution development period and linked to acceptance of the Service or other important milestones. In any event it is important that any Nodal Agency payments are not paid towards advisers' fees or working capital or other similar costs.

3.9.2. If there is a solution development delay or cost over-run, Nodal Agency capital contributions should be withheld. Nodal Agency should also ensure that levels of subcontract security (bonds, liquidated damages, etc.) remain at the same levels regardless of any public-sector capital contribution (i.e. if there is a 10% Nodal Agency contribution, sub-contract security levels should still be gauged against 100% costs and not just against the 90% private sector contribution). No amendment of the core drafting listed in Section 1.4.1 should be made.

### **3.10. Early Works Agreements**

3.10.1. In the ordinary course of events, for a well planned procurement exercise no agreements should be needed for the commencement of early works ahead of the parties signing the Contract. Such agreements would generally be considered bad practice for a number of reasons:

- there may be questions as to whether any such early works agreement had been procured in accordance with relevant procurement law and regulation;



- in the ordinary course, no payments would be made to the PPP Vendor or any Solution development Sub-Contractor prior to completion of the relevant facilities and commencement of the Services (see further Section 3.9 (Capital Contributions));
- in the ordinary course, Nodal Agency should not be under any obligation to make any payments prior to Financial Close;
- negotiations on early works agreements tend to be a distraction for the negotiating teams on the main Contract and obstruct the completion process for the main Contract;
- project integration issues can arise;
- early works agreements can undermine the bargaining position of the Nodal Agency and adversely affect the balance of risk on the procurement; and □ to date, early works agreements tend not to have been factored into the original procurement programme and are often a sign that a procurement is in difficulty.

3.10.2. For all these reasons early works agreements are generally to be avoided. However, for certain projects where particular issues apply (such as offices who wish to avoid facility handovers occurring during financial close), basic enabling works may be needed prior to Contract signature, and for such projects the following rules should apply:

- the enabling works should be planned well in advance and as part of the overall procurement strategy (and alternatives to it should always be appraised);
- consideration should be given as to whether it is appropriate for the bidder to do such works or whether the Nodal Agency should independently commission a third party to do them;
- the works proposal should offer demonstrable savings to the project timetable and be value for money in its own right;<sup>11</sup>
- the relevant Private Finance Unit should be consulted and approve the proposal;
- the works should only comprise essential early works which the Nodal Agency would wish to have done in any event.;
- the works should be of a general nature, and not specifically related to the specific project solution proposed by the bidder, such that they will be of value to the Nodal Agency whether or not the Contract is signed;
- the works completed should not impair the risk allocation in respect of work subsequently done under the Contract; and
- the scale/cost of such works should not be significant and the Nodal Agency should ensure it has funding for them.

## **4. PROTECTIONS AGAINST LATE SERVICE COMMENCEMENT**

### **4.1. Introduction**

4.1.1. The Contract must ensure that the Nodal Agency is protected against late Service Commencement by the PPP Vendor in a way which gives the Nodal Agency value for money, taking into account the type of loss the Nodal Agency may suffer and the need for (and cost of) any contingency plans that are put in place (see Section 3.3.1). This Section deals with the level, types and combinations of protections appropriate in relation to a particular project.

4.1.2. In considering the issue of late Service Commencement, the Nodal Agency should acknowledge that the PPP Vendor is likely to be at least as concerned as the Nodal Agency to commence Service delivery on time due to significant financial pressures. The PPP Vendor's financing will often be structured with limited contingency to deal with a delay in Service Commencement, and the PPP Vendor risks suffering a cash flow drain investment return obligations are not being met by payments of the Unitary Charge by the Nodal Agency. For every day the PPP Vendor is late in commencing Service delivery, not only does it lose revenue, but its revenue earning period is also reduced. The longer the solution development period is, relative to the Service Period, the greater the concern for the PPP Vendor.

4.1.3. If the Nodal Agency will not suffer any significant loss as a result of late Service Commencement, then it is unlikely to need specific protections. In exceptional cases, however, the Nodal Agency may need protections from the PPP Vendor (in addition to the non-payment of the Unitary Charge) such as liquidated damages, performance bonds and/or parent company guarantees. These types of protections are, however, likely to increase the price and affect the project timetable, so the Nodal Agency must consider carefully their effect on value for money (see Sections 4.2 (Liquidated Damages), 4.3 (Performance Guarantee) and 4.4 (Parent Company Guarantees)).

4.1.4. The Nodal Agency should also protect itself against prolonged uncertainties arising from late Service Commencement by having a cut-off date after which it may terminate the Contract if the PPP Vendor has not commenced Service delivery by such a date (see Section 4.5 (Long-stop Date)) . As stated in Section 3.3.2 and elsewhere throughout this guidance, termination should be a last resort.

4.1.5. The Nodal Agency should also consider the issue of early Service Commencement and whether the Nodal Agency should accept and reward early delivery (see Section 4.6 (Bonus Payments for Early Service Commencement)).

### **4.2. Liquidated Damages**

4.2.1. Liquidated damages for delayed Service Commencement are an ascertained payment representing a genuine pre-estimate of the losses or damages the Nodal Agency will suffer if the PPP Vendor fails to fulfil its obligation to commence Service delivery on time. If the Nodal Agency

will not suffer any losses in excess of the payment of the Unitary Charge (taking into account the cost of procuring the Service itself), liquidated damages are not appropriate or recoverable. If the Nodal Agency will suffer such losses, liquidated damages may be appropriate but only where they offer the Nodal Agency value for money, taking into account the effect of any other protections being required by the Nodal Agency or the PPP Vendor.

4.2.2. To protect against late Service Commencement, PPP Vendors will usually require the Sub-Contractors to cover risk for any period of delay through liquidated damages paid to the PPP Vendor. The Sub-Contractor will price this requirement into the price it charges the PPP Vendor (for example, by increasing its solution development costs to ensure completion will be achieved on time) and may also require a longer build period to allow itself more contingency time. This cost is then likely to be passed on to the Nodal Agency through the Unitary Charge and the Project timetable is likely to be longer. If the Nodal Agency requires liquidated damages to be paid by the PPP Vendor to itself, this is likely to further increase the Unitary Charge and the build period. Liquidated damages payable to the Nodal Agency may therefore prove bad value for money unless circumstances such as those outlined in Section 4.2.3 exist.

4.2.3. Liquidated damages may prove value for money in situations where the costs the Nodal Agency incurs as a result of the delay are so great as to justify the increased expense (e.g. a higher Unitary Charge) to which such liquidated damages give rise. This could be the case where there are critical dates (see Section 3.3 (Critical Dates)) and the Nodal Agency's contingency plan to cope with such dates has a significant quantifiable expense associated with it. Liquidated damages may also be justified where:

- the Nodal Agency has contributed a valuable asset to the Project which could otherwise have been used by the Nodal Agency during the period prior to Service Commencement, so an "opportunity cost" is incurred; or
- there are no prior claims on liquidated damages paid by a Sub-Contractor and liquidated damages give value for money.

4.2.4. If liquidated damages are considered worthwhile and value for money, the Nodal Agency should specify the level of liquidated damages, and any cap<sup>7</sup>, early on in the bidding process (i.e. in the Pre-Bid Discussions) to enable the bidders to price the risk of incurring liquidated damages<sup>8</sup>. Bidders could also be invited to submit alternative bids without liquidated damages and/or using higher or lower caps. The Nodal Agency's technical or financial adviser should advise on an appropriate level.

4.2.5. The Nodal Agency should note that any assessment of the appropriate rate of liquidated damages must be a genuine pre-estimate of the losses the Nodal Agency is likely to incur as a result of the delay in Service Commencement. If this is not the case, the rate may be judged to be a penalty and the liquidated damages provision will not be legally enforceable against the PPP Vendor.

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<sup>7</sup> A cap will be a key issue for PPP Vendor

<sup>8</sup> It will assist the evaluation of any bids submitted if the cost of providing liquidated damages could be identified separately within such bids

4.2.6. If the PPP Vendor is not going to be able to deliver the Service on time, but is able to find some form of alternative which is acceptable to the Nodal Agency and which can commence on the Planned Service Commencement Date (or will reduce the delay in Service Commencement), the Nodal Agency may agree that this alternative service may be provided for a certain period for a reduced Unitary Charge. Any liquidated damages liability will be deferred for the period in question and the PPP Vendor's revenue stream will commence. The Unitary Charge will be reduced appropriately to reflect the fact that the Service is not being provided as contracted. This is not an issue which needs to (or necessarily can) be agreed prior to signature of the Contract, so it may need to be negotiated at the time.

### **4.3. Performance Guarantee**

4.3.1. In the IT / e-Governance industry, performance bonds are generally given by Vendors as a form of guarantee of completion and satisfactory performance of the services (the amount guaranteed is usually a percentage of the value of the contract). They can be called by the recipient when, for example, the Planned Service Commencement Date is missed or due to the poor quality of services provided. Accordingly, the PPP Vendor may well require a performance bond from the Sub-contractor. The Sub-Contractor will pass through the cost and timing effects of providing such a bond to its customer (i.e. the PPP Vendor), who will in turn pass them on to the Nodal Agency.

### **4.4. Parent Company Guarantees**

4.4.1. In traditional procurement, the Nodal Agency may expect to obtain parent company guarantees from the parent companies to the PPP Vendor and/or the Sub-Contractors (in particular, the Sub-Contractor) to support the obligation to deliver the Service on time. This is not, however, normally appropriate in PPP Contracts and should not be a pre-condition to acceptance of a bidder's bid.

4.4.2. Rather, the necessary comfort and protection for the Nodal Agency can be provided through the Project Documents, the use of collateral warranties and or direct agreements between the Sub-Contractors and the Nodal Agency. Further discussion of this issue takes place in Section 21 (Indemnities, Guarantees and Contractual Claims).

### **4.5. Long-Stop Date**

4.5.1. Service Commencement should not generally be allowed to be delayed indefinitely due to PPP Vendor default. The Nodal Agency may impose a long-stop date after which the Contract may be terminated by the Nodal Agency if the Service has not yet been commenced (see Section 19.2.2 (Events Leading to Termination)).

4.5.2. The long-stop date is often fixed by reference to the Planned Service Commencement Date. The date chosen should be reasonable, taking into account the nature of the Project and the length of time the PPP Vendor should reasonably be allowed to remedy the situation. The Planned Service

Commencement Date and, therefore, the long-stop date should be extended to the extent of any delay caused by any Compensation Event, Relief Event or Force Majeure Event (see Sections 5 (Supervening Events) and 19.3 (Termination on Force Majeure)).

#### **4.6. Bonus Payments For Early Service Commencement**

4.6.1. It is sometimes proposed that “bonus payments” should be paid for early Service Commencement, particularly where the Nodal Agency has required protections of the types described above against late Service Commencement. The term “bonus payment” can be misleading, however, so it is important to understand what is envisaged and how it ties in with the implications of early Service Commencement.

4.6.2. The key point for the Nodal Agency is that it should not be under an obligation to accept early Service Commencement (unless it has agreed to be). It should only accept early Service Commencement and payment of any relevant bonus if it offers value for money. Early Service Commencement may clearly prove good value for money if there is a critical demand for the Service or if it would benefit the Nodal Agency financially. This might be the case, for example, if the early start date meant the Project generated additional third party revenue, or the PPP Vendor made savings, in which the Nodal Agency shared. Any benefit to the Nodal Agency should be assessed on a case by case basis.

4.6.3. There may be budgetary problems for some Nodal Agencies in accepting and paying for early Service Commencement. These should generally be surmountable, however, if sufficient warning is given by the PPP Vendor of early commencement, particularly as the Nodal Agency would in many cases be sharing in extra revenue or savings.

4.6.4. If the Nodal Agency decides to accept early Service Commencement, the PPP Vendor’s revenue stream will commence earlier than originally planned. The Nodal Agency will have the choice between bringing the Expiry Date of the Contract forward to retain the length of the original Service Period or retaining the original Expiry Date, thereby extending the original Service Period. This is where the “bonus payment” concept is relevant since:

- if the Nodal Agency retains the original Expiry Date, the PPP Vendor will receive a “bonus” amount of revenue through the Unitary Charge payable in respect of the extra Service Period;
- if the Nodal Agency brings the Expiry Date forward, the Nodal Agency may either simply pay the Unitary Charge for the same length of Service Period (i.e. essentially what it would have paid originally), which involves a “bonus” element (as payment is being received earlier) or it may pay the PPP Vendor a “bonus payment” equivalent to the additional amount the PPP Vendor would have received if the original Expiry Date had instead been retained. The difference between this approach and the alternative outlined in the first bullet point is that this bonus would not be subject to deductions as a result of unavailability or poor performance. It would also be likely to be paid as a lump sum;

- the Nodal Agency may alternatively simply opt to make a “bonus payment” which is unrelated to the length of the Service Period or any additional amounts of revenue which the PPP Vendor may expect to receive due to its early Service Commencement. Such a bonus would typically be an agreed fixed amount.

## 5. SUPERVENING EVENTS

### 5.1. Introduction

5.1.1. The PPP Vendor undertakes to ensure Service Commencement usually by a particular fixed date<sup>9</sup> and to continue to provide the Service for the duration of the Contract. There may, however, be circumstances in which the PPP Vendor should fairly be relieved from liability for failure to commence or provide the Service. A balance must be struck between encouraging the PPP Vendor to manage the risk and protecting the Nodal Agency from non-performance.

5.1.2. Supervening events for which some relief is appropriate should be divided into three categories:

- Compensation Events – i.e. events which are clearly at the Nodal Agency's risk and in respect of which the PPP Vendor should be compensated (see Section 5.2 (Compensation Events));
- Relief Events – i.e. events which are best managed by the PPP Vendor (although not necessarily in its control) and for which the PPP Vendor bears the financial risk, but in respect of which no rights of termination should arise (see Section 5.3 (Delays Due to a Relief Events)); and
- Force Majeure Events – a limited set of events which arise through no fault of either party, which are best managed by the PPP Vendor (although not in its control) and in respect of which rights of termination can arise (see Section 5.4 (Force Majeure Events)).

5.1.3. The distinction between Compensation Events and Relief Events is sometimes expressed as being the difference between the PPP Vendor being given 'time and money' and 'time' only.

5.1.4. Certain events may be dealt with differently in specific projects, depending on the nature of the Project, the likelihood of the event occurring and the value for money obtainable if the PPP Vendor prices the risk of such event occurring into its price. Given the effect on the Nodal Agency of adding risks to Compensation Events, this should only be done after careful consideration in specific cases. For example, in a project in which Government use means that delays during the development phase are a high risk, the Nodal Agency may accept that the event leading to such increased risk should be a Compensation Event. In a project where such risks do not exist, the parties may agree that a Relief Event is the way to deal with that risk. An alternative way of dealing with the risk of discovery of new requirements (functional or Non-functional) during the solution development period, which lies somewhere between the Compensation Event and Relief Event approach, is for the PPP Vendor to bear a pre-determined initial level of loss (both financial and in terms of delays to the solution development timetable), as defined in the Contract, with further losses above that prescribed level being shared by the parties in accordance with an agreed formula<sup>10</sup>.

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<sup>9</sup> The typical structure will require the PPP Vendor to ensure Service Commencement either by a scheduled date for completion of solution development (i.e. the Planned Service Commencement Date) or at any time from the date of the Contract or the Effective Date (depending upon the presence of conditions precedent) but by a pre-agreed long-stop date (see Section 4.5 (Long-Stop Date)).

<sup>10</sup> A different approach is justified here because of:

(a) the potential impact of such risk being greater than is the case with other possible Relief Events; and

5.1.5. Similarly, the risk of planning delays may require different treatment in different projects. For example, the Nodal Agency may accept some planning delay risk in order to obtain value for money if it wants the Contract to be signed before full detailed planning consent is. As far as the discovery of adverse ground conditions and historic events is concerned, this should not usually be at the Nodal Agency's risk as the PPP Vendor should have carried out appropriate surveys in relation to such matters prior to signing the Contract and can often assess and accept such risks more economically than the Nodal Agency. The situation may be different in specific circumstances such as where the PPP Vendor has been prevented from carrying out appropriate surveys or it is not reasonable or good value for money for surveys to be undertaken (e.g. because of the number of sites involved in the project). For instance, normal practice for a creating a CSC scheme / VAT Computerization would be for the Nodal Agency to organize surveys/provide data itself and ensure that the bidders (who would ultimately bear the risk) could rely on them.

## 5.2. Compensation Events

### 5.2.1. Purpose and Scope

5.2.1.1. Compensation Events are designed to cater for events which arise before the Service Commencement Date which are at the Nodal Agency's risk and which result in a delay to Service Commencement and/or increased costs to the PPP Vendor, although the concept can be extended to the Service Period (see Section 5.2.1.4). Such events are more appropriately dealt with by compensation methods than by being an Nodal Agency Default (see Section 19.1.2.1 (PPP Vendor's Right to Terminate for Nodal Agency Default)) as termination should in all circumstances be a last resort (although if an event renders the parties' contractual relationship untenable the Nodal Agency may choose to exercise its voluntary termination rights). In fact, even a delay is not strictly necessary for the occurrence of a Compensation Event (see Clause 5.2(a)) as cost increases can arise without any timetable changes.

5.2.1.2. Events which can arise before the Service Commencement Date and which are at the Nodal Agency's risk (i.e. for which compensation should be paid to the PPP Vendor) are:

- Nodal Agency breach of an obligation (which includes a breach occasioned by third parties for whom the Nodal Agency is responsible, such as department officials who are to provide inputs / approvals);
- Nodal Agency changes (see Section 13 (Change in Service)); and
- discriminatory or specific changes in law (see Section 14.6 (Discriminatory, Specific and General Changes in Law)).

The Nodal Agency should bear the effects of Nodal Agency changes and Qualifying Changes in Law in accordance with the principles set out in Sections 13 (Change in Service) and 14 (Change in Law)

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(b) the public benefit that is derived from the discovery of new requirements (functional or non-functional).



respectively. The only significant difference in relation to how the approaches are dealt with during the Service Period is referred to in Section 5.2.3 (Calculation of Compensation).

As mentioned in Section 5.1.4, it may, after careful consideration in certain projects (or sectors), be appropriate to add other specific events. As Nodal Agency changes and Qualifying Changes in Law are dealt with in Sections 13 and 14 respectively, the required definition of Compensation Event is as follows:

**“Compensation Event”** means a breach<sup>11</sup> by the Nodal Agency of any of its obligations under this Contract<sup>12</sup>.

5.2.1.3. It is of course possible that Nodal Agency changes and changes in law will occur during the Service Period. The Nodal Agency should bear the risk of these events in accordance with the principles set out in Section 13 (Change in Service) and Section 14 (Change in Law).

5.2.1.4. The Nodal Agency may be faced with a request by the PPP Vendor to give compensation for Nodal Agency breaches which occur during the Service Period. This will not always be appropriate and the Nodal Agency should consider carefully the nature of its obligations during the Service Period<sup>13</sup>. If its sole obligation is to make payment, then there is no need to give compensation as non-payment in the Service Period is addressed through the provisions dealing with interest on late payment (see Section 7.2.3 and Clause 27.6 (Interest on Late Payments)) and, in extreme cases, through termination for Nodal Agency Default (see Section 19.1 (Termination on Nodal Agency Default)).

5.2.1.5. If, however, the Nodal Agency has significant ongoing obligations and breach of such obligations would seriously adversely affect the PPP Vendor's ability to perform (e.g. if the Nodal Agency failed to carry out procedures for certifying operating matters) or materially affect the cost of performance, then it may be appropriate to give compensation if such breach occurs. This can most easily be addressed by extending the scope of the Compensation Event concept.

## 5.2.2. Consequences

5.2.2.1. A practical consequence of a Compensation Event occurring is that the Planned Service Commencement Date may have to be postponed, usually by the length of any delay caused (and any long-stop date will be similarly put back). This means that the start date of the PPP Vendor's revenue stream is also delayed and/or additional costs<sup>14</sup> are incurred (see Section 5.2.2.6). As a

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<sup>11</sup> This is a breach that will not normally lead to an Nodal Agency Default (which can lead to termination - see Section 21.1 (Termination on Nodal Agency Default)), but which will nevertheless cause delay and put the PPP Vendor to material expense, including, for example, a failure to allow the PPP Vendor appropriate access to an Nodal Agency provided site.

<sup>12</sup> To the extent that the Nodal Agency is contracting on behalf of others, then these should be included. Other persons responsible to the Nodal Agency can, by failing to act, also trigger Compensation Events.

<sup>13</sup> If it is appropriate for the Nodal Agency to give the PPP Vendor compensation for Nodal Agency breaches arising during the Service Period, the Contract will need to incorporate an appropriate compensation mechanism.

<sup>14</sup> A Compensation Event may not affect the PPP Vendor's ability to achieve the Planned Service Commencement Date but increase the PPP Vendor's costs.

result, the PPP Vendor may incur finance charges and additional costs which could involve the PPP Vendor in significant expense<sup>15</sup>.

5.2.2.2. The PPP Vendor should be compensated for any delay to Service Commencement resulting directly from a Compensation Event. The original Expiry Date should be retained and the PPP Vendor compensated for its loss. This does not mean that payment of the Unitary Charge is made for a month in which no Service has been provided although the monetary value of the compensation may be derived from the Unitary Charge subtracting the costs.

5.2.2.3. If the Contract contains liquidated damages provisions (see Section 4 (Protections Against Late Service Commencement)), then the PPP Vendor's liability for liquidated damages will also be relieved for the period of delay caused by the Compensation Event. The PPP Vendor should, of course, also be relieved of any other liability for the Nodal Agency's losses in respect of the Compensation Event. This should be taken into account in determining the consequences for the Nodal Agency of a Compensation Event.

5.2.2.4. The main advantages of this approach are first, simplicity and second, it will be preferable to PPP Vendors. This approach also means that the Nodal Agency has an incentive to manage its rights and obligations in the solution development period in a way that does not result in delay. The detail of how this approach should work in practice can be seen by reference to Section 5.2.3 (Calculation of Compensation).

5.2.2.5. The PPP Vendor should be obliged to use reasonable endeavours to mitigate its losses and costs (for example, by rescheduling its works timetable or by redeploying staff). Such mitigation may result in there being no delay in the Planned Service Commencement Date (although extra costs may result from steps taken to mitigate).

### **5.2.3. Calculation of Compensation**

5.2.3.1. The Unitary Charge may need to be adjusted if the Compensation Event concerned involves an additional cost or a time delay which has cost or loss of revenue implications. The Contract must contain an appropriate method for dealing with any changes that arise as a result of a Compensation Event. Section 5.2.3.3 below sets out the required drafting. The treatment of issues here is equally applicable to costs arising as a result of an Nodal Agency change in Service (see Section 13.2 (A Typology of Changes)) and a Qualifying Change in Law (see Section 14.8 (General Change in Law as a Shared Risk)).

5.2.3.2. One common way of dealing with such events is to rely on the financial model to deal with the issue and for both parties to use this to calculate how and when compensation should be paid. Typically this would require the Nodal Agency to agree that the investments and the returns

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<sup>15</sup> If "bonus payments" are to be made for early Service Commencement (see Section 4.6 (Bonus Payments for Early Service Commencement)) the parties will need to consider what, if any, further compensation should be paid to the PPP Vendor where early Service Commencement has been prevented by the occurrence of a Compensation Event.

remain unchanged. Whilst there is no objection in principle to the parties referring to a financial model (provided both parties fully understand all of its various aspects), there are three principal problems that can arise in using a financial model to calculate compensation payable for Compensation Events (and for that matter the effects of a Nodal Agency change in Service (see Section 13.2 (A Typology of Changes)) and Qualifying Changes in Law (see Section 14.8 (General Change in Law as a Shared Risk)):

- the financial model may obscure the process being followed in reaching the answer, unless there is clarity on all sides on how the relevant formulae used in the model work. For example, if something has happened which was not originally modelled for and audited, there could be conflict arising on how to model it, which could impact on the calculation concerned;
- if the Nodal Agency has access to a financial model in sufficient detail and to all of the internal costs, returns and other assumptions (to the level of detail required), then more information than is relevant simply to value the consequences of the event may have to be provided by the PPP Vendor, which may not be acceptable to it (and, in addition, certain of the assumptions may need to be updated); and
- the result of preserving the investment return ratios can be achieved in a number of different ways (these are referred to in Section 5.2.3.4).

The guidance requires that as simple an approach as possible is followed as the only concern of this Section is to ensure fair compensation for a limited number of events which can be calculated in a straightforward manner. If the Unitary Charge is to change, then financial advice is likely to be needed.

5.2.3.3. The approach taken in the drafting to the various events that may lead to a change in the Unitary Charge is as follows:

- if the event concerned requires Capital Expenditure (whether before or during the Service Period), then in most cases, it will be more practicable to deal with this by a lump sum reimbursement (subject of course to the possibility of staged payments)<sup>16</sup> (see Clause 5.2(c)(ii)); and
- if the event concerned requires a change in operating costs, then an alteration in the Unitary Charge is the appropriate means of payment (see Clause 5.2(c)(iii)).

Although the issue is dealt with in this way in the drafting, it is important to stress that for Nodal Agency breach it is also perfectly acceptable for the Nodal Agency simply to reimburse the PPP Vendor on the basis of costs incurred (for example, as a result of any delay in giving an approval).

5.2.3.4. The approach referred to in the drafting and Section 5.2.3.3 ensures that a minimum of additional financing costs are incurred. Other reasons, including affordability constraints may, however, mean that an Nodal Agency wishes to reserve the right to ask the PPP Vendor to use

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<sup>16</sup> Significant Nodal Agency changes are likely to be acceptable to the PPP Vendor only if compensation is paid by the Nodal Agency, so as to match the timing of the agreed costs of the change.

reasonable endeavours to finance the event where Capital Expenditure is required. If this is done then careful scrutiny of the value for money implications should be undertaken.

5.2.3.5. Where the compensation involves an increased obligation to incur Capital Expenditure, other possibilities<sup>17</sup> to that referred to in the drafting and Section 5.2.3.3 include:

- a lump sum payment from the Nodal Agency paid immediately on Service Commencement, the amount payable to exceed the amount of the relevant increase in Capital Expenditure by any incremental increase in financing than originally anticipated and the agreed costs incurred in arranging any such financing;
- an adjustment to the Unitary Charge to take account of the PPP Vendor's additional investment for the event concerned. This adjustment would reflect the actual terms and conditions of the funding, which would have been agreed between the parties at the outset, and be applied on the basis that the PPP Vendor is no worse and no better off, from the perspective of risk and return, than they would have been had the increase in Capital Expenditure not arisen. As stated above, in practice this generally means that an increase is made to the Unitary Charge (over the term of amortisation of the additional dedicated funding) to restore the investment and returns to their values had the additional funding not been required. This calculation can only be made by using the financial model (as to which see Section 5.2.3.2 above). The Nodal Agency should not seek a grace period on paying higher Unitary Charge even if this would satisfy the investment and equity return for the PPP vendor (as this could cause inappropriate distortion to the cash flow profile); or
- particularly if the Nodal Agency cannot afford to pay compensation in the form of a lump sum but wishes to avoid having to use a financial model, it may offer to pay a supplementary Unitary Charge over a period of its choosing as an annuity equivalent of the Capital Expenditure. If this approach is adopted, the discussion can be reduced to a single issue, namely the annuity rate to be applied. In this case, the Nodal Agency need not be concerned with how and at what cost the PPP Vendor has arranged additional dedicated funding, if any<sup>18</sup>.

5.2.3.6. If the event concerned involves a Capital Expenditure reduction (e.g. cancellation of citizen service thereby impacting the capital and operational expenses), this would involve:

- a reduction in Unitary Charge. The size of reduction will depend upon not only savings in Capital Expenditure but also consequent savings in finance and operating costs. The decision on whether or not to cancel any excess committed finance prior to project completion (if this is possible with the financing structure concerned) will be taken with the PPP Vendor.
- there are two alternative approaches to determining the appropriate reduction in Unitary Charge: either to use the financial model (see Section 5.2.3.2 above); or to determine the annuity equivalent reduction. With an annuity equivalent reduction the term of the annuity should be the term of the Contract, unless the parties otherwise agree.

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<sup>17</sup> Particularly to avoid the time and expense of engaging advisers for what may be minor compensation sums (if this approach is used), it is recommended that the parties agree and record in the Contract the incremental impact on Unitary Charge of minor capital expenditure and operational expenditure changes

<sup>18</sup> If the original Unitary Charge over the chosen annuity payment period is profiled, then the supplementary Unitary Charge should similarly be profiled. Annuities being based upon nominal discount rates would be excluded from any indexation provisions of the Unitary Charge.

5.2.3.7. If the compensation arises only because of a change in operating costs then appropriate changes in the Unitary Charge should be by negotiation and may be possible without reference to the financial model, even where the impact on operating costs is periodic or irregular over time. The change in Unitary Charge should be made at the time of the Compensation Event to reflect forecast operating costs changes, as to amount and timing. The use of lump sum compensation payments or annuity equivalents are also inappropriate for changes in operating costs. As many of the above issues have complicated financial consequences, financial advisers should be consulted as to the most appropriate approach for a particular project.

5.2.3.8. In any event, (even if this approach is taken in relation to Nodal Agency changes and Qualifying Changes in Law) it is not appropriate in any circumstances for breach by the Nodal Agency of its obligations to give rise to an obligation on the PPP Vendor to finance any Capital Expenditure consequences.<sup>17</sup>

5.2.3.9. In assessing the consequences of a Compensation Event, other causes of delays to the Service Commencement Date will be relevant as to whether the PPP Vendor will receive relief from its obligations and/or compensation. The PPP Vendor's losses should be calculated as accurately as possible at the time and payment made as appropriate.

The following draft may be considered while finalizing the contract (please refer to the contract template provided along with this document):

#### **5.2.4. Delays in Service Commencement Due to a Compensation Event**

- a) If, on or before the Service Commencement Date<sup>19</sup>, as a direct result of the occurrence of a Compensation Event<sup>20</sup>:
  - i. the PPP Vendor is unable to achieve Service Commencement on or before the Planned Service Commencement Date, or, following the Planned Service Commencement Date, the Long Stop Date;
  - ii. the PPP Vendor is unable to comply with its obligations under this Contract; and/or
  - iii. the PPP Vendor incurs costs or loses revenue<sup>21</sup>,

then the PPP Vendor is entitled to apply for relief from its obligations and/or claim compensation under this Contract.

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<sup>19</sup> This provision may also be applied during work of a solution development nature (such as on an insurance reinstatement following total or partial destruction of an asset) (see Section 5.2.1.4). The concept can also be extended in respect of an Nodal Agency obligation to be performed during the Service Period, particularly if there are non payment obligations on the Nodal Agency (again see Section 5.2.1.4). Subject to the reinstatement point, however, the principal obligations in the Service Period will be payment related and can often be dealt with through provisions dealing with interest on late payment (see Clause 30.6 (Interest on Late Payments))

<sup>20</sup> In the event of a delay to the Planned Service Commencement Date the solution development costs will most likely increase, due to a longer financing period. The PPP Vendor is under a duty to mitigate its other costs associated with any delay (for example, by delaying recruitment, if this can be done

<sup>21</sup> This loss means not only out of pocket costs but also a claim for loss of profits (including a lost completion bonus) caused directly by the Compensation Event.

- b) Subject to sub clause (d) below, to obtain relief and/or claim compensation the PPP Vendor must:
- i. (as soon as practicable, and in any event within [21] days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Contract and/or the PPP Vendor to incur costs or lose revenue, give to the Nodal Agency a notice of its claim for an extension of time for Service Commencement, payment of compensation and/or relief from its obligations under the Contract;
  - ii. within [14] days of receipt by the Nodal Agency of the notice referred to in paragraph (b)(i) above, give full details<sup>22</sup> of the Compensation Event and the extension of time and/or any Estimated Change in Project Costs and/or loss of revenue claimed;<sup>23</sup> and
  - iii. demonstrate to the reasonable satisfaction of the Nodal Agency that:
    - A. the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or any delay in the achievement of the Planned Service Commencement Date and/or breach of the PPP Vendor's obligations under this Contract, or, following the Planned Service Commencement date, delay in achieving Service Commencement before the Long Stop Date; and
    - B. the Estimated Change in Project Costs and/or loss of revenue, time lost, and/or relief from the obligations under the Contract claimed, could not reasonably be expected to be mitigated or recovered by the PPP Vendor acting in accordance with good industry practice.
- c) In the event that the PPP Vendor has complied with its obligations under paragraph (b) above, then:
- i. in the case of a delay, the Planned Service Commencement Date or, following the Planned Service Commencement Date, the Long Stop Date, shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;<sup>24</sup>
  - ii. in the case of an additional cost being incurred or revenue being lost by the PPP Vendor:
    - A. on or before the Service Commencement Date; or
    - B. as a result of Capital Expenditure being incurred by the PPP Vendor at any time the Nodal Agency shall compensate the PPP Vendor for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost (to the extent it

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<sup>22</sup> The Nodal Agency and the PPP Vendor may wish to specify in the Contract precisely what details are required

<sup>23</sup> This figure will not calculate the compensation payable, but it gives an indication of the seriousness of the breach and so what should be taken by way of mitigation

<sup>24</sup> Since the Long Stop Date is linked to the Planned Service Commencement Date, where (prior to the Planned Service Commencement Date), the Planned Service Commencement Date is put back, the Long Stop Date will automatically be put back too. If the PPP Vendor is required to pay the Nodal Agency liquidated damages for failure to achieve Service Commencement by the Planned Service Commencement Date, the Nodal Agency and its advisers should consider how the PPP Vendor's obligation to pay will be relieved if a Compensation Event occurs after the Planned Service but prior to actual Service Commencement.

could not reasonably have been mitigated), within [30] days of receipt of a written demand by the PPP Vendor supported by all relevant information<sup>25</sup>;

- iii. in the case of a payment of compensation for the Estimated Change in Project Costs and/or without double counting, loss of revenue that does not result in Capital Expenditure being incurred by the PPP Vendor referred to in paragraph (B) above but which reflects a change in the costs being incurred by the PPP Vendor after the Service Commencement Date, the Nodal Agency shall compensate the PPP Vendor in accordance with paragraph (f) below by an adjustment to the Unitary Charge; and /or
  - iv. the Nodal Agency shall give the PPP Vendor such relief from its obligations under the Contract, as is reasonable for such a Compensation Event.
- d) In the event that information is provided after the dates referred to in paragraph (b) above, then the PPP Vendor shall not be entitled to any extension of time, compensation, or relief from its obligations under the Contract in respect of the period for which the information is delayed.
- e) If the parties cannot agree the extent of any compensation, delay incurred, relief from the PPP Vendor's obligations under the Contract, or the Nodal Agency disagrees that a Compensation Event has occurred (or as to its consequences), or that the PPP Vendor is entitled to any relief under this Clause, the parties shall resolve the matter in accordance with Clause 25 (Dispute Resolution).
- f) Any payment of compensation referred to in paragraph (c) (iii) above shall be calculated in accordance with [Section 5.2.3 (Calculation of Compensation) above]<sup>26</sup>.

## 5.3. Relief Events

### 5.3.1. Purpose

5.3.1.1. Relief Events are events which prevent performance by the PPP Vendor of its obligations at any time, in respect of which the PPP Vendor bears the financial risk in terms of increased costs and reduced revenue but for which it is given relief from termination for failure to provide the full Service. The events listed in Section 5.3.2 (Scope of Relief Events) may be outside the PPP Vendor's control, but that is not the appropriate measure of whether an event should appear on the list, as many events beyond a person's control at the time they occur could in fact have been prevented by proper precautions (e.g. fire). In fact, the list of events has been arrived at because the risk of the events concerned occurring is better borne by the PPP Vendor as it is in a better position than the Nodal Agency to mitigate and manage the consequences. In some cases this will be with insurance, in others with a combination of insurance and proper planning and in others still, by risk management and planning (i.e. the events can be worked around for the period they exist).

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<sup>25</sup> This payment can be in the form of a monthly payment as expenditure is incurred (or staged payments against milestones) and invoiced if the delay is for a significant period of time. In the event that the Nodal Agency wishes the PPP Vendor to increase its financing to pay for the consequences of a Compensation Event (other than an Nodal Agency breach), then Section 5.2.3 (Calculation of Compensation) should be reflected.

<sup>26</sup> Authorities should not enter into arrangements whereby after the relevant effects of the Compensation Event has been calculated there is a reconciliation if the costs are greater or lesser than those agreed or estimated

5.3.1.2. It is clear in most cases that termination should not follow a Relief Event. This is because any replacement PPP Vendor would be similarly affected and so the Nodal Agency's position would not be improved by termination. Relief Events do not, however, require the same treatment as Force Majeure Events (see Section 5.4 (Force Majeure Events)) as their consequences are not likely to be as severe and will usually only last for a finite period.

5.3.1.3. In the past it has been argued that a right to terminate should exist for the prolonged occurrence of a Relief Event. Other than in certain defence projects<sup>27</sup>, this is not appropriate for two reasons. First there is a risk of there being no proper incentive on the PPP Vendor to manage the risk (depending on any compensation payable on termination) and secondly the occurrence of such an event is likely either to be short-lived and/or lead to an alternative sourcing of the supply concerned by the PPP Vendor (e.g. any shortage of fuel). In any event, the appropriate measure for a termination payment in such circumstances (i.e. PPP Vendor Default – see Section 19.2.5 (Compensation on Termination for PPP Vendor Default)) would be unlikely to be agreed by PPP Vendor.

## 5.3.2. Scope of Relief Events

### **ILLUSTRATIVE DRAFTING**

#### **“Relief Event”**

means<sup>28</sup>:

- a) the unintentional introduction of a virus in the software application / database of the IT project
- b) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event)<sup>29</sup>, earthquakes, riot and civil commotion;
- c) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;
- d) any accidental loss or damage [to the solution development];
- e) any failure or shortage of power, fuel or transport;
- f) any blockade or embargo which does not constitute a Force Majeure Event, and
- g) any:
  - (i) official or unofficial strike;
  - (ii) lockout;
  - (iii) go-slow; or

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<sup>27</sup> In the interests of certainty in particular defence projects, for example where the Service is needed by the MOD for military or operational reasons, a right to terminate may be allowed for both parties in the event of prolonged occurrence of a Relief Event. See MOD Standard Form Contract

<sup>28</sup> This list can be further customized provided that the commercial risk of the occurrence of such events clearly still lies with the PPP Vendor. Nodal Agency should be aware that the issues relating to termination rectification should restrict the list to events (other than those set out above) over which the PPP Vendor has no control. There will also be circumstances in which the un-insurability of particular risks may require relief treatment in order to prevent either party from terminating the Contract (see Section 25.9 (Risks that become Uninsurable)).

<sup>29</sup> Force Majeure Events are defined in Section 5.4



(iv) other dispute, generally affecting the industry or a significant sector of it, unless any of the events listed in paragraphs (a) to (f) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Contractor<sup>30</sup> or any of its sub-contractors.

5.3.2.1. The Contract will have similar provisions during both the solution development/development phase and the Service Period. In addition, as mentioned in Section 5.1.5, the above list of events may be extended to include other similar events if the circumstances warrant. Force majeure delays should be excluded (see Section 5.4 (Force Majeure Events)) as they are treated separately. In addition, in circumstances where the Contract imposes a long-stop date for Service Commencement (see Section 4.5 (Long-Stop Date)) the scope of Relief Events may be extended to cover further events (e.g. unforeseen ground conditions) given that the financial risks associated with such events will remain with the PPP Vendor, though in ordinary circumstances allowance will already have been made for such contingency when setting the Long-Stop Date.

Wilful acts and defaults of the PPP Vendor are excepted from the definition of Relief Events. Failure to rectify the default within the agreed period may lead to termination.

### **5.3.3. Consequences**

5.3.3.1. The financial effects of delays caused by Relief Events are borne by the PPP Vendor, so no compensation should be paid by the Nodal Agency on the occurrence of such delays. If a Relief Event occurs prior to Service Commencement any long-stop termination date will be put back by a period equal to the relevant delay. In most cases the only relief given will be relief from termination (i.e. Relief Events are separate and distinct from Compensation Events and Force Majeure Events).

5.3.3.2. There should be no extension to the Contract owing to a Relief Event. The Nodal Agency should not regard an extension of the Contract as a concession without significant cost. This is because if an extension is given, then although the PPP Vendor does not receive the Unitary Charge during a Relief Event (save to the extent the Service is delivered), the PPP Vendor's revenue period would be kept whole. If this occurs, then there is a reduced incentive on the PPP Vendor to manage the effects of the Relief Event and restore the Service as soon as possible. In addition, the Nodal Agency's exposure to any risks it bears under the Contract is extended indefinitely as the Expiry Date may be continually extended. By extending the Contract, therefore, the Nodal Agency can be taking a large element of the risk of the occurrence of Relief Events (as the economic effects of an extension can be substantial).

5.3.3.3. The parties should consider, on a project specific basis, whether or not the PPP Vendor should be relieved of any liability for liquidated damages, although availability and performance deductions should continue to be made where necessary in respect of the period of delay caused by the Relief Event (see Sections 4 (Protections Against Late Service Commencement) and 7 (Price and Payment Mechanism)). Liquidated damages prior to Service Commencement (to the extent they exist) are designed to compensate the Nodal Agency for specific losses due to late Service delivery so

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<sup>30</sup> See also Section 21.2.4.3 in relation to Relief Events occurring during rectification periods for PPP Vendor Default

that if the PPP Vendor fails to commence provision of the Service due to a Relief Event, the Nodal Agency will still suffer this loss. Depending on the nature of the Project, however, the Nodal Agency may feel that it will obtain better value for money if it allows any liability of the PPP Vendor for liquidated damages to be postponed by the period of the delay.

5.3.3.4. When a Relief Event has occurred and the Nodal Agency has been informed, the parties should consult to discuss relevant issues, such as the likely duration of the Relief Event and the action to be taken to mitigate its effects.

5.3.3.5. The Nodal Agency should not normally expect to exercise any step-in rights it has during a Relief Event (see Sections 26 (Nodal Agency Step-In)). If the PPP Vendor is not using reasonable endeavours to rectify matters and mitigate the consequences, it will not obtain the relief afforded by Relief Events and will be at risk of termination for default (see Clause 5.3(b) (Delays due to a Relief Event)). This should provide a sufficient spur for the PPP Vendor to perform (depending, in part, on the approach taken to relief from other obligations under the Contract).

## **ILLUSTRATIVE DRAFTING**

### **Consequences of a Relief Event**

- a) If and to the extent that a Relief Event:
  - (i) is the direct cause of a delay in Service Commencement; and/ or
  - (ii) adversely affects the ability of the PPP Vendor to perform any of [its obligations under this Contract], then the PPP Vendor is entitled to apply for relief from any rights of the Nodal Agency arising under Clause 21.2 (Termination on PPP Vendor Default) [and its obligations<sup>31</sup> under this Contract].
- b) To obtain relief, the PPP Vendor must<sup>32</sup>:
  - (i) as soon as practicable, and in any event within [14] days after it became aware that the Relief Event has caused or is likely to cause delay and/or adversely affect the ability of the PPP Vendor to perform its other obligations give to the Nodal Agency a notice of its claim for relief from its obligations under the Contract, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;
  - (ii) within [7] days of receipt by the Nodal Agency of the notice referred to in paragraph (b)(i) above, give full details of the relief claimed; and
  - (iii) demonstrate to the reasonable satisfaction of the Nodal Agency that:
    - A. the PPP Vendor and its sub-contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
    - B. the Relief Event directly caused the delay to the Planned Service Commencement Date or, following the Planned Service Commencement Date, delay in achieving

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<sup>31</sup> In most contracts Relief Events should give only relief from the risk of termination for failure to complete or failure to perform (see Section 5.3.3.1). In cases in which liquidated damages are payable to the Nodal Agency there will be an issue of the extent to which relief can be given from claims for damages or liquidated damages (see Sections 5.3.3.3 and 24 (Indemnities, Guarantees and Contractual Claims)). The performance regime should still apply and this should be made clear, to the extent there is potential for relief from liquidated and other damages

<sup>32</sup> The approach here is to set out a quick procedure so that relief can be given or refused on a sensible timescale without additional delays.

- Service Commencement by the Long Stop Date or [the need for relief from other obligations under the Contract],
- C. the time lost and/or relief from the obligations under the Contract claimed could not reasonably be expected to be mitigated or recovered by the PPP Vendor acting in accordance with good industry practice, without incurring material expenditure; and
  - D. the PPP Vendor is using reasonable endeavours to perform its obligations under the Contract.
- c) In the event that the PPP Vendor has complied with its obligations under paragraph (b) above, then:
- (i) the Planned Service Commencement Date or, following the Planned Service Commencement Date, the Long Stop Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or
  - (ii) the Nodal Agency shall not be entitled to exercise its rights to terminate the Contract under Clause 21.2 (Termination on PPP Vendor Default) [and, subject to paragraph (d) below, shall give such other relief as has been requested by the PPP Vendor].<sup>33</sup>
- d) [Nothing in paragraph (c) above shall affect any entitlement to make deductions<sup>34</sup> or any deductions made as a result of [Section 9 (Payment Mechanism Management and monitoring)] during the period in which the Relief Event is subsisting].
- e) in the event that information required by paragraph (b) above is provided after the dates referred to in that paragraph, then the PPP Vendor shall not be entitled to any relief during the period for which the information is delayed.
- f) The PPP Vendor shall notify the Nodal Agency if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- g) If the parties cannot agree the extent of the relief required, or the Nodal Agency disagrees that a Relief Event has occurred or that the PPP Vendor is entitled to any extension of the Planned Service Commencement Date or the Long Stop Date [and/or relief from other obligations under this Contract], the parties shall resolve the matter in accordance with Clause 25 (Dispute Resolution).

## 5.4. Force Majeure Events

### 5.4.1. Scope of Force Majeure

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<sup>33</sup> This wording is only appropriate where additional relief beyond relief from termination (for instance for liquidated damages) are offered.

<sup>34</sup> If the termination levels under the Contract for non-performance are connected to the deductions made under the Contract or the award of performance points, the Contract should ensure that deductions or points arising due to non-performance caused by Relief Events are not taken into account in the termination provisions of the Contract. This is best dealt with in the performance regime

5.4.1.1. The purpose of force majeure provisions is to give the Affected Party relief from liability and, if the event continues for a certain period, to give the parties an opportunity to terminate the Contract. The definition of Force Majeure Events (see Section 5.4.1.2) should only include events which, unlike Relief Events, are likely to have a catastrophic effect on either party's (although usually the PPP Vendor's) ability to fulfil its obligations under the Contract. In practice, such events are highly unlikely to occur. As neither party is likely to be in a better position than the other to manage either the occurrence or the effects of force majeure, and the events may continue for a long period of time, such events are given a different treatment from Relief Events and the financial consequences shared.

5.4.1.2. The following is the required definition of Force Majeure Events:

**“Force Majeure Event”<sup>35</sup>**

means the occurrence after the date of Contract of:

- (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 PPP Vendor or its subcontractors; or (c) pressure waves caused by devices travelling at supersonic speeds, which directly causes either party (the “Affected Party”) to be unable to comply with all or a material part of its obligations under this Contract.
- (c) could not have been prevented by the non-performing Party's reasonable precautions or commercially accepted processes, or could not reasonably be circumvented by the non-performing Party through the use of substitute services, alternate sources, work-around plans, the implementation of appropriate security measures or the disaster recovery procedures required of Vendor.

5.4.1.3. Relief for Force Majeure Events applies only to the extent that the PPP Vendor or the Nodal Agency is unable to comply with all or a material part of its obligations under the Contract and the parties cannot agree within a limited period (say 6 months) how to resume the Project.

5.4.1.4. The Nodal Agency should not be obliged to pay the PPP Vendor any amount simply to service the PPP Vendors' investment break-even obligations in whole or in part, but the parties should recognise that the PPP Vendor may wish to include certain tolerances into its Contract to allow for this. If termination occurs, the Nodal Agency will in any event compensate the PPP Vendor for outstanding investment return gap. If termination does not occur, then the parties will be discussing continuation of the Contract against a back drop of such a compensation payment.

## **5.4.2. Consequences of Force Majeure**

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<sup>35</sup> This definition should not be expanded without a very careful consideration of the specific issues on the Project concerned, as the effect can be to dilute or undermine agreed areas of risk transfer. It is recognised, however, that there are some obvious sector specific changes that may be needed (for example, certain projects might exclude some of paragraph (a) if it is intended to operate during times of war). The definition may also be narrowed to cope with the fact that paragraph (b) may be inapplicable to Disaster management projects which may be designed to deal with a certain degree of natural disasters.

5.4.2.1. On the occurrence of a Force Majeure Event, the parties should consult to attempt to find a way to continue the Project, such as agreeing how it can be reinstated if destroyed (although neither party will be obliged to do this). The solution will depend on the nature of the event and its effects, but may involve altering the service requirement, amending the payment mechanism or even extending the term of the Contract. The required drafting for dealing with the effects of Force Majeure Events is set out in Section 19.3 (Termination on Force Majeure).

### **5.4.3. Relief Events, Force Majeure Events and Insurance**

**5.4.3.1** Contractors may take out advance loss of profit or business interruption insurance against certain of the Relief Events (see Section 22 (Insurance)) to provide a replacement revenue stream on the revenue of the Project for the duration of the event and/or the duration of a rebuild. Such insurances will often be subject to an excess for a number of days and so the occurrence of any such event may still involve the PPP Vendor in substantial cost. Such insurance may not be available in respect of all types of Relief Event and, generally, will only pay out where there is physical damage to the Project.

**5.4.3.2** The issue of allocating the risk of Relief Events and Force Majeure Events should be treated separately from the issue of whether or not insurance is available. The primary factor in allocating risk is who is best placed to manage the risk and its consequences and, in the case of Relief Events, this is the PPP Vendor. Whether it can insure against such risk is a matter for the PPP Vendor as it is essentially the PPP Vendor's decision to manage the risk (to the extent the insurances are not required) in a satisfactory manner. Nodal Agency should therefore not accept the argument that uninsurable events should inevitably fall within the definition of force majeure or an equivalent. This would significantly extend the definition of Force Majeure Events (see Sections 22 (Insurance) and 21.3 (Termination on Force Majeure)). Force Majeure is specifically given a different treatment in this guidance as the occurrence of the events listed in Section 19.3.2.2 are judged to be risks which the PPP Vendor is not necessarily best placed to manage, and so should be shared by the Nodal Agency.

## **6. WARRANTIES**

### **6.1. Introduction**

6.1.1. Bidders base their bids on information provided by the Nodal Agency in the tender documents and the Nodal Agency should make it clear whether or not such information has been verified.

6.1.2. The Contract should determine who should bear the risk if information on which a PPP Vendor relies in its bid subsequently proves to be incorrect. This includes determining who should bear the risk of latent defects appearing in assets transferred from the Nodal Agency to the PPP Vendor.

### **6.2. Due Diligence**

6.2.1. A common approach in the past has been for the Nodal Agency to assume automatically that it should hand over full responsibility to the PPP Vendor for verifying information. This involves the PPP Vendor (and other bidders) in due diligence expense in ascertaining what is being bid against and what contingencies to include. PPP Vendors have accepted this risk in Projects in which the due diligence is small in relation to the rest of the Project, particularly where the Project involves only the provision of a new service.

6.2.2. PPP Vendors may be reluctant, however, to bear this risk where the Project involves a great deal of costly due diligence (relative to the size of the Project) or where the Nodal Agency is the sole source of information which cannot otherwise be verified. This is usually the case where the Nodal Agency is handing over a service (and possibly employees) which has been provided in-house for an extended period and/or a range of assets in uncertain condition.

6.2.3. If the PPP Vendor bears the risk of information being inaccurate, then its bid price may increase to reflect the level of risk assumed. The Nodal Agency should consider whether it can obtain better value for money (taking into account the overall risk allocation) if it is able to bear some of this risk itself or transfer some of this risk to a third party. If the risk is sufficiently large it will affect the ability of some or all bidders to submit bids.

### **6.3. Nodal Agency Warranties**

6.3.1. The Nodal Agency should be very careful in warranting any information it provides. Warranties, to the extent given, should not extend beyond information on which the PPP Vendor must rely for its bid. Accordingly, the Nodal Agency should seek to minimise the extent of any warranties, unless:

- the Nodal Agency is the sole source of such information or such information cannot be verified by the PPP Vendor at reasonable cost;

- the Nodal Agency is confident in the accuracy of such information or is able to confirm its accuracy without significant expense (e.g. through surveys, in-house checks or inspections); and
- the Nodal Agency will obtain better value for money as a result (taking into account the overall risk allocation).

6.3.2. If the criteria listed in Section 6.3.1 are satisfied and the Nodal Agency gives certain warranties, this will help reduce the PPP Vendor's costs. The Contract could then either contain a price variation mechanism to be employed if the information turns out to be inaccurate (rather than giving rise to a right to terminate) or give rise to a damages claim.

6.3.3. Required drafting for warranty exclusion for Contracts in which warranties are not given by the Nodal Agency is as follows:

### **ILLUSTRATIVE DRAFTING**

#### **Exclusion from Warranty**

- a) The PPP Vendor shall be deemed to have:
  - (i) satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Contract; and
  - (ii) gathered all information necessary to perform its obligations under this Contract and other obligations assumed, including information as to the nature, location and condition (including geography, climate, law & order, terrorism, population density, periodicity etc.);
  - (iii) [other relevant information]
- b) The PPP Vendor shall not in any way be relieved from any obligation under this Contract nor shall it be entitled to claim against the Nodal Agency on grounds that any information, whether obtained from the Nodal Agency or otherwise (including information made available by the Nodal Agency) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

### **6.4. Benefit of Surveys and Reports**

6.4.1. There are other means by which the Nodal Agency can help reduce the PPP Vendor's due diligence costs. It may, to the extent possible, disclose the contents of or assign the benefit of any reports or surveys it commissions from third party consultants direct to the PPP Vendor (or the bidders) or share the benefit of such reports or surveys with them having reached an agreement on cost sharing. If the Nodal Agency wants to follow this route, it must ensure that when it appoints the relevant consultant that it agrees to take on the work on the basis of such assignment or sharing of the benefit. In addition, if this approach is to be of value to the PPP Vendor, the relevant report must be up-to-date and address the issues of particular concern to the PPP Vendor.

6.4.2. A practical option for bidders to consider is to share the cost of carrying out expensive aspects of due diligence by jointly appointing a consultant.

## **6.5. Latent Defects Risk**

6.5.1. The issue of who should bear latent defects risk in assets transferred to the PPP Vendor by the Nodal Agency should be addressed on a project specific basis as it depends on the type of assets involved.

6.5.2. In transferring latent defects risk from the Nodal Agency to the PPP Vendor in respect of existing space provided to PPP vendor, particular issues will arise where:

- the relevant space is large and;
- there is any significant doubt as to the structural stability; or
- the Project involves minor additions/site preparation in the existing space



## 7. PRICE AND PAYMENT MECHANISM

### 7.1. Introduction

7.1.1. The payment mechanism lies at the heart of the Contract. It puts into financial effect the allocation of risk and responsibility between the Nodal Agency and the PPP Vendor. It determines the payments which the Nodal Agency makes to the PPP Vendor and establishes the incentives for the PPP Vendor to deliver the Service required in a manner that gives value for money.

7.1.2. Many PPP payment mechanisms involve two key determinants of payment – availability of the Service and performance of Service. This Section is an introduction to the wide range of concepts which can be used in payment mechanisms. These two concepts are discussed in more detail in Sections 8 (Availability Requirements) and 9 (Performance Requirements).

7.1.3. When procuring services through PPP contracts, Nodal Agency should assess not only their current requirements but also their requirements into the future. In many projects, demand or usage will be a key risk over the life of the Contract, regardless of whether or not this risk is passed to the PPP Vendor through the payment mechanism. In drawing up a functional and non-functional requirement for the Services required, Nodal Agency should be confident that there will be long-term demand for the Service.

7.1.4. The design and calibration of the payment mechanism requires input from the Nodal Agency and its advisers, including financial, legal and technical advisers. The payment mechanism should be tailored to the individual project. Where more detailed guidance has been issued by a specific department, such as enrollments under UIDAI, this should be followed.

### 7.2. Features of the Payment Mechanism

7.2.1. The key features of a payment mechanism are:

- no payments should be made until the Service is available;
- there should be a single Unitary Charge for the Service which is not made up of separate independent elements relating to availability or performance;
- the level of payment should be linked to the level of Service. For a payment mechanism based on availability with an overlay of performance deductions, this will mean linking payment to both the availability and the quality of the Service;
- the Unitary Charge should never be paid in advance of the period to which it relates;
- the payment mechanism should adjust for sub-standard performance, and deductions should reflect the severity of failure. Thus no Service should lead to no payment, but proportionality is important and therefore 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 mechanism should not only incentivize the PPP Vendor to remedy service failures but should also take into account the importance of that failing Service to the Nodal Agency;

- a balance should be struck amongst the variables in the payment mechanism, such as the initial “weighting” of deductions for failures, response / rectification periods, and the “ratcheting up” of deductions for repeated failures over time;
- the performance and payment regime should not be made up of sub-elements which relate to delivery of inputs (e.g. completion of stages of solution development, cost of Hardware or man-month costs) but should be based on outputs (e.g. the availability of services or standard of Services); and
- the payment mechanism should never contain a fixed element which the PPP Vendor always receives irrespective of performance (e.g. which covers the PPP Vendor’s investments break-even period obligations).

7.2.2. It is not generally appropriate to “sculpt” the Unitary Charge (i.e. through an uneven or irregular payment profile) other than for relevant general price changes or to ensure consistency with any ramp-up in services in an initial period or project phasing. The reason for this is that sculpting the Unitary Charge is contrary to the principle of paying for Services rather than inputs; moreover it is orientated towards affordability rather than value for money concerns and can undermine the effectiveness of the risk transfer to the private sector. “Ramp-up” can happen, for example, where a project involves a mixture of new solution development and refurbishment of existing facilities, with the latter becoming available before completion of solution development.

7.2.3. The Nodal Agency should pay for Services on time and payment should not be unreasonably withheld. The Nodal Agency should agree payment of interest if payment is late. The Nodal Agency should also take steps to ensure that the PPP Vendor complies with best practice in this area. In accordance with Government policy the PPP Vendor should pay its Sub-Contractors ordinarily within 30 days, unless a different period is specified in the relevant Sub-Contract.

7.2.4. The choice of payment mechanism should be a positive decision by Nodal Agency, informed by advice from their advisers. The Nodal Agency should also involve relevant stakeholders (e.g. endusers) as appropriate.

7.2.5. The payment mechanism must be properly applied in practice. There may be occasions where Nodal Agency be wary of imposing deductions for fear of threatening their relationship with the PPP Vendor, or because they are concerned that deductions will damage the ability of Sub-Contractors to rectify problems. Nodal Agency should regard the payment mechanism as an important part of their Contract and should enforce it.

7.2.6. The Nodal Agency’s requirements and payment mechanism are designed to deliver the required Services identified in the business case and accordingly out-performance (i.e. performance to a higher standard) by the PPP Vendor should not ordinarily warrant further payment. However, for some projects (for example, where the performance by the PPP Vendor can affect the financial

position of the Nodal Agency, such as tax collection (VAT, Municipal etc.). Nodal Agency may consider that there is value for money in including scope for additional payments.

In such cases Nodal Agency may wish to cap payments for out-performance (e.g. at the level of previous deductions or by awarding 'bonus points' which can only serve to offset 'negative' points for poor performance). Such payments will, however, only offer value for money if they are valued by bidders in their pricing for the Project.

### 7.3. Structuring the Payment Mechanism

7.3.1. Nodal Agency should consider the following principles in structuring their regime:

- where the mechanism measures both availability and Service performance, the distinction between points to be included as part of the definition of availability and those to be part of a performance measurement system is important.
- the mechanism might involve (a) direct cash deductions for failure, whether in terms of unavailability, poor performance, or other terms appropriate to the mechanism for a specific project, or (b) a two-stage system whereby failure leads firstly to points which in turn lead to cash implications (e.g. once a certain number of points are reached). If the definition of availability omits key requirements – these being instead covered by the performance measurement system – the latter could include both immediate payment deductions and a system of performance points;
- the payment for a given period, e.g. a month, might be structured as (a) starting from zero, with payment increased in response to availability and performance, or (b) increasing for availability but subject to deductions for poor performance, or (c) a base case figure for the Unitary Charge for that period which is subject to deductions for both unavailability and poor performance;
- a number of performance regimes amongst early projects have been over-elaborate and, as a result, ineffective, and some have not been designed with enough consideration of the practicability of day-to-day procedures. As a rule, simple is best. The payment mechanism should seek to “measure less but measure well”;
- unnecessary complexity can also arise where the movement from specification of inputs to specification of outputs has not been endorsed by the Nodal Agency. The mechanism should concentrate on measuring “outputs” not measuring “inputs”; and
- Nodal Agencies should first build their model from the bottom up, ensuring that for any particular area, or service failure, there is an appropriate potential deduction. The model should then be reviewed from the top down, considering the cumulative effect of all types of deduction. If it is “over-weighted” in terms of the scale of likely deductions, it will encourage excessive risk pricing and cash reserving by bidders. If it is “under-weighted”, bidders will not be sufficiently incentivized to rectify Service failures.

7.3.2. The key objectives are value for money and effective incentivisation; the Contract should contain sufficient incentives for the PPP Vendor to rectify any default.

7.3.3. A variety of payment mechanism structures have been used across various sectors and project types. Models A to C below illustrate alternative features of a payment mechanism. They are not intended to be prescriptive:

- Model A – the Unitary Charge is built up from the number of available places or units, so only places or units that are available are paid for. The definition of available places or units incorporates the provision of ongoing services that are core to the requirements of the Nodal Agency to carry out its functions. On top of this, a performance regime is imposed to address levels of performance that do not impact on the availability of places and/or Services that are outside the definition of the core Service. Sub-standard performance leads initially to “performance points” accruing and, only indirectly, to deductions from the Unitary Charge once a certain level of points has accrued. A ratchet increases the deduction for repeated performance failings.
- Model B – the Unitary Charge (before any deductions) is based on a full provision of the overall requirement and the payment mechanism determines deductions both for unavailability and sub-standard performance, i.e. both are represented in the calculations as deductions from the 100% level. Availability is defined in terms of being usable and accessible and different deductions are made depending on which area is unavailable. There is a system of weightings whereby each section of accommodation is divided into units and given a weighting depending on its importance; for each failure to provide an available unit there is initially a payment deduction equal to the Unitary Charge multiplied by the relevant weighting. The deduction can be based on an escalating tariff so that subsequent days of unavailability of the same space may lead to progressively higher deductions.
- Model C – the Unitary Charge is based both on availability and usage, for example in the context of a online returns filing with payment per returned filed. There is a minimum take-or-pay level (i.e. if usage by the Nodal Agency is below that level it must nonetheless pay for usage at that level) in order to assist with the financeability of the Project and to strike a balance between flexibility and the cost implications of greater risk transfer. There is still a requirement for availability to be defined, as the Nodal Agency will not pay above its actual usage if the units of Service are not available. There can in addition be scope for payment deductions for poor performance of Services.

## 7.4. Usage-Based Systems

7.4.1. An alternative to availability-based payment is for the level of the Unitary Charge to be determined by usage (also referred to as ‘volume’ or ‘demand’), or to combine these approaches within a single payment mechanism. The Income Tax Project relied on usage payments. Normally, where usage is relevant the Unitary Charge is only partly dependent on usage. Payments linked to usage can bring advantages when the PPP Vendor’s performance can influence the level of usage, since customers can “vote with their feet” on the availability and quality of the Service; in this way payment will be linked to performance through this automatic feedback.

7.4.2. It is important to differentiate between regimes where the Unitary Charge itself (payable by the Nodal Agency) is adjustable by reference to usage, and regimes where the Unitary Charge is

based on availability and performance principles, but the PPP Vendor separately takes the risk on the amount of “third party revenue” which can be generated from the facilities (and in respect of which the Nodal Agency may seek some gain share). This relevance of this system is low in the e-Governance areas. However the possibilities of the same cannot be discounted (for e.g. advertising at the back of the Smart card issued by a Government department)

**7.4.3** Third party revenue should be assessed as part of the value for money evaluation of the proposed structure as a whole; if it provides a benefit to the PPP Vendor this should in principle reduce the required return from other activities. The Unitary Charge may be reduced as a result of PPP Vendor access to third party revenue, with a revenue-sharing arrangement for revenue above the amount assumed in the Unitary Charge reduction. The value for money benefit of allowing third party revenue to fall to the PPP Vendor will depend on the PPP Vendor’s ability to forecast and influence it (and Nodal Agencies should be wary of over-optimistic assumptions on these points). In 7.4.3. many projects the scope for recognizing significant third party revenue in the financial model, and thus reducing the Unitary Charge, is limited as the demand is difficult to predict; in these cases upside sharing is particularly important.

7.4.4. In some projects (for example online returns filing for tax) a measure of usage risk may be transferred such that profitability is only affected at the margins. Where there is a mixture of availability and volume-based principles, some “take-or-pay” minimum volume amounts may be used. Nodal Agency must ensure that these structures do not mutate into structures which simply ring-fence the PPP Vendor’s investment as it is contrary to basic PPP risk transfer principles. Where take-or-pay arrangements exist, the mechanics of availability are likely still to be required, since the Nodal Agency should not pay for the minimum level of usage where the facilities are unavailable. Take-or-pay principles should not protect payment streams where Services are unavailable because of Relief Events, Force Majeure events or PPP Vendor failures.

7.4.5. In some circumstances performance regimes which are dependent on levels of usage may not in fact transfer true usage risk to the PPP Vendor. This is the case where the increase in payments corresponding with an additional unit being used is equal to the marginal cost to the PPP Vendor of providing the unit. For example, where an extra transaction of service will cost a PPP Vendor an extra INR 10 to process, increasing the payment by INR 10 per tonne will not affect the PPP Vendor’s profitability.

7.4.6. The factors which determine whether it is value for money to transfer usage risk tend to be project-specific. Genuine transfer of all usage risk to the PPP Vendor, making its profit (i.e. revenue less costs) dependent on usage, is rarely appropriate and should only be considered in cases where the PPP Vendor can forecast and influence future usage. Usage risk transfer may be appropriate where the PPP Vendor is satisfied with predictions of the level of demand for the Service, or where reductions in Nodal Agency usage can be offset by third party revenue. A part of usage risk can be transferred in some cases, but many Projects cannot transfer any usage risk, even where services are being provided. Transferring usage risk in inappropriate cases is likely to result in poor value for money. The PPP Vendors (& their Risk team) tend to have strong concerns over the transfer of usage risk, and “take-or-pay” where investment protection ratios may be required.

***Evaluation and other implications of transferring usage Risk***

7.4.7. Where the Unitary Charge is sensitive to usage or there is third party revenue, bid evaluation (i.e. in terms of the potential costs of alternative proposals) is made more complex. Moreover it may be difficult to predict the likely level of termination payments which would result should the Project in due course be terminated. From the perspective of flexibility for the Nodal Agency, this is particularly relevant to Nodal Agency voluntary termination (where PPP Vendors look for some compensation for their lost opportunity to make returns from future revenues). Areas of the Contract which may require special attention where volume-based payments are significant are Compensation Events, Qualifying Change in Law, Nodal Agency Step-in, Nodal Agency change in Service, Force Majeure, and the various different termination scenarios. The basis for compensation may vary according to the type of event leading up to loss and whether the compensation has any sensitivity to future revenue expectations<sup>36</sup>. For example, following Qualifying Change of Law and in other no-fault scenarios the appropriate measure should be the lower of base case (i.e. the original forecasts) and actual usage levels, and Nodal Agency may also wish to seek to apply this principle to compensation on termination for PPP Vendor Default and/or Nodal Agency voluntary termination.

7.4.8. The volume of usage (demand) risk is, where the risk is material, the key determinant of the accounting treatment of the underlying asset. Nodal Agency should consider, as part of their Business Case prior to commencing procurement, the likely materiality of demand risk, and the allocation of it. Where they have a high level of certainty in the need for the asset, and the volume of usage in relation to it (for example, the number of returns to be filed) is predictable, Nodal Agency may often demonstrate that the risk in relation to demand is immaterial. As transfer of usage risk is rarely appropriate, as described above, Nodal Agencies should generally retain this risk but, it will commonly be immaterial for the reasons described. Where this is not the case, and the Nodal Agency is planning to retain material demand risk, Nodal Agencies should consult their Private Finance Unit prior to commencing procurement to ensure that the accounting implications are appreciated.

## **7.5. Calibration**

7.5.1. The economic characteristics and detailed design of the payment mechanism are central to the achievement of value for money. There are a large number of points of detail involved in assigning numbers to the various parts of the payment mechanism. This process is referred to as “calibration”. The remainder of this section assumes an availability-based payment mechanism but the principles have wider application.

7.5.2. Nodal Agency and their advisers should consider how to approach this issue during the procurement process, and how much input to seek from PPP Vendors and at what point. An over-rigid approach during negotiations will reduce the scope for innovation by the bidders and so reduce

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<sup>36</sup> See Section 21 (Early Termination). In the case of third party revenue and the termination of the Project, the facility may continue to be operated by the Nodal Agency and this may mean that the Nodal Agency's exposure to higher-than-expected costs of termination is offset by higher-than-expected future revenue.

the potential for best value for money to be achieved.<sup>37</sup> However, it is normally appropriate to include a significant level of detail relatively early in the process so that the maximum benefit is taken for development while under competitive tension. Under the Competitive Dialogue procedure there is no scope for making significant alterations to the payment mechanism after completion of the dialogue (though fine tuning is still permitted). Where final calibration is still to be completed at the time of appointment of the winning bidder, the winning bidder's letter should include an obligation to recalibrate with the final details. It is essential that the process is not undermined by last-minute re-calibration following last minute due diligence.

7.5.3. The Nodal Agency should understand how the various responsibilities relating to the drafting and calibration of the output specification and payment mechanism are allocated amongst its advisers, and ensure that all issues have a clear allocation of responsibility.

7.5.4. There are many variables in a payment mechanism, including the following:

- the definitions of availability and performance standards (i.e. how demanding the requirements are);
- response and rectification periods (i.e. how quickly problems have to be addressed);
- the scope (in practical terms and under the contract) for the PPP Vendor to provide (temporary) alternative services/locations instead of having deductions applied, giving them greater flexibility to avoid deductions, or for allowing 'unavailable' facilities to continue to be used;
- levels/weightings of deductions for unavailability or poor performance;
- ratchet mechanisms for repeated or widespread failures; and
- caps on performance deductions<sup>38</sup>

7.5.5. The degree of risk transfer depends on all of these parts; heavy deductions for poor service might not imply a harsh mechanism if the Service requirements are not overly demanding, there are long periods in which the PPP Vendor can respond, the PPP Vendor can provide alternative solution / rectification with lower deductions applying. On the other hand a scheme with small cash deductions might provide strong incentives to perform and significant risk transfer if the definitions give tightly-defined high standards and the time requirements are short or ratchet up.

### ***Calibration methodology***

7.5.6. Nodal Agency should consider the following calibration issues:

- the level of deductions should be considered in the light of the importance of the Services to the Nodal Agency (i.e. large deductions for the unavailability of important parts of the Service). The incentives on the PPP Vendor are also important (i.e. large deductions for types of failure which could be expensive to remedy and therefore require a strong incentive);

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<sup>37</sup> In establishing a suitable system, the Nodal Agency should be aware of the effects a particular system has on the solution offered by a bidder. For example, a bid solution that is capital intensive up-front with reduced life-cycle costs may have one optimum approach and one with lower initial costs but higher life cycle costs another, because the financial structure of the PPP Vendor will be different. It is crucial for the Nodal Agency to understand what system will best achieve the result it seeks.

<sup>38</sup> This is not a complete list of every potential feature of a payment mechanism and other features may be appropriate to particular projects

- the Nodal Agency should determine what level of performance is required, and this should then serve as the benchmark at which 100% or close to 100% payment is achieved; and
- there are a range of approaches available to an Nodal Agency to improve its understanding of how a proposed system might work. These approaches range from consideration of a limited number of specific potential scenarios to the solution development of complex models. A calibration model can be used to suggest what levels of deduction might result from a given specification and payment mechanism, give an insight into the economic incentives they give rise to, and also help an Nodal Agency understand the level of contingency which a PPP Vendor might incorporate in its price.

7.5.7. **7.5.7** Where the Nodal Agency is seeking to simulate how the mechanism is likely to work, it might seek information from other successful projects, and also consider the use of historical data from existing services run by itself.

### ***Standards***

7.5.8. The payment mechanism should give clear economic incentives to the PPP Vendor to perform to the required standards. Availability and performance standards should be defined to meet the requirements of the Nodal Agency, but should also be set at a realistic and achievable level to avoid unnecessary risk pricing by the PPP Vendor and Sub-Contractors.

7.5.9. Given that a key element of the expression of the Nodal Agency's requirements in a PPP Contract is the output SLAs, significant parts of the output SLAs frequently feature in, or are linked to, the payment mechanism. The Contract will be easier to manage, and to change in the event of Contract variations, if these relationships are clearly laid out, and the role of any output specification requirements which do not feature in the payment mechanism should be challenged (or they should be brought into the payment mechanism). The use of specification requirements in the payment mechanism must be clear. Units should be provided where appropriate – for example, a requirement for maintenance to be performed, together with a deduction of INR [ ] for a security breach, requires a clear linkage in terms of how many poorly maintained security, over what period, attract a single deduction of INR [ ].

### ***Time periods for repair/rectification***

7.5.10. Time periods for repair and/or rectification are not applicable to all types of failure (for example, they do not apply to staff being recruited without required qualifications). Where a period is applicable, such as for the bug resolution, the Nodal Agency should ensure that repair periods are challenging but realistic, without entailing costs to a level which does not represent value for money. An Nodal Agency might consider what resources may be available on-site and thus at short notice, and what types of problems might most cost-effectively require outside resources and thus perhaps warrant longer periods for repair. For significant problems, "rectification plans", to be agreed on a case by case basis and to include agreed rectification periods, may be used.



7.5.11. For some failures a concept of “temporary repair” can be appropriate, and some payment mechanisms make a distinction between a response period, being the time within which a temporary solution should be found (would depend on the service), and a rectification period, being the time within which the problem should be properly remedied. Immediately at the start of operations, an Nodal Agency may allow slightly longer periods for stabilization the regime.

#### ***“Unavailable but used”***

7.5.12. The use of a definition of “unavailable but used” (see Section 8.8), dealing with the situation where the Nodal Agency wishes to continue using a facility which is technically “unavailable”, can be appropriate. In some projects it may be common for elements of the scope of work to be unavailable but used so this can be a significant part of the regime.

#### ***Weightings***

7.5.13. In many payment mechanisms the maximum notional deduction for unavailability exceeds 100% of the Unitary Charge. The maximum financial deduction is however capped at 100% of the Nodal Agency’s payment (e.g. the total Unitary Charge for a given month), so the PPP Vendor may receive zero payment before the facility becomes entirely unavailable (or when it is entirely unavailable but only for part of the period e.g. month), but should not be obliged to make payments to the Nodal Agency when notional deductions are higher than the Unitary Charge payment<sup>39</sup>. High weightings clearly strengthen the incentive on the PPP Vendor to perform but also increase the risk on the PPP Vendor and may encourage higher pricing.

If the weighting is too heavy, negative incentives may arise. For example, if the PPP Vendor is receiving zero payment for only one-quarter of service provision there is little incentive to increase to one-half service provision if payment will remain zero at that level.

7.5.14. There is little point in using weightings so low that it is cheaper overall to the PPP Vendor to under-perform. Deductions in respect of poor performance of services need not significantly exceed the estimated cost of those services, so long as the many elements of performance are appropriately weighted. Nodal Agencies should consider the overall weighting in the light of the detail of the output specification, the other variables of the mechanism and the facility/facilities in question.

7.5.15. A benchmark for standard accommodation projects is that the overall weighting of unavailability deductions should be in the range 150-200% (assuming a standard approach to the overall solution development of the payment mechanism). For projects such as Hardware intensive projects it is more difficult to generalise. Factors suggesting a lower level, even below 150%, include a project having a range of separate project outputs which are not interdependent<sup>40</sup>. Factors

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<sup>39</sup> Some payment mechanisms have allowed Authorities to “carry forward” any deductions greater than 100% to apply in the following period. This is unlikely to be value for money and is not recommended. The scope for retrospective deductions (where the Nodal Agency later discovers a performance failure has existed undetected for a period) should be subject to a cap, as the PPP Vendor may not have been aware of the failure and therefore not have taken steps to remedy it.

<sup>40</sup> Thus a lack of inter-connectedness, from the perspective of the overall solution, suggests a lower impact on the Nodal Agency of a single element being unavailable. Note that this is not the only driver of weighting – the deductions must still suffice to incentivize the PPP Vendor. At the same time, if the

suggesting a higher level within that range, or above 200%, are complexity and interdependence of outputs, for example a large IT outsourcing project where a number of applications have interdependencies, each requires the other in order for the project to deliver the desired outcome.

7.5.16. The payment mechanism should not however be designed simply on the basis of broad economic assumptions such as these. These weighting recommendations are designed as a sense check for the regime. Performance regimes should be constructed initially from the bottom-up with weightings for the different output components designed to incentivize good performance. The aggregate figure should then be given a top-down sense check to ensure that the overall economics of the Project offer value for money.

7.5.17. Potential Contractors and Sub-Contractors will model the behaviour of the payment mechanism in order to examine the risks they will face, and base their pricing on the results (noting that for Sub-Contractors the deductions for unavailability may be regarded as of less day-to-day significance than deductions relating to the performance measurement system). Similarly, the riskiness of the Contract will affect the level of interest of the bidders. An onerous output specification and payment mechanism may lead to higher pricing or put off credible bidders. Some early regimes were over-rigorous and overcomplicated when they were constructed, and were not then fully enforced. An over-rigorous Contract combined with weak enforcement offers poor value for money. Nodal Agency should strive to produce fair regimes and diligently enforce them. Section 8.4 (Payment for Availability and Weighting of Critical Areas) provides further comment on this area of the calibration.

### ***Ratchet mechanisms***

7.5.18. Many payment mechanisms include “ratchets” whereby a long delay in fixing a problem, or its repeated recurrence, or its widespread occurrence in a number of areas across a project, leads to higher deductions. Ratchets help ensure that systematic problems are properly dealt with. See further Section 9.5 (Consequences of Poor Performance). The use of ratchets should be considered carefully: a low initial deduction together with a ratchet may simply encourage a reactive rather than pro-active approach to performance management, but on the other hand, without ratchets the incentives may not be effective (for example it may turn out that without a ratchet the deduction is not heavy enough to give an economic incentive to good performance). Ratchets are likely to be useful in most payment mechanisms<sup>41</sup>.

### ***Performance deduction caps***

7.5.19. In some sectors it is common for there to be a cap on the amount of deductions which can be made in respect of poor performance. The Sub-Contractor’s maximum exposure in any year may be limited to receiving zero payment from the PPP Vendor (i.e. they may lose all their income but

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elements are independent from the perspective of the service provider, there can be a “portfolio effect” meaning that a higher weighting might be tolerable by the PPP Vendor.

<sup>41</sup> The ratchet should be triggered by repeated performance failures even if they had different causes.

they do not reimburse the PPP Vendor for deductions which exceed their fee but are due to their failings as a Sub-Contractor). The risk of additional availability deductions then stays with the PPP Vendor. It is important for the Nodal Agency always to preserve the principle of no-service no-fee and in an availability-based payment mechanism there should be no payment if the facility is unavailable. The capping of deductions for poor performance of Services may be acceptable if the Nodal Agency considers that there is little further benefit from further performance deductions which cannot be either passed down or absorbed by the PPP Vendor on a value for money basis.

However, any cap should not be used simply to insulate bidders from risk. In any event, if a Sub-contractor is losing a significant portion of its fee for poor performance it is likely to be in default of its own Sub-Contract and the PPP Vendor has a clear motive to replace it before it puts the availability of the facilities and hence the full Unitary Charge at risk. Nodal Agency should ensure that the PPP Vendor is incentivized to manage Sub-Contractors effectively, and should not concede a cap on deductions without advice from their advisers. Any performance deduction cap must always be justified on value for money grounds.

## **7.6. Financial Risks of the PPP Vendor**

7.6.1. A payment mechanism should not ring-fence or guarantee the PPP Vendor's finance charges.

7.6.2. The PPP Vendors will test deductions against their financial model runs in order to assess their risk in the investment.

## **7.7. Flexibility**

7.7.1. Nodal Agencies should consider how far their payment mechanisms are able to accommodate change in requirements, whether in terms of additional capital works or changes to Services. This is partly a matter of payment mechanism design, but Nodal Agency should also consider including in the payment mechanism a process for annual review of weightings, rectification times, etc. Such a review may only provide for changes to be made where both parties agree, but the Contract can nevertheless set out a framework for discussions. Such a review might be appropriate at the end of any stabilizations period.

7.7.2. For those payment mechanisms where the payment varies with usage or volume (see Section 7.4 (Usage-based Systems)), the payment mechanism allows (subject to any minimum take-or-pay level or the limitations of design capacity) for the payment to be adjusted in response to changes in throughput. This typically means that as changes occur, the payment mechanism needs to be re-calibrated. The weighting of the original facilities as a proportion of the total post-variation Unitary Charge will need to be amended in order to preserve the incentive effect of the original calibration. Particularly where the changes are small to medium-value, the transaction costs of re-calibration can be quite high relative to the cost of the changes.

7.7.3. A relatively straightforward way of dealing with this issue is to design the payment mechanism in such a manner that it can automatically be extended to cover changes up to a limit, with only a periodic review (say once a year, perhaps part of the general annual review suggested above) required of the overall calibration.

7.7.4. Further flexibility can be gained if Nodal Agency agree with the PPP Vendor that below certain volume and value thresholds, change orders will be regarded as normal churn in the Project and will not have to go through detailed due diligence. Instead the PPP Vendor can simply certify, in quarterly/annual reports to all stakeholders, what changes have been put through the Contract with automatic extensions of the payment mechanism. Annual reviews can be carried out as above to check that the calibration is still in balance. This will save technical and legal due diligence fees as well as management time.

## **7.8. Other Remedies for Poor Performance**

7.8.1. The payment mechanism provides a mechanism through which the Nodal Agency can calibrate the financial consequences of Service failures. The Nodal Agency should not seek compensation in damages in addition to levying its deductions for Service failures. Please note that this does not limit the Nodal Agency from pursuing other rights expressly given to it in the Contract (such as, for instance, termination rights, step-in rights or specific indemnity rights, or rights to require the replacement of a sub-Contractor if certain levels of poor performance are reached) and does not limit any claim for specific performance or injunctive relief.

### **ILLUSTRATIVE DRAFTING**

#### **Payment Mechanism: No double remedy**

(a) Subject to:

- (i) any other express right of the Nodal Agency pursuant to this Contract, and
- (ii) the Nodal Agency's right to claim, on or after termination of this Contract, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Contract by the PPP Vendor, save to the extent that the same has already been recovered by the Nodal Agency pursuant to this Contract or has been taken into account to calculate any compensation payable by the Nodal Agency pursuant to Clauses 21.3.2 (Compensation on Termination for Force Majeure), 21.2 (Compensation on Termination for PPP Vendor Default), 21.1.3 (Compensation on Termination for Nodal Agency Default), 21.4.4 (Compensation Termination for Corrupt Gifts and Fraud), 21.5.2 (Compensation on Voluntary Termination), the sole remedy of the Nodal Agency in respect of a failure to provide the Services in accordance with this Contract shall be the operation of Schedule [ ] (Payment Mechanism).

(b) Nothing in this Clause 7.8 (Payment Mechanism: No Double Remedy) shall prevent or restrict the right of the Nodal Agency to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.

7.8.2. PPP Vendor Default is discussed in Section 19.2 (Termination on PPP Vendor Default). The Nodal Agency must ensure that adequate termination rights exist, for example, in terms of the levels of unavailability or Service failure which constitute a termination event, or in terms of alternative definitions where the payment mechanism is not availability-based.

7.8.3. The calibration of payment mechanisms is discussed in Section 7.5. The thresholds for PPP Vendor Default and potential precursors thereto should be determined as part of the overall calibration process. Such precursors typically include:

- warning notices to the PPP Vendor;
- increased monitoring of performance, normally at the PPP Vendor's expense;
- a requirement for the PPP Vendor to produce a remedial plan;
- replacement of the sub-PPP Vendor; and
- PPP Vendor Default (noting that termination remains at the Nodal Agency's discretion).

7.8.4. There is no need to use all of these steps or to be limited to them. Nodal Agency should choose a route to potential termination which will provide a meaningful framework for discussions about how to address the poor performance. These steps can be linked to a given level of payment deduction, for example, a deduction greater than x% of the Unitary Charge in some/each of y successive months or a series of short and longer-term thresholds, or to a system of "termination points" which might be linked to the other elements of the payment mechanism or might run in parallel.<sup>42</sup>

7.8.5. Nodal Agency should primarily consider what constitutes an unacceptable level of performance to themselves when setting the PPP Vendor Default threshold and related thresholds. As a secondary matter, they may also consider the impact which the threshold level of deductions has on the financial position of the PPP Vendor (and even where thresholds are not expressed in simple financial terms it should be possible to consider the relationship between the levels of performance leading to PPP Vendor Default and the level of deductions likely to accompany that performance)<sup>43</sup>.

7.8.6. A different approach might be required for non-availability-based payment mechanisms; a low level of usage and hence of payment does not necessarily mean that the PPP Vendor is failing, although it may do.

7.8.7. Sub-Contracts will typically have termination arrangements which are linked to the wider arrangements for PPP Vendor Default (see Sections 9.3 (Replacement of Sub-Contractors) and 9.4

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<sup>42</sup> So, for example, deductions in a single month of greater than 25% or deductions in each of three successive months of greater than 20% each could earn the PPP Vendor a 'termination point' the accumulation of which leads to PPP Vendor Default. In terms of actual drafting, projects can involve a range of different triggers, and some projects have different thresholds for deductions relating to unavailability and deductions relating to poor performance of services.

<sup>43</sup> If a PPP Vendor is suffering deductions which are sufficient to entirely erode profit margins and allowances for contingency throughout the supply chain, including the risk premium element of the investment return, its position may prove unsustainable. The level at which all contingency and profit margin is eroded might be in the region of a 15-20% deduction from the Unitary Charge over a period of several months, however this can vary in accordance with the overall structure of the payment mechanism.

(Monitoring of Sub-Contractors). When calibrating its remedies, the Nodal Agency should also bear in mind that the PPP Vendor will similarly be calibrating their own remedies. The Nodal Agency should understand how these relate to the Nodal Agency's position and ensure that the overall structure appropriately incentivizes the bidders to exercise their remedies in advance of the Nodal Agency exercising its remedies.

## **7.9. Qualitative Factors and User Satisfaction**

7.9.1. The specification even of relatively straightforward requirements such as those relating to capacity utilization can be difficult and subject to dispute after Contract signature; the appropriate level of contractual detail reflects considerations of practicability and clarity, and Nodal Agency should consider these issues carefully for all elements of the payment mechanism. Objective and well-defined performance criteria should always be used as far as practicable, but other methods of measuring performance may be considered and may offer complementary requirements within the overall mechanism.

7.9.2. In some projects there may be qualitative aspects of performance which it may be difficult to measure objectively but which are nevertheless important to the users of the Service, such as the helpfulness of Citizen Contact Centre. More generally, the quality of service in a complex setting such as front window cannot easily be wholly reduced to a practical set of availability and performance criteria.

7.9.3. The most straightforward mechanism to measure this is a regular customer satisfaction survey with deductions for a low or falling score. It is commonly argued that it is difficult to base financial compensation on customer satisfaction surveys because they are based on individuals' perceptions rather than hard measurable facts and so the results may be variable; moreover they may be vulnerable to manipulation. However, surveys are a useful way of monitoring performance, and have been used successfully in a number of outsourcing projects albeit that the maximum deduction is generally a relatively small element of the overall Unitary Charge. Based on the surveys, the requirements for the PPP Vendor to carry out a performance audit and prepare a remedial plan in the event of low user satisfaction. The main advantage of such a system is that the feedback obtained can be very useful as an incentive to good Service provision.

7.9.4. In this context, the focus should be to secure continuous improvement in the way they exercise their statutory functions. This would commonly involve the making of periodic user satisfaction surveys to compare the quality of service under the Contract against the quality of comparable services elsewhere.

7.9.5. A variety of mechanisms have been used successfully in the past to reflect the importance of qualitative factors in the payment mechanism. All projects should as a minimum include the following points:

- provision for regular user satisfaction surveys (at least annual albeit that they may be conducted on a rolling basis), to be paid for by the PPP Vendor. These would usually be carried out by the PPP Vendor, or an independent third party (under contract to the PPP

Vendor)<sup>44</sup>. In the former case, the Nodal Agency should have the option to commission its own survey from an independent third party in the event of its dissatisfaction with the PPP Vendor's own survey, such option to be exercised at the expense of the Nodal Agency and such survey to take precedence over the PPP Vendor's survey unless the Nodal Agency agrees otherwise. The intention is that even if the results of the survey have no direct financial impact, this information is useful management information for both the Nodal Agency and PPP Vendor. Failure to carry out the survey should itself trigger a penalty under the payment mechanism

- a requirement for production of a remediation plan, by the PPP Vendor at their expense, in the event of low satisfaction. This plan should set out the PPP Vendor's view of why satisfaction is measured as low in the survey, their planned actions to improve it insofar as it (in their view) relates to their performance, and their proposals for assessing the effectiveness of these actions (for example, inclusion of related questions in the next survey). "Low" satisfaction should be defined in the Contract where possible, but it is acceptable to set it for an initial period and provide for review after, say, five years of operations. The production of a plan clearly requires some management time and therefore it is a form of indirect financial cost for the PPP Vendor, but it is intended primarily as a device to ensure that issues with user satisfaction are taken seriously by the PPP Vendor; and
- the findings of user satisfaction surveys should be regarded as legitimate evidence, insofar as they relate to the relevant service provider, in the evaluation of incumbent Service providers for market testing of soft facilities management services.

7.9.6. As regards sanctions for poor user satisfaction, Nodal Agency should consider the following potential approaches:

- immediate direct financial deduction (for example, a set amount per percentage point short of a pre-agreed base-line, which might remain constant or be adjusted to reflect obligations for continuous improvement). The design of such deductions should be subject to value for money evaluation and are likely to be fairly modest;
- the award of performance points, to be treated in a similar way to points for other types of performance failure where such a system is used;
- the remediation plan discussed above could be connected to deductions should its adoption have no effect on user satisfaction;
- low satisfaction could require the PPP Vendor to carry out a performance audit (at the PPP Vendor's expense) in relation to the mechanism more widely. In effect, this represents using poor satisfaction ratings as a tool to ensure rigorous application of the "standard" elements of the payment mechanism, and it is an indirect approach to giving financial effect to poor user satisfaction; and/or
- linking deductions to complaints or to calls to a help-desk.

7.9.7. Nodal Agency should consider whether to deduct from the Unitary Charge for poor satisfaction or reward for out-performance, or both. Payments linked to user satisfaction might be

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<sup>44</sup> These options both assume that the respondents will be the actual users. Another suggestion is to use "mystery shoppers". A mystery shopper is a qualified independent individual used to test aspects of the Service; this reduces subjectivity as they will apply the same standards throughout.

an area where reward for out-performance does have merit (see Section 7.2.6) in which case the incentive could work both ways.

7.9.8. As with other elements of the payment mechanism, Nodal Agency should agree the detail of the measurement process and the financial implications before the appointment of the winning bidder (for example, they should agree the design and content of any questionnaire, required scores, sample size/identification process, and the details of who is going to carry out the survey, how and when).

7.9.9. The best approach to choice of user groups for satisfaction surveys will depend on the particular project. There are a range of different “users” in most projects, from the Secretary of the department, to Section officers, to Field Officers to operational staff (e.g. data entry operators) and wider stakeholders (e.g. citizens). Either party may be more comfortable with surveying some groups than others, depending on their relationships with the parties involved.

7.9.10. It may in some cases be value for money to measure outcomes from the Service as a whole, which reflect the performance of public-sector staff and PPP Vendor staff together, e.g. applications for health or educational assistance . This moves away from a focus on the PPP Vendor’s activities but is more objective, albeit that it may be more appropriate for payments for out-performance than deductions.

7.9.11. Nodal Agency can calibrate user satisfaction requirements against pre-PPP performance where possible, or results from similar projects (e.g. those run by the same project sponsors or Nodal Agency).



## 8. AVAILABILITY REQUIREMENTS

### 8.1. Introduction

8.1.1. The substance of a PPP deal should be the procurement of a Service. The payment mechanism is therefore often structured around the availability or unavailability of the Service, with unavailability resulting in a reduced payment by the Nodal Agency or, in certain circumstances, no payment. This Section applies to projects where the payment mechanism or an element thereof has been structured in this way. This Section should be read in conjunction with Section 7 (Price and Payment Mechanism).

8.1.2. Among the most obvious examples of projects in which payment depends on availability are those that involve the internet based Service (such as a online payments, online applications, online status updates etc.).

### 8.2. Definition of Availability

8.2.1. Contracts with availability-based payments must define what is meant by “available” (or, alternatively, what is meant by “unavailable”). The definition will typically specify certain conditions which must be met if the Service is to be treated as available. As payment depends on the definition being met, the PPP Vendor is very concerned that the definition is objective, measurable, reasonable and does not contain criteria which are unachievable or immaterial in the context of the Service as a whole.

8.2.2. The definition of availability should therefore concentrate on the core functions of the Service and consist of objective, measurable criteria, so that it is clear to both parties whether or not those criteria have been satisfied. For example, an “application uptime” is a core requirements for any e-Governance project and for the Nodal Agency to carry out its functions. For such projects, the existence of a “application uptime” to be an acceptable minimum standard may be appropriate to include in the definition of availability. Provided minimum standards are met, failure in performance in such circumstances would not, however, make the whole Service unavailable.

8.2.3. In general terms, unavailability should be measured in as simple a way as possible. Accordingly, complex definitions that require excessive monitoring costs should be avoided, although definitions may have to be very specific. The precise measure will depend on the nature of the individual project, the particular times when the Service should be provided and the rectification periods allowed (see Section 8.7 (Rectification of Unavailability)). Possible examples of periods triggering unavailability include:

- for critical services, less than one hour;
- the remainder of a 12 or 24 hour period, i.e. measured in days or half days; or
- the remainder of normal working hours (say 8am to 6pm). Unavailability outside normal working hours will usually not affect payment (unless for a specific function).

### **8.3. Examples of Unavailability**

8.3.1. Unavailability will occur if the relevant key objective criteria determining availability are not satisfied. These, for example, may include:

- network downtime
- application downtime
- Front window downtime
- Helpdesk downtime
- failure to comply with any other specified factors (i.e. those which are likely to jeopardise continuing operations).

### **8.4. Payment for availability and Weighting of Critical Areas**

8.4.1. Payment for availability of the Service will vary according to each project and the scope defined for the project.

8.4.2. Where the Service is divided into areas, the financial consequences of unavailability of an area should depend on its level of criticality, as some areas will be critical to the provision of the Service whilst others will be less so.

8.4.3. The Contract must therefore specify which areas are most important (i.e. core to the Service) and allocate them a higher weighting (i.e. make a greater deduction from the Unitary Charge if they are unavailable). For example, for e-Governance project in Commercial Taxes, the critical availability are Application uptime, website uptime, helpdesk uptime, network uptime, data entry and front window uptime : the most important area includes Application uptime (for usage by Public Sector staff) and website uptime (for tax payers); the area of medium importance includes network uptime and helpdesk, and the least important areas may be front window & data entry services.

8.4.4. The effect of weighting can also be achieved through or in conjunction with other means, for example, by allowing shorter rectification periods for key areas before the PPP Vendor suffers deductions.

8.4.5. The calibration of the payment mechanism and weightings of deductions is discussed further in Section 7.5.

### **8.5. When does availability commence?**

8.5.1. The Contract must specify what happens if the PPP Vendor is able to provide the Service earlier than the Planned Service Commencement Date. The Nodal Agency should not be obliged to make any payment of the Unitary Charge before the Planned Service Commencement Date unless it has agreed in the Contract to accept earlier Service Commencement (see Section 4.6 (Bonus Payments for Early Service Commencement)). If early commencement is practical and agreed, then

the Contract should also provide for adequate notice to be given to the Nodal Agency of a possible early Service Commencement Date so that the Nodal Agency can make all necessary preparations for earlier Service Commencement.

## **8.6. When does unavailability commence?**

8.6.1. The Contract must specify precisely when unavailability starts so that any permitted rectification period can be measured by both parties. Both parties should therefore be notified as soon as practicable when unavailability is discovered. Possible triggers which should be considered are:

- when the PPP Vendor (e.g. the “Help Desk” provided by the PPP Vendor) receives a notice of unavailability from the Nodal Agency. This may take the form of a simple telephone call, an e-mail that is activated when opened by the Help Desk<sup>45</sup> or a paper based pro-forma sent to the Help Desk. The key issue is that there must be formal recognition and recording of receipt of the notice so that the time taken for rectification can be measured; and
- when monitoring indicates that the availability criteria are not being met. The PPP Vendor will need to verify the reported unavailability if it has not carried out the relevant monitoring.

8.6.2. If the Nodal Agency detects the unavailability but is unable to notify the PPP Vendor because, for example, there is a failure in access to the Help Desk<sup>46</sup> then unavailability commences from the time when the failure is detected. If, however, the Nodal Agency fails to notify until later because of other duties, then unavailability and any applicable rectification period should not commence until the PPP Vendor has been notified.

## **8.7. Rectification of Unavailability**

8.7.1. The Contract should usually provide for a rectification period within which the PPP Vendor has the opportunity to rectify the problem without triggering the start of a period of unavailability. How long the rectification period should be (e.g. one hour or twelve hours) will depend on the criticality of the area or function and the nature of the Project<sup>47</sup>. In the event that the PPP Vendor is able to rectify / supply the Service by other means (e.g. delayed data entry) and where the Contract recognises this option, availability payments should continue in full (although deductions to reflect standards of performance of the Service may be made and the effects of any disruption should be dealt with).

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<sup>45</sup> To the extent such an e-mail is not opened within a certain time frame this will be dealt with through performance points and/or deductions

<sup>46</sup> Failure to provide a Help Desk Facility may give rise to deductions being made and performance points being awarded under the performance regime.

<sup>47</sup> The Nodal Agency should consider carefully any requirement for rectification periods, taking into account tolerances already built into the Service levels and considering separately those events which lead to immediate unavailability and those which do not, but which provide an opportunity for rectification prior to failing to meet the availability criteria. When assessing whether or not to grant rectification periods to the PPP Vendor, the Nodal Agency should ensure that the PPP Vendor will continue to be incentivised to carry out maintenance during the planned maintenance periods and not as and when the Service becomes unavailable.

8.7.2. If the PPP Vendor rectifies the failure(s) within the relevant rectification period, the Service should be deemed to have been available throughout that period (i.e. from the commencement of unavailability determined in accordance with Section 8.6) and no availability deductions should be made.

8.7.3. If the PPP Vendor fails to rectify the failure(s) within the relevant rectification period, the Service should be deemed to have been unavailable throughout that period and availability deductions should be made. Any performance points accrued during that period in respect of the relevant failure should be discounted to the extent the availability deduction represents the full agreed financial consequence of that failure to avoid double counting for the same failure.

8.7.4. As well as any rectification period(s), the payment mechanism will need to make clear what deduction an instance of unavailability for a given length of time will give rise to. Longer periods of unavailability may give rise to higher deductions than shorter ones.

## **8.8. Service Unavailable but used**

8.8.1. The Contract should specify what happens if the Nodal Agency continues to use the Service despite the defects which would otherwise render that part of the Service unavailable (for e.g. poor response time of the application). If part or all of the Service is unavailable but used then this may lead to either only a proportion of the availability fee being paid, based on what part of the Service is available, or appropriate deductions or performance points accruing in respect of the relevant failure. In either case, the PPP Vendor should not receive a full Unitary Charge (with no availability or performance deductions) as it has not provided the Service at the required standard. The deduction should reflect the degradation in Service. However the Nodal agency & PPP vendor should ensure that there are measurement systems in place which can measure and report such sub-standard quality of services. In case this cannot be measured, it is better to look out for some alternate mechanism of measurement or measure some other service parameter which covers this quality of service.

8.8.2. However, the Nodal Agency must ensure that where it is able to use any alternative service (e.g. provided by the PPP Vendor or a third party), this is reflected in the deductions made. In addition, the PPP Vendor should not be penalized if the Nodal Agency obstructs the PPP Vendor from remedying the defect. Both the PPP Vendor and the Nodal Agency should agree reasonable access times for remedial work to occur.

8.8.3. Unavailability should be excused if it is caused by Nodal Agency step-in and the PPP Vendor is not itself in default (see Section 26 (Nodal Agency Step-In)). The effects of a Compensation Event on availability are set out in Section 5.2 (Compensation Events).

8.8.4. As availability is a factor in determining payment, the dispute resolution procedure should contain a mechanism to ensure a quick solution to any disagreements (see Section 25 (Dispute Resolution)).

## **8.9. Restoration of Availability**

8.9.1. The Contract must include a mechanism for assessing when availability has been restored. This can be done by technology (for e.g. Enterprise management Systems). Alternatively, the monitoring personnel on the Nodal Agency's project management team may simply submit a pro-forma confirmation to the Help Desk. There should be an agreed procedure for both parties to be notified, particularly so that the Nodal Agency can where necessary confirm such availability.

## **8.10. Planned Maintenance**

8.10.1. Maintenance is required in order to allow the PPP Vendor to keep any facility at the appropriate standard in order to meet the output specification throughout the life of the Contract (see Section 11 (Maintenance)). The programme for planned preventative maintenance should be agreed in advance in the Contract between the parties so that the extent to which units or areas will be affected by the PPP Vendor undertaking such maintenance is clear.

8.10.2. There should be no deduction for unavailability or performance deductions during periods when agreed preventative maintenance is taking place as planned. The PPP Vendor will have to balance whether maintenance occurring at times other than those agreed will result in an improvement or worsening in its financial position (e.g. by postponing or accelerating maintenance).

8.10.3. Arrangements and contractual requirements in relation to planned preventative maintenance must be considered by the Nodal Agency and its advisers, including arrangements around the timing of work. What is reasonable will depend on the nature of the activities undertaken by the PPP Vendor. For example, the maintenance of an application can be planned around weekends or holiday periods.

## 9. PERFORMANCE REQUIREMENTS

### 9.1. Introduction

9.1.1. The level of Unitary Charge paid can be conditional upon the quality of the performance of services (see Section 7 (Price and Payment Mechanism)). Performance regimes normally work in conjunction with availability regimes (see Section 8 (Availability Requirements)).

9.1.2. Where this approach is used within the payment mechanism the Contract should set out:

- the level of performance required;
- the means by which the Nodal Agency is able to monitor the PPP Vendor's performance against such required level; and
- the consequences for the PPP Vendor of a failure to meet the required level.

### 9.2. Setting the Performance Level

9.2.1. In order to encourage innovation and optimise risk transfer, the Contract should specify the required performance level through output requirements (i.e. the Service standard required), rather than through prescriptive inputs (i.e. how the Service will be delivered). In some cases there may be no appropriate comparators or benchmarks available. In such circumstances a suitable performance regime (baseline) will need to be carefully worked out by the Nodal Agency and the bidders during the competitive stages of the procurement (or during the stabilization phase of the project). The performance regime will form a key element of the risk-transfer mechanism. The Nodal Agency should pay due attention to the principles set out in Section 7.5 (Calibration).

9.2.2. In setting the performance level, the Nodal Agency should focus primarily on the level of Service it requires and not, for example, on what it is familiar with. If, however, the Nodal Agency or a third party is already providing the same type of Service or part of the Service, this may provide a benchmark against which the Nodal Agency may compare the quality and price of the PPP Vendor's bid.

9.2.3. Benchmarking against a comparator group of other providers of the same or similar Services may be useful where the Service to be delivered has not been measured before in the manner required by the performance monitoring regime in the Contract. An untested performance measurement system may by itself result in performance deductions being too high or too low, so a mechanism for setting the level by comparing similar services should avoid this problem.

9.2.4. As with availability, PPP Vendor will be concerned that the performance level required is reasonable and objectively measurable. They will seek to establish that the Unitary Charge will not, save in circumstances which they have satisfied themselves are unlikely to occur, drop below a level that makes the project risky. In considering what a reasonable level is, the Nodal Agency should decide what the optimum 100% performance standard would be and whether it is achievable and essential (taking into account the nature of the Service), to set the required standard in the Contract

at this level. For example, in some cases such as railway ticket bookings, the optimum 100% standard will always be required and should always be achievable.

9.2.5. In other cases, however, the Nodal Agency may recognise that the optimum 100% standard is not, in practice, always essential (or necessarily always achievable). In such cases, the Nodal Agency may retain the optimum 100% level, but allow a certain leeway before the PPP Vendor suffers for performing below such 100% level. For example, it may be acceptable for the PPP Vendor to incur a certain number of performance points in any specified period before suffering financially where the Service provided is adequate without being excellent and the under-performance does not materially affect the operation in that area (see Section 9.5 (Consequences of Poor Performance)).

### 9.3. Replacement of Sub-Contractors

9.3.1. Some Contracts allow flexibility in the performance regime where a replacement of Sub-Contractor is allowed.

9.3.2. The PPP Vendor should bear the risk of poor performance of its Sub-Contractors. The Nodal Agency should not be disadvantaged by any change in Sub-Contractors so the performance regime should not be interrupted. The Nodal Agency should, however, recognise that it should allow the PPP Vendor the right to replace its Sub-Contractors in order to improve performance and avoid termination. To enable it to do so, the PPP Vendor will normally set a stricter termination threshold (or trigger termination earlier in point of time) in its Sub-Contracts than that which applies in the Contract.

9.3.3. However, where there are one or two Sub-Contractors, the PPP Vendor may find it impossible to find a replacement Sub-Contractor where the performance points accrued at Contract level are such that a further very minor default under the Sub-Contract could trigger termination of the Contract. In these circumstances, the Nodal Agency should consider whether it should:

- give relief from termination of the Contract on replacement of that Sub-Contractor for a limited period of time (e.g. two months) during which failures attributable to poor performance of the relevant Services provided by the replacement Sub-Contractor will not result in termination of the Contract. Financial deductions under the Contract should continue to be made for such failures to incentivize proper performance of that contract and to the extent that the performance regime includes any “ratchet” mechanisms for continued poor performance, these should not be relaxed; and/or
- cancel any performance points or warning notices, in so far as they count towards any termination threshold only, accrued by the PPP Vendor under the Contract in relation to the relevant Services provided by the replaced Sub-PPP Vendor on the appointment of the replacement Sub-PPP Vendor.

9.3.4. The PPP Vendor’s ability to benefit from the performance relief regime should be limited to twice in the life of the Contract.



9.3.5. As mentioned above, the Nodal Agency should not be disadvantaged by the replacement of any Sub-Contractor. Accordingly, the Nodal Agency should consider allowing itself the opportunity to approve the identify of any replacement Sub-Contractor if a request is made by the PPP Vendor for temporary relief under the performance regime following the replacement of a Sub-PPP Vendor.

9.3.6. For Projects where there are a number of Sub-Contractors the Nodal Agency should not give this relief as failures attributable to a single Sub-Contractor in these circumstances are less likely to cause accrued penalty points under the Contract to approach termination thresholds.

## **9.4. Monitoring of Sub-Contractors**

9.4.1. An Nodal Agency may feel it needs to use the Contract to allow it to intervene at Sub-Contractor level to protect its interest if a Sub-Contractor is underperforming (e.g. the Nodal Agency may want the right to direct or require the replacement of the Sub-Contractor). This approach should only be allowed as a final resort, since ordinarily it should be for the PPP Vendor to manage its Sub-Contractors and intervention by the Nodal Agency will affect the degree of risk transfer achieved (see Section 16 (Sub-Contracting, Employees and Documentary Changes)). The Nodal Agency should instead rely on the payment mechanism and its termination rights to address sub-standard performance.

9.4.2. Deductions under the payment mechanism and, ultimately, the risk of the Nodal Agency terminating the Contract for under-performance, should be a sufficient incentive on the PPP Vendor to manage its Sub-Contractors' performance. The PPP Vendor will typically ensure it has the right under the Project Documents to replace its Sub-Contractors before the Nodal Agency's right to terminate arises under the Contract. Concerns regarding Sub-Contractors' performance may be further addressed in the Contract by requiring a temporary increase of monitoring at the PPP Vendor's expense in specified circumstances as well as requiring the PPP Vendor to provide an acceptable plan outlining how any defects in the Service will be put right. Both of these measures impose costs on the PPP Vendor and are only acceptable if there has been a persistent and verifiable period of under-performance (see Section 7.8 (Other Remedies for Poor Performance) regarding termination arrangements and calibration).

## **9.5. Consequences of Poor Performance**

9.5.1. The Contract must set out clearly the consequences of any failure by the PPP Vendor to perform to the standard required by the output specification.

9.5.2. The simplest approach is to categorise the various types of performance shortcomings and use a simple grid of monetary deductions. An alternative two-stage approach is for the PPP Vendor to incur a specified number of performance points for each failure, with the number of points incurred varying according to the seriousness of the failure and for there to be then a mechanism for translating points to monetary deductions. The Contract would in this case include a schedule setting out in detail the level of points imposed for each failure to meet a specified performance output.



The Contract may be structured so deductions only start once a certain threshold level of points is exceeded.

9.5.3. There should be a clear link between the seriousness of the failure, the number of points accrued where applicable, and the financial impact on the PPP Vendor. Similarly, the same type of failure may also incur different deductions depending upon the nature of the area in which it arises.

9.5.4. If performance deteriorates below a particular level then a range of other non-financial mechanisms can be implemented to encourage the PPP Vendor to improve performance. These range from formal warnings to eventual termination for breach of the Contract (see Section 7.8 (Other Remedies for Poor Performance) and Section 19.2.2.1 (Events Leading to Termination)).

### ***Ratchet mechanisms***

9.5.5. It may be appropriate to have a ratchet mechanism to encourage the PPP Vendor to improve performance if it is consistently poor in relation to a particular part of the Service or a particular failure is not rectified. This can be particularly useful where the financial cost of performance points which accrue is insufficient to provide an appropriate incentive on the PPP Vendor to rectify the fault. Too complicated a regime can, however, be difficult to manage and including onerous measures in the pricing mechanism can lead to poor value for money. A key advantage of a ratchet mechanism is that poor performance that continues for a significant period of time will be more difficult to ignore, encouraging early action by the PPP Vendor. It is recommended that ratchets be used in most payment mechanisms.

9.5.6. A simple ratchet mechanism will work by increasing the number of penalty points awarded for a particular failure in the Service which recurs too often within a specified period. For example, if  $x$  points are awarded for a failure to achieve a particular output then  $(x+3)$  points may be awarded for each failure over and above a specified maximum number of failures within a predefined period<sup>48</sup>. It is of vital importance to tailor the ratchet mechanism to a particular project in a way that produces best value for money. Ratchets might also apply to failures which occur in a high proportion of areas within a large project, i.e. for repeated failures geographically rather than repeated failures over time.

9.5.7. There is an argument that performance points should not be capable of being “earned back” retrospectively by the PPP Vendor performing above the standard required: the required performance level should be set at what is considered reasonable and achievable, so if the PPP Vendor is capable of performing at a consistently higher level then either the level is too low (i.e. the payment mechanism has been poorly calibrated) or the PPP Vendor is simply performing very well and delivering a standard of service at a higher level than the Nodal Agency expected or required. However, for some projects it may be considered that the higher level of performance is of additional benefit to the Nodal Agency, in which case it may be appropriate for the PPP Vendor to receive additional consideration over and above the usual Unitary Charge and “earn back” the points. See also Section 7.2.6.

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<sup>48</sup> Alternatively, the number of points may increase for each failure over and above *de minimis* level.

9.5.8. The performance points regime should as far as possible cover every aspect of the Service. Where an all-encompassing performance regime is not feasible or does not sufficiently address persistent failures, the Nodal Agency should consider what recourse it has against the PPP Vendor for sub-standard performance which is not covered under the performance regime (see Section 19.2.3 (Termination for Persistent Breach by the PPP Vendor)).

## 10. PAYMENT MECHANISM MANAGEMENT AND MONITORING

### 10.1. Contract Management

10.1.1. Robust contract management arrangements must be in place in respect of all areas of the Contract and payment mechanism. In many contracts the performance measurement system will be the most complex element of the payment mechanism, and the detail in the following Sections relates most directly to that element.

10.1.2. The following issues must be considered:

- the requirement for the monitoring system to be set out in the Contract so that all parties are clear where their responsibilities lie (see Section 10.2 (Monitoring Against the Payment Mechanism));
- when monitoring/transition arrangements should start (see Section 10.3 (Commencement of Monitoring));
- what to do where Sub-Contractors have been replaced (see Section 9.3 (Replacement of Sub-Contractors));
- who performs the monitoring function (see Section 10.4 (Who does the Monitoring?)). In many cases it will be appropriate for the PPP Vendor to self-monitor, with Nodal Agency audit procedures and Nodal Agency rights to investigate complaints;
- who pays for monitoring against the payment mechanism (see Section 10.5 (Who pays for the Monitoring?)). The PPP Vendor should normally pay for monitoring, and the pre-bid discussions should make this clear;
- what information must be communicated, to whom, when and in what format (see Section 10.6 (Reporting the Results of Monitoring)). Lack of adherence to information requirements needed to enable the payment mechanism to be applied should itself be subject to incentives on the PPP Vendor;
- the relationship with other contracts or activities of the Nodal Agency, or dependencies of the Nodal Agency on the successful performance of the PPP Contract. This area is generally referred to as “interface risk”, but also includes the initial transition/handover of the Project; and
- the relationship between the requirements of the Contract and the Nodal Agency’s actual procedures in relation to such matters as invoicing and acceptance of completed works.

10.1.3. Nodal Agency should develop & document best practice, to help ensure that the desired performance level is achieved. These points include the following<sup>49</sup>:

- Nodal Agency should develop a “manual” or “user guide” to support effective monitoring. This manual should provide a plain English/<Local Language> explanation of the payment mechanism, together with references to the Contract as appropriate, to facilitate effective

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<sup>49</sup> The Nodal Agency should refer to the “Capacity Building Guidelines” issued by DIT, Gol

management by individuals who may not have been involved with the original negotiation. It may be helpful to include worked examples in this;

- the manual should provide references to relevant guidance and contact details;
- for complex payment mechanisms or complex elements of payment mechanisms, the manual should explain the desired incentive effects;
- successful Contract management has resource requirements for the Nodal Agency, which should be considered at the Project planning stage and during procurement. There must be adequate resourcing of suitably-qualified staff during the Project's operational phase. The individuals or groups who will be involved in Contract management should be brought into the procurement process prior to Financial Close;
- training should be provided on the payment mechanism to relevant staff, on both the Nodal Agency and private-sector side, and also involving users as appropriate. This is particularly important where the knowledge retained by relevant staff may be limited, for example, where the procurement has involved external advisers for project management or where the lead managers for the Nodal Agency have not been involved in the development of the Contract;
- Nodal Agency should consider holding a "dry run" of the payment mechanism and monitoring system prior to Financial Close, by testing scenarios to see how the payment mechanism and monitoring staff would deal with these. Similarly, Nodal Agency might also perform a "shadow" or "trial" run of the payment mechanism after Contract signature but prior to Service Commencement, in order to ensure its effective application once the Project is in operation and to ensure that the relevant staff have been trained adequately in its application;
- review mechanisms for the calibration of the payment mechanism can be appropriate (see Section 7.7.1 (Flexibility));
- the payment mechanism should not be constructed as a technical document drafted only by technical, financial and legal advisers. It must be user-friendly. An over complex mechanism risks being ignored in practice. Where it is necessary to have a complex structure, consideration should be given to what in practice might be the distinction between features applied on a day-to-day basis and those which are designed to ward off specific potential performance problems; and
- where the Contract will be managed for the Nodal Agency by an individual or group which is relatively remote from the actual Project, careful consideration should be given to initiatives to ensure that contract management arrangements are robust and that the Service is responsive to the requirements of users. Nodal Agency and Contractors should put in place training sessions to assist third parties in understanding their monitoring role and should issue user guides so that the processes and the communications between the Nodal Agency/PPP Vendor/third party are clearly set out.

## **10.2. Monitoring against the Payment Mechanism**

10.2.1. There must be a mechanism under the Contract which enables the Nodal Agency to monitor the PPP Vendor's performance against the payment mechanism so that the payment mechanism can

operate effectively. The Nodal Agency should also be able to identify other performance problems so that any other remedies for poor performance can be pursued if necessary.

10.2.2. The monitoring requirement should be set out in the main bid documents<sup>50</sup> and a full methodology included in the bid. The methodology will normally include a substantial element of monitoring by the PPP Vendor, subject to periodic Nodal Agency audits. Additional Nodal Agency monitoring will also take place on an exceptional basis.

10.2.3. The reports relied upon for monitoring performance will be key to the management of the Contract and the payment mechanism, and should be specifically tailored to meet these requirements. Monitoring reports should be set out in detail in the Contract sufficient to minimize the scope for future disagreement.

10.2.4. Monitoring involves the collection and evaluation of data that should be objective, relevant, quantifiable and agreed with the PPP Vendor. There should be a clear connection between the data collected, unavailability and the financial penalties for poor performance.

### **10.3. Commencement of Monitoring**

10.3.1. Whilst availability should only be recognized from the time that the Service is actually available, further consideration may be appropriate as regards whether the Contract should specify the performance regime to apply in full from the Service Commencement Date. In some projects, it is recognized that issues are inevitable in the stabilization period, and the PPP Vendor can be afforded a degree of flexibility. In other projects, it is essential that the PPP Vendor ensures there are no settling in problems, and the Nodal Agency requires the full performance regime from day one, even if the implementation happens in phases.

10.3.2. One approach which gives flexibility in the stabilization period is to allow the PPP Vendor to accrue a higher number of performance points during that period before financial penalties are triggered than is allowed during the remainder of the Contract. Some Contracts (e.g. where the Service involves a relocation from existing facilities into new facilities) have alternatively made successful use of a regime where the Contractors are allowed a 3 to 6 month stabilization period. During this time, monitoring takes place, but any financial deductions imposed on the PPP Vendor for poor performance are set at a lower level than is the case once operations are fully established (but, in such cases, this does not affect the Nodal Agency's rights to terminate for PPP Vendor Default). A third approach is to award performance points at the normal Contractual rate so that the Nodal Agency only pays for the Services which it receives but to apply a more lenient mechanism in counting the points which trigger the right to terminate for PPP Vendor Default.

### **10.4. Who does the monitoring?**

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<sup>50</sup> Including an indication of who should bear the costs associated with performance monitoring (see Section 10.5 (Who pays for the Monitoring?)

10.4.1. A key issue is who will do the monitoring – the Nodal Agency, the PPP Vendor, a partnership between the two or a third party.

10.4.2. Monitoring should occur at three levels:

- a systematic monitoring by the PPP Vendor through a quality management system measuring availability and performance (see Section 3.5 (Quality Management Systems));
- a review of the quality management system of the PPP Vendor by the Nodal Agency with certain planned and random spot checks (with an ability to increase monitoring on repeated failure or poor performance) (see Section 9.5 (Consequences of Poor Performance)); and
- the ability for users to report failures (e.g. citizen complaints, number of calls to call centre ).

A failure to agree such a system can cause difficulties, particularly if disputes arise on the issue of whether a payment is due.

10.4.3. Monitoring requires the use of information that can only be gathered with co-operation from the PPP Vendor. Mechanisms must be in place to ensure the PPP Vendor provides data accurately<sup>51</sup>. The right approach depends on the particular Project but will always call for cooperation between the parties as benefits will accrue to the PPP Vendor as well as the Nodal Agency. Where a PPP Vendor is providing the information, the Nodal Agency should obtain a right of audit to verify the information.

10.4.4. The Nodal Agency must ensure that sufficient resources and people with the right level of experience are available to manage and monitor the Contract. Some projects arrange for joint training and development of Nodal Agency and PPP Vendor staff to encourage partnership.

## 10.5. Who pays for the monitoring?

10.5.1. Monitoring arrangements impose obligations on the PPP Vendor and may cause the PPP Vendor natural concern about any exposure to onerous obligations. It is therefore sensible for each party to bear its own costs of monitoring and this should reassure the PPP Vendor that the Nodal Agency will not act with too heavy a hand and avoid any possible conflict of interest. The Nodal Agency's cost of additional monitoring or audit required due to the poor performance of the PPP Vendor however should be paid for by the PPP Vendor.

10.5.2. The Nodal Agency should ensure that the monitoring arrangements are proportional to the consequences of Service failure. This will ensure that where it is possible to have a less onerous system it will be in all parties' interests to do so. Equally, where the consequences of failure are severe, for example, system uptime, then a rigorous monitoring system (preferably through automated systems) should be specified.

## 10.6. Reporting the results of Monitoring

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<sup>51</sup> Failure to provide data should give rise to deductions and/or the award of performance points under the performance regime

10.6.1. The Contract will need to specify the way in which information regarding shortfalls in availability or performance are reported. Wherever possible, monitoring should allow co-ordination of report production in a way that avoids duplication of effort and all parties should consider carefully what is needed. The key issues which have to be considered are:

- what reports are required by whom? How frequently? Are different reports required by different people in the organization, e.g. Department Secretary, contract manager, etc?
- what is the content of the various reports (it is not enough for the Contract simply to state that a “report” be produced)?
- is there to be a standard monitoring form or an electronic format to present results?
- how soon after a monitoring period is the report to be received?  
how often are meetings required between the Nodal Agency and the PPP Vendor? who is required to attend from the PPP Vendor?

## 11. MAINTENANCE

### 11.1. Introduction

11.1.1. The PPP Vendor will base its costings on a forecast capital expenditure to maintain the IT Assets at the specified output standards. The PPP Vendor will also consider the means of funding this expenditure throughout the life of the Project and refreshing the technology, as and when required to meet the requirements. The risk associated with assessing what will need replacing, when and how much this will cost, is one that the PPP Vendor should take and therefore the Nodal Agency should not attempt to be prescriptive in this respect.

11.1.2. The Nodal Agency will find it easier to achieve this risk transfer if it starts by expressing its service requirements as an output specification. Bidders should be allowed to develop their own proposals which may, for example, incorporate alternative programmes of maintenance where IT assets with a longer life are used or used differently. An Nodal Agency should not attempt to impose its own system of asset replacement on bidders.

11.1.3. The parties should, however, establish a planned preventative maintenance programme so that both parties know when parts of the Service are permitted to be “unavailable” without any payment deductions being made (see Section 8.10 (Planned Maintenance)). The Contract should also contain a mechanism by which either party can propose reasonable alterations to the planned programme (i.e. alterations which will not adversely affect the delivery of the Service).

### **ILLUSTRATIVE DRAFTING**

#### **Maintenance<sup>52</sup>**

The PPP Vendor 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<sup>53</sup>;
- (b) it can maintain the design intention of the assets<sup>54</sup> to achieve their full working life;<sup>55</sup> and
- (c) [the Assets are handed back to the Nodal Agency on the Expiry Date in a condition complying with the requirements of this Clause.]<sup>56</sup>

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<sup>52</sup> It may also be appropriate to include a further provision within this Clause requiring the Contractor to keep the physical assets in good structural and decorative order (subject to fair wear and tear).

<sup>53</sup> This provision should cross refer to the relevant output specification

<sup>54</sup> These are the physical assets referred to in the definition of “Assets”. In certain Contracts this may not be required and in others, such as IT contracts, equivalent provision may be needed in relation to any maintenance of IPR

<sup>55</sup> This will often be for the life of the Contract. To the extent a significantly longer period is required then this should be made clear as soon as possible in the competitive process (and certainly not after the bid documentation has been issued). If relevant, reference could be made to the output specification

<sup>56</sup> Paragraph (c) will only apply to the extent that the Nodal Agency has at least an option to acquire the Assets and the PPP Vendor does not bear the residual value risk (see Section 20 (Treatment of Assets on Expiry of Service Period)).



## 11.2. Sinking Fund

11.2.1. The Unitary Charge will usually be made on a broadly level basis in accordance with the principles of value for money, whereas the need for capital replacement will only occur at intervals. The Unitary Charge will accordingly include amounts to cover the PPP Vendor's anticipated future expenditure on maintenance, and technology refresh costs.

11.2.2. The PPP Vendor will therefore usually build up a sinking fund over some years, in anticipation of significant capital expenditure in future periods. It will usually be required to do so where the maintenance & technology refresh risk is left with the PPP Vendor and not passed to Sub-Contractors. The sums involved could be considerable.

11.2.3. Maintenance should be left firmly at the PPP Vendor's risk and the Nodal Agency should not attempt to prescribe the quantum, location or availability of a sinking fund<sup>57</sup>. The Nodal Agency should not require rights over any sinking fund established by the PPP Vendor and should instead ensure that the maintenance requirement is adequately protected through payment and termination provisions<sup>58</sup>. The Nodal Agency will wish to ensure that the PPP Vendor is as equally incentivised to maintain the Assets in the later years of the Contract as it is to the early years. The Nodal Agency should have the ability to conduct a final survey towards the end of the Contract and withhold payment of the Unitary Charge if the Assets are not restored to the required maintenance standard.

11.2.4. To protect themselves in the event of Default, the PPP Vendor will have a charge over the sinking fund as security. The PPP Vendor should look to its own resources first to repay its investment, and so any compensation payable to the PPP Vendor by the Nodal Agency on a termination should be reduced by all cash held by the PPP Vendor, including amounts in sinking funds (see Section 20 (Calculation and Payment of Early Termination Payments)). The Nodal Agency should not need any additional rights over the sinking fund.

## 11.3. Expiry of the Contract

11.3.1. As the Expiry Date approaches, the Nodal Agency's interest in the maintenance of any Asset will become most acute where ownership and use of the physical assets will (or may) rest with the Nodal Agency from expiry. The PPP Vendor's proper management of the maintenance requirements of such physical assets will be facilitated by the Nodal Agency informing the PPP Vendor of its handover requirements as early as possible prior to the Expiry Date.

## 11.4. Transfer of Assets at end of Contract

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<sup>57</sup> The PPP Vendor may, however, be required to provide the Nodal Agency with details of the balance of the sinking fund in accordance with Clause 26.2 (PPP Vendor's Records and Provision of Information)

<sup>58</sup> If, however, the size of the Project (including associated maintenance obligations) is comparatively large in relation to the financial resources of a PPP Vendor, the Nodal Agency may want to consider requiring a sinking fund over which it has secured rights.

11.4.1. In projects where the assets are unlikely to revert to the Nodal Agency on termination, and the PPP Vendor is taking a risk on their residual value, then it is in the interests of the PPP Vendor properly to maintain any assets. Accordingly, the Nodal Agency may be less concerned to put in place protections in respect of asset condition on expiry of the Contract (unless it retains an option to purchase).

11.4.2. In contrast, if the assets are likely to revert to the Nodal Agency on termination at no cost or a fixed price, then the Nodal Agency will have to ensure that the price it is paying for the Service during the term of the Contract (and on which its value for money assessment has been made) includes coverage for appropriate maintenance obligations. Generally, the transfer or reversion to the Nodal Agency at the end of the Contract will be at zero cost. In these circumstances, the Contract should provide for sums to be retained in the final years (or alternatively bonding to be provided by the PPP Vendor) if handback surveys reveal that significant maintenance is likely to be required to ensure that the relevant assets meet the handover requirements at the end of the term of the Contract.

## 11.5. Technical Assessments

**11.5.1.** Particularly where the Nodal Agency will take back the Assets at the end of the Contract, maintenance obligations need to be monitored (other than through the performance monitoring system – see Section 10 (Payment Mechanism Management and Monitoring)) and a mechanism needs to be agreed whereby this can be done in as non-intrusive a manner as possible.

### **ILLUSTRATIVE DRAFTING**

#### **Technical Assessments**

(a) If the Nodal Agency reasonably believes that the PPP Vendor is in breach of its obligations under Clause 11.1 (Maintenance) then it may carry out (or procure) a Technical Assessment of the Assets to assess whether the Assets have been and are being maintained by the PPP Vendor in accordance with its obligations under Clause 11.1 (Maintenance). This right may not be exercised more often than once every [two] years.

(b) The Nodal Agency shall notify the PPP Vendor in writing a minimum of [14] days in advance of the date on which it wishes to carry out the Technical Assessment. The Nodal Agency shall consider in good faith any reasonable request by the PPP Vendor for the Technical Assessment to be carried out on a different date if such request is made at least [7] days prior to the notified date and the PPP Vendor (acting reasonably) is able to demonstrate that carrying out the Technical Assessment on the notified date would materially prejudice the PPP Vendor's ability to provide the Service.

(c) When carrying out any Technical Assessment, the Nodal Agency shall use reasonable endeavours to minimise any disruption caused to the provision of the Service by the PPP Vendor. The cost of the Technical Assessment shall, except where paragraph (d) below applies, be borne by the Nodal

Agency. The PPP Vendor shall give the Nodal Agency (free of charge) any reasonable assistance required by the Nodal Agency during the carrying out of any Technical Assessment.

(d) If the Technical Assessment shows that the PPP Vendor has not complied or is not complying with its obligations under Clause 11.1 (Maintenance), the Nodal Agency shall:

- (i) notify the PPP Vendor of the standard that the condition of the Assets should be in to comply with its obligations under Clause 11.1 (Maintenance);
- (ii) specify a reasonable period within which the PPP Vendor must carry out any necessary rectification and/or maintenance work; and
- (iii) be entitled to be reimbursed by the PPP Vendor for the cost of the Technical Assessment.

(e) The PPP Vendor shall carry out such rectification and/or maintenance work within the period specified and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense. immaterial failures.

## **12. PAYMENTS AND SET-OFF**

### **12.1. Introduction**

12.1.1. The Nodal Agency should ensure that the Contract contains an express right for the Nodal Agency to deduct liquidated amounts owed to it by the PPP Vendor under the Contract from any payments it is obliged to make to the PPP Vendor (whether during the Service Period or on termination). This applies to liquidated damages and all other debts or liabilities owed to the Nodal Agency (including amounts owed in respect of failure by the PPP Vendor to comply with its maintenance obligations at the end of the Contract).

12.1.2. The right to set-off being described here does not apply to deductions for non-availability or sub-standard performance of the Service (see Section 7 (Price and Payment Mechanism)) as these are contractual deductions which apply automatically if the relevant circumstances arise (e.g. if the availability or performance criteria are not met). Disputes relating to these are dealt with under Section 25 (Dispute Resolution).

### **12.2. Scope of Nodal Agency's Right to Set Off**

12.2.1. One of the best practice in procurement has been for the Nodal Agency to have the right to set-off amounts owed to it by the PPP Vendor against amounts due to the PPP Vendor under any contract between the PPP Vendor and the Nodal Agency.

12.2.2. If the PPP Vendor does have other contracts with the Nodal Agency, the bidders would be highly unlikely to agree to a wide set-off clause which enabled amounts relating to other contracts (whether PPP or non-PPP contracts) to be set off against amounts due under the Contract. Generally, the bidders will only agree to the Nodal Agency having the right to set-off any ascertained amount owed to it by the PPP Vendor under the Contract and Project Documents (subject to any agreed restrictions) against amounts the Nodal Agency owes to the PPP Vendor under such documents. The Nodal Agency should not usually seek to extend such right as many of the value for money benefits of PPP projects come from isolating the rights and obligations of the Project from more general rights and obligations.

12.2.3. Over-payments, liquidated damages and amounts claimed under indemnities are the only liquidated claims that are likely to give rise to a set-off. Provided that any relevant criteria are fulfilled, as specified in the Contract (e.g. the Planned Service Commencement Date is missed due to the PPP Vendor's fault or the Nodal Agency suffers a loss due to a breach covered by an indemnity), then the applicable amounts should be calculated by the Nodal Agency and set-off against the next payment. The determination of any dispute as to whether such criteria were fulfilled or about the level of any indemnity amount set-off will also determine whether or not any amounts should be repaid. Interest should be paid on any amounts which it is determined should be repaid with effect from the due date.

12.2.4. To the extent an amount owed is disputed, the Nodal Agency should pay the undisputed amount, but be entitled to retain the disputed amount until the dispute is resolved (see Clause 25 (Dispute Resolution)).

### 12.3. Timing of Set-Off

12.3.1. During the Service Period, any amount to be set-off should generally be applied against the next payment of the Unitary Charge (or other payments) due after the amount owed by the PPP Vendor has fallen due and payable (unless the PPP Vendor has already paid the Nodal Agency the relevant amount).

#### **ILLUSTRATIVE DRAFTING:**

##### **Set-off**

- (a) The PPP Vendor shall not be entitled to retain or set off any amount due to the Nodal Agency by it, but the Nodal Agency may retain or set off any amount owed to it by the PPP Vendor under this Contract which has fallen due and payable<sup>59</sup> against any amount due to the PPP Vendor under this Contract<sup>60</sup>.
- (b) If the payment or deduction of any amount referred to in paragraph (a) above is disputed<sup>61</sup> then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with Clause 25 (Dispute Resolution).

### 12.4. VAT on Payments

12.4.1. Standard required provisions for VAT on such payments may be as follows<sup>62</sup>.

#### **12.4 VAT**

- a) All amounts due under this Contract are exclusive of VAT.
- b) If any supply made or referred to in this Contract is or becomes chargeable to VAT then the person receiving the supply (the “Recipient”) shall in addition pay the person making the supply (the “Supplier”) the amount of that VAT against receipt by the Recipient from the Supplier of a proper VAT invoice in respect of that supply<sup>63</sup>.

12.4.2. If amounts due under the Contract are calculated by reference to costs incurred by any person and VAT has been incurred on the costs, then VAT should not be included in the calculation of those costs if the person concerned can reclaim the VAT.

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<sup>59</sup> This must be by definition an ascertained amount

<sup>60</sup> The right to set-off here is subject to the restriction in Clause 22.4 (Set-off on Termination)

<sup>61</sup> This would apply, for example, to performance or availability deductions

<sup>62</sup> For changes in law relating to VAT that qualify for compensation see Section 14.10.2 (Changes in VAT Scope).

<sup>63</sup> In relation to transactions that are “VATable” at the election of the Supplier (e.g. grants of land interests) then other considerations will be relevant. Typically, the Recipient should be entitled to agree the election before it is made

**ILLUSTRATIVE DRAFTING:**

Where under this Contract any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off or repayment.

12.4.3. A provision as follows is also required for the above to work: The PPP Vendor shall provide the Nodal Agency with any information reasonably requested by the Nodal Agency in relation to the amount of VAT chargeable in accordance with the Contract and payable by the Nodal Agency to the PPP Vendor.

## 13. CHANGE IN SERVICE

### 13.1. Introduction

13.1.1. The Service requirements set out in the Contract should take into account the Nodal Agency's long-term (and not just its current) requirements, anticipating any changes in Service that can reasonably be foreseen. Accordingly, an appropriate amount of flexibility should be designed into the initial bid solution to cope with *anticipated* changes, and a well-developed change mechanism put in place in the Contract to cope with the residual *unanticipated* changes to the Service over the length of the Contract period.

13.1.2. Changes in Service can take various forms in PPP projects (see below), but may broadly be categorised into at least three distinct types as follows:

- Changes in use or functionality, for example:
  - conversion of VAT application into a GST application (as and when it comes under force)
  - integration of CCTNS application with UIDAI or NATGRID; and/or
  - adding a feature to send sms for status updates
- Changes in capacity or throughput, for example:
  - More electronic returns filed in a VAT application, than forecasted;
  - Capturing of scanned document along with the registration form
  - Increase in data archival period;
- Changes in service specifications or performance standards, for example;
  - changes in solution development standards;
  - enhancement in the SLAs;
  - introduction of new standards in solution development

13.1.3. Nodal Agency should consider carefully whether anticipated changes in its Service requirements are capable of being specified, designed and priced as part of the initial bid solution, ideally at a stage where there is some competitive pressure in the procurement. This will ensure that the desired flexibility is priced efficiently, and will enable the change to be processed and implemented effectively at the appropriate time, imposing minimum disruption on the Project.

13.1.4. In some projects, changes to requirements may be quite foreseeable (e.g. new type of citizen services would get added). In such circumstances, the Nodal Agency should consider the feasibility of requiring the PPP Vendor to commit to pricing pre-specified changes as part of the Contract. Similarly, it is feasible in some cases to include within the Contract a formulaic method of adjusting the Unitary Charge for increases or decreases in capacity. In the VAT Computerization project for instance, the unit rates for processing a return could be planned for any change in the capacity to handle returns. The justification being that beyond a certain limit the changes in the unitary charges may not be linear and may undergo a step change.

13.1.5. However, many changes, even if anticipated, may not be amenable to specification, design and pricing during the initial procurement – for instance, an Nodal Agency may anticipate a phased

expansion of capacity to accommodate expected increases in demand, but may not be in a position during the procurement to specify the scale of expansion required. In such circumstances, Nodal Agency should carefully assess if additional flexibility can be created within the Contract to deal appropriately with changes in Service that can be anticipated but not specified upfront with any degree of precision. The following elements of the Contract could be reviewed for greater long-term flexibility:

- well-developed change mechanisms;
- shorter Contract lengths;
- early termination rights (including the ability to terminate parts of a Contract and/or Nodal Agency Break Points); and
- phased project development through long-term partnering frameworks.

13.1.6. In general, greater flexibility in PPP Contracts will usually come at a higher price. Well designed Contracts therefore need to strike a balance between price, long-term flexibility and certainty of whole-life costs, and so consideration of all these issues should form an important part of procurement design and evaluation.

13.1.7. PPP Contracts in IT tend to be long-term contracts, commonly ranging around 10 years. Over such long periods, it is inevitable that changes will occur that cannot be anticipated at the start. Provided long-term requirements have been well thought through and adequate flexibility built into the design of the Contract (as discussed above), the frequency and impact of unanticipated changes should be limited and manageable.

13.1.8. All PPP Contracts can and should deal effectively with a limited volume of unanticipated change, and this is best achieved through well-developed change mechanisms written into the Contract. Good change mechanisms should seek to achieve at least the following four outcomes:

- **Clear** process, with clearly defined roles, responsibilities and timescales;
- **Quick** and **efficient** procedures (appropriate to the scale and complexity of the change required), with transaction time and cost kept to a minimum;
- **Transparent** pricing; and
- **Value for money**.

## 13.2. Typology of Changes

13.2.1. Changes in PPP Contracts can be classified in different ways, and it is recommended that Nodal Agency collect data on changes to projects to build up a pattern of changes that are occurring.

13.2.2. The typology below should help Nodal Agency in drafting change mechanisms that are best suited for the pattern and types of changes.

13.2.3. Changes in Service can be classified:

### By Origin

- Nodal Agency change



- PPP Vendor change
- Changes in law

#### **By Timing**

- Solution development
- Early operations
- Steady state operations

#### **By Value**

- Small
- Medium
- Large

#### **By Impact**

- Financial only
- Facility only
- Services only
- Facility and Services

#### **By Type**

- Change in use or functionality
- Change in capacity or throughput
- Change in service specifications or performance standards.

13.2.4. *Changes by origin:* As discussed above, the Nodal Agency may wish to make anticipated or unanticipated changes to its Service requirements. In many cases, such changes tend to be driven either by underlying changes in the Nodal Agency's initiative / policy or changes in legislation<sup>64</sup>. Similarly, the PPP Vendor may wish to propose changes to either the Service requirement itself (e.g. to improve efficiency), or to the way in which it delivers the Service. Although the output specification should generally be flexible enough to allow the PPP Vendor to make changes to its method of delivering the Service (e.g. by introducing new technology) without formally consulting the Nodal Agency, there may be circumstances where aspects of the method of delivery impact on the Service requirement and are therefore critically important to the Nodal Agency. In such circumstances, the Nodal Agency will wish to be formally consulted prior to the implementation of the changes. This can usually be done most efficiently by including in the Contract a suitable form of review procedure (providing a quicker, simpler way of dealing with these matters than a full-fledged change mechanism)<sup>65</sup>. Such review procedures deal typically, for instance, with design development and changes to solution development proposals, the solution development programme, Service Delivery proposals, programmed maintenance and third party use arrangements.

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<sup>64</sup> Changes in Law are discussed in Section 14

<sup>65</sup> In most PPP contracts, there is a clear and deliberate distinction made between the change mechanism (which is used to make changes to the Nodal Agency's Service requirements) and a review procedure through which the Nodal Agency is given the right to comment on (and in some cases – if it wishes – to raise objections to) the manner in which the PPP Vendor delivers the Nodal Agency's Service requirements. Apart from its limited rights under the review procedure, the Nodal Agency should not otherwise constrain the PPP Vendor's ability to make changes to its Service delivery methodology so long as the Service requirements are met

13.2.5. The rights of the parties will vary depending on the origin of the change. For instance, the Nodal Agency should generally have an unfettered right to request changes in the operational period, but a more restricted ability to do so during the solution development period. The PPP Vendor should generally be given only limited rights to object to or refuse to undertake the changes, such as if the change would imperil the economics of the Project or otherwise make it impossible for the PPP Vendor to meet its obligations under the Contract. In contrast, the PPP Vendor should generally be given the right to propose changes to the Service requirements but the Nodal Agency should have an absolute right to approve or reject such proposals. However, if the change is required to comply with a Qualifying Change in Law, then both parties will be obliged to agree and implement it.

13.2.6. *Changes by timing:* Changes during the solution development phase should, where possible, be kept to a minimum and unless a long period of time is scheduled to elapse before the Service Commencement Date (e.g. three years or more) the Nodal Agency should not ordinarily seek to change its solution development requirements prior to Service Commencement. In exceptional circumstances the PPP Vendor may be able to incorporate such a change during the solution development period (if it is requested early enough in the solution development programme) more cheaply than after the Service has commenced, and the Contract (in such exceptional circumstances) should then incorporate provisions to reflect this possibility. However, in general Nodal Agency should seek to ensure that no significant changes of scope occur during the solution development period, as this can seriously imperil the ability of the PPP Vendor to deliver the project to time and budget.

13.2.7. *Changes by value:* Some of the unanticipated changes in the solution provided in the PPP projects may be small. Small and medium value changes need to be specified, agreed and implemented relatively quickly and cost effectively to avoid users perceiving the Contract as “inflexible”, causing in turn a negative impact on user satisfaction.

13.2.8. In contrast, large-value changes typically reflect major changes in strategy or policy that could not have been anticipated when the Contract was signed. As such, they tend to occur less frequently and generally warrant the time and cost of proper due diligence (from the Nodal Agency, the PPP Vendor). The Nodal Agency should consider what rights the PPP Vendor should have to refuse to implement large-value changes (particularly if they impact on the risk profile of the Project), and how to secure transparent, value-for-money pricing from the PPP Vendor. Large value changes could give rise to procurement issues if they were not properly covered under the terms of the original Scope of work<sup>66</sup>.

13.2.9. The definition of small, medium or large-value changes should be relative to the size of the Project. For instance, a INR 1000 crores ESIC project may define “small” as less than INR 5,000, “medium” as INR. 5,000 to INR 100,000 and “large” as values higher than INR. 100,000; a INR 25 crore PPP project may well have different thresholds.

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<sup>66</sup> Nodal Agency should seek professional procurement advice when drafting their original Scope of work to ensure that, as far as possible, procurement issues do not obstruct the processing of changes

13.2.10. *Changes by impact:* A proposed change may involve solution development and/or changes to the facilities management “(FM)” services. It is generally easier to accommodate changes which are solely related to the FM service provision but do not involve additional solution development works. For the latter, a variety of commercial issues surface in relation to how the change should be implemented – for instance, the choice of the solution development company could be significant if there are interfaces between the new solution development and the existing solutions which will need to be managed by the PPP Vendor.

*Changes by type:* The commercial issues related to different types of change normally arise from their differential value or impact. For instance, changes in use or functionality typically tend not to be large-value, and may not even involve any change to Facility or Services. On the other hand, changes in capacity would almost certainly involve both new solution development and more Services, and would tend to be large in value. Changes in Service specifications or performance standards probably fall somewhere in between and can be much more variable – they may have a purely financial effect (e.g. a change in the risk sharing on energy efficiency), or they may involve both Facility and Services.

13.2.11. *Other Changes:* Occasionally other changes are needed to the arrangements between the parties, which are neither changes to the Services or to the Works or to the PPP Vendor’s proposals. These would not fit in to the review procedure or the change mechanisms, but would involve a change to the Contract, negotiated between the parties and effected through a Deed of Amendment. It is vital to the integrity of the arrangements between the parties that all such amendments, together with all other various change orders which might be implemented, are clearly recorded and that the Contract, as an ongoing document, remains complete, coherent and up to date.

### 13.3. Change Protocols

13.3.1. Nodal Agency must include in their Contract a well-developed Change Protocol that deals effectively and appropriately with the different kinds of changes discussed above. Such Change Protocols must be developed during the procurement process, and be agreed and incorporated into the Contract at Financial Close. At the same time, Nodal Agency must ensure (as part of the evaluation process prior to the selection of the winning bidder) that the PPP Vendor will be properly resourced to provide an appropriate change management service to the Nodal Agency that complies with the Change Protocol during the operational period, reflecting its responsibilities and obligations as a responsive partner.

13.3.2. Change Protocols should cover, at a minimum, the following elements of the change management process for all types of changes:

- Notification and Specification;
- PPP Vendor’s Estimate;
- Nodal Agency Approval;
- Change Implementation;
- Funding and Payment;

- Due Diligence; and
- Documentation and Monitoring.

At each stage, the Change Protocol should clearly define the roles and responsibilities of each party and the timescales within which they are expected to perform, whilst recognising the different requirements (in terms of process and timing) of different types of changes.

13.3.3. *Notification and Specification:* It is important that Nodal Agency inform the PPP Vendor early on of their intention to request changes (and vice versa). The Change Protocol should set out a clear format and timing for early notification, following which the parties should collaborate in good faith to develop an appropriately detailed specification for the change request. The specification should wherever possible be a restatement of the original output specification, and where not, an alternative output specification. However, it may be that (particularly with small to medium-value changes) an input specification may be more appropriate where the Facility or Services required are very specific. Nodal Agency should agree with the PPP Vendor a catalogue of pre-specified small Works and Services that can simply be ordered (at pre-priced rates). The rates in this catalogue can then be reviewed and refreshed each year of the Contract by indexing them to an appropriate inflation index like the CPI or WPI. The final specification should be signed off by the Nodal Agency and submitted to the PPP Vendor as a formal Change Request (unless it relates to a PPP Vendor change), together with any other information the PPP Vendor may reasonably require in order to develop a design solution and estimate for the change.

13.3.4. *PPP Vendor's Estimate:* Following the receipt of the Change Request from the Nodal Agency, the PPP Vendor should generally be given a reasonable period of time (depending on the scale and complexity of the change requested) to notify the Nodal Agency if it wishes to refuse to implement the change<sup>67</sup>. It would be reasonable for the PPP Vendor to have the right to refuse on the following grounds.

- if it requires the Service to be performed in a way that infringes any law or is inconsistent with good industry practice;
- if it would cause any consent to be revoked (or a new consent required to implement the relevant change in Service to be unobtainable);
- if it would materially and adversely affect the PPP Vendor's ability to deliver the Service;
- if it would materially and adversely affect the health and safety of any person;
- if it would require the PPP Vendor to implement the change in Service in an unreasonable period of time;
- if it would (if implemented) materially and adversely change the nature of the Project (including its risk profile); and/or
- the Nodal Agency does not have the legal power or capacity to require the implementation of such a Change.

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<sup>67</sup> Although the expectation must be that any issues the PPP Vendor has with respect to the change are resolved in the collaborative process of developing the specification. Furthermore, small value changes should not generally have any material impact on the Project and so it should be the presumption that the PPP Vendor will have no objection to carrying them out.

If the PPP Vendor agrees to proceed with the change (or, in the case of a PPP Vendor change, once the final specification is agreed), the Change Protocol should set out the timescales by when the PPP Vendor will respond with a design solution (if required) and an estimate of the costs of the change, together with any other information the Nodal Agency reasonably requires to approve the change (“the PPP Vendor’s Estimate”). The PPP Vendor’s Estimate should generally include the opinion of the PPP Vendor on (as appropriate)<sup>68</sup>.

- a detailed timetable for implementation;
- whether relief from compliance with obligations is required, including the obligations of the PPP Vendor to achieve the Planned Service Commencement Date and meet the performance regime during the implementation of the change in Service;
- any impact on the provision of the Service;
- any amendment required to the Contract and/or any Project Document;
- any Estimated Change in Project Costs, taking into account any Capital Expenditure that is required or no longer required;
- any gain or loss of revenue;
- any regulatory approvals which are required; and
- the proposed method of certification of any solution development or operational aspects of the Service required by the change in Service if not covered by the procedures specified in Section 3 (Service Commencement).

Timescales for the submission of the PPP Vendor’s Estimate should distinguish between the scale and complexity of different change requests. The Change Protocol should set out a definite (and short) timescale for responding to requests for small value changes to the service, whereas timescales for medium to large value changes can be agreed flexibly between both parties in each case depending on the type and complexity of the change.

13.3.5. *Nodal Agency Approval:* Upon receipt of the PPP Vendor’s Estimate, the Nodal Agency should similarly have a reasonable period of time in which to consider the response, and then indicate its approval or otherwise to the PPP Vendor. The Nodal Agency’s rights of approval should be related to the origin of the change as discussed above: it should have absolute rights to approve or reject the PPP Vendor’s Estimate if the change is an Nodal Agency or PPP Vendor change. The Nodal Agency should not be able to reject a change in Service which is required in order to conform to a Qualifying Change in Law. The costs of introducing a change in Service resulting from a Qualifying Change in Law (including any resulting variation in the Unitary Charge) should be shared in accordance with Section 14 (Change in Law) and to the extent not dealt with should be borne by the PPP Vendor. It is recommended that for large-value changes, Nodal Agency should follow a 2-stage approval process with the PPP Vendor providing an initial budget price at Stage 1 (based on which the Nodal Agency can confirm it can afford to pay for the change), followed by detailed design work and a fixed price at Stage 2. This will prevent significant abortive costs from being incurred by

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<sup>68</sup> The timetable should identify the different phases of the development period, such as technical, pricing, planning, legal, etc. and indicate which of the deliverables will be issued in which phase, and the points at which the PPP Vendor will require the Nodal Agency to issue any further confirmations to proceed.

the PPP Vendor in the earlier (less certain) stages, and also give the Nodal Agency more confidence and certainty of affordability.

For small-value changes, Nodal Agency should consider delegating approval rights to local representatives so that such changes can be agreed quickly and without too much process or bureaucracy.

**13.3.6. Change Implementation:** Once the Nodal Agency has signalled its approval of the PPP Vendor's Estimate, the PPP Vendor should proceed to implement the change in Service in accordance with the agreed timetable. A standard timescale can be set out in the Change Protocol for small-value changes (such as those listed in an agreed catalogue of small Works and Services), or agreed on a case by case basis for larger or more complex changes.

**13.3.7. Funding and Payment:** Nodal Agency will generally be liable for the cost of changes associated with Nodal Agency changes, and should ensure they have budgeted accordingly. For PPP Vendor changes, the Nodal Agency should be under no obligation to pay unless a payment from the Nodal Agency is specifically agreed as part of the discussions with the PPP Vendor.

Where the Nodal Agency is responsible for bearing or sharing the cost of the change in Service, it should generally be assumed that:

- the payment for any capital works will be made on the achievement of milestones or on completion through lump sum capital payments; and
- the payment for any change to Services shall be made through an adjustment to the Unitary Charge.

### **13.3.8. Due Diligence**

**13.3.8.1. PPP Vendor's Due Diligence:** It is reasonable for the PPP Vendor to wish to conduct due diligence on changes which can alter the risk profile of the Contract, in order to protect their investment. Accordingly, Change Protocols should set out a framework for due diligence which, whilst protecting the position of the PPP Vendor, allows routine small value changes to be processed at minimal transaction costs. Some ways in which this might be achieved are suggested below.

**13.3.8.2. Legal and technical due diligence:** Legal due diligence will generally be necessary whenever there is either a change to the terms of the Contract, or a separate Deed of Amendment (see Section 13.3.8.9) is required to give effect to the change. Similarly, where changes in Service pose any additional Solution design or solution development risks, or may have a material impact on the operating and life-cycle costs of providing the original Service, technical due diligence will be necessary and desirable.

The Change Protocol should list circumstances where a change in Service can be agreed between the Nodal Agency and the PPP Vendor without the need for legal and/or technical due diligence. This could include for example:

- where the change in Service is called off from a pre-priced catalogue of small and routine Services (like make changes in the masters, change of user rights); and/or

- where the change in Service can be implemented without any material impact on the ability of the PPP Vendor to deliver the existing Service.

13.3.8.3. *Financial due diligence:* Financial due diligence will typically concentrate on adjustments to the financial model and calibration of the payment mechanism.

13.3.8.4. Adjustments may need to be made to the financial model to give effect to a change in Service, so that the Unitary Charge is adjusted to take into account the change in Project Costs wish to conduct due diligence over the financial model to ensure that cover ratios remain acceptable.

13.3.8.5. To improve the efficiency and speed of the process, Nodal Agency should agree with the PPP Vendor that the financial model should generally only be adjusted and reviewed periodically (say once or twice a year), so that all the changes that have occurred during that year can be ‘bundled’ together into a single cumulative adjustment as necessary. This will avoid the expensive and cumbersome exercise of carrying out financial due diligence on the financial model every time a change occurs, and greatly reduce the transaction costs of undertaking changes. An exception to this rule can be on the occurrence of large-value changes, where it is quite likely that the financial model will need to be adjusted on a case by case basis.

13.3.8.6. Similarly, payment mechanisms are usually calibrated at Financial Close based on the economics of the Project at that time. As changes in Service accumulate, the payment mechanism may well need to be re-calibrated to ensure that it remains a fair and effective method of incentivizing the PPP Vendor. To keep due diligence costs at an efficient level however, it is strongly recommended that Nodal Agency agree with the PPP Vendor as part of the Change Protocol that reviews of the Payment Mechanism should only be triggered after changes up to a certain aggregate value have occurred in a year. Below this threshold, the parties should only need to agree a periodic review of the payment mechanism (such as every year or every two years) to ensure that the calibration stays in line with its desired objectives.

13.3.8.7. *Insurance due diligence:* Changes in Service, particularly where they involve a change to the insured assets, may also require authorisation from the insurers<sup>69</sup>. Underwriters rely on the concept of utmost good faith, and will normally expect to be notified immediately of any material change in the scope of the Project. Materiality will to a large extent depend on the size and nature of the scope change. The insurance arrangements can be structured to give the PPP Vendor a degree of flexibility in processing changes without any additional insurance due diligence. For instance:

- A capital additions Clause in the material damage insurance will cover the PPP Vendor for ‘modest’ changes in the scope of the Project leading to a change in the capital value of the insured assets. Typically the amount is capped at a relatively low level (e.g. c. INR. 100,000). The insurer will still need to be advised of the material change, though this can be when the insurance is renewed, rather than at the time of the scope change.
- A contract works extension could be included in the insurance package which will cover the PPP Vendor for works undertaken during the operational period. The above provisions are fairly.

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<sup>69</sup> It may be noted that the insurance clause is applicable only if the ownership of the assets is with the PPP vendor

13.3.9. *Documentation and Monitoring*: All changes in Service should be implemented in accordance with the Change Protocol, with the PPP Vendor acting as the prime counter-party responsible for implementation. The alternative to this is for the Nodal Agency to contract directly with another agency to implement the change, but this is not recommended as, over time, it can lead to serious interface risks and confusions as to responsibilities. It could also have significant value for money implications if it displaces the basic risk allocation embedded in the Contract.

There is a separate issue as to the *terms* under which the Nodal Agency should contract for changes in Service. Small value changes should generally be capable of being covered under the existing terms of the Contract and the Change Protocol where the implementation process is typically straightforward and solution development or operation risks are not substantial. However, for those changes in Service where the implementation is complex or the risks are substantial, it is quite likely that the parties will need to agree a bespoke set of terms and conditions under which the PPP Vendor will deliver the change particularly in relation to matters such as:

- payment terms;
- site issues;
- statutory permissions;
- warranties from solution development or services sub-contractors;
- protections against failure to complete (liquidated damages, deductions, termination rights);
- Relief and Compensation Events (including the interface with the existing Project);
- limits of liability; and/or
- indemnities and insurance issues.

This makes it likely that for complex changes, a separate Deed of Amendment that accurately encapsulates the particular terms agreed in relation to such changes will usually be appropriate. It is important for both parties to accurately document and monitor all changes, and ensure that they are captured in a change log which tracks any new assets or services agreed as part of the Change Protocol, and references the terms (e.g. Deed(s) of Amendment) under which the changes have been carried out.

## 13.4. Transparency of Pricing and Value for Money

13.4.1. The Change Protocol should place a general requirement on the PPP Vendor to process and implement changes using a transparent open-book approach to pricing, with an obligation to secure value for money for the Nodal Agency.

13.4.2. Two key questions arise in relation to the issue of transparency and value for money:

- which items should reasonably be included and which excluded when costing a variation, and
- for the pricing of items which *are* included, how might the Nodal Agency assess whether or not it is getting value for money?

### 13.4.3. Costing Issues



13.4.3.1. *Time and materials costs:* Clearly, the costing of a variation must include the basic resource costs of implementing the change (i.e. in terms of the labour and materials expended on design, solution development, facilities management, and/or maintenance). This can also include professional fees (e.g. where design work or solution development is involved), and an element of contingency to deal with any performance risk being accepted by the Sub-Contractor.

13.4.3.2. *Sub-Contractor margins:* In addition to the basic resource costs, many Sub-Contractors charge a “margin” that provides a contribution to overheads and profits at the Sub-Contractor level. While this is fairly standard practice in the industry, the levels can vary. In the context of variations, Sub-Contractor margin levels could be set in two ways:

- the levels could be fixed in the Change Protocol with reference to the levels set in the original Sub-Contracts; and/or
- independent technical advice could provide a market benchmark for margin levels at the time of the change.

For small-value changes, the catalogue pricing should include both the time and materials cost, as well as any Sub-Contractor margins.

13.4.3.3. *PPP Vendor mark-ups:* There are three potential areas in respect of which the PPP Vendor may seek to charge a separate fee or margin over and above the elements discussed above:

- processing time and cost (e.g. paperwork, liaison, meetings, external advice etc);
- accepting performance risk on the implementation of the change (i.e. “wrapping” the performance of the Sub-Contractors carrying out the change in terms of the time, cost and quality of delivery); and
- accepting any interface risks between the implementation of the change and the provision of the existing Service.

13.4.3.4. In some cases (particularly during the solution development period), the PPP Vendor acts largely as a passive intermediary, whilst the work to process and implement changes occurs at the Subcontractor level. In such cases, there is very little case for any additional processing charges being paid to the PPP Vendor.

In most other cases (certainly during the operational period), the PPP Vendor should be resourced to process changes themselves and add value in providing a change management function for the Nodal Agency. The proper resourcing of Contractors to provide an effective change management Service should be a part of the specification set at Financial Close. Since change management therefore forms a routine part of the Service provided by the PPP Vendor, there should be no need for the Nodal Agency to pay any additional PPP Vendor fee or margin for processing each variation. However, there may still be instances (e.g. complex changes) where the PPP Vendor is required to put in significant additional resources of its own over and above what was envisaged as part of the standard Service. In such cases, the Change Protocol should:

- enable fair re-imburement of any third party costs (such as consultant fees) incurred by the PPP Vendor to supplement its own resources; and/or

- set out a standard day rate by which any additional PPP Vendor staff time incurred on processing the change (i.e. over and above what is required as part of the Service).

The PPP Vendor should make the case for such additional processing costs on a case-by-case basis and a suitable budget should be established with the Nodal Agency before work is commenced.

13.4.3.5. The Nodal Agency should consider carefully how performance risk is priced by the PPP Vendor. Where the PPP Vendor is required to fund the change (see Section 13.3.7 above), the “charge” for bearing the Sub-contractor performance risk will be reflected in the rates of return charged, and will be reflected in the calculation of the revised Unitary Charge. No separate PPP Vendor mark-up (over and above the appropriately benchmarked cost of capital) should therefore be included within the costing of the change for this reason.

However, where the change is funded by the Nodal Agency, the risk of Sub-contractor failure should be carefully considered. It may be the case (in limited circumstances such as high-value or complex changes) that the risk of Sub-contractor default is material. In such cases an additional mark-up in the costing of the change reflecting the risk and impact of Sub-Contractor default may be reasonable.

13.4.3.6. Finally, the PPP Vendor will need to manage any interface risks between the implementation of the change in Service and the existing Service. How significant these interface risks are and what value should be assigned to them will vary from case to case, and it is impossible to generalize. Indeed, in some cases, it is entirely possible that a change in Service may reduce the overall risk for the PPP Vendor. Nodal Agency will need to seek specialist technical advice for the impact and valuation of such interface risks. In any case these risks, where justified, should be priced separately (as higher solution development, operating or lifecycle costs) rather than being included as a standard PPP Vendor mark-up over the basic costs of the change.

13.4.3.7. In summary, there should not generally be any separate PPP Vendor mark-up priced into the costing of changes. The exceptions to this rule would be:

- where the PPP Vendor is likely to be required to put more significant additional resources into the processing of a change (e.g. in procurement or project management) than contemplated as part of the standard change management service (in which case an additional fee should be calculated based on a pre-set man-month rate); and
- where the PPP Vendor is not required to invest, but is nevertheless asked to take performance risk on the Sub-Contractors implementing the change (in which case a mark-up reflecting the probability and impact of Sub-PPP Vendor failure will usually be reasonable).

13.4.3.8. *Transaction Costs:* Finally, there are the costs of conducting financial, technical, legal and insurance due diligence on variations. All such costs, where reasonably incurred by the PPP Vendor, ought to be reimbursed or compensated by the Nodal Agency provided that budgets are agreed in advance. However, the Change Protocol should require the PPP Vendor to minimize such costs as described in Section 13.3.8 above.

#### **13.4.4. Pricing Issues**

13.4.4.1. There are a number of different pricing techniques which could be systematically introduced into the Change Protocol to increase transparency and certainty in pricing changes (although different techniques will be relevant to different types of changes).

13.4.4.2. *Small-Value Changes:* The recommended approach for transparent pricing of small value changes is that Nodal Agency agree a detailed catalogue of small works and Services (at preset prices that are linked to a suitable inflation index such as CPI or WPI), so that such small value changes can simply be “called off” the catalogue. For small-value changes that cannot be pre-priced in the catalogue, there should be a schedule of rates for any specialist labour required for design, solution development, installation or commissioning purposes, and any cost of materials incurred in implementing the change should be charged at cost to the Nodal Agency on an open-book basis or using industry benchmarks. Wherever possible, the small value change in service should be carried out by a suitably qualified on-site PPP Vendor employee so that specialist labour charges are avoided.

13.4.4.3. Where small-value changes have long-term lifecycle or FM implications, the PPP Vendor should clearly indicate this to the Nodal Agency as part of the specification-setting process, and the pricing for such extensions to the FM and lifecycle Services should be done on an open-book and transparent basis. Wherever practicable, however, PPP Vendor should seek to develop a flexible Service solution so that small-value changes (particularly those drawn from a catalogue of pre-priced works and services) can be accommodated relatively easily.

13.4.4.4. *Medium-Value Changes:* One of the difficult pricing issues in respect of medium-value changes is that they can encompass a very large variety of fairly bespoke works and services, and frequently have long-term lifecycle and FM service implications. As a result, they are neither standard enough to allow a pre-priced approach (as for small-value changes) nor large enough to warrant a full-fledged technical audit, benchmarking or competitive tendering approach (as would apply for large-value changes).

13.4.4.5. As a result, it is likely that the best method of introducing greater transparency into the pricing of medium-value changes is to adopt a framework approach with:

- standard allowances agreed between the Nodal Agency, the PPP Vendor and the Solution development and Services Sub-Contractors at Financial Close for professional fees, overheads, contingencies and profit margins (as described above in Section 13.4.3);
- a schedule of rates for specialist labour services and an agreement to charge the cost of materials based defined on market rates; and
- the pricing for any bespoke risks (e.g. site conditions) agreed on an open-book basis.

13.4.4.6. This framework approach could reflect a form of “after-sales support” provided by the Sub-Contractor, and a method of on-going support from the Services Sub-Contractor(s) during the operational period. Other than for projects with very long solution development periods, it should be possible for the Sub-Contractor to sign up to a support package for implementing medium-value changes that runs for at least 2 years post-Service Commencement. The framework can then be

renewed (depending on use and anticipated activity) every few years from then on by the PPP Vendor, or put out to competition.

13.4.4.7. *Large-Value Changes:* For Large Value changes, it will usually be cost-effective to go through an intensive due diligence process that ensures the Nodal Agency can be confident about the value for money of the price developed by the PPP Vendor. Nodal Agency can choose from any of the following approaches to ensuring value for money in pricing large value changes:

- benchmarking;
- independent technical adviser approach; and/or
- competitive tendering/market testing.

13.4.4.8. *Benchmarking:* A benchmarking approach requires the Nodal Agency to develop its own independent estimate of the cost of the change in Service (perhaps with the assistance of its own technical advisers), so that it can intelligently query the PPP Vendor's Estimate, and judge whether or not it is getting value for money. This benchmarking approach can be quite useful and efficient where the types Services involved are relatively standard and there is sufficient data available in-house to conduct the benchmarking. In the absence of good data however, there is a risk that the approach can collapse into a dispute between the technical advisers on either side, and other alternatives (such as the ones discussed below) should be considered.

13.4.4.9. *Independent Technical Adviser approach:* Under this approach, both parties agree a joint appointment for a suitably qualified independent technical adviser (ITA) (or maybe, NIC) who will advise on the pricing for the change in question. This jointly appointed adviser would be independent in the sense that it is not contracted solely to either party and therefore would not face a conflict of interest.

The terms of reference of the ITA could include:

- assisting the Nodal Agency and the PPP Vendor in developing a high level Reference Price based on a clear specification for the change order as part of the Stage 1 approval, before detailed design or pricing work is done by the PPP Vendor; and
- reviewing and sign off the PPP Vendor's estimates for reasonableness as part of the Stage 2 approval.

The cost of the ITA's services would be borne by the Nodal Agency.

13.4.4.10. *Competitive Tendering approach:* Under this approach, the Nodal Agency can require the PPP Vendor to obtain competitive quotes from at least three suppliers for the provision of the Services associated with the change. The PPP Vendor should generally be responsible for:

- deciding how best to package the Works and Service into work packages;
- ensuring a price discovery for Sub-Contract work packages;
- evaluating and selecting the preferred suppliers;
- negotiating and finalising appointments of suppliers; and
- managing the implementation of the change order.

The Nodal Agency should have the following rights in respect of the tendering procedure:

- the right to approve the tendering procedure (including the evaluation criteria) for suppliers to ensure that it is fair and transparent;
- the right to prevent the selection of any person as a prospective bidder if it reasonably believes that such person does not (or could not reasonably be considered to) comply with the evaluation criteria;
- the right to prevent the selection of any person as a bidder on the grounds that the prospective bidder has been blacklisted
- the right to review the list of prospective bidders. The PPP Vendor should provide the Nodal Agency with an explanation of the reasons behind the non-inclusion on the list of prospective bidders of any person identified as suitable by the Nodal Agency, if so requested by the Nodal Agency; and
- the right to dispute the PPP Vendor's decision on the selected bidder.

Where any company associated with the PPP Vendor, its shareholders or its Sub-Contractors intends to bid, the Nodal Agency may require that an independent tender process manager is appointed to manage the tendering process.

#### **13.4.5. Abortive Costs**

In cases where the Nodal Agency decides to withdraw a request for a change in Service (particularly following Stage 1 approval for large-value changes) and the PPP Vendor has incurred significant third party costs, the Nodal Agency should agree to reimburse the PPP Vendor for any such third party costs reasonably incurred and evidenced in developing proposals up to the time the change request was withdrawn provided that budgets for such costs have been agreed in advance.

### **13.5. Incentivisation**

13.5.1.1. An important consideration for Nodal Agency in managing changes to their projects is how to ensure the PPP Vendor is incentivized to perform in accordance with the Change Protocol. The procedures set out in the Change Protocol should generally encourage a collaborative working relationship between the Nodal Agency and the PPP Vendor, but explicit incentivization through the payment and performance mechanism is nevertheless recommended.

13.5.1.2. The Contract should contain some performance indicators for the "change management service" that the PPP Vendor is asked to provide in accordance with the Change Protocol. This should set reasonable targets for the PPP Vendor's performance (particularly in respect of meeting the agreed timescales for processing and implementing changes). Failure to meet these timescales should attract deductions, which should increase with further delay. The Nodal Agency could also consider whether it would offer value for money to reward performance in excess of the targets (i.e. changes processed or implemented earlier than expected) through e.g. bonus payments or reward points that can be used to offset other deductions.

13.5.1.3. Wherever possible, the PPP Vendor and the Nodal Agency should both establish a framework of delegated Nodal Agency to local representatives, so that changes can be agreed and processed quickly with minimum bureaucracy.

13.5.1.4. Experience from the management of earlier PPP contracts shows that tiers of sub-subcontracting by the PPP Vendor can slow-down and, potentially, impair the process of communication between the Nodal Agency and those providing the Services on the ground. Accordingly, the Change Protocol should include an obligation on the PPP Vendor to ensure that regardless of whether it performs all the Services itself, or through Sub-Contracts or through Sub sub-contracts to any level, the speed and responsiveness of those providing the Service to requests and other communications from the Nodal Agency should be in accordance with performance standards set out in the payment and performance mechanism.

## **14. CHANGE IN LAW**

### **14.1. Introduction**

14.1.1. The PPP Vendor must comply with all applicable legislation. A failure to comply could give rise to termination for PPP Vendor Default (see Section 19.2 (Termination on PPP Vendor Default)). The cost of complying with legislation which is current or foreseen at the time of the Contract should be built into the price the PPP Vendor bids to provide the Service. Nevertheless, the PPP Vendor may not, for example, be capable of including in the price specific costs arising from changes in law which are not foreseeable prior to contract signature. Accordingly, the issues concern who should be responsible for the costs arising from changes in law and how such costs should be funded.

14.1.2. The treatment of changes in law relates very closely to the issues of indexation, benchmarking and market testing (see Section 15 (Price Variations)), particularly in relation to the risk of increases in operating costs. These provisions must be developed in conjunction with each other when negotiating the overall level of change in law risk to be transferred by the Nodal Agency. For example, the more often a Contract provides for benchmarking and market testing to occur (allowing upward revisions of price), then the more likely an apparently tougher change in law provision can be achieved by the Nodal Agency. It is recognised, however, that benchmarking, market testing and indexation provisions are not likely to have a significant bearing on the risk transfer position in relation to increases in capital costs due to a change in law.

### **14.2. PPP Vendor's and Nodal Agency's Concerns**

14.2.1. PPP Vendor would be concerned that change of law is a risk which they cannot control and which they regard as being within the control of the Nodal Agency or wider Government. In practice, however, Nodal Agency would have negligible influence over legislation whereas the private sector has traditionally proved adept at managing the effects of changes of law and minimising their impact on their business. Hence it is appropriate for the PPP Vendor to bear or share in the risk.

14.2.2. Under more traditional commercial contracts, the PPP Vendor is usually able to pass on the costs of changes in law to its customers through an increase in price or, in Contracts of relatively short duration, is able to take a view on the prospects of changes in law arising during the term of the Contract. As the prices in PPP Contracts are agreed on a long-term basis and are not flexible in the same way, the PPP Vendor will often not be in a position to price the full cost of prospective changes in law effectively.

14.2.3. A sharing approach is the best way to ensure that the costs of implementing changes in law are minimised. The approach set out in this Section in respect of the sharing of risks relating to changes in law is intended to play to the strengths of both the public and private sectors and ensure that the PPP Vendor is incentivised to manage its costs, even where the Nodal Agency agrees to meet the PPP Vendor's costs resulting from complying with a change in law.

### 14.3. Definition of Change in Law

14.3.1. The Contract should specify that the PPP Vendor is expected to comply with all relevant law and should contain a mechanism for handling the effects of a change in law.

#### **ILLUSTRATIVE DRAFTING:**

##### **“Change in Law”**

means the coming into effect after the date of this Contract of:

- (a) Legislation, other than any Legislation which on the date of this Contract has been published:
  - (i) in a draft Bill as part of a Government Consultation Paper;
  - (ii) is with the Standing Committee
  - (iii) in a draft statutory instrument; or
  - (iv) in a Bill;
- (b) any applicable judgment of a relevant court of law which changes a binding precedent.

##### **“Legislation”**

means any Act of Parliament or subordinate legislation.

### 14.4. Allocation of Risk of Change in Law

14.4.1. In some projects, it is possible to treat changes in law of any type as the PPP Vendor’s risk. For e.g. in case it requires to make minor modification in the software application.

14.4.2. In other cases, a risk sharing approach has developed where the main user of the Project is the Nodal Agency and it is not appropriate for the PPP Vendor to bear all of the change in law risks as the risk cannot be quantified or passed on to third party users. There are a number of different possible approaches to risk sharing that build on the distinctions between discriminatory/specific legislation and general legislation. These all involve a sharing of the risk of changes in law.

### 14.5. Mitigation

14.5.1. Whenever the Nodal Agency bears some of the risk of a change in law, the PPP Vendor should be obliged to keep any cost increases to a minimum.

14.5.2. This duty to mitigate can be measured, in part, by reference to the extent to which price increases in comparable sectors are experienced. It will also require the PPP Vendor to foresee and anticipate the effect of changes in law, particularly in relation to expenditure which it has planned to incur anyway in the ordinary course of the Contract. For example, a PPP Vendor cannot on one day change a database server under its normal maintenance programme and then argue that it immediately has to replace it due to a subsequent change in law which the PPP Vendor should have



anticipated at the time of replacement (and for which the Nodal Agency bears the cost in whole or in part). For that reason, any compensation should reflect any anticipated future saved maintenance costs.

## 14.6. Discriminatory, Specific and General Changes in Law

### **ILLUSTRATIVE DRAFTING:**

#### **“Discriminatory Change in Law”**

means a Change in Law, the terms of which apply expressly to:

- (a) the Project and not to similar projects procured under the PPP;
- (b) the PPP Vendor and not to other persons; and/or
- (c) PPP Contractors and not to other persons.

#### **“Specific Change in Law”**

means any Change in Law which specifically refers 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 to the Service].

### **ILLUSTRATIVE DRAFTING:**

#### **“General Change in Law”**

means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law.

14.6.1. Where a risk sharing approach is adopted in respect of Change in Law (as referred to in Section 14.4.2), any costs arising from Discriminatory Changes in Law and Specific Changes in Law should be at the Nodal Agency’s risk.

## 14.7. General Change in Law at PPP Vendor’s Risk

14.7.1. Costs arising from changes in non-discriminatory/non-specific legislation (i.e. General Changes in Law) can either be for the account of the PPP Vendor or shared between the PPP Vendor and the Nodal Agency.

14.7.2. General Changes in Law are generally only at the PPP Vendor’s sole risk in specific sectors where the length of the Contract is such that the PPP Vendor is comfortable that the risk of General Changes in Law occurring is low, or where the relationship between the parties and the history of changes in the sector concerned is such that the PPP Vendor is prepared to accept this risk.

14.7.3. Although the PPP Vendor may appear to bear all the risk of General Changes in Law, this approach will often involve some method of mitigating the effect on the PPP Vendor. For example, market testing, benchmarking and/or indexation provisions will in fact lead to the sharing of some of his risk (see Section 15 (Price Variations)) in that additional operating costs may be reflected in

increases to the Unitary Charge following a benchmarking or market testing and/or indexation, although the PPP Vendor will bear such risk for the period up to benchmarking or market testing.

## 14.8. General Change in Law as a Shared Risk

14.8.1. General Change in Law may affect the Project in a variety of ways. For example:

- the change may require alterations to the technical architecture (with an impact both on Capital Expenditure and, potentially, timetable); and
- the change may necessitate a change in the way a Service is delivered (e.g. the number of people required to deliver it may change).

14.8.2. Costs arising from General Changes in Law should generally be for the account of the PPP Vendor, as the PPP Vendor is protected through the combined effects of benchmarking, market testing and indexation<sup>70</sup>.

14.8.3. This alternative approach recognises, however, that it may be more equitable for the Nodal Agency to share costs which are difficult for the PPP Vendor to manage. An exception is therefore made of General Changes in Law which:

- require Capital Expenditure; and
- take effect during the Service Period (i.e. after solution development is completed (but see Section 14.8.8)); and
- were not reasonably foreseeable at Contract signature.

Under this approach the costs of a General Change in Law falling within this exception are shared between the PPP Vendor and the Nodal Agency. If the change was foreseeable during the solution development period although not yet in effect, the PPP Vendor's obligation to mitigate (see Section 14.5 (Mitigation)) would require it to have taken all reasonable action to minimize the eventual cost of implementing such change (e.g. by altering solution development prior to completion). This approach promotes a shared incentive to keep the costs of a change in law to a minimum without exposing the PPP Vendor to excessive risk.

14.8.4. An appropriate approach to sharing the risk of the type of change in law described in Section 14.8.3 is to share such risk on a progressive scale. the Contractor takes 100% of the first Stage of Capital Expenditure, 75% of the next stage, 50% of the next stage and so on (see the table set out in Section 14.8.10). Once a certain amount is reached, the Authority takes 100% of any amounts above that amount. The threshold figures agreed and the number of graduated steps will take into account the size of the Project and the impact of other. The levels of Cumulative Capital Expenditure (see Section 14.8.10) are not indexed (as the totals are cumulative, indexation can lead to unnecessary

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<sup>70</sup> The PPP Vendor should also receive the benefits of any cost savings resulting from General Changes in Law. Benchmarking, market testing and indexation should act to restrict the overall benefits received by the PPP Vendor.

complication). The PPP Vendor's total liability should generally be between 2% to 5% of the initial capital cost of the Project<sup>71</sup>. A cap by reference to time is not recommended.

14.8.5. The advantage of sharing the risk in the way described (as opposed to the PPP Vendor simply being liable for the first stage is that it both incentivises the PPP Vendor to minimise the cost of implementing the change (as opposed to the PPP Vendor simply invoicing the Nodal Agency for whatever it costs) and reduces any concern the PPP Vendor has that the Nodal Agency can take advantage of the situation.

14.8.6. Although it is the responsibility of the PPP Vendor to manage the way in which it will fund any increases in capital costs which occur as a result of a General Change in Law occurring during the Service Period, if it is clear to the Nodal Agency from the winning bidder's Base Case that it has priced the risk at 100 percent, the Nodal Agency may wish to retain the risk on value for money grounds. Experience has shown however, that the competitive bidding process incentivizes bidders to price the risk at less than 100 percent and bidders are typically comfortable that General Changes in Law can be managed either by:

(i) standby finance; (ii) undrawn revolving working capital facilities; or (iii) building up sums over time from free cash flow:

- changes in law are usually consulted well in advance;
- there is normally a grace period for implementation; and
- such changes rarely apply retrospectively.

14.8.7. The Nodal Agency should generally pay such Capital Expenditure in accordance with the principles set out in Section 13.3.7 (Funding and Payment). Any consequent operating cost increases are borne by the PPP Vendor although these costs will be mitigated by the effects of market testing, benchmarking and/or indexation (see Section 15 (Price Variations)). The points made in Section 5.2.3 (Calculation of Compensation) are similarly relevant here.

14.8.8. All other General Changes in Law requiring Capital Expenditure (e.g. those which take effect during a typical solution development period) should, with this approach, be at the risk of the PPP Vendor in terms of time and money.

14.8.9. For projects which have unusually long solution development periods, transferring the risk of General Changes in Law for the entire solution development period (rather than adopting a sharing approach) may in fact be poor value for money and is likely to be difficult to achieve in practice .

14.8.10. Changes arising in operational costs as a result of a General Change in Law should also be borne by the PPP Vendor (subject to Section 15 (Price Variations)). If a General Change of Law requires changes to the Service then either party should be entitled to require a variation to the project specifications to comply with a Change in Law and no breach of contract should arise while this is being done.

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<sup>71</sup> Bidders will price into their bid submissions any General Change in Law risk they are required to take. Both the Nodal Agency and bidders should seek to ensure that cost and adequate risk transfer are balanced as far as possible to achieve the best value for money

### **ILLUSTRATIVE DRAFTING:**

#### **“PPP Vendor’s Share”**

means the percentage figure corresponding to that part of the Cumulative Capital Expenditure at the relevant time, shown in the first column of the table set out below.

#### **Cumulative Capital Expenditure<sup>72</sup> PPP Vendor’s Share<sup>18</sup>**

INR. 0 – INR. [a] million (inclusive) 100%

INR. [a] million to INR. [b] million (inclusive) 80%

INR. [b] million to INR. [c] million (inclusive) 60%

INR. [c] million to INR. [d] million (inclusive) 40%

INR. [d] million to INR. [e] million (inclusive) 20%

INR. [e] million to INR. [f] million (inclusive) 10%

INR. [f] million and above 0%

#### **“Cumulative Capital Expenditure”**

means the aggregate of:

- all Capital Expenditure that has been incurred as a result of each General Change in Law that has come into effect during the Service Period; and
- the amount of Capital Expenditure that is agreed, or determined to be required, as a result of a General Change in Law under Clause 14.8 (Qualifying Change in Law).

#### **“Qualifying Change in Law”<sup>73</sup>**

means:

- a Discriminatory Change in Law;
- a Specific Change in Law; and/or
- [a General Change in Law which comes into effect during the Service Period and which involves Capital Expenditure<sup>74</sup>] which was not foreseeable at the date of this Contract<sup>75</sup>.

### **14.8 Qualifying Change in Law**

(a) If a Qualifying Change in Law occurs or is shortly to occur, then either party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

- (i) any necessary change in Service<sup>76</sup>;
- (ii) whether any changes are required to the terms of this Contract to deal with the Qualifying Change in Law;

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<sup>72</sup> These figures are to be bid as part of the bid submission. In each case they are not to be indexed

<sup>73</sup> It may of course be that there is a particular uncertainty attaching to a particular change in law (even if foreseeable), such as where, for example, its effects can vary by a significant factor. If this is so, then risk sharing can be agreed where the value for money impact is extremely difficult to assess.

<sup>74</sup> This will depend on which option in Section 14.7 (General Change in Law at PPP Vendor’s Risk) is adopted and the extent to which Capital Expenditure is at the risk of the PPP Vendor (i.e. the extent to which such amounts have been included in the bid).

<sup>75</sup> If any greater clarity can apply to this in a particular Project (such as concerns over particular envisaged changes in law) then this should be expanded upon

<sup>76</sup> For example, the contractual, financial, operational and/or solution development implications of the change in Service. Any change in Service should be agreed and implemented in accordance with the Change Protocol described in Section 13 (Change in Service), with the costs of the change being shared as recommended in this Section.

- (iii) whether relief from compliance with obligations is required, including the obligation of the PPP Vendor to achieve the Planned Service Commencement Date and/or meet the [performance regime] during the implementation of any relevant Qualifying Change in Law;
  - (iv) any loss of revenue that will result from the relevant Qualifying Change in Law;
  - (v) any Estimated Change in Project Costs that directly result from the Qualifying Change in Law; and
  - (vi) any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Service Period, in each case giving in full detail the procedure for implementing the change in Service. Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) shall be dealt with in accordance with paragraphs (b) to (f) below.
- (b) As soon as practicable after receipt of any notice from either party under paragraph (a) above, the parties shall discuss and agree the issues referred to in paragraph (a) above and any ways in which the PPP Vendor can mitigate the effect of the Qualifying Change of Law, including:
  - (i) providing evidence that the PPP Vendor has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its subcontractors to minimize any increase in costs and maximize any reduction in costs;
  - (ii) demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the PPP Vendor;
  - (iii) giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project; and
  - (iv) demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraph (a) (v) and/or (vi) above.
- (c) If the parties agree or it is determined under Clause 25 (Dispute Resolution) that the PPP Vendor is required to incur additional Capital Expenditure due to a Qualifying Change in Law (excluding the PPP Vendor's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this paragraph), then the PPP Vendor shall use its reasonable endeavours to obtain funds on terms reasonably satisfactory to it.
- (d) If the PPP Vendor has used reasonable endeavours to obtain funding from external sources (c), but has been unable to do so within [60] days of the date that the agreement or determination in paragraph (c) occurred, then the Nodal Agency shall pay to the PPP Vendor an amount equal to that Capital Expenditure on or before the date falling 30 days after the Capital Expenditure has been incurred.

- (e) Any compensation payable under this Clause by means of an adjustment to or reduction in the Unitary Charge<sup>77</sup> shall be [see Section 5.2.3 (Calculation of Compensation) above].

## 14.9. Changes in Tax Law

14.9.1. Discriminatory and specific changes in tax law should be dealt with in accordance with Section 14.6 (Discriminatory, Specific and General Changes in Law).

14.9.2. Whichever approach is adopted on General Changes in Law, all costs arising from changes in tax law that are general should be for the account of the PPP Vendor, except as stated in Section 14.10 (Changes in VAT) in relation to changes in VAT legislation.

14.9.3. Save as otherwise expressly permitted by this guidance (e.g. gross up on certain termination payments or change in VAT regime), Nodal Agency should not provide tax indemnities to the PPP Vendor, and the Change of Law provisions should not be used as a device to transfer tax risk<sup>78</sup>.

## 14.10. Changes in VAT

### 14.10.1. Changes in the VAT Rate

14.10.1.1. The Contract should be explicit regarding the consequences of a change in the rate of VAT affecting the Service. Where the Service is within the scope of VAT, a change in the rate will affect the Unitary Charge paid by the Nodal Agency. This risk is borne by the Nodal Agency.

14.10.1.2. A change in the rate of VAT may also affect the gross costs borne by the PPP Vendor if input VAT is not reclaimable (i.e. the Service supplied by the PPP Vendor to the Nodal Agency is specifically disallowed or relates to “exempt supplies” as at the date of the Contract). If the rate changes in relation to supplies received by the PPP Vendor, then the PPP Vendor will benefit or not in the same way as if its general corporation tax bill changes. This risk should, therefore, be borne by the PPP Vendor.

14.10.1.3. Changes in the rate of VAT can lead to a cash flow cost or advantage. There is always a difference in timing of VAT payments and their recovery. A PPP Vendor should not increase its Unitary Charge to deal with any such disadvantage.

### 14.10.2. Changes in VAT Scope

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<sup>77</sup> There will only be an adjustment to the Unitary Charge in respect of increased capital costs if the PPP Vendor's Share is less than 100% and the Nodal Agency does not make a lump sum payment to the PPP Vendor. Increased operational costs resulting from any General Change in Law are borne by the PPP Vendor and will not result in an adjustment to or reduction to the Unitary Charge.

<sup>78</sup> If a change of tax law does however fall within the Discriminatory Change in Law or Specific Change in Law provisions, the normal protections available to the PPP Vendor would apply. The loss of charitable status which a PPP Vendor could suffer as a result of any General Change of Law would not fall within these categories.

14.10.2.1. During the course of the Contract, changes in the scope of VAT may affect the PPP Vendor's ability to recover its input VAT. The Contract should make it clear that the PPP Vendor bears this risk unless it results from a change in the VAT status of the Service e.g. the Service becomes exempt from VAT. In this exceptional case, the Contract should provide for an adjustment to the Unitary Charge.

**ILLUSTRATIVE DRAFTING:**

**Payment of Irrecoverable VAT**

The Nodal Agency shall pay to the PPP Vendor from time to time as the same is incurred by the PPP Vendor sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within 30 days of the delivery by the PPP Vendor to the Nodal Agency of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this Clause 14.10 "Irrecoverable VAT" means input VAT incurred by the PPP Vendor on any supply which is made to it which is used or to be used exclusively in performing the Services or any of the obligations or provisions under the Contract (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the PPP Vendor is not entitled to repayment or credit from VAT Authorities in respect of such input VAT.

## 15. PRICE VARIATIONS

### 15.1. Introduction

15.1.1. The Contract will set out the Unitary Charge for the entire Contract term. However, due to the uncertainties of inflation rates and certain operating costs over a long-term contract, it is usually in the interests of both Nodal Agency and PPP Vendor to set out provisions for varying the Unitary Charge in certain specified circumstances. The PPP Vendor should always be encouraged to control its costs, but if there are mechanisms for addressing unforeseeable changes in costs, the PPP Vendor can reduce the contingency in its bid price for such risk. Similarly, although the Nodal Agency should ensure it obtains a competitive price initially by undergoing a "price discovery", it will take additional comfort if there is some means of ensuring the price it has agreed to pay in future years will not be in excess of future market prices for such Services.

15.1.2. The Contract must achieve the right balance between the provisions for change in law (see Section 14 (Change in Law)), indexation and value testing; these are inherently interrelated, particularly in relation to the allocation of operating-cost risk. PPP Vendors will be more willing to take risk in relation to certain changes in law, or in relation to cost increases above the relevant indexation rate, if they have some protection through the value testing provisions (i.e. they can bear certain risks for the period up to value testing as the extra costs are likely to be covered to an extent following value testing). The Nodal Agency should consider such inter-relationships when preparing its bid documents.

### 15.2. Inflation Indexation

15.2.1. The PPP Vendor will be concerned to protect itself against its costs inflating over the course of the Contract, rendering the Unitary Charge insufficient to meet its operating costs and financing obligations. The payment mechanism should therefore usually include arrangements for indexing the Unitary Charge to this extent. If there is no indexation mechanism, the PPP Vendor is likely to have to build a contingency into its price to cover operating-cost inflation risk and this is unlikely to give the Nodal Agency value for money (as the risk is outside the control of the PPP Vendor and, historically, has been difficult to forecast accurately). It is highly unusual for prices to be fixed (i.e. without indexation) throughout the term of any Contract for periods for which PPP Contracts are typically let. Conversely, it is not usual for the whole Unitary Charge to be indexed, and such "over-indexation" should not be used as a method of artificially reducing the initial Unitary Charge.

15.2.2. The Nodal Agency should focus on the appropriate method of applying indexation to the payment stream at an early stage in Project development. By the time a tender is issued, the Contract should specify the index to be applied and how it applies (i.e. how the proportion of the Unitary Charge to be indexed is to be determined). Nodal Agency should not leave the indexation proportion or choice of indices to the bidders, given the difficulties in comparing one bidder's price and value for money with that of another bidder where different bidders use different proportions and methods of indexation.



15.2.3. Nodal Agency should bear in mind that the use of benchmarking or market testing gives some protection to Vendors for the Services covered by these arrangements. In most cases value for money can be achieved through indexation of a proportion of the Unitary Charge which matches the proportion of total costs represented by any elements of the PPP Vendor's underlying costs which are not fixed, using a general price index such as WPI or CPI.

15.2.4. On certain projects, the use of a more focussed index may be preferable. In these cases, the Nodal Agency should take care with index selection. Choosing an index that may be short lived, or is not independently produced, is not a sensible approach. It is also not appropriate to have too narrow a focus on a particular industry or sector, where the Contractors or their Affiliates are themselves responsible to a significant extent for inflationary costs (that is, they can actually affect the index by increasing their price).

15.2.5. Whilst choosing an index and weighting that reflect the underlying cost exposure of the PPP Vendor has the effect of reducing its cost risk, amended forms of such indexation formulae can incentivize real cost savings over the life of the Contract<sup>79</sup>.

### 15.3. Value Testing of Operating Costs

#### 15.3.1. Introduction

15.3.1.1. As noted above, it may be beneficial to include within the Contract provisions for periodic value testing of certain Services provided by the PPP Vendor. By "value testing", this guidance generally refers to either market testing or benchmarking, although other forms of value testing may sometimes be appropriate.

15.3.1.2. Market testing means the re-tendering by the PPP Vendor of a relevant Service to ascertain the market price of that Service. This may lead to the replacement of the Sub-PPP Vendor 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 Nodal Agency.

15.3.1.3. Benchmarking is a process by which the PPP Vendor compares either its own costs or the cost of its Sub-Contractors for providing certain Services against the market price of such Services. This may lead to a price adjustment, but not to a change in the sub-Contractor providing the Service.

15.3.1.4. The Services provided by the PPP Vendor that are suitable for value testing are generally limited to soft services. By "soft services", this guidance means Services such as Facility Management services, to the extent they do not involve a significant capital outlay in their performance or affect the value of any capital asset under the Contract. These services are suitable as the prices charged

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<sup>79</sup> One such amended indexation formula of  $x \times (1 + \text{CPI} \pm y)$  could be used by the Nodal Agency in its Pre-Bid Discussions, with bidders required to bid values of  $x$  and  $y$ . Where future cost reductions are reasonably foreseeable and not reflected in the initial Unitary Charge these can be reflected in the value of  $y$ . The bidder can propose a value of  $x$  reflecting the percentage of any elements in its cost structure that are not fixed. The variable  $x$  will therefore be a number between 0 and 1.

by the incumbent sub-Contractor and by various potential sub-contractors for such services from year to year should be comparable. Where an incumbent sub-Contractor has incurred capital costs, its price cannot be expected to compete with the price of a bidder who was not required to incur those capital costs. Services such as building a turnkey solution or lifecycle maintenance of equipment should not generally be market tested or benchmarked. These services are referred to as “hard services”.

15.3.1.5. Providing for periodic value testing of soft services in the Contract may benefit both the Nodal Agency and the PPP Vendor. Testing against the market is an important mechanism for the Nodal Agency to ensure that the soft service costs remain value for money over the life of the Contract and that the PPP Vendor does not become complacent in its pricing or delivery. In addition, if the PPP Vendor was required to enter into a fixed price long-term contract for soft services (with a simple indexation mechanic and the assumption of operational change of law risk) without any form of periodic testing, significant risk reserves may need to be built into its price. This in turn would not offer value for money to the Nodal Agency. It is important that both the Nodal Agency and the PPP Vendor understand the purpose of the value testing process and the results it may yield. In particular, if the PPP Vendor has misjudged its original service delivery bid or is inefficient in its operation, value testing should not be viewed by it as a means of passing Service or delivery risk back to the Nodal Agency.

### **15.3.2. Choice of Value Test - Preference for Market Testing**

15.3.2.1. It is now standard practice in most sectors of the PPP market to include some form of value testing. The recommended approach in Version 3 of this guidance was to adopt benchmarking as the preferred value testing mechanism and to use market testing only to the extent that the parties cannot agree on the outcome of benchmarking. This position has now changed.

15.3.2.2. Market testing allows a more flexible approach to the provision of Services than benchmarking because it ensures that the soft service provision for the Project can be reassessed to match public sector requirements at the time the exercise takes place. Market testing also offers greater opportunity for transparency and competition. Accordingly, and because of a greater maturity in the soft services market, the recommended approach is to provide for market testing of soft services, as this is most likely to yield best value for money.

15.3.2.3. In certain limited circumstances however, it may not be appropriate to provide for market testing. For example:

- the Service may be specialised and only provided by one or two contractors, or it may require specific security clearance. In these cases neither market testing nor benchmarking may be appropriate but some alternative form of value testing such as profit-sharing may be considered,<sup>7</sup> or
- there may be no competitive market for the relevant Service in the area, although Nodal Agency should be expected to actively develop a market for the Service where possible. If no competitive market exists or can be developed and effective market testing would thus be impossible, benchmarking (perhaps against suppliers of a similar service operating in a different geographic region) or an alternative form of value testing may be used.

Nodal Agency should consult their relevant departmental Private Finance Units for guidance where benchmarking is proposed instead of market testing.

15.3.2.4. Whether the Nodal Agency determines market testing or benchmarking to be appropriate, it should consider whether it would be beneficial to include provisions in the Contract for an alternative method of value testing. Where market testing is selected as the primary value testing method, provisions could be included to allow the Nodal Agency to require a benchmarking process following the initial market test procedure if the market test fails, perhaps due to lack of any bidder other than the incumbent.

15.3.2.5. Similarly, where benchmarking is thought to be the most appropriate value test, it will usually be appropriate to include provisions in the Contract to allow the Nodal Agency to require a market test, at its discretion, with or without a prior benchmarking process. Benchmarking on its own is unlikely to produce best value for money results. Nodal Agency should move to market testing following a benchmarking process where adequate benchmark data was not available, a robust benchmark process had not been achieved, or a price adjustment was not agreed. Further, it would be appropriate to move straight to a market test where benchmarking was selected due to a lack of competitive market, and a sufficiently competitive market has developed between Contract signature and the value testing date.

15.3.2.6. Different Services within the same Project may need different treatment (or possibly the same Service could have different treatment at different points in the Project). Nodal Agency need therefore to consider their options carefully both at the outset and at any value testing point.

### **15.3.3. Planning and Management**

15.3.3.1. At the outset of the Project, when developing its business case, the Nodal Agency should consider what Services it needs and whether it is appropriate to include soft services. An Nodal Agency may decide that only those Services intimately connected with the design solution of the Project, such as hard services, should be included in the Project; a number of hospital projects have taken this route. If soft services are to be included in the Contract, the nature of the individual services and their degree of integration in the design solution and with each other needs to be considered.

15.3.3.2. The Nodal Agency should specify in the PRE-BID DISCUSSIONS when the first value testing exercise will take place. Commonly the value testing exercise will occur at five to seven year intervals with a longer interval before the first exercise. The longer initial period (which should be well into the Service Period) should ensure that bidders do not set a deliberately low initial price that they then try to increase through the review. An excessively long initial period may, however, expose the Nodal Agency to an unreasonable price premium for transferring this risk. Where benchmarking is appropriate, the first benchmarking exercise could be limited such that it is capable of resulting in decrease in price only or a capped increase in price.

15.3.3.3. Some early projects have experienced practical difficulties in managing their benchmarking and market testing procedures and some early contracts lack detail on these processes. Contracts in any event are unlikely to provide a comprehensive blue print for such procedures.

15.3.3.4. Benchmarking and market testing are the responsibility of the PPP Vendor, from both a cost and management perspective. Depending on the Project, this may involve an independent tender manager being employed to manage the market testing and/or benchmarking processes. Having some independent management level (coupled with appropriate information barriers) would be essential where the current service provider, or any bidder, or any member of their respective groups, had a shareholding interest in the PPP Vendor or relevant sub-PPP Vendor.

15.3.3.5. This guidance assumes that the person providing the soft services to be benchmarked or market tested is an operating Sub-PPP Vendor who has a direct contractual relationship with the PPP Vendor. If the relevant Services are instead being provided by a sub-PPP Vendor to such an operating Sub-PPP Vendor, and thus there is no direct contract with the PPP Vendor, the same principles apply. However, in these cases the calculation of pricing adjustments to the Unitary Charge following value testing may become more complicated, since the relationships between cost and price charged to the PPP Vendor become more remote.

## 15.4. Market Testing

15.4.1. As outlined in Section 15.3.2, the recommended approach is to provide for market testing of soft services in the Contract, as this is most likely to yield best value for money. The procedure for market testing should be as follows:

- on certain fixed dates, the PPP Vendor re-tenders the relevant Project Document and conducts a competition for potential replacement sub-contractors (and normally the existing sub-Contractor would be allowed to bid). Care must be taken to avoid any conflict of interest issues, for instance where the PPP Vendor may be part of the same corporate group as any bidder;
- if the competition shows that the PPP Vendor can obtain better value for money with a new winning bidder, then the Unitary Charge should be reduced (as described in Section 15.5.4) and the PPP Vendor would obtain a reduction in cost by appointing the winning bidder as a replacement sub-Contractor; and
- if the competition shows that the PPP Vendor's current sub-PPP Vendor is better value for money than any potential replacement, then the sub-PPP Vendor should continue, but with an appropriate change being made to the Unitary Charge to reflect the subcontractor's bid price.

15.4.2. Information will need to be collected by the PPP Vendor and made available to bidders for the market testing to be effective. For example, information relating to the terms and conditions, job title, age, length of service and benefits of the employees of the service provider engaged wholly or mainly in the provision of the market tested services may be required. The Contract should provide

that this information is provided to the Nodal Agency (see Section 23, (Information and Confidentiality)).

15.4.3. The Contract should also make clear that the market testing of each Service is the responsibility of the PPP Vendor who should ensure a smooth transition between sub-contractors.

The Nodal Agency may however wish to actively support the PPP Vendor in encouraging bidders for the relevant Services, perhaps by the appointment of an independent tender manager, in order to ensure there are sufficient bidders willing to compete against an incumbent Service provider to provide an effective competition.

#### **ILLUSTRATIVE DRAFTING:**

##### **Market Testing**

- a) At least [40] weeks before each market testing date, the parties shall meet together as often as may be necessary in respect of all market tested services to be market tested on that date:
  - (i) to consider any changes required to the relevant services;
  - (ii) to discuss and seek to agree the appropriate manner of advertising the services required and the means of identifying prospective bidders;
  - (iii) to discuss and seek to agree the tender requirements which must include:
    - A. a statement of the tender validity period;
    - B. details of the tender evaluation criteria;
    - C. the terms and conditions under which the services will be contracted;
    - D. information relating to employees and their conditions of employment;
    - E. the information that bidders are required to provide;
    - F. how many tenders are required for the market testing to be valid; and
    - G. whether or not an independent tender manager needs to be appointed by the PPP Vendor to manage the tender process.

15.4.4. Where a number of Services are being market tested, the question may arise as to whether bidders must tender for all such Services or whether they can select certain Services and tender in respect of those only (for example, some bidders may only want to take over the data entry function, whereas others may want a wider role). One way of dealing with this is as follows:

##### **Grouping of Services**

Unless the PPP Vendor can demonstrate to the Nodal Agency that best value for money is likely to be achieved for the PPP Vendor if market tested services are tendered separately or in particular groupings, or if any market tested service is divided into separate parts, the grouping of any market tested services shall be left to the discretion of bidders on the basis that the tender requirements shall specify that:

- a) bidders may submit tenders for all or any of the market tested services; and

- b) if a bidder submits a tender for a group or groups of market tested services, then it may be required to provide all or any of the services in such group or groups.

15.4.5. The next step in the market testing provisions will be to specify how bidders are selected<sup>80</sup>. A suggested way of doing this is set out below:

#### **Selection of Bidders**

- a) The PPP Vendor shall be responsible for compiling the list of prospective bidders and selecting the bidders from the list of prospective bidders on the basis of their:
  - (i) financial standing; and
  - (ii) technical and managerial experience and ability (taking into account any relevant references).
- b) The Nodal Agency shall have a right to prevent the selection of any person as a prospective bidder if it reasonably believes that such person does not (or could not reasonably be considered to) comply with any of the criteria referred to in Clause 15.4.4 (a)(iii) above.
- c) The Nodal Agency shall, in its absolute discretion, have the right to prevent the selection of any person as a bidder on the grounds that the prospective bidder has been blacklisted by any Government Agency.
- d) The Nodal Agency shall have a right to review the list of prospective bidders. The PPP Vendor shall provide the Nodal Agency with an explanation of the reasons behind the non-inclusion on the list of prospective bidders of any person identified as suitable by the Nodal Agency, if so requested by the Nodal Agency.
- e) The PPP Vendor shall provide any prospective bidder which is unsuccessful in being selected with an explanation of the reasons behind its non-selection, if so requested by the person in question.

15.4.6. Once the period for submission of tenders has ended, the PPP Vendor must determine the best tender. The following drafting deals with this issue:

#### **ILLUSTRATIVE DRAFTING:**

- (a) The PPP Vendor shall determine which compliant tender in respect of any market tested service represents the best value for money<sup>81</sup>.
- (b) On making this determination, the PPP Vendor shall supply to the Nodal Agency a copy of its tender evaluation, together with sufficient supporting information concerning the tender evaluation

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<sup>80</sup> The Contract will also have to deal with the extent to which any person is disqualified from selection as a bidder merely by virtue of its connection with any other person in the Project. Typically, no such connection should disqualify a bidder provided an independent tender manager is appointed and appropriate information barriers are put in place. See Section 15.3.3.4

<sup>81</sup> If only one compliant tender is submitted in respect of some or all of the market tested services, the Nodal Agency is at risk of being obliged to pay an uncompetitive price for that part or all of the Service. Accordingly, the Contract may provide a right for the Nodal Agency to prevent the PPP Vendor appointing a single bidder and passing those costs onto the Nodal Agency through the Unitary Charge without its approval. The risks of only one such bid being received in practice should be remote and capable of assessment by the PPP Vendor (unless there are project specific reasons to the contrary) which should enable the PPP Vendor to accept the inclusion of a provision of this nature. If the parties wish to specify what would happen in those circumstances, the provision should be amended on a project specific basis.

to enable the Nodal Agency to analyse and understand the basis for the PPP Vendor's determination.

(c) If the Nodal Agency does not agree with the PPP Vendor's determination, the Nodal Agency may, within 15 Business Days of being provided with the tender evaluation, dispute such determination and, if the parties do not resolve such dispute within a further 15 Business Days, the dispute shall be dealt with in accordance with Clause 25 (Dispute Resolution).

15.4.7. On selection, the winning bidder will take over the provision of the Service and the Unitary Charge should be adjusted on the basis agreed in the Contract. As the PPP Vendor is responsible for the market testing, the Nodal Agency should be indemnified against any claims brought against it (for example, from a losing bidder) as a result of any market testing (for example, for a breach of the agreed market testing procedures).

## 15.5. Benchmarking

15.5.1. The following provisions of this Section 15.5 are relevant if a benchmarking process is included in the Contract, either as the sole value test or included along with market test provisions (as outlined in Section 15.4).

15.5.2. To ensure any benchmarking exercise provides a good comparison with the costs of a Sub-PPP Vendor, the PPP Vendor will have to ensure the following issues are addressed:

- that the cost comparison encompasses only the services being benchmarked;
- that the cost comparison includes factors relating to risks inherent in a change of service provider (such as mobilisation costs);
- that PPP Vendor's own costs are not used as a benchmark;
- whether individual services are to be benchmarked separately, in clusters, or all together;
- whether it is possible to rely on the information being provided by those persons contacted for benchmarking information;
- whether it is possible to verify the appropriateness of the benchmarking information as a comparator for the service being benchmarked; and
- whether there is any other reason or factor that would make benchmarking unrealistic or impracticable.

See further Operational Taskforce guidance referenced at Section 15.3.3.3 above.

15.5.3. The procedure for carrying out a benchmarking exercise is as follows:

- on certain fixed dates, the PPP Vendor compares certain of its costs (e.g. what it pays its Sub-Contractors providing soft services) with equivalent prevailing market costs (e.g. what it would have to pay other Sub-Contractors to provide the equivalent service) and, if appropriate, proposes a variation to the Unitary Charge;
- the Nodal Agency and the PPP Vendor should generally begin planning 40 weeks ahead of the benchmark adjustment date in order to allow sufficient time to complete the benchmarking process (and allow a market testing to occur, should this be needed and

provided for in the Contract), though this period could be longer or shorter depending on the scale and nature of the relevant services;

- if the market cost is higher than the PPP Vendor's current costs and the current Sub-Contractor is still obliged to provide the Service at the lower price, there is no need to adjust the Unitary Charge (it may be that the Sub-Contractor concerned is simply more efficient than the rest of the market);
- if the market cost is higher than the PPP Vendor's current costs and the current Sub- PPP Vendor is contractually entitled to review its price, the Unitary Charge may be adjusted (although this will not necessarily be the case - see Section 15.5.4);
- if the market cost is lower than the PPP Vendor's current costs, there should be an adjustment to the Unitary Charge (see Section 15.5.4). It could be that the Sub- Contractor is not as efficient as its competitors. The price decrease should encourage the PPP Vendor to take appropriate steps to reduce its costs (for example by replacing the sub-Contractor, taking into account the costs of such replacement). The Nodal Agency should encourage efficiency, for example by comparing the PPP Vendor's costs to those of the most efficient quartile of the market, rather than the median;
- the Nodal Agency must have the right to inspect the PPP Vendor's and sub-PPP Vendor's cost information to confirm cost details. Full transparency of cost information is needed for benchmarking to function properly (see Clause 26.2 (PPP Vendor's Records and Provision of Information) and
- if the Nodal Agency and the PPP Vendor cannot agree on any price adjustment or the Nodal Agency is not satisfied that there has been a robust benchmark process, then if the Contract so provides the Service concerned should be market tested (see Section 15.4 (Market Testing)).

15.5.4. The outcome of the review should not necessarily be a direct pass-through to the Nodal Agency of the benefit or burden of all the cost change. There should instead be a formulaic adjustment that shares any cost increase or decrease in a way that incentivizes the PPP Vendor to control its costs. The sharing ratios need not be symmetrical on an upwards and downwards price variation, and the Nodal Agency should assess the likely value for money impact of a greater sharing in a price reduction than a price increase when deciding on such an approach.



## **16. SUB-CONTRACTING, EMPLOYEES AND DOCUMENTARY CHANGES**

### **16.1. Control over Sub-Contractors**

16.1.1. The Nodal Agency often has the perception that it must retain a large degree of control of a subjective nature over Sub-Contractors. This perceived need for control applies both to the performance of the Sub- Contractors and to any procedure for appointing replacement Sub-Contractors. The PPP Vendor's stated view is often that as it originally selected these Sub-Contractors and has taken risk on their performance, it should be entitled to change them at will (for example, if they are not performing) whilst recognizing the legitimate interest of the Nodal Agency in the identity of key sub-contractors (as provided for in Section 16.1.5).

16.1.2. In general, attempts by the Nodal Agency to control Sub-Contractors are to be discouraged as it is in most cases unnecessary and may dilute the level of risk transfer achievable by the Nodal Agency (see also Section 9.4 (Monitoring of Sub-Contractors)). The Nodal Agency should in any event (if control is needed) generally only seek a degree of control in relation to Sub-Contractors and not in relation to sub-contractors of Sub-Contractors, though the ability to engage directly with the service provider on-site may also be needed (see further Section 13.5.3).

16.1.3. In certain limited cases, there may be overriding reasons why the Nodal Agency should have a degree of control over sub-contractors. For example, there may be national security issues (particularly in some projects related to national security), other public interest issues (e.g. regarding who should be allowed to be involved in social sector e-Governance projects), or the Nodal Agency may have a statutory duty that it needs to carry out.

16.1.4. In such cases, the criteria that a replacement sub-contractor must satisfy should be reasonable (for example, they should require that the potential sub-Contractor is not a threat to national security or other relevant aspect of the public interest). Any judgment that the potential sub-contractor does not satisfy the criteria should be based on objective evidence. For example, a judgment that employment of a certain sub-Contractor would represent a threat to national security or the public interest should be made on the basis of concrete information received from a relevant legal, financial or other Nodal Agency demonstrating that the national interests would be detrimentally affected. In the majority of cases, criteria of this nature will not be needed.

16.1.5. In cases in which there is no specific reason to control sub-contractors, the Nodal Agency may still want some control on the basis that it placed reliance on the original sub-contractor's identity and ability to perform in awarding the Contract to the PPP Vendor. In such cases, satisfaction of a limited set of objective criteria should prove an acceptable level of control to the Nodal Agency and the PPP Vendor. Any such criteria should include: technical ability and competence; and financial strength (including any willingness to give guarantees to the PPP Vendor).

16.1.6. If in the circumstances described the Nodal Agency retains some control over replacement Sub-Contractors or sub-contractors of Sub-Contractors, these controls will also apply to any substitute Sub-Contractors or sub-contractors.

## **16.2. Control over Employees**

16.2.1. The Nodal Agency should not generally seek to control whom the PPP Vendor (or its subcontractors) employs, except where there are valid reasons to do so (e.g. overriding public policy considerations, national security issues, security clearances or statutory duties).

16.2.2. The Nodal Agency's concerns are likely to be focused on preventing or terminating the employment of persons with a criminal conviction relevant to their employment. This is unlikely to be an issue for the PPP Vendor where the concern relates to a matter which is also of concern to the PPP Vendor (e.g. dishonesty convictions). The PPP Vendor will be equally keen to build in safeguards into its employment procedures to take action against dishonest employees.

16.2.3. Examples where a degree of Nodal Agency control is required include Ministry of Home Affairs/NATGRID projects, where the Nodal Agency retains a need to approve all staff because of statutory duties relating to sensitive security considerations. The Nodal Agency has the right to prevent the employment, or require the removal, of any staff. Similarly, public policy considerations may mean that an Nodal Agency involved in e-Governance in Primary Education projects, for example, does not want employees with convictions of a certain nature (but, again, the Nodal Agency and PPP Vendor are likely to have a common interest on such issues).

16.2.4. In the cases in which the Nodal Agency is justified in retaining a degree of control over the PPP Vendor's employees, the Nodal Agency should agree the relevant restrictions with the PPP Vendor as part of the bidding process. The PPP Vendor's personnel and employment policy will need to reflect the Nodal Agency's requirements and this may have a cost implication. The Contract provisions should be reasonable and allow the Nodal Agency to veto or require the removal of staff, with the PPP Vendor bearing the risk of the consequences of such action. Any judgment that an employee does not satisfy certain relevant criteria should, to the extent within the Nodal Agency's control, be made on the basis of objective evidence. Contractors should note that certain security clearance procedures may be outside the control of the Nodal Agency.

16.2.5. Controls need to be exercised over employees at the end of the Service Period, where the considerations referred to in Section 18.4 (Handover Provisions for Assets which transfer to the Nodal Agency) apply.

## **16.3. Consequences of Control**

16.3.1. If the Nodal Agency does retain some control over sub-contractors and/or employees then the Contract should contain a procedure to be followed to confirm whether the Nodal Agency has any objections to a particular party. Any failure by the Nodal Agency to respond within the specified time limit should be dealt with in accordance with Section 5.2 (Compensation Events). Nodal Agency should consider carefully whether their "approval" can be deemed to be given if they fail to respond.

## **16.4. Changes to Project Documents**

16.4.1. The PPP Vendor will want to retain flexibility in case its sub-contracting need updating, but the Nodal Agency will want to ensure that this does not prejudice the Project, and that the Project Documents reviewed by it prior to Financial Close, as part of its due diligence, are not simply rewritten. Section 20 ensures that the Nodal Agency's own exposure to liability on termination of the Contract is not increased without the Nodal Agency's consent, despite any changes being made to the Project Documents.

Nodal Agency should not use this as a device to micro-manage delivery of the Service.

#### **ILLUSTRATIVE DRAFTING:**

##### **Delivery of Initial and Changed Project Documents**

- (a) The PPP Vendor has provided to the Nodal Agency copies of the Project Documents.
- (b) Without prejudice to the provisions of Clauses 16.4.2 or 16.4.3, if at any time an amendment is made to any Project Document, or the PPP Vendor enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), the PPP Vendor shall deliver to the Nodal Agency a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as the case may be), certified as a true copy by an officer of the PPP Vendor.

##### **Changes to Project Documents**

The PPP Vendor shall perform its obligations under, and observe all of the provisions of, the Project Documents and shall not:

- (a) terminate or agree to the termination of all or part of any Project Document;
- (b) make or agree to any material variation of any Project Document;
- (c) in any material respect depart from its obligations, (or waive or allow to lapse any rights it may have in a material respect), or procure that any counterparty to a Project Document in any material respect departs from its obligations (or waives or allows to lapse any rights they may have in a material respect), under any Project Document; or
- (d) enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Project Document, unless the proposed course of action (and any relevant documentation) has been submitted to the Nodal Agency for review and there has been no objection made by the Nodal Agency within [ ] Business Days of receipt by the Nodal Agency of such submission, or such shorter period as may be agreed by the parties, [and provided, in the circumstances specified in Clause 16.4.2 (a), that the PPP Vendor has complied with the provisions of [Section 16 (Sub-Contracting, Employees and Documentary Changes)]. The Nodal Agency may only make objection on the following reasonable grounds [ ].

## **17. ASSIGNMENT**

### **17.1. Introduction**

17.1.1. Over the course of a long-term contract, the identity of the Nodal Agency and the PPP Vendor may change to some extent. This should be recognized at the time of negotiating the Contract and an appropriate balance struck which allows some flexibility for change where appropriate but gives the parties sufficient comfort about the identity and/or creditworthiness of their counterparties.

### **17.2. Restrictions on the PPP Vendor**

17.2.1. The Contract should not allow the PPP Vendor to assign, novate or transfer its rights under the Contract.

### **17.3. Restrictions on the Nodal Agency**

17.3.1. The Contract should generally not allow the Nodal Agency to assign or transfer its rights or obligations under the Contract without the consent of the PPP Vendor.

17.3.2. The main exceptions to the above are where transfer either takes place under statute. Specific exceptions may also have to be provided for in a particular project if a transfer is anticipated or particular sectors (e.g. the Nodal Agency where transfers may be required due to change in Ministry or re-organization of States). Nodal Agency should recognise that bidders will be concerned to ensure that the transfer could not prejudice their security.<sup>1</sup> If this is not the case, appropriate credit enhancement (e.g. in the form of a guarantee) may be required so that the PPP Vendor's position is not prejudiced. Where such a right is required by the Nodal Agency, appropriate drafting for both central and non-central government projects is set out below.

#### **ILLUSTRATIVE DRAFTING:**

#### **17.3(A) Restrictions on Transfer of the Contract by the Nodal Agency in Central Government Projects**

The rights and obligations of the Nodal Agency under this Contract shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) [acquiring the whole of the Contract and] having the legal capacity, power and Nodal Agency to become a party to and to perform the obligations of the Nodal Agency under this Contract being public body whose obligations under this Contract are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the PPP Vendor) by the Nodal Agency having the legal capacity, power to perform the obligations under the guarantee and the obligations of the Nodal Agency under this Contract.

### **17.3(B) Restrictions on Transfer of the Contract by the Nodal Agency in Non-Central Government Projects**

The rights and obligations of the Nodal Agency under this Contract shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) [acquiring the whole of the Contract and] having the legal capacity, power and Nodal Agency to become a party to and to perform the obligations of the Nodal Agency under this Contract being any [Agency] which has sufficient financial standing or financial resources to perform the obligations of the Nodal Agency under this [Contract2]; or any other public body whose obligations under this Contract are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the PPP Vendor) by the Nodal Agency having the legal capacity, power to perform the obligations under the guarantee and the obligations of the Nodal Agency under this Contract.

### **17.4. Restrictions on the PPP Vendors**

17.4.1. The Nodal Agency may be tempted to seek to limit the ability of PPP Vendors to transfer their rights. This is due in part to a perceived need to have the original equity holders involved who understand the deal negotiated, but is primarily a confidentiality and national security/public policy issue. The Nodal Agency may be concerned, for example, about whose hands project information may be in and to whom the Nodal Agency may end up owing money. The Nodal Agency does not want to become embroiled in national security issues.

17.4.2. The Nodal Agency should not attempt to put restrictions on the identity of the new equity holders unless exceptional circumstances apply. The appropriate way to deal with confidentiality issues, for example, is to impose confidentiality obligations in the Contract.

## **18. TREATMENT OF ASSETS ON EXPIRY OF SERVICE PERIOD**

### **18.1. Introduction**

18.1.1. A distinction can be drawn between:

- Contracts where it represents best value for money for the Nodal Agency to take control of the Assets on Expiry. This includes Assets where the long-term public sector demand is clear or for which there is no practical alternative use (for example information technology systems, due to its nature, is only of value to the public sector client). These are dealt with in Section 18.2 (Assets where the Nodal Agency Retains Residual Value on Expiry); and
- Contracts where residual value of the Assets is best transferred to the PPP Vendor. These are generally generic Assets which have alternative use outside the public sector and for which there is no clear long-term public sector need (for example generic information technology systems). These are discussed in Section 18.5 (Transfer of Residual Value Risk).

18.1.2. By “residual value” this guidance means, in the context of a Contract, the market value of the Assets associated with the Contract at the time it expires. When the Contract is signed, the residual value of the Assets is not known. “Residual Value Risk” refers to the uncertainty as to what the residual value will prove to be. There will usually be some estimate of the approximate residual value to be expected, which may be factored into the overall financing structure of the Contract.

18.1.3. The Contract should deal comprehensively with the treatment of Assets on all types of terminations. Which party retains the Assets on termination, and whether those Assets have any alternative use, will affect the level of termination payment (if any) payable by the Nodal Agency.

### **18.2. Assets where the Nodal Agency retains Residual Value on Expiry**

18.2.1. In most PPP projects, the Nodal Agency’s long-term objectives will be best served by requiring either automatic transfer or reversion of the Assets to itself on expiry of the Contract or at a minimum an option to purchase the assets at nominal cost. This may be because:

- legal constraints prevent any practical alternative option, for example, the private sector cannot be start collecting taxes so all hardware and related software must revert to the Nodal Agency;
- contracts which involve Assets, are specifically designed to cater for a particular service. In these sectors, the Assets have a useful economic life if retained by the Nodal Agency but there is no realistic alternative use for the Assets. There may be only limited scope for alternative use on expiry of the Contract and conversion is likely to be costly;
- the Nodal Agency requires long-term use of the Asset for the continued provision of its services;
- bidders are likely to discount the residual value of the Assets; or

- the expiry of the useful economic life of the Asset means it has no value but there is a separate reason for the Asset, such as any freehold of the land, to revert to the Nodal Agency<sup>82</sup>.

18.2.2. The Contract must, however, protect the Nodal Agency's interest by not restricting the options exercisable at or immediately before the end of the Contract. These may include:

- taking possession of any Assets at no cost;
- retendering the provision of the Service, with the outgoing PPP Vendor making any Assets available to the new PPP Vendor at no cost; and
- removing any Assets.

18.2.3. In most cases in which the Nodal Agency retains Assets at no cost, the Nodal Agency should consider the extent to which it should have recourse to the PPP Vendor if the condition of the Assets reveals that the PPP Vendor has not carried out all its contractual (for example, maintenance) obligations. This would not be necessary if such Assets had reached the end of their useful economic life (as may be the case, for example, in equipment based projects). The Nodal Agency should be driven by its operational requirements and value for money rather than by an attempt to create some residual value interest.

#### **ILLUSTRATIVE DRAFTING:**

##### **Treatment of Assets at Expiry Date**

- (a) On or before a date falling no later than [12]4 months prior to the Expiry Date, the Nodal Agency shall notify the PPP Vendor in writing whether it wishes to retender the provision of the Service.
- (b) If the Nodal Agency wishes to retender the provision of the Service then:
  - (i) the PPP Vendor shall do all necessary acts (including entering into any contracts)
  - (ii) to ensure that the successor PPP Vendor obtains all of its rights, title and interest in and to the Assets with effect on and from the Expiry Date; and
  - (iii) the Nodal Agency will bear all costs of any retendering of the Contract on expiry.<sup>5</sup>
- (c) If the Nodal Agency does not wish to retender the Service then the Assets shall transfer to the Nodal Agency on the Expiry Date and the PPP Vendor shall do any necessary acts (including entering into any contracts) to ensure that the Nodal Agency obtains all of its rights, title and interest in the Assets with effect on and from the Expiry Date.

18.2.4. The parties may also wish the Contract to deal with a mandatory second term option with the existing PPP Vendor (see Section 18.6.3) in conjunction with an open competition<sup>83</sup>. If this is the case, then the retendering would have to be on substantially the same terms as the original Contract<sup>84</sup>, so that this can be evaluated against other bids. The Nodal Agency must also consider

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<sup>82</sup> In some cases, the land will have significant residual value in its own right, notwithstanding that the other Assets may not (see Sections 20.1.1 and 20.5 (Transfer of Residual Value Risk)).

<sup>83</sup> Such a competition may be subject to any procurement regulations applicable at the time

<sup>84</sup> That is, the Unitary Charge may be substantially different, particularly if the incumbent or incoming PPP Vendor is not, as part of the competition, purchasing any Assets, but is taking over existing Assets

what the effect will be on the Nodal Agency's option if it wants to retender on different terms. The effect of this may then be to transfer some residual value risk.

### **18.3. Preserving the Condition of the Assets on Expiry**

18.3.1. Some early Contracts used Terminal Payments at the end of the Contract (even where the Nodal Agency retained control of the Assets on Expiry) as a means of incentivising the PPP Vendor to maintain high standards of Service throughout the Service Period. The argument here is that if there is a Terminal Payment related to the value of the Assets at the end of the Contract then the PPP Vendor will ensure high Service standards are maintained to the end. This argument confuses the purpose of payments for Services and payments for Asset transfer, as service standards can still be low, even if the Assets are very well maintained. Terminal Payments are not therefore recommended (except for any residual value transfer arrangement – see Section 18.6).

18.3.2. The payment mechanism should be the main method by which the Contract incentivizes the PPP Vendor to maintain service standards at all stages of the Contract. If there will be a re-competition of the Service, this provides further incentive on the PPP Vendor to continue to meet the Nodal Agency's requirements until the Expiry Date.

18.3.3. One means of incentivizing the PPP Vendor to maintain Service standards where there is no alternative use for the Assets would be to structure the Contract to give the Nodal Agency an option to enter a secondary Contract period with the initial PPP Vendor. This will increase the incentive for the PPP Vendor to maintain standards through to the Expiry Date, in addition to the payment mechanism incentives, without the need for a Terminal Payment. The PPP Vendor is obliged to enter into a second term if the Nodal Agency decides to exercise its option, but such decision will be taken in the context of an open competition with other bidders. One drawback of this is that the prices for such a second term (if it is added to the typical term for a PPP contract) are very difficult to bid in advance. The likelihood is that at best only a mechanism for calculating the price for the second period can be set out and such a mechanism is of questionable value. The Nodal Agency may, of course, instead opt to contract with another PPP Vendor if this offers better value for money. If this happens, the new PPP Vendor will have to bid to take over the use of the Assets.

### **18.4. Handover Provisions for Assets which Transfer to Nodal Agency**

18.4.1. Provisions dealing with the transfer of the Assets will need to be set out in the Contract. These will have to deal with:

- the condition of the Assets, any rectification works, their cost and how they are paid for (see Sections 11 (Maintenance));
- any design life requirement after the Expiry Date;
- inspection prior to handover;
- checking any rectification works have been done;
- provision for any assignment of warranties, contracts and other rights relating to the Project;
- and



- any disputes in connection with the above.

18.4.2. Other relevant issues include how employees should be dealt with, as they may transfer to any successor PPP Vendor or the Nodal Agency or be with the PPP Vendor.

18.4.3. To the extent that employees are being transferred, then the Contract should contain restrictions on the ability of the PPP Vendor to alter either the number of employees or their terms and conditions as the end of the Contract approaches (such as in the last 2 to 3 years of the Contract).

18.4.4. A general further assurance provision is usually included in relation to termination, such as the following: The PPP Vendor shall take all reasonable steps and co-operate fully with the Nodal Agency and any successor PPP Vendor so that any continuation in the Service is achieved with the minimum of disruption and so as to prevent or mitigate any inconvenience or risk to health or safety of the employees of the Nodal Agency and members of public.

## **18.5. Transfer of Residual Value Risk**

18.5.1. Where there is the potential for alternative use, and hence alternative users, of the Service or any Assets, there may be scope for the Contract to include provisions that transfer some residual value risk to the PPP Vendor. It is crucial that this issue is dealt with as part of the competitive bidding process if it is to deliver real value.

18.5.2. There are a number of issues for an Nodal Agency to consider. First, is it likely to require long term use of the Assets? If so, it is unlikely to derive best value from transferring residual value risk. Second, if the Nodal Agency has no clear long-term requirement for the Assets, is it possible for the Nodal Agency to pass on any residual value risk to the PPP Vendor? Third, will transfer of residual value risk provide value for money? Finally, how will transfer of residual value impact on any payment on termination on expiry of the Contract.

18.5.3. It will not be possible in all cases to leave the residual value risk of the Assets with the PPP Vendor, even if there is some potential for alternative use. The difficulty of estimating value and the required length of the initial Contract may make it uneconomic for the PPP Vendor to estimate the residual value of the Asset at anything other than an insignificant amount. In such circumstances, PPP Vendors are unlikely to accept being exposed to significant residual value risk. It will in such circumstances generally not represent value for money for the Nodal Agency to transfer this risk as the PPP Vendor will expect to obtain its return over the life of the Contract.

18.5.4. If transfer of residual value risk will enhance value for money, the Nodal Agency can pay a Unitary Charge which does not enable the PPP Vendor to cover the complete cost of financing its investment through the service payments it receives during the Contract. The PPP Vendor instead has to rely on value being left in the Assets remaining on the Expiry Date to recover all such cost. This leaves some real risk with the PPP Vendor in relation to the residual value at the end of the Contract. Where this is the case it will be possible to have a shorter Contract length (see Section 2

(Duration of Contract)). Nodal Agency should also consider Residual Value Risk when setting any capital expenditure contribution limits or liabilities (for example on a Qualifying Change of Law – see Sections 14.6 to 14.8).

18.5.5. The options exercisable by the Nodal Agency on the Expiry Date in relation to Assets with an alternative use where the PPP Vendor is taking the residual value risk are:

- to take over the Asset, in which case a payment should be made to the PPP Vendor (see Section 18.6 (Valuation of Terminal Payments on Expiry where Residual Value Risk has been Transferred));
- to re-tender the Service, in which case the successful PPP Vendor in the re-tendering exercise should make a payment to the previous PPP Vendor reflecting the value of the Assets (see Section 18.6 (Valuation of Terminal Payments on Expiry where Residual Value Risk has been Transferred)); or
- if the Nodal Agency has no further use for the Assets, to walk away at no further cost, leaving the PPP Vendor to realise their value.

18.5.6. Each of these options affords the PPP Vendor the ability to realise the value of the Assets upon expiry of the Contract, and accordingly the NPV of the total Unitary Charges payable under the Contract should be lower than if the Residual Value Risk had been retained (subject, of course, to there being a "price discovery"/tender).

#### **ILLUSTRATIVE DRAFTING:**

#### **18.5 Assets with an Alternative Use**

- (a) On or before the date falling [six] months before the Expiry Date, the Nodal Agency shall notify the PPP Vendor in writing whether it wishes to:
- (i) purchase the Assets by paying to the PPP Vendor an amount equal to the Terminal Payment;
  - (ii) retender the provision of the Service; or
  - (iii) do neither (i) nor (ii) above.
- (b) If no notice is given under paragraph (a) above, then the Nodal Agency shall be deemed to have exercised its option under paragraph (a)(iii) and the Assets shall remain with the PPP Vendor.
- (c) If the Nodal Agency wishes to exercise its option under paragraph (a)(i) above, then:
- (i) the PPP Vendor and the Nodal Agency shall do all necessary acts (including entering into any contracts) to ensure that on the Expiry Date, the Assets are transferred to the Nodal Agency;
  - (ii) Within [30] days of effective transfer of ownership of the Assets to the Nodal Agency, the Nodal Agency shall pay to the PPP Vendor the Terminal Payment.
- (d) If the Nodal Agency wishes to exercise its option under paragraph (a)(ii) above, then:
- (i) it shall carry out the retendering with the aim of entering into a new contract with a successor PPP Vendor to provide the Service on and from the Expiry Date;

- (ii) a condition of any retendering shall be that the successor PPP Vendor must pay the PPP Vendor the Terminal Payment on transfer of ownership of the Assets to the successor PPP Vendor; and
- (iii) the PPP Vendor and the Nodal Agency shall do all necessary acts (including entering into any Contracts) to ensure that ownership of the Assets is transferred to the successor PPP Vendor with effect on and from the Expiry Date.

18.5.7. The Contract will also need to take account of Assets retained by the PPP Vendor in the various scenarios where the Contract may be terminated prior to its expiry date. See Section 20.3 (Retention of Assets by PPP Vendor on Termination).

## **18.6. Valuation of Terminal Payments where Residual Value Risk has been Transferred**

18.6.1. The two main options for determining amounts payable by the Nodal Agency at the expiry of the Contract in respect of Assets with an alternative use (and which are owned by the PPP Vendor) are:

- the market value of the Assets in their existing use; and
- an amount bid by the PPP Vendor when negotiating the original Contract, indexed through the duration of the Contract.

These amounts are referred to as “Terminal Payments”.

18.6.2. The market value of the Assets is the more valid basis for a payment to be made at the end of the Contract. If, however, there is a possibility of an extraordinary increase in market value during the duration of the Project and the Assets are critical to the Nodal Agency’s needs (i.e. the Service cannot be obtained without them) then a cap on the amount payable may be prudent (for example, to guard against excessively inflated property prices).

18.6.3. The mechanism for arriving at the market value must be specified in the Contract to avoid a dispute over the valuation. The final amount will reflect the condition of the Assets.

18.6.4. The alternative method (bid amount) referred to in Section 18.6.1 is unlikely to be appropriate. The value paid should reflect the actual value of the Assets (for example, their condition) and a fixed sum transfers no risk in this regard.

## 19. EARLY TERMINATION

The intention of the parties to the Contract should be that it will run its full course and terminate on the Expiry Date (see Section 18 (Treatment of Assets on Expiry of Service Period)), but the Contract must deal comprehensively with the consequences of early termination. The Contract should specify precisely what compensation is payable if it is terminated early. The amount of compensation payable will depend on the reason for termination. Early termination can be caused by Nodal Agency Default (see Section 19.1 (Termination on Nodal Agency Default)), PPP Vendor Default (see Section 19.2 (Termination on PPP Vendor Default)), Force Majeure (see Section 19.3 (Termination on Force Majeure)) and Corrupt Gifts (see Section 19.4 (Corrupt Gifts and Fraud)).

### 19.1. Termination On Nodal Agency Default

#### 19.1.1. Introduction

19.1.1.1. The Contract should define the events that give the PPP Vendor the right to terminate and determine the rights of the relevant parties under this scenario.

#### 19.1.2. PPP Vendor's Right to Terminate for Nodal Agency Default

19.1.2.1. The PPP Vendor should be allowed the right to terminate the Contract where the Nodal Agency or Government acts in a way which renders their contractual relationship untenable or completely frustrates the PPP Vendor's ability to deliver the Service. A minor breach will not fall into this category and even a material breach of itself is likely to be insufficient if the Nodal Agency's actions do not have the effect described above.

#### **ILLUSTRATIVE DRAFTING:**

##### **"Nodal Agency Default"**

means one of the following events:

- (a) an expropriation, sequestration or requisition of a material part of the Assets and/or shares of the PPP Vendor by the Nodal Agency or other Relevant Nodal Agency;
- (b) a failure by the Nodal Agency to make payment of any amount of money exceeding INR. [ ] (indexed) that is due and payable by the Nodal Agency under this Contract within 30 days of service of a formal written demand by the PPP Vendor, where that amount fell due and payable [two] (or more) months prior to the date of service of the written demand;
- (c) a breach by the Nodal Agency of its obligations under this Contract which substantially frustrates or renders it impossible for the PPP Vendor to perform its obligations under this Contract for a continuous period of [two] months, or
- (d) a breach by the Nodal Agency of Clause 17 (Restrictions on Transfer of the Contract by the Nodal Agency) occurs.

19.1.2.2. Beyond this, the circumstances in which the PPP Vendor is permitted to terminate for Nodal Agency Default must be considered on a project by project basis. The Nodal Agency needs to

examine the nature of its obligations during the Contract and should only extend the list of Nodal Agency Default events to include breaches of other obligations which will render the contractual relationship untenable or completely frustrate the PPP Vendor's ability to deliver the Service.

19.1.2.3. Termination by the PPP Vendor should be a last resort and it is important to ensure that there are no "hair triggers" which could put the Nodal Agency at risk of termination before it has had an opportunity to remedy its default. There can be no question of reciprocity with the defaults that trigger a PPP Vendor Default as the obligations of the Nodal Agency are principally payment obligations and approval rights, rather than detailed performance or other credit related obligations.

19.1.2.4. The PPP Vendor should bear in mind that a failure by the Nodal Agency to comply with the provisions of the Contract before Service Commencement (for example issuing approvals) and sometimes after that date, can in most cases be adequately dealt with by way of a Compensation Event (see Section 5 (Supervening Events)). In addition, any failure by the Nodal Agency to pay sums when due should give rise to interest on late payment (see Section 7.2.3 and Clause 27.6 (Interest on Late Payments)) and so a reasonable grace period for non-payment should be built into the Contract and so neither of these should trigger termination.

#### **ILLUSTRATIVE DRAFTING:**

##### **Termination on Nodal Agency Default**

- a. If an Nodal Agency Default has occurred and the PPP Vendor wishes to terminate the Contract, it must serve a termination notice on the Authority within [45] days of becoming aware of the Nodal Agency Default.
- b. The termination notice must specify the type of Nodal Agency Default which has occurred entitling the PPP Vendor to terminate.
- c. The Contract will terminate on the day falling [45] days after the date the Nodal Agency receives the termination notice, unless the Nodal Agency rectifies the Nodal Agency Default within [30] days of receipt of the termination notice.

##### **19.1.3. Compensation on Termination for Nodal Agency Default**

19.1.3.1. The objective should be to ensure that the PPP Vendor is fully compensated (i.e. no worse off because of Nodal Agency Default than if the Contract had proceeded as expected).

19.1.3.2. The PPP Vendor should be required to specify its preferred method of calculation of investment return at the time of its bid. It should choose between the level set out in the original base case, the market value at the time of termination and the original base case return from the Termination Date (see Section 19.1.3.6).

19.1.3.3. The PPP Vendor is likely to incur redundancy costs as a result of the termination of the Contract and, to the extent that these will occur, these should be included in the compensation payable by the Nodal Agency. Similarly, the Sub-Contractors may incur losses as a direct result of the early termination of the Contract (e.g. in respect of cancellation of orders for materials and goods). The Contract should specify those heads of loss which the Nodal Agency will pay to the PPP Vendor,

on account of the Sub-Contractors' losses. If the Nodal Agency proposes to offer compensation to cover the Sub-Contractors' future loss of profits, it should limit the period of time for which it will pay for such future loss (e.g. for a one year period from termination) and satisfy itself (through conducting due diligence over Sub-Contracts or otherwise) that the quantum of the loss of profit and other consequential losses and breakage costs are reasonable and appropriate.

19.1.3.4. The Nodal Agency should also decide what happens to the Assets following a compensation Payment. As the Nodal Agency has fully compensated the PPP Vendor, they should usually revert to the Nodal Agency. Where the assets may have a significant residual value and the PPP Vendor retains the assets then different considerations will apply (see, for example, Section 20.3 (Retention of Assets by PPP Vendor on Termination)).

### **ILLUSTRATIVE DRAFTING:**

#### **Compensation on Termination for Nodal Agency Default**

- (a) On termination of the Contract under Clause 21.1.2 (Termination on Nodal Agency Default) the Nodal Agency shall pay the PPP Vendor the “Nodal Agency Default Termination Sum” in accordance with [Section 20 (Calculation and Payment of Early Termination Payments)] on the Termination Date. Subject to paragraphs (c) to (e) below the Nodal Agency Default Termination Sum shall be an amount equal to the aggregate of:
  - (i) the investments/costs incurred by the PPP Vendor
  - (ii) redundancy payments for employees of the PPP Vendor that have been or will be reasonably incurred by the PPP Vendor as a direct result of termination of this Contract and any Sub-Contractor Breakage Costs;
- (b) On payment of the amount referred to in paragraph (a) above, the Nodal Agency shall have the option to require the PPP Vendor to transfer its right, title and interest in and to the Assets to the Nodal Agency or as directed by the Nodal Agency.

#### **“Relevant Assumptions”**

means the assumptions that the sale of the PPP Vendor is on the basis that there is no default by the Nodal Agency, that the sale is on a going concern basis;

#### **"Sub-Contractor Breakage Costs"**

means Losses that have been or will be reasonably and properly incurred by the PPP Vendor as a direct result of the termination of this Contract, but only to the extent that:

- (a) the Losses are incurred in connection with the Project and in respect of the provision of Services or the completion of Works, including:
  - (i) any materials or goods ordered or Sub-Contracts placed that cannot be cancelled without such Losses being incurred;
  - (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
  - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
  - (iv) redundancy payments; and

- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms [and [ ]];15 and
- (c) the PPP Vendor and the relevant Sub-PPP Vendor has each used its reasonable endeavours to mitigate the Losses;

19.1.3.5. This is the same level of compensation as is appropriate on a voluntary termination by the Nodal Agency (see Section 19.5.3 (Compensation for Voluntary Termination)). Choosing different approaches for these two types of termination could lead to the Nodal Agency to be incentivized to default in certain circumstances, which is why this document recommends that the methods used should be the same for both Voluntary Termination and Termination for Nodal Agency Default.

## 19.2. Termination on PPP Vendor Default

### 19.2.1. Introduction

19.2.1.1. The Contract must deal comprehensively with the possibility of early termination due to PPP Vendor default. It must achieve a fair balance between the Nodal Agency's desire to be able to terminate for inadequate service provision, even if caused by relatively minor defaults (a right which Nodal Agency are used to having in conventional service contracts) and the PPP Vendor's interest in restricting termination to the severest of defaults, when all other reasonable alternative options have been exhausted, including a reasonable rectification period procedure. It should be the Nodal Agency's last resort to exercise rights of termination.

### 19.2.2. Events Leading to Termination

19.2.2.1. The Contract should specify the events of PPP Vendor Default which may lead to termination. As far as practicable, these should be objective, clear and provide for reasonable tolerances, bearing in mind the undesirable consequences of a termination.

#### **ILLUSTRATIVE DRAFTING:**

##### **"PPP Vendor Default"**

means one of the following events:

- (a) a breach by the PPP Vendor of any of its obligations under this Contract which materially and adversely affects the performance of the Service;
- (b) a Persistent Breach occurs;
- (c) a court makes an order that the PPP Vendor [or Holding company] be wound up or a resolution for a voluntary winding-up of the PPP Vendor [or Holding company] is passed;
- (d) [a breach of Clause 16 (Sub-Contracting, Employees and Documentary Changes) occurs;]
- (e) [a breach by the PPP Vendor of its obligations in Clause [17] (Assignment) occurs;]
- (f) [a breach of Clause [18] (Change of Ownership) occurs;]
- (g) the abandonment of the Contract by the PPP Vendor;
- (h) a failure to achieve the Service Commencement Date by [date];

- (i) a failure to provide [ ] Available [places/areas] [availability for use] for [x] period;
- (j) the accumulation of [ ] or more [performance points] in any [Quarter/Year];
- (k) a breach by the PPP Vendor of its obligation to take out and maintain Required Insurances.

19.2.2.2. Other events of default may be included on a project-specific basis. If the Nodal Agency places restrictions on assignment, change in ownership or replacement of Sub-Contractors, then it may be appropriate to include a corresponding event of default for breach of such restrictions (see Sections 16 (Sub-Contractors, Employees and Documentary Changes) and 17 (Assignment)). Similarly, if the Project is in a security-sensitive sector, breach of specific security requirements might be included. Generally, it is not necessary to include non-payment of sums by the PPP Vendor as a PPP Vendor Default as the PPP Vendor's payment obligations are limited and the Nodal Agency should have the ability to set off certain amounts (see Section 12 (Payments and Set-off)), although particular projects may require this (e.g. where the Project has significant third party income).

19.2.2.3. Generally, insolvency events of default should not be extended to include Sub-Contractor's or the PPP Vendor's shareholders. This is because the PPP Vendor will in any event be incentivised to replace the Sub-PPP Vendor concerned to ensure performance of the Contract. An exception to this would be where the contractual structures concerned make it necessary that such parties owe unusually significant financial or contractual obligations to the PPP Vendor (or the Nodal Agency) and no replacement can be found who would match such obligations.

19.2.2.4. Termination should be subject to any rectification procedures (see Section 19.2.4 (Rectification)). Accrued performance points should not generally be altered on appointment of a replacement Sub-Contractor (see Section 9.3 (Replacement of Sub-Contractors)).

19.2.2.5. These events are not mutually exclusive, since breaches covered under certain events (e.g. performance point limit) can still be caught under other default events.

### **19.2.3. Termination for Persistent Breach by the PPP Vendor**

19.2.3.1. The Contract should dis-incentivize the PPP Vendor in some way in respect of any breach by the PPP Vendor, however minor. There are various means to deal with the persistent occurrence of minor defaults. The recommended approach is to impose performance points in respect of all types of minor defaults. This is a particularly effective means of dis-incentivizing the PPP Vendor when coupled with a right to terminate the Contract if the total number of performance points accrued exceeds a certain level (see above).

19.2.3.2. It may not be feasible in every case to negotiate an all-encompassing performance points regime. This could leave the Nodal Agency exposed to a situation in which minor breaches are occurring persistently or being left un-remedied, but as they have no effect on the Unitary Charge, the Nodal Agency will have little ability to influence the PPP Vendor to perform. If such circumstances are likely to exist, the Nodal Agency should retain a right to terminate the Contract for Persistent Breach. The PPP Vendor will be anxious to avoid a "hair trigger" default and will wish to ensure the mechanics relating to this default are as objective as possible.



19.2.3.3. The Contract should therefore include a warning procedure which provides that the PPP Vendor is served a formal preliminary notice that a certain type of breach has been persistently occurring. The PPP Vendor should in any case be aware of such breaches already. If such breach continues to occur persistently in, say, the 12 months following such notice (allowing a short rectification period), a final notice is served warning the PPP Vendor that any further single occurrence of such breach in, say, the following 6 months will entitle the Nodal Agency to terminate the contract. This then gives the PPP Vendor the opportunity to remedy. The Nodal Agency should consider whether it requires a persistent breach remedy during the solution development period as well as the operational period. The concerns of the Nodal Agency in the solution development period are likely to be greater when the Nodal Agency shares the site during that period.

#### **ILLUSTRATIVE DRAFTING:**

##### **“Persistent Breach”**

means a breach for which a final warning notice (referred to in paragraph (b) of Clause 21.2.3 (Persistent Breach)) has been issued, which has continued for more than [ ] days or recurred in [ ] or more months within the [six] month period after the date on which such final warning notice is served on the PPP Vendor<sup>85</sup>;

##### **Persistent Breach**

- (a) If a particular breach, other than any breach for which performance point deductions could have been awarded and/or availability deductions could have been made, has continued for more than [ ] days or occurred more than [ ] times in any [ ] month period then the Nodal Agency may serve a notice on the PPP Vendor:
  - (i) specifying that it is a formal warning notice;
  - (ii) giving reasonable details of the breach; and
  - (iii) stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Contract.
- (b) If, following service of such a warning notice, the breach specified has continued beyond 30 days or recurred in [ ] or more months<sup>86</sup> within the [ ] month period after the date of service, then the Nodal Agency may serve another notice on the PPP Vendor:
  - (i) specifying that it is a final warning notice;
  - (ii) stating that the breach specified has been the subject of a warning notice served within the [twelve] month period prior to the date of service of the final warning notice; and

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<sup>85</sup> This event of default addresses “Persistent Breaches” of the same type where each single breach may in itself not constitute a material breach but the persistent nature renders the contractual relationship untenable. This type of default should be used where the performance regime is not able to cover all types of breaches and the Nodal Agency would otherwise be left with no sanction for persistent failure by the PPP Vendor to perform. This does not address the Persistent Breaches of different types (since persistent service failures covered by the performance regime are excluded by the definition). This does not mean that the Persistent Breach Clause should itself include wording to the effect that the relationship between the Nodal Agency and the PPP Vendor has become untenable, which is in itself highly subjective. The mechanism in Clause 21.2.3 relating to warning notices, and final warning notices, leading to termination, in itself demonstrates that the relationship between the parties has become untenable. Neither should the Clause be amended to the effect that the Nodal Agency, in terminating the Contract for Persistent Breach, is acting in a “reasonable and proportionate manner”. Again, the detailed mechanism in Clause 21.2.3 is itself sufficient in ensuring that the right to terminate is only exercised for repeated failures following service of a series of warnings, and final warning notices, to the PPP Vendor

<sup>86</sup> This will depend on the particular breach concerned, but a certain number of recurrences should be specified. In paragraph (b) (but not in (a)) it is provided that the persistent breach should occur across a number of months in order for it to accrue towards possible termination.

- (iii) stating that if such breach continues for more than [ ] days or recurs in [ ] or more months within the [six] month period after the date of service of the final warning notice, the Contract may be terminated.
- (c) A warning notice may not be served in respect of any breach which has previously been counted in the making of a separate warning notice.

19.2.3.4. Once a termination notice is served for a Persistent Breach, the PPP Vendor should not be entitled to any further rectification period.

#### **19.2.4. Rectification**

19.2.4.1. The Nodal Agency should afford the PPP Vendor the opportunity of remedying any breach capable of remedy and/or financially compensating the Nodal Agency for the effects of the breach. As stated in Section 19.2.1 (Introduction), termination should only be used as a last resort. Accordingly, the Contract should set out a mechanism allowing the PPP Vendor the opportunity to remedy breaches which are capable of remedy to avoid termination. Rectification will not be appropriate in respect of all types of breach. Some breaches may not be capable of remedy (for example, failure to complete solution development by the long-stop date) and some events may only qualify as termination events after some kind of grace has already been given (e.g. after the accrual of a specified level of performance points or because of the tolerances contained in the Persistent Breach concept).

#### **ILLUSTRATIVE DRAFTING:**

##### **Rectification**

- a) If a PPP Vendor Default has occurred and the Nodal Agency wishes to terminate the Contract, it must serve a termination notice<sup>87</sup> on the PPP Vendor.
- b) The termination notice must specify:
  - (i) the type and nature of PPP Vendor Default that has occurred, giving reasonable details; and
  - (ii) that in the case of any PPP Vendor Default falling within (a), (d), (e), (f) and (k) of the definition of PPP Vendor Default this Agreement will terminate on the day falling [sixty] days after the date of the date the PPP Vendor received the termination notice, unless:
    - A) in the case of a breach under (a) of the definition of PPP Vendor Default the PPP Vendor puts forward an acceptable rectification programme within [thirty] days after the date the PPP Vendor receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the PPP Vendor Default in accordance with the programme); or
    - B) in the case of any PPP Vendor Default falling with the (a), (d), (e), (f) and (k) of the definition of PPP Vendor Default the PPP Vendor rectifies the PPP Vendor

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<sup>87</sup> This notice will specify at least the information in paragraph (b).

Default within [sixty] days after the date the PPP Vendor receives the Termination Notice; or

- (iii) that in the case of any other PPP Vendor Default (not being (a), (d), (e), (f) or (k)), this Agreement will terminate on the date falling [thirty] days after the date the PPP Vendor receives the termination notice.
- c) If the PPP Vendor either rectifies the PPP Vendor Default within the time period specified in the termination notice, or implements the rectification programme, if applicable, in accordance with its terms, the termination notice will be deemed to be revoked and the Contract will continue.
- d) If:
  - (i) in the case of a PPP Vendor Default within (a) of the definition of that term no acceptable rectification programme has been put forward pursuant to Clause 21.2.4(b)
  - (ii) (A) and the PPP Vendor fails to rectify the PPP Vendor Default within the time period specified in the termination notice; or
  - (ii) in the case of a PPP Vendor Default falling within (d), (e), (f), or (k) of the definition of PPP Vendor Default, the PPP Vendor fails to rectify the PPP Vendor Default within the time period specified in the termination notice,the Nodal Agency may give notice stating that the Contract will terminate on the date falling [seven] days after the date of receipt of such notice.
- e) If the PPP Vendor fails to implement any rectification programme in accordance with its terms, the Contract will, terminate on the date falling [seven] days after the date of notification by the Nodal Agency to the PPP Vendor of such failure to implement the rectification programme in accordance with its terms.

19.2.4.2. The rectification procedure should allow the PPP Vendor to propose a rectification programme which the Nodal Agency may comment on and approve. There will usually be a fixed period within which such programme must be carried out, although it may be appropriate to agree a different, reasonable, period in circumstances where the period set out in the Contract is agreed to be inappropriate, taking into account the nature of the specific breach.

19.2.4.3. During the rectification period it will be to the PPP Vendor's benefit to claim that a Relief Event has occurred. It is for this reason that wilful acts and defaults of the PPP Vendor are excepted from the definition of Relief Events (see Section 5.3.2 (Scope of Relief Events)). Failure to rectify the default within the agreed period will lead to termination.

#### **19.2.5. Compensation on Termination for PPP Vendor Default**

19.2.5.1. One question that may be asked is why compensation should be paid to the PPP Vendor when it has failed to perform in accordance with the Contract. Under a typical service contract, not only would no compensation be paid but the non-performing party could expect the innocent party to bring claims for damages. The reason that compensation is paid is that a failure to compensate could unfairly benefit the Nodal Agency. This would be the case, for example, where a particular asset is developed to deliver a particular service and the Nodal Agency is entitled to have the asset transferred to it on a termination without compensating the PPP Vendor for its value. The question

that is then relevant is how best to assess what an appropriate level of compensation is for PPP Vendor Default.

19.2.5.2. The amount of compensation payable on PPP Vendor Default termination is one of the key commercial issues for all parties concerned. The market value approach described below is the required approach for all PPP projects.

19.2.5.3. In order to understand why the market value principle has been adopted, and accepted by the PPP market, it is helpful to understand the variety of alternatives which preceded it. These ranged from early roads projects, which provided for no compensation for PPP Vendor Default, prisons projects, which offered no compensation for termination, early accommodation, schools and hospital projects, which were based on a wide range of calculations usually linked to capital costs less rectification costs and during the Service Period to the NPV of future cashflows, and some contracts which virtually guaranteed (implicitly or explicitly) full payout of debt.

19.2.5.4. The market value approach represents a balance between protecting the Nodal Agency's interests and not imposing unreasonable deductions on the PPP Vendor for its default.

19.2.5.5. The "no compensation" models have been driven by a proper concern. They do expose, however, the public sector to the charge that it is seeking a possible gain in the event that termination occurs (e.g. if it takes over a valuable asset), although this may be refuted by the Nodal Agency agreeing to pay the market value for any assets to be transferred to it.

They may also serve to increase the cost of projects to the public sector by forcing bidders to take a conservative approach to risk pricing, liquidated damages and the limits on liability they require from their Sub-Contractors.

**19.2.5.6.** On the other hand, calculations based on the NPV of future cashflows proved extremely complex and difficult to negotiate. In practice, they are unlikely to take full account either of the performance history of the defaulting Project (and so expectations of future performance), the extra costs accruing to the Nodal Agency over the period of the Contract or of the risk transfer to the PPP Vendor (particularly in relation to whole life costing).

## **19.3. Termination on Force Majeure**

### **19.3.1. Failure to agree**

19.3.1.1. As set out in Section 5.4 (Force Majeure Events), the Contract should define the Force Majeure Events that can lead to termination and determine the rights of the relevant parties if this occurs. If a Force Majeure Event occurs and the parties cannot agree a solution within a specified period (6 months is typical), either party is entitled to terminate the Contract with compensation payable to the PPP Vendor as set out in Section 19.3.2 (Compensation on Termination for Force Majeure). The Contract should, however, give the Nodal Agency the right to prevent termination by

paying the PPP Vendor as if the Service were being fully provided after such period. In such circumstances the Nodal Agency should specify a fixed period for which it will make such payment, before reconsidering the situation, so that the PPP Vendor can plan accordingly.

**ILLUSTRATIVE DRAFTING:**

**Termination on Force Majeure**

- (a) No party shall be entitled to bring a claim for a breach of obligations under the Contract by the other party or incur any liability to the other party for any losses or damages incurred by that other party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt (but without prejudice to Clauses 21.3(e) or 21.3(g)), the Nodal Agency shall not be entitled to terminate this Agreement for a PPP Vendor Default if such PPP Vendor Default arises from a Force Majeure Event.
- (b) Nothing in paragraph (a) above shall affect any entitlement to make deductions or any deductions made as a result of [Section 5 (Price and Payment Mechanism)] in the period during which the Force Majeure Event is subsisting.
- (c) On the occurrence of a Force Majeure Event, the Affected Party shall notify the other party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.
- (d) As soon as practicable following such notification, the parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Contract.
- (e) If no such terms are agreed on or before the date falling [120] days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Contract for a period of more than [180] days, then, subject to paragraph (f) below, either party may terminate the Contract by giving [30] days' written notice to the other party.
- (f) If the Contract is terminated under paragraph (e) above or (g) below:
  - (i) compensation shall be payable by the Nodal Agency in accordance with Clause 21.3.2 (Compensation on Termination for Force Majeure); and
  - (ii) the Nodal Agency may require the PPP Vendor to transfer its title, interest and rights in and to any Assets to the Nodal Agency.
- (g) If the PPP Vendor gives notice to the Nodal Agency under paragraph (e) above that it wishes to terminate the Contract, then the Nodal Agency has the option either to accept such

notice or to respond in writing on or before the date falling [10] days after the date of its receipt stating that it requires the Contract to continue. If the Nodal Agency gives the PPP Vendor such notice, then:

- (i) the Nodal Agency shall pay to the PPP Vendor the Unitary Charge from the day after the date on which the Contract would have terminated under paragraph (e) as if the Service was being fully provided; and
  - (ii) the Contract will not terminate until expiry of written notice (of at least [30] days) from the Nodal Agency to the PPP Vendor that it wishes the Contract to terminate.
- (h) The parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the PPP Vendor shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with industry good practice to overcome or minimize the consequences of the Force Majeure Event.
- (i) The Affected Party shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Contract. Following such notification the Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

### **19.3.2. Compensation on Termination for Force Majeure**

19.3.2.1. If the Contract terminates for Force Majeure, the Nodal Agency should pay compensation to the PPP Vendor reflecting the principle that Force Majeure is neither party's fault and the financial consequences should to some extent be shared. There is, however, no equitable reason for "full" compensation as this would involve the Nodal Agency in bearing all the pain.

19.3.2.2. The Contract should in addition provide the Nodal Agency with the option to retain or walk away from the Assets. Whatever the Nodal Agency decides, only the payment outlined in Clause 21.3.2 (Compensation on Termination for Force Majeure) should be made.

### **ILLUSTRATIVE DRAFTING:**

#### **Compensation on Termination for Force Majeure**

- (a) On termination of the Contract under Clause 21.3 (Termination on Force Majeure), the Nodal Agency shall pay to the PPP Vendor the "Force Majeure Termination Sum" in accordance with [Section 20 (Calculation and Payment of Early Termination Payments)]. Subject to paragraphs (c) to (e) below the Force Majeure Termination Sum shall be the amount equal to the aggregate of:
- (i) the Termination Amount;
  - (ii) redundancy payments for employees of the PPP Vendor that have been or will be reasonably incurred by the PPP Vendor as a direct result of termination of the Contract and any Sub-Contractor Breakage Costs.

- (b) If the amounts referred to in paragraphs (a) are less than zero, then, for the purposes of the calculation in paragraph (a) they shall be deemed to be zero.
- (c) On termination, the Nodal Agency shall have the option to require the PPP Vendor to transfer to the Nodal Agency all of its right, title and interest in and to the Assets.

## **19.4. Termination on Corrupt Gifts and Fraud**

### **19.4.1. Introduction**

19.4.1.1. The Contract must deal comprehensively with termination as a result of corrupt acts or fraud involving the PPP Vendor, any sub-Contractor and any Public Servant.

19.4.1.2. A balance must be struck between the Nodal Agency's proper desire for the right to free itself from a corrupt or fraudulent partner.

### **ILLUSTRATIVE DRAFTING:**

#### **"Prohibited Act"**

means

- (a) offering giving or agreeing to give to [any Public Servant] any gift or consideration of any kind as an inducement or reward:
  - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Contract or any other contract with the Nodal Agency / concerned department; or;
  - (ii) for showing or not showing favour or disfavour to any person in relation to this Contract or any other contract with the Nodal Agency / concerned department;
- (b) entering into this Contract or any other contract with the Nodal Agency / concerned department in connection with which commission has been paid or has been agreed to be paid by the PPP Vendor or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Nodal Agency;
- (c) committing any offence:
  - (i) under the Prevention of Corruption Act;
  - (ii) under Legislation creating offences in respect of fraudulent acts, or
  - (iii) at common law in respect of fraudulent acts in relation to this Contract or any other contract Nodal Agency/concerned department; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Crown.

### **19.4.2. Scope of Corrupt Gifts and Fraud**

19.4.2.1. The corrupt gifts and fraud provision is aimed at all types of bribery, corruption and fraudulent acts perpetrated against the Nodal Agency, in connection with the procurement of the Contract and the ongoing contractual relationship.

19.4.2.2. As the Nodal Agency's ultimate sanction to terminate for such acts is severe, the recommended approach allows the PPP Vendor the opportunity to avoid termination where the act has been carried out by a sub-Contractor or employee acting on his own. Within a specified reasonable time period, the PPP Vendor has to ensure that any relationship with the relevant party is terminated and, if applicable, a replacement procured for such party.

19.4.2.3. The following approach is the most appropriate way of dealing with the issue:

- if the relevant breach is committed by the PPP Vendor or one of its employees and this is not the action of an employee acting independently, the Nodal Agency may terminate the Contract on payment of Termination Amount and can recover from the PPP Vendor either any losses it suffers as a result of the breach or the amount of the value of the corrupt gift in question. If the breach is the result of the action of an employee acting independently, then the PPP Vendor should terminate the person's employment and procure a replacement within [30] days of notice of the breach. If this is not done, then the Contract can be terminated on payment of the Termination Amount and recovery of the Nodal Agency's losses;
- if the breach is committed by one of the PPP Vendor's main Sub-Contractors (e.g. Sub-Contractor) or their employee and this is not the action of an employee acting independently, the Nodal Agency may terminate the Contract as above, unless the PPP Vendor terminates the relevant main Sub-Contract and procures the performance of such service by another person within [30] days of notice of the breach. If the breach is the result of the action of an employee acting independently, then the Sub- PPP Vendor should terminate that person's employment and procure a replacement within [30] days of notice of the breach. If this is not done, then the Contract can be terminated on payment of the Termination Amount and recovery of the Nodal Agency's losses;
- if the breach is committed by any other party, the Nodal Agency may terminate as above unless within 30 days of notice of the breach the PPP Vendor procures the termination of the employment of such person and of their employer (if not employed by the PPP Vendor or its main Sub-Contractors) and the performance of such service by another person.

#### **ILLUSTRATIVE DRAFTING:**

##### **Corrupt Gifts and Fraud**

The PPP Vendor warrants that in entering the Contract it has not committed any Prohibited Act.

##### **Termination for Corrupt Gifts and Fraud**

- (a) If the PPP Vendor or any Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then the Nodal Agency shall be entitled to act in accordance with paragraphs (b) to (g) below.



- (b) If a Prohibited Act is committed by the PPP Vendor or by an employee not acting independently of the PPP Vendor, then the Nodal Agency may terminate the Contract by giving notice to the PPP Vendor.
- (c) If the Prohibited Act is committed by an employee of the PPP Vendor acting independently of the PPP Vendor, then the Nodal Agency may give notice to the PPP Vendor of termination and the Contract will terminate, unless within [30] days of receipt of such notice the PPP Vendor terminates the employee's employment.
- (d) If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-PPP Vendor, then the Nodal Agency may give notice to the PPP Vendor of termination and the Contract will terminate, unless within [30] days of receipt of such notice the PPP Vendor terminates the relevant Project Document.
- (e) If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, then the Nodal Agency may give notice to the PPP Vendor of termination and the Contract will terminate, unless within [30] days of receipt of such notice the Sub-PPP Vendor terminates the employee's employment and (if necessary) procures the performance of such part of the Works and/or Service by another person.
- (f) If the Prohibited Act is committed by any other person not specified in paragraphs (b) to (e) above, then the Nodal Agency may give notice to the PPP Vendor of termination and the Contract will terminate unless within [30 days] of receipt of such notice, the PPP Vendor procures the termination of such person's employment and of the appointment of their employer (where not employed by the PPP Vendor or the Sub-Contractors).
- (g) any notice of termination under this Clause shall specify:
  - (i) the nature of the Prohibited Act;
  - (ii) the identity of the party whom the Nodal Agency believes has committed the Prohibited Act;
  - (iii) the date on which the Contract will terminate, in accordance with the applicable provision of this Clause; and
  - (iv) the Nodal Agency's chosen option under Clause 21.4.3 (Compensation on Termination for Corrupt Gifts and Fraud).

#### **19.4.3. Compensation on Termination for Corrupt Gifts and Fraud**

19.4.3.1. Regardless of whether or not the Assets have any alternative use, only the Termination Amount should be paid out on a termination for Corrupt Gifts or Fraud. If the Nodal Agency wishes to have the right to terminate, it should accept such level of compensation.

#### **ILLUSTRATIVE DRAFTING:**

##### **Compensation on Termination for Corrupt Gifts and Fraud**

- (a) On termination of the Contract in accordance with Clause 21.4.3 (Termination for Corrupt Gifts and Fraud), then the Nodal Agency shall pay the PPP Vendor an amount equal to the Termination Amount.

- (b) Such amount shall be determined and paid in accordance with [Section 20 (Calculation and Payment of Early Termination Payments)].
- (c) If termination occurs then the Nodal Agency may require the PPP Vendor to transfer its rights, title and interest in and to the Assets to the Nodal Agency.

## **19.5. Voluntary Termination by Nodal Agency**

### **19.5.1. Introduction**

The intention of all parties to a Contract should be that it will run its full course. There may be circumstances, however, in which the Nodal Agency is no longer able to continue the relationship it has with the PPP Vendor under a Contract. For example, there may be a policy change which makes further provision of the Service redundant. In order to cater for such circumstances, the Nodal Agency may wish to retain the right to terminate the contract voluntarily.

### **19.5.2. Consequences of Voluntary Termination**

19.5.2.1. The PPP Vendor should not object to the Nodal Agency having such a right provided that it is compensated in full if such right is exercised.

### **19.5.3. Compensation for Voluntary Termination**

19.5.3.1. The PPP Vendor should receive a termination payment which leaves it in the position it would have been in had the Contract run its full course.

19.5.3.2. Regardless of whether or not the asset has any alternative use, the level of compensation on a voluntary termination should be the same as the level proposed on a termination for Nodal Agency default (see Section 19.1.3 (Compensation on Termination for Nodal Agency Default)).

19.5.3.3. Again, the Contract should clarify what happens to the asset following such full payout. It would usually be expected to revert to the Nodal Agency.

### **ILLUSTRATIVE DRAFTING:**

#### **Voluntary Termination by the Nodal Agency**

- (a) The Nodal Agency may terminate the Contract at any time on or before its Expiry Date by complying with its obligations under paragraphs (b) to (d) below<sup>88</sup>.
- (b) If the Nodal Agency wishes to terminate the Contract under this Clause, it must give notice to the PPP Vendor stating:
  - (i) that the Nodal Agency is terminating the Contract under this Clause 21.5.1 (Voluntary Termination by Nodal Agency);
  - (ii) that the Contract will terminate on the date specified in the notice, which must be a minimum of [30] days after the date of receipt of the notice; and
  - (iii) whether the Nodal Agency has chosen to exercise its option under paragraph (c) below.

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<sup>88</sup> This could arise, for example, if the Nodal Agency did not wish the Project to continue for reasons unconnected with the PPP Vendor

- (c) On termination, the Nodal Agency shall have the option to require the PPP Vendor to transfer its right, title and interest in and to the Assets to the Nodal Agency or as directed by the Nodal Agency.
- (d) The Contract will terminate on the date specified in the notice referred to in paragraph (b) above;

#### **19.5.2 Compensation on Voluntary Termination**

On termination under Clause 21.5.1(d) above, the Nodal Agency shall pay the PPP Vendor an amount equal to the amount payable under Clause 21.1 (Nodal Agency Default) in accordance with [Section 20 (Calculation and Payment of Early Termination Payments)].

## **20. CALCULATION & PAYMENT OF EARLY TERMINATION PAYMENTS**

### **20.1. Introduction**

20.1.1. This Section sets out the principles which should apply to termination payments.

### **20.2. Method of Payment**

20.2.1. Where an incoming PPP Vendor pays market value on PPP Vendor Default termination, or the Contract is terminated for Nodal Agency Default, the Nodal Agency should pay the PPP Vendor by way of a lump sum.

20.2.2. On other types of termination, the Contract should deal with how compensation is paid. Value for money issues should be taken into consideration which in most cases will mean that compensation payments by lump sum will be the appropriate position. Value for money is unlikely to be achieved if the Nodal Agency repays such amounts over time (i.e. in installments), as interest will continue to accrue on the compensation.

20.2.3. While the above is the general position, Nodal Agency may wish to reserve the option to pay over time due to affordability constraints, particularly as their ability to generate funds at short notice may be limited. Therefore, where a Nodal Agency seeks the right to pay compensation by installments.

20.2.3.1. The PPP Vendor will require the Nodal Agency to pay interest on any outstanding balance at the rate the Government provides interest on tax refunds.

#### **ILLUSTRATIVE DRAFTING:**

##### **Method of Payment**

The Nodal Agency shall pay to the PPP Vendor the Termination Sum, together with interest on any Termination Amount, on or before the date falling 60 days after the Notice Date.

### **20.3. Retention of Assets by PPP Vendor on Termination**

20.3.1. To the extent the PPP Vendor retains Assets on a termination, then their value should be deducted from any compensation payments made. The value of the Assets will be close to zero in the case of Assets with no alternative use and so there may be no need to deal with this issue in the Contract. Where residual value exists the Nodal Agency should, however, carefully consider likely residual value out-turns, as the commercial incentives can be different if the residual value were to be significant. In certain scenarios (e.g. if residual value could exceed the original return) residual value could distort the effect of any compensation payment (e.g. for PPP Vendor Default) and reduce the incentives to perform that would otherwise exist.



## **21. INDEMNITIES, GUARANTEES AND CONTRACTUAL CLAIMS**

### **21.1. Introduction**

21.1.1. The Nodal Agency will often be contracting with a PPP Vendor (which may be in the shape of an SPV) with no track record of public service delivery and whose main asset is the Contract. The Nodal Agency will therefore require comfort that the PPP Vendor and its Sub-Contractors will be able to meet their contractual obligations to provide the Service and any corresponding financial liabilities.

21.1.2. In a traditional procurement, such comfort would normally take the form of guarantees, indemnities and collateral warranties to the Nodal Agency provided by the principal PPP Vendor, its parent company and Sub-Contractors. Under PPP, where the PPP Vendor is not paid if the Service is not delivered, such extensive direct comfort will not normally be necessary or appropriate.

21.1.3. The Nodal Agency will, however, require certain types of comfort from the PPP Vendor. This Section advises on the type of comfort the Nodal Agency should normally expect.

### **21.2. Guarantees**

21.2.1. Nodal Agency will have to be sure that continuity of service supply is maintained even if their counterparty is insolvent. In many service contracts this can be done by way of a guarantee by a parent company (whether this company is the ultimate parent company in a group or a sufficiently claim worthy person will be a matter for negotiation). In a Contract for the period of time that PPP contracts are typically provided for, such guarantees can be of much less value.

21.2.2. In case the PPP vendor is a limited liability company (which generally is the case), or a SPV is formed after the contract is awarded, it results in isolating and limiting the liabilities of the Project from those of the shareholders. Consequently, the obtaining of direct guarantees by the Nodal Agency is not normally appropriate. The Nodal Agency should generally not insist on receiving guarantees from the parent companies of a Sub-Contractor or the PPP Vendor's shareholders in respect of the obligations of the PPP Vendor.

21.2.3. A well-advised Nodal Agency can usually obtain sufficient comfort from ensuring that the PPP Vendors and its Sub-Contractors have a suitable track record and financial standing, that the levels of equity are sufficient to demonstrate a commitment of shareholders to the Project and the rest of the financing structure is sufficiently robust. Appropriate levels of equity may well differ in the operating period from the development or solution development period and will vary from project to project. This involves an analysis of the entirety of the structure (including the Contract, all Project Documents and any limits on liability of the PPP Vendor, Sub-Contractors under their Sub-Contracts) and any liability interfaces (such as which Sub-Contractor is liable in the period between completion of solution development and commencement of operation).

21.2.4. If the PPP Vendor is funding the Project from its own internal resources and there is no third party debt being provided to the PPP Vendor, the Nodal Agency should:

- assess the credit strength of the PPP Vendor and consider whether or not it should require the PPP Vendor to provide it with a guarantee from its parent or strongest credit within its group; and
- consider whether or not it should require the PPP Vendor to maintain financial covenants throughout the term of the Contract.

### 21.3. Indemnities

21.3.1. The Nodal Agency will want to ensure the Contract requires the PPP Vendor to indemnify the Nodal Agency against certain costs and the PPP Vendor will make provision for such contingent liability in its bid price.

21.3.2. The general principle in e-Governance procurement is that there should be no limit on indemnities provided to the Nodal Agency. This principle can be overridden, however, if commercial necessities demand.

21.3.3. An analysis of the limits on liabilities under the Contract will be part of the assessment by the Nodal Agency of the strength of its counterparty. The existence and extent of any indemnity should be considered in conjunction with other obligations imposed on the PPP Vendor and Sub-Contractor (e.g. under collateral warranties). In this context Section 21.5 (Damages Claims) is relevant. The levels of insurance in respect of any likely claim are also relevant and the PPP Vendor should always set these at a level sufficient to compensate it for foreseeable loss.

21.3.4. Broadly, there are four heads of liability that the Nodal Agency will be concerned to be indemnified against if the liability arises as a result of the PPP Vendor's operations. These are:

- death and personal injury;
- property damage;
- breach of statutory duty; and
- third party claims.

Liability for death and personal injury cannot, at law, be capped, and a Nodal Agency should only allow caps or restrictions on other heads of claim if they believe this offers clear value for money benefits. Nodal Agency should not offer such caps as a matter of course. As regards personal claims a PPP Vendor enjoys no cap on the actions, claims, etc., made directly against it by third parties, and should set its insurance at whatever level it feels necessary to protect itself. It may not therefore provide any additional value for money to allow a PPP Vendor to cap the identical liability which it may suffer indirectly through the Nodal Agency, in circumstances where the claimant makes its claim against the Nodal Agency and the Nodal Agency seeks to recoup its loss from the PPP Vendor.

21.3.5. The Nodal Agency should not generally use the indemnity provisions in the Contract as an additional layer of protection for specific remedies set out in the Contract. For example, if the deductions being made to the Unitary Charge under the performance mechanism are a genuine

reflection of the losses that the Nodal Agency will incur as a result of the PPP Vendor's nonperformance, the Nodal Agency should not generally seek to rely on the indemnity as an additional or alternative means of claiming against the PPP Vendor in respect of that loss.

21.3.6. Given the project specific nature of many of the employment issues that arise on projects no guidance can be given on either employment indemnities.

21.3.7. The Nodal Agency may be faced with a request for a reciprocal indemnity from the PPP Vendor. A general indemnity from the Nodal Agency should not be offered in response to such a request. If the request relates to possible breach of the Nodal Agency's obligations under the Contract, this should be dealt with under Compensation Events (see Section 5.2.1.4). Exceptionally an Nodal Agency may be faced with project specific issues which require it to offer a reciprocal indemnity, in which case the Nodal Agency should ensure that the indemnity is limited to the specific issue.

#### **ILLUSTRATIVE DRAFTING:**

##### **Indemnity**

- (a) The PPP Vendor shall, subject to paragraph (b), be responsible for, and shall release and indemnify the Nodal Agency, 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 (including property belonging to the Nodal Agency or for which it is responsible "Nodal Agency Property");
  - (iii) breach of statutory duty; and
  - (iv) actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis),

which may arise out of, or in consequence of, the design, solution development, operation or maintenance of the assets or the performance<sup>6</sup> or non-performance by the PPP Vendor of its obligations under this Contract or the presence on the Nodal Agency's property of the PPP Vendor, a sub-PPP Vendor of the PPP Vendor, their employees or agents.

- (b) The PPP Vendor shall not be responsible or be obliged to indemnify the Nodal Agency for:
- (i) any of the matters referred to in paragraphs (a)(i) to (iv) above which arises as a direct result of the PPP Vendor acting on the instruction of the Nodal Agency;
  - (ii) any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Nodal Agency, its employees, agents or contractors or by the breach by the Nodal Agency of its obligations under this Contract; [or
  - (iii) any claims made under Clause 24.3(a)[(iii)] in excess of [ ].]<sup>7</sup>
- (c) An indemnity by either party under any provision of this Contract shall be without limitation to any indemnity by that party under any other provision of this Contract.

21.3.8. This Clause will also need to deal with:

- giving notice of claims (stating in reasonable detail the nature of the matter and the amount claimed). This will enable the proceedings to be contested before any judgment in respect of such proceedings is given;



- taking any action insurers may request to dispute the matter or enforce rights against any person;
- the exclusive conduct of the proceedings by the party giving the indemnity although it may be that certain politically sensitive issues would require the Nodal Agency to control proceedings which will require specific agreement; and
- there being no admission of liability or settlement of the matter without the consent of the indemnifying party.

## 21.4. Collateral Warranties

21.4.1. An Nodal Agency should seek a collateral warranty (i.e. a direct contractual undertaking) from each of the Sub-Contractors and other key sub-contractors, giving direct claims and the ability to step-in to the relevant sub-contracts in some circumstances. Provided that the content of any undertakings requested dovetail with the overall approach to the Project structure. That is they should not be used to increase levels of liability or impose obligations where none would otherwise exist (see Sections 21.3 (Indemnities) and 21.5 (Damages Claims))

21.4.2. The Nodal Agency should consider the strength of the covenant of the counterparty in the light of the obligation in the warranty. It may be that the Sub-Contract warranties are required to be guaranteed by the parent companies (or other companies of substance within the group) of the relevant Sub-Contractors. Except in the case of rights that exist to protect the position of the Nodal Agency, the rights of the Nodal Agency to bring an action under these collateral warranties should, however, be exercisable only on an early termination.

## 21.5. Damages Claims

21.5.1. It is common practice to limit the ability of the Nodal Agency and the PPP Vendor to make claims against each other for breach of obligation under the Contract. The rationale for limiting this ability is that the Contract payment mechanism is structured to ensure that there is an incentive to perform and that any deduction as a result of the payment mechanism reflects the loss to the Nodal Agency and so should usually be the exclusive remedy of the Nodal Agency. See Clause 7.8 (Payment Mechanism: No double remedy).

21.5.2. The issues here are similar to those in Section 4.2 (Liquidated Damages). This is because the issue of when liquidated damages and general damages claims are appropriate are closely connected. The Nodal Agency should strive to ensure that the performance payment mechanism works in such a way as to ensure that during the term of the Contract the absence of the Service reflects the costs the Nodal Agency incurs in not receiving the Service.

21.5.3. There will, as described in Section 4.2 (Liquidated Damages), be circumstances in which relying on the non-payment of the Unitary Charge is insufficient to compensate the Nodal Agency for its loss. For the reasons given in that Section, liquidated damages may be appropriate. A general damages claim for service failures is not something that the Nodal Agency should seek to obtain or

preserve. A combination of the payment mechanism and market value assessment should deal with issues that are required to be covered. To the extent particular categories of claim need special treatment, they should explicitly be dealt with in Clause 24.3 (Indemnity).

21.5.4. On a termination for PPP Vendor Default, the PPP Vendor will have an ability to pursue claims against Sub-Contractors. This can lead to the Nodal Agency reasoning that it should have a right to claim in such a situation too. This may be the case in some situations (as described above), but in many cases (and probably most cases) the deductions from termination compensation payments will reflect any amount which, in traditional procurement, the Nodal Agency would normally expect to claim from the PPP Vendor.

21.5.5. On termination for PPP Vendor Default, not all amounts which the Nodal Agency could claim on a termination are reflected in a reduced market value compensation payment. Examples would include claims under Clauses 24.3 (Indemnity), 26 (Information and Confidentiality) and Sections 24 (Intellectual Property Rights) and claims against the Nodal Agency by third parties. To the extent these claims are not deducted from the market value payment (for example for reasons set out in Section 12 (Payments and Set-off)), they should continue to be exercisable after termination. Such rights should therefore if relevant be included in any collateral warranties.

21.5.6. The limits on liability within collateral warranties should be within the overall required limits on indemnities within the Contract (and, by implication, the Sub-Contracts) (see Sections 21.3 (Indemnities) and 21.4.1 (Collateral Warranties)). Accordingly, claims against indemnities which reduce the capped liability within the Contract should have the same effect on the maximum liabilities under the collateral warranties and vice-versa. The Nodal Agency should assess the optimum level of such a limit, taking into account all circumstances, such as value for money, consideration of specific rules and the issues referred to above.

21.5.7. Care should be taken to ensure that amounts dealt with under the payment mechanism or market value compensation on termination payment are not capable of being claimed, as this could result in double counting.

## 22. INSURANCE

### 22.1. Introduction

22.1.1. Traditionally, Central government has chosen not to take out commercial insurance against insurable risks retained under conventional procurement techniques, as the premiums payable have not been seen to represent good value for money compared to self-insurance.

22.1.2. Nodal Agencies and other public bodies sometimes elect to insure some of their assets in the commercial insurance market, though typically this is with very high deductibles and a significant level of self-insurance.

22.1.3. The position is different under PPP, because insurable risks are transferred to the PPP Vendor which may have limited free financial resources, particularly if it is a SPV. Moreover, the need to ensure continuity of service means that self-insurance by such a PPP Vendor for the full range of insurable risks is, generally, not appropriate. The Risk Management prudence of the PPP Vendor require more extensive insurance cover than that required by the Nodal Agency. Nonetheless, the Nodal Agency should not rely on the PPP Vendor to look after the Nodal Agency's own insurance interests, and it is essential for the Nodal Agency to seek professional insurance advice on what insurance requirements should be imposed on the PPP Vendor at an early stage in the procurement process (before issuing the tender documents) and during subsequent negotiations.

22.1.4. The main issues which the Nodal Agency will need to consider with its insurance advisers are:

- whether and the extent to which the Nodal Agency should require the PPP Vendor to take out and maintain certain insurances as a means of managing particular risks, and how these may change over time.
- ensuring that the proceeds of any claim under any required insurance are used correctly by the PPP Vendor;
- Nodal Agency control of litigation where the PPP Vendor is the principal party insured;
- whether the Nodal Agency should share significant increases and decreases in the market-wide cost of maintaining the PPP Vendor's operating period insurances;
- what should happen if a risk for which insurance is to be effected and maintained in accordance with the required insurance schedule in the Contract becomes uninsurable; and
- what should happen if any required insurance term becomes unavailable

Insurance lies at the heart of the PPP Vendor's risk management strategy and, in turn, efficient risk management lies at the heart of the value for money benefits of PPP that derive from long-term Asset ownership and stewardship by investors. The PPP Vendor's approach to insurance is inseparable from its approach to Asset design, solution development, choice of materials and maintenance regimes etc. Accordingly, Nodal Agency and their advisers should take care not to disturb the transfer of this integral package of risks, nor to disturb incentives that ensure these risks

are efficiently priced and managed. Moreover it is essential that the Nodal Agency's insurance requirements and associated contractual provisions are clearly stated in the tender documents and that bidders are required to price these matters within their responses to the tender documents.

22.1.5. The Nodal Agency's insurance requirements in Clause 25.2 will represent a minimum degree of cover which the Nodal Agency expects to see maintained by the PPP Vendor. It is, of course, for the PPP Vendor to determine the overall insurance programme to be implemented, consistent with the Nodal Agency's respective requirements. To ensure delivery of value for money, the Contract should incentivize (or, as appropriate, require) the PPP Vendor at all times to:

- ensure full integration between the insurance programme and their overall risk management strategy,
- make cost-effective trade-offs between lower deductibles and increased insurance premiums (within the constraints specified by the Nodal Agency);
- procure insurance from good quality and cost-effective suppliers; and look only to the Nodal Agency for cover in relation to unavailability of insurances as a last resort.

Under exceptional circumstances it may not be value for money for the private sector to bear all the risks associated with placing an insurance programme itself (e.g. in the event of (i) non availability of insurance or (ii) excessive market wide increases in insurance costs) and it is likely to be better value for money if an Nodal Agency provides a limited level of protection under specific circumstances. Factors which should incentivize the PPP Vendor to manage risks effectively and discourage the PPP Vendor from seeking protection from the Nodal Agency, unless in exceptional circumstances and as a last resort, include the following:-

- the PPP Vendor remains liable for deductible related losses;
- in the event of uninsurability and an uninsured risk materialising, the Nodal Agency may have the ability to terminate the Contract; and furthermore, the amount payable by the Nodal Agency to the PPP Vendor upon such termination will be the same as that payable upon termination in the event of Force Majeure; and
- in respect of the operating period insurance premium risk sharing arrangement, protection is limited to general market wide changes in insurance costs. Furthermore the PPP Vendor takes the first 30% of any relevant change in insurance cost, as well as 15% of any relevant change in insurance cost in excess of 30%.

## 22.2. Nodal Agency's Requirements

22.2.1. In general terms, the PPP Vendor will be expected to insure in accordance with good industry practice. However, in addition to the statutory insurances, there will be a number of required insurances which the Nodal Agency will want to know are being taken out and maintained by the PPP Vendor, to ensure that insurance proceeds are available to cover certain types of claims. Such required insurances should include third-party liability insurance, Contractors' "all risks" insurance and property damage insurance during operation.

22.2.2. Only those risks which are to be covered by the Required Insurances and insurances required by law (see Clause 25.2(a) and (b)) will attract uninsurability protection. It is therefore

important that apart from delay in start up and business interruption insurance (see Section 22.2.3 below), only those insurances from which the Nodal Agency derives a benefit as a co-insured party should be designated Required Insurances. Furthermore, in respect of those risks that the PPP Vendor is required to insure against, the Nodal Agency should ensure that the uninsurability protection does not extend to cover risks if it would have the effect of undermining the essence of the commercial principle that the risk being covered is a risk that the PPP Vendor is required to manage. For example, if professional indemnity insurance or non-vitiation protection become unavailable, the Nodal Agency should not provide such cover since it would insure the PPP Vendor against claims relating to the PPP Vendor's (or its Sub-Contractors') negligence. Nodal Agency should therefore ensure that any professional indemnity insurance does not feature as a Required Insurance and non-vitiation protection is carved out of the uninsurability protection provided under Clause 25.9.

22.2.3. The PPP Vendor will like to take get delay in start-up and business interruption insurance. The effect of these insurances is to ensure that during any period of reinstatement of physical damage to the Project, the PPP Vendor will be able to meet its unavoidable running costs and obligations. If such insurances become unavailable in the market and material damage to the Project subsequently arises, the PPP Vendor may (depending on the period of reinstatement) have adverse effect on its financial and may eventually default . Without the benefit of uninsurability protection for delay in start-up and business interruption insurances, PPP vendors are likely to **require contingencies** to be put in place by the PPP Vendor to cover such eventualities. It is thus preferable that the Nodal Agency should, on value for money grounds, extend uninsurability protection in the Contract to cover business interruption insurance and delay in start-up insurance. It is important to remember that delay in start-up and business interruption insurances only respond in circumstances where an underlying policy covering material damage to the Project also responds, or would have responded in the case that this cover is also unavailable.

22.2.4. Insurance requirements should reflect the degree of risk transfer, the ability of the PPP Vendor to make the premium payments (relative to the size of the risks), value for money considerations and the specifics of the Project. There are, of course, standard insurances that are required during the solution development and operating phases of all projects, although the full scope of cover (e.g. the insured risks, the exclusions, the endorsements, the amounts of cover and the deductibles) will vary from project to project. Whilst the solution development phase insurances typically cover the whole of the solution development phase, the operational insurance are renewed periodically (mostly annually). It is important that the renewal process starts well in advance of the renewal date.

22.2.5. Insurers should inform the Nodal Agency of changes in the policy.

22.2.6. If the Nodal Agency wishes to increase the limits or scope of the insurances during the life of the Contract, then this should be treated as an Nodal Agency change in Service (see Section 13.2 (A Typology of Changes)).

22.2.7. As central Government generally self-insures, there should be no requirement for insurances to cover those risks retained under the Project by a central Government Nodal Agency. It is, however, reasonable to seek third-party public liability insurance where appropriate.

22.2.8. The Nodal Agency should protect its position by being a co-insured for its own interests (where it has an insurable interest) and requiring its interests to be noted as appropriate on the insurances taken out by the PPP Vendor. This should be acceptable to the PPP Vendor.

22.2.9. The Nodal Agency should consider the value for money benefits of requiring the PPP Vendor to take out “non-vitiation” protection in respect of certain required insurances. Non-vitiation protection allows the Nodal Agency to claim as a co-insured under a policy even if the insurer would be able to avoid a claim made by the PPP Vendor on the basis that the PPP Vendor, for example, withheld material information from the insurer. However, absence of such cover shall not be covered by the uninsurability protection given to the PPP Vendor in respect of unavailability of insurance cover.

#### **ILLUSTRATIVE DRAFTING:**

##### **Insurance**

(a) The PPP Vendor shall, prior to the Service Commencement Date, take out and maintain or procure the maintenance of the insurances described in [Part 1 of Annex 1 (Required Insurances)] and any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences.

(b) The PPP Vendor shall during the Service Period take out and maintain or procure the maintenance of the insurances (Required Insurances) and any other insurances as may be required by law.

(c) No party to this Contract shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that party is an insured, a co-insured or additional insured person.

(d) With the exception of any insurances required by law, the insurances referred to in paragraphs (a) and (b) shall:

(i) subject to paragraph (e) below, name the PPP Vendor as co-insured with any other party maintaining the insurance;

(ii) [provide for non-vitiation protection in respect of any claim made by the Nodal Agency as co-insured in accordance with Endorsement

(iii) contain a clause waiving the insurers’ subrogation rights against the Nodal Agency, its employees and agents in accordance with Endorsement [2] in Part 3 of [Annex 1];

(iv) provide for 30 days prior written notice of their cancellation, non-renewal or amendment to be given to the Nodal Agency in accordance with Endorsement ; and

(v) in respect of the Physical Damage Policies provide for payment of any proceeds received by the PPP Vendor

(e) Wherever possible, the insurances referred to in paragraphs (a) and (b) shall name the Nodal Agency as a co-insured for its separate interest.

(f) The PPP Vendor shall provide to the Nodal Agency:

- (i) copies on request of all insurance policies referred to in paragraphs (a) and
- (b) (together with any other information reasonably requested by the Nodal Agency relating to such insurance policies) and the Nodal Agency shall be entitled to inspect them during ordinary business hours; and
- (ii) evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this Clause 25.2 (Insurance).
- (g) Renewal certificates in relation to the insurances referred to in paragraphs (a) and
- (b) shall be obtained as and when necessary and copies (certified in a manner acceptable to the Nodal Agency) shall be forwarded to the Nodal Agency as soon as possible but in any event on or before the renewal date.
- (h) If the PPP Vendor is in breach of paragraphs (a) or (b) above, the Nodal Agency may pay any premiums required to keep such insurance in force or itself procure such insurance and may in either case recover such amounts from the PPP Vendor on written demand.
- (i) The PPP Vendor shall give the Nodal Agency notification within 30 days after any claim in excess of INR. [ ] on any of the insurance policies referred to in this Clause accompanied by full details of the incident giving rise to the claim.
- (j) Neither failure to comply nor full compliance with the insurance provisions of this Contract shall limit or relieve the PPP Vendor of its liabilities and obligations under this Contract.
- (k) The insurance premiums in respect of the insurances referred to in paragraphs (a) and (b) shall be the responsibility of the PPP Vendor.

## 23. INFORMATION AND CONFIDENTIALITY

### 23.1. Introduction

23.1.1. The Contract should include provisions dealing with records, provision of information, personal data, publicity and confidentiality.

### 23.2. PPP Vendor's Records and Provision of Information

#### **ILLUSTRATIVE DRAFTING:**

#### **PPP Vendor's Records and Provision of Information**

- (a) The PPP Vendor shall:
  - (i) at all times maintain a full record of particulars of the costs of performing the Service, including those relating to the design, solution development, maintenance, operation and finance;
  - (ii) when requested by the Nodal Agency, provide a summary of any of the costs referred to in paragraph (i), including details of any funds held by the PPP Vendor specifically to cover such costs, in such form and detail as the Nodal Agency may reasonably require to enable the Nodal Agency to monitor the performance by the PPP Vendor of its obligations under this Contract; and
  - (iii) provide such facilities as the Nodal Agency may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Clause.
- (b) Compliance with the above shall require the PPP Vendor to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to the Contract showing in detail:
  - (i) administrative overheads;
  - (ii) payments made to Sub-Contractors and to sub-contractors;
  - (iii) capital and revenue expenditure;
  - (iv) such other items as the Nodal Agency may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 5.2 (Delays in Service Commencement due to a Compensation Event), [Section] 13 (Change in Service), Clause 14.8 (Qualifying Change in Law), Clause 15.4 (Market Testing) and [Section 15.5] (Benchmarking), and the PPP Vendor shall have (and procure that the sub-contractors shall have) the books of account evidencing the items listed in paragraphs (i) to (iv) available for inspection by the Nodal Agency (and any expert) upon reasonable notice, and shall present a report of these to the Nodal Agency as and when requested.
- (c) The PPP Vendor shall maintain or procure that the following are maintained.
  - (i) a full record of all incidents relating to health, safety and security which occur during the term of the Contract; and
  - (ii) full records of all maintenance procedures carried out during the term of the Contract, and the PPP Vendor shall have the items referred to in paragraphs (i) and (ii) available



for inspection by the Nodal Agency upon reasonable notice, and shall present a report of them to the Nodal Agency as and when requested.

- (d) The PPP Vendor shall permit records referred to in this Clause to be examined and copied by the representatives of the Nodal Agency, and by [the Comptroller and Auditor General and his representatives].
- (e) The records referred to in this Clause shall be retained for a period of at least [5] years after the PPP Vendor's obligations under the Contract have come to an end.
- (f) Upon termination of the Contract, and in the event that the Nodal Agency wishes to enter into another contract for the operation and management of the Project, the PPP Vendor shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of the Nodal Agency to provide information relating to the PPP Vendor's costs of operating and maintaining the Project.
- (g) The PPP Vendor shall:
  - (iii) provide to the Nodal Agency on 31 March, 30 June, 30 September and 31 December each year a document listing all information pertaining to legal and commercial implications during the preceding three month period;
  - (iv) provide to the Nodal Agency copies of its annual report and accounts within 30 days of publication;
  - (v) provide to the Nodal Agency a copy of the Financial Model at Financial Close and (as the same may be amended) within 30 days of any amendment thereto;
  - (vi) use all reasonable endeavours to assist the Nodal Agency in its preparation of any report required by [Department], from time to time;
- (h) The Nodal Agency may, in the circumstances referred to in paragraph (g) (iv) above require the PPP Vendor to provide an Interim Project Report and to attend, such meetings as the Nodal Agency may convene to discuss such Interim Project Report and the circumstances giving rise to it.

### 23.3. Public Relations and Publicity

#### **ILLUSTRATIVE DRAFTING:**

##### **Public Relations and Publicity**

- (a) The PPP Vendor shall not by itself, its employees or agents and procure that its subcontractors shall not communicate with representatives of the press, television, radio or other communications media on any matter concerning the Contract without the prior written approval of the Nodal Agency.
- (b) No facilities to photograph or film in or upon any property used in relation to the Project shall be given or permitted by the PPP Vendor unless the Nodal Agency has given its prior written approval.

### 23.4. Confidentiality

The Contract should determine whether information provided by the Nodal Agency to the PPP Vendor and vice versa is to be treated as confidential. It should also specify the extent to which details in the Contract itself are confidential.

### 23.5. Government Openness

23.5.1. The Right to Information Act (“RTI”) came into force on 12<sup>th</sup> October 2005. Its underlying premise is that the approach to release of information should be based on the assumption that information should be released.

23.5.2. In case PPP Contracts are placed in the public domain<sup>89</sup>, then PPP vendor has to assist/support in providing the information. Only “commercially sensitive” information, information the dissemination of which is contrary to the public interest or information which is personally private should be withheld. In the PPP context the key concern relates generally to “commercially sensitive” information and issues of national security.

23.5.3. **26.5.3** Extensive guidance on Right to Information is available from the Department of Personnel & Training (GoI) website.

### 23.6. Related Matters

23.6.1. Stock Exchanges have publicity requirements with which listed companies are required to comply. Companies raising finance through capital markets (e.g. through bond issues), in particular, must disclose details of Contracts and related documents. There are some exceptions to disclosure requirements, for example, where national security would be prejudiced..

23.6.2. Nodal Agency should recognise in any event that attempts to keep contractual terms confidential amongst the private sector and financial community are to some extent cosmetic, as details of signed contracts will often become known over time. The advantage of greater openness on the public sector side is that Nodal Agency planning projects should benefit similarly from gaining knowledge of positions PPP Vendor investment and returns on projects similar to those planned and to gain the benefits of competition, there is some advantage in making positions known. If there is a public offering or wide syndication, the prospectus or information memorandum will usually contain a great deal of detail on the contents of the Contract and other documents.

23.6.3. PPP Vendors should note that the CAG will require access to all relevant information from the Contracts which it requires for its audit purposes, irrespective of whether it is confidential or sensitive. The CAG may also publish any information (including key contract terms, the contract price

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<sup>89</sup> Currently the PPP projects are not covered under RTI, but it is a possibility that they would come in due course. Even in the case, it does not come under RTI, it is expected that the PPP Vendor should support the Nodal Agency in encouraging transparency.

and results of bid evaluations) in its reports to Parliament. The Contract should ensure that the Comptroller and Auditor General is entitled to examine the PPP Vendor's records.

23.6.4. The Nodal Agency should make it a condition of it becoming involved in the underlying financing that the Nodal Agency is entitled to receive from the PPP Vendor a copy of any information memorandum, prospectus or other similar document containing information relating to the Project. Such information, where necessary, will be treated as Commercially Sensitive Information.

#### **ILLUSTRATIVE DRAFTING:**

##### **Confidentiality**

(a)

- (i) The parties agree that provisions of this Contract and each Project Document shall, subject to sub-paragraph (ii) below, not be treated as Confidential Information and may be disclosed without restriction.
- (ii) Sub-paragraph (i) above shall not apply to provisions of this Contract or a Project Document<sup>12</sup> designated as Commercially Sensitive Information and listed in Part I of Schedule [ ] (Commercially Sensitive Information) to this Contract<sup>13</sup> which shall, subject to sub-paragraph (b) below, be kept confidential for the periods specified in that Part.
- (iii) the parties shall keep confidential all Confidential Information received by one party from the other party relating to this Contract and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

(b) Paragraphs (a) (ii) and (iii), shall not apply to:

- (i) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the Contract for the performance of those obligations;
- (ii) any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- (iii) any disclosure to enable a determination to be made under Clause 25 (Dispute Resolution) or in connection with a dispute between the PPP Vendor and any of its subcontractors;
- (iv) any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory Nodal Agency having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory Nodal Agency concerned;
- (v) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- (vi) any provision of information to the parties' own professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the PPP Vendor to enable it to carry out its obligations under the Contract, or may wish to acquire shares in the PPP Vendor [and/or Holding company] in accordance with the provisions of this Contract to

- that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (vii) any disclosure by the Nodal Agency of information relating to the design, solution development, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to:
- A. any proposed new PPP Vendor and its advisers, should the Nodal Agency decide to retender the Contract; or
- B. any person in connection with [Clause 15.5 (Benchmarking)] or Clause [15.4] (Market Testing);
- (viii) any registration or recording of the Consents and property registration required;
- (ix) any disclosure of information by the Nodal Agency to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Nodal Agency for any purpose related to or ancillary to the Contract; or
- (x) any disclosure for the purpose of:
- A. the examination and certification of the Nodal Agency's or the PPP Vendor's accounts;
- B. complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
- C. (without prejudice to the generality of paragraph (b)(iv) above) compliance with the RTI, provided that, for the avoidance of doubt, neither paragraph (x) (D) nor paragraph (iv) above shall permit disclosure of Confidential Information otherwise prohibited by RTI.
- (c) Where disclosure is permitted under paragraph (b), other than paragraphs (ii), (iv), (v), (viii) and (x), the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Contract.
- (d) For the purposes of the audit, the Auditor may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the PPP Vendor and any sub-PPP Vendor and may require the PPP Vendor and any sub-PPP Vendor to produce such oral or written explanations as he considers necessary.
- (e) The PPP Vendor shall not make use of the Contract or any information issued or provided by or on behalf of the Nodal Agency in connection with the Contract otherwise than for the purpose of the Contract, except with the written consent of the Nodal Agency.
- (f) Where the PPP Vendor, in carrying out its obligations under the Contract, is provided with information relating to [people/users], the PPP Vendor shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the PPP Vendor has sought the prior written consent of that [person/user] and has obtained the prior written consent of the Nodal Agency.
- (g) On or before the Expiry Date, the PPP Vendor shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to [people/users e.g. prisoners/patients/pupils] including any documents in the possession, custody or control of a sub-PPP Vendor, are delivered up to the Nodal Agency.
- (h) The parties acknowledge that the CAG has the right to publish details of the Contract (including Commercially Sensitive Information) in its relevant reports to Parliament.

**“Commercially Sensitive Information”** means the sub-set of Confidential Information listed in column 1 of Part 1 (Commercially Sensitive Contractual Provisions) and column 1 of Part 2

(Commercially Sensitive Material) of Schedule [ ] (Commercially Sensitive Information) in each case for the period specified in column 2 of Parts 1 and 2 of Schedule [ ].

**“Confidential Information”** means:

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data; and
- (b) Commercially Sensitive Information.

## 23.7. Freedom of Information

### **ILLUSTRATIVE DRAFTING:**

#### **Freedom of Information**

- (a) The PPP Vendor acknowledges that the Nodal Agency is subject to the requirements of the RTI and shall facilitate the Nodal Agency’s compliance with its Information disclosure requirements pursuant to the same in the manner provided for in paragraphs (b) to (g) (inclusive) below.
- (b) Where the Nodal Agency receives a Request for Information in relation to Information that the PPP Vendor is holding on its behalf and which the Nodal Agency does not hold itself the Nodal Agency shall refer to the PPP Vendor such Request for Information that it receives as soon as practicable and in any event within [ten] Business Days of receiving a Request for Information and the PPP Vendor shall:
  - (i) provide the Nodal Agency with a copy of all such Information in the form that the Nodal Agency requires as soon as practicable and in any event within [ten] Business Days (or such other period as the Nodal Agency acting reasonably may specify) of the Nodal Agency’s request; and
  - (ii) provide all necessary assistance as reasonably requested by the Nodal Agency in connection with any such Information, to enable the Nodal Agency to respond to a Request for Information within the time for compliance of the RTI.
- (c) Following notification under Clause 26.10 (b), and up until such time as the PPP Vendor has provided the Nodal Agency with all the Information specified in Clause 26.10 (b) (i), the PPP Vendor may make representations to the Nodal Agency as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Nodal Agency shall be responsible for determining at its absolute discretion:-
  - (i) whether Information is exempt from disclosure under the RTI; and
  - (ii) whether Information is to be disclosed in response to a Request for Information, and in no event shall the PPP Vendor respond directly, or allow its sub-contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Nodal Agency.

- (d) The PPP Vendor shall ensure that all Information held on behalf of the Nodal Agency is retained for disclosure for at least [ ] years (from the date it is acquired) and shall permit the Nodal Agency to inspect such Information as requested from time to time.
- (e) The PPP Vendor shall transfer to the Nodal Agency any Request for Information received by the PPP Vendor as soon as practicable and in any event within 2 Business Days of receiving it.
- (f) The PPP Vendor acknowledges that any lists provided by him listing or outlining Confidential Information, are of indicative value only and that the Nodal Agency may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the RTI.
- (g) In the event of a request from the Nodal Agency pursuant to clause 26.10 (b) above, the PPP Vendor shall as soon as practicable, and in any event within [10] Business Days of receipt of such request, inform the Nodal Agency of the PPP Vendor's estimated costs of complying with the request to the extent these would be recoverable if incurred by the Nodal Agency under RTI Fees. Where such costs (either on their own or in conjunction with the Nodal Agency's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in RTI, the Nodal Agency shall inform the PPP Vendor in writing whether or not it still requires the PPP Vendor to comply with the request and where it does require the PPP Vendor to comply with the request within the 10 Business Days period for compliance shall be extended by such number of additional days for compliance as the Nodal Agency is entitled to under the RTI. In such case, the Nodal Agency shall notify the PPP Vendor of such additional days as soon as practicable after becoming aware of them and shall reimburse the PPP Vendor for such costs as the PPP Vendor incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with the RTI.

## **24. INTELLECTUAL PROPERTY RIGHTS**

### **24.1. Introduction**

24.1.1. In most projects, the PPP Vendor will need to use some type of Intellectual Property (“IP”) in order to deliver the Service. The PPP Vendor may use IP developed by a third party or by itself. Such IP may have a general application or may be specifically developed for the relevant Project. If the PPP Vendor uses IP developed by and belonging to a third party, the PPP Vendor will need a licence to use such IP<sup>90</sup>.

24.1.2. The Contract must require the parties not to breach any terms of any licence to use IP and not to infringe the Intellectual Property Rights (“IPR”) of any owner of IP used. The Contract must set out what happens if any breach or infringement of IPR occurs.

24.1.3. The Nodal Agency does not need to own the IPR, though the Nodal Agency may inherit free, or have an option to purchase IPR which is the core to the continuity of the Service (e.g. specially written software). Irrespective of who “owns” the IP, however, the Contract must ensure that the Nodal Agency is able to use any IP required to provide the Service if it takes over the Service or employs/procures a third party to perform the Service (e.g. on expiry or early termination of the Contract).

### **24.2. Infringement of IPR by the PPP Vendor**

24.2.1. The general principle is that any costs resulting from infringement by the PPP Vendor of IPR should be borne by the PPP Vendor. It should be responsible for any costs of the owner of the IPR and the Nodal Agency. This will normally require the PPP Vendor to offer an indemnity to the Nodal Agency.

24.2.2. If the infringement or related legal action threatens the delivery of the Service, the Nodal Agency should be notified as soon as possible. The Nodal Agency should be obliged to provide reasonable assistance to the PPP Vendor in defending any legal action, but this should not extend to meeting any costs of the PPP Vendor’s defence.

### **24.3. Infringement of IPR by the Nodal Agency**

24.3.1. If the Nodal Agency infringes IPR, it should generally bear any resulting costs. The Nodal Agency should bear the owner’s costs and any costs incurred by the PPP Vendor (e.g. if sued by the owner or if it has to procure a licence of different IPR from another party). This will normally require the Nodal Agency to offer an indemnity to the PPP Vendor.

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<sup>90</sup> If the Nodal Agency owns IPR that will be required by the PPP Vendor in order to carry out the Project, the Nodal Agency should consider how it intends to allow the PPP Vendor to use such IPR during the term of the Contract.

24.3.2. The Nodal Agency may contribute IP to the Project for the PPP Vendor to use. If it does not own the relevant IPR, it must ensure that it is entitled to pass it on to the PPP Vendor (e.g. by way of sub-licence). If the Nodal Agency infringes the owner's IPR by passing the relevant IP on to the PPP Vendor, the Nodal Agency should be liable for any resulting costs unless Section 24.3.3 applies.

24.3.3. If the PPP Vendor uses any IP which the Nodal Agency has brought into the Project, it should ensure that it is entitled to do so. It will be liable for any infringement by it unless it is unable (acting reasonably) to verify such matter.

## **24.4. Rights to IPR on Expiry or Termination**

24.4.1. The Contract will also need to deal with what happens to IPR on a termination (whether early (see Section 19 (Early Termination)) or on expiry of the Contract (see Section 18 (Termination of Assets on Expiry of Service Period))), particularly in circumstances in which software or similar assets have been developed for the specific project. Examples of this could be a simulator training project or a similar project, where if the Project is to be transferred to the Nodal Agency on a termination then IPR should also be transferred as the Project would be unworkable without this.

24.4.2. Generally, the Nodal Agency should be entitled to a free and perpetual licence of IPR specifically developed for the Project (e.g. specially bespoke software) for use in that project only (either by it or an alternative provider of the Service). The Nodal Agency should not usually attempt to extend its right to use such IPR in other projects but should be entitled to negotiate a price for its use on other projects<sup>91</sup>, having taken into account any development costs incurred in producing that software. Particular issues may arise on certain projects that make such licences impossible to obtain.

24.4.3. In respect of other IPR central to the Project such as third party software licences, the PPP Vendor should ensure that the Nodal Agency is either entitled to a novation of such licences or has the right to obtain a licence of such software at commercial rates. It is for the PPP Vendor to ensure that any licence it (or its sub-contractors) enters into reflects these requirements. If the PPP Vendor is unable to ensure that the Nodal Agency will have the benefit of all necessary IPR, it must indemnify the Nodal Agency against any costs incurred due to such non-availability. For example, if the PPP Vendor chooses to use proprietary software, it must bear the risk if the owner will not agree to licence such software to the Nodal Agency or replacement PPP Vendor. Similarly, the PPP Vendor must bear the risk of the owner of the relevant IPR being prevented from licensing such IPR to the Nodal Agency or replacement PPP Vendor due to trade restrictions imposed by its Government. If the PPP Vendor does not want to bear such risks, it should find alternative IPR which is capable of being licensed to the Nodal Agency.

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<sup>91</sup> If it is likely that the PPP Vendor will be able to commercially exploit any IPR developed for the Project, the Nodal Agency should consider whether or not revenues from IPR exploitation are likely to be significant and whether it should require the PPP Vendor share any such revenues with the Nodal Agency.



24.4.4. In addition to ensuring that the Nodal Agency has the right to use IPR required to continue provision of the Service (e.g. on expiry, early termination or Nodal Agency step-in), arrangements should wherever possible be put in place to ensure that the Nodal Agency has immediate access to such IPR and any information required to operate it. For example, source codes of IT products should be held in escrow by an independent party (e.g. the NIC or for a State Government it could be an State IT Agency). It should be noted that an additional or new service provider will need access to IPR in advance of the Expiry Date or the commencement of its service contract in order to acquaint itself with the Service and allow a smooth handover and such access rights should be negotiated in advance, rather than left to be resolved on termination.

## 25. DISPUTE RESOLUTION

### 25.1. Introduction

25.1.1. The Contract must specify a procedure for handling disputes under the terms of the Contract.

### 25.2. Dispute Resolution Procedure

25.2.1. As going through the courts may not be appropriate for the disputes that can arise under a PPP contract, an alternative formal dispute resolution procedure may offer a more efficient and cost-effective method of resolving disputes.

25.2.2. A common form of dispute resolution involves a three stage process as follows:

- the Nodal Agency and PPP Vendor consult with each other for a fixed time period (possibly involving different levels of internal consultation) in an attempt to come to a mutually satisfactory agreement;
- if consultation fails, the parties may then (except in the case of certain types of dispute) put their case before an expert to decide. The expert is appointed from a panel (e.g. of solution development or operation experts) whose appointment is regulated by the Contract. It may be appropriate in certain circumstances to substitute other forms of Alternative Dispute Resolution ("ADR")<sup>92</sup> for this type of expert determination. Disputes relating to the mechanics of price variations may go to a financial expert agreed between the parties at the time<sup>93</sup>, and
- if either party is dissatisfied with the expert's decision, it may refer the matter either to arbitration (itself a form of ADR) or to the courts for a final and binding decision. The method of appointing the arbitrator should be set out in the Contract.

25.2.3. It is often proposed that a fast-track dispute resolution process is included in the contract to deal with certain pressing issues. The drafting included below reflects the procedure to fast track.

### 25.3. Joinder of Sub-Contract Disputes

25.3.1. The PPP Vendor and its Sub-Contractors may request the right to join their disputes into a dispute under the Contract if the same issues are involved. This should generally be resisted by the Nodal Agency as it will only increase the time and cost of the process for the Nodal Agency. The Nodal Agency should not automatically become embroiled in the PPP Vendor's disputes with its Sub-

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<sup>92</sup> Other forms of ADR which may be considered include mediation, conciliation and neutral evaluation

<sup>93</sup> To enable the financial expert to reach an appropriate resolution (particularly where the dispute concerns the pricing of a change in accordance with Section 13 (Change in Service) which may result in the PPP Vendor implementing a change at a price it considers too low) suitable terms of reference should be agreed in advance and provided to the expert in accordance with the relevant approach taken to such changes in the Contract (see Section 5.2.3 (Calculation of Compensation)). As Section 5.2.3 (Calculation of Compensation) makes clear, the agreed approach will depend on the risk profile of the Project, and the pricing approach adopted in the Contracts and Sub-Contracts.

Contractors, particularly as the PPP Vendor should in any case ensure that, as far as possible, decisions under the Contract flow down the contractual chain. This is achieved through proper structuring of the Sub-Contracts. It may, however, be possible to agree joinder in relation to certain limited matters (such as disputes arising out of the User Acceptance Tests referred to in Section 3.6 (Acceptance and Service Commencement)).

25.3.2. The Nodal Agency should adopt a compromise position. This allows the Sub-Contractors the right to make written representations to the arbitrator/adjudicator as part of the PPP Vendor's case in a dispute under the Contract where that dispute relates to issues in dispute under the relevant Sub-Contract. The arbitrator/adjudicator will not determine the Sub-Contract dispute itself, so in order for his decision on the Contract dispute to be binding on the PPP Vendor and the Sub-Contractor, they must separately agree to be bound by the decision of the arbitrator/adjudicator in respect of that matter as between themselves.

## **25.4. Delays Caused by Disputes**

25.4.1. PPP Vendors may try to include disputes between the Nodal Agency and the PPP Vendor under the Contract in the list of Relief Events on the basis that they cannot continue work until the dispute is resolved. This issue arises during the solution development phase in particular. This should not be allowed. The PPP Vendor (and the Sub-Contractors) should not be permitted to "down tools" just because a dispute has arisen. If no other course of action can be taken (usually towards the end of the solution development phase, but also at critical stages), then the issues involved can give rise to relief.

25.4.2. The PPP Vendor must be under an obligation to carry on with the Service in accordance with the Nodal Agency's wishes while any dispute is being carried on. The PPP Vendor must rely on the expert or arbitrator awarding adequate compensation if the dispute is resolved in the PPP Vendor's favour.

25.4.3. The Nodal Agency should recognise that if the dispute is resolved in the PPP Vendor's favour, the Nodal Agency will typically be liable for the PPP Vendor's costs. These could include any extra costs incurred in rebuilding (such as manpower costs and materials costs) and any resulting costs incurred by the PPP Vendor if a delay to Service Commencement results. Delays caused by the Nodal Agency failing to comply with the relevant dispute resolution procedure should be taken into account in the arbitrator's determination.

### **ILLUSTRATIVE DRAFTING:**

#### **Dispute Resolution**

- (a) Any dispute arising in relation to any aspect of the Contract shall be resolved in accordance with this Clause.
- (b) If a dispute arises in relation to any aspect of this Contract, the PPP Vendor and the Nodal Agency shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.

(c) Without prejudice to paragraph (b) above, either party may give the other notice of intention to refer the dispute to adjudication and the adjudicator shall be selected in accordance with paragraph (d) below.

(d) The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts appointed in accordance with the following:

(i) there shall be two panels of experts, one in respect of solution development matters (the "Solution development Panel") and one in respect of operational and maintenance matters (the "Operational Panel")<sup>94</sup>. All the experts on each panel shall be

wholly independent of the PPP Vendor, the Nodal Agency, the relevant Sub-Contractor and any of the major competitors of the PPP Vendor or relevant Sub-Contractor;

(ii) the Solution development Panel shall be comprised of [3] experts who shall be appointed jointly by the PPP Vendor and the Nodal Agency. Such appointments shall take place within [28] days of the date of this Contract<sup>95</sup>,

(iii) the Operational Panel shall be comprised of [3] experts who shall be appointed jointly by the PPP Vendor and the Nodal Agency. Such appointments shall take place on or before the Service Commencement Date<sup>96</sup>,

(iv) if any member of a panel resigns during the term of the Contract, a replacement expert shall be appointed by the PPP Vendor and the Nodal Agency as soon as practicable;

(v) if the Nodal Agency and the PPP Vendor are unable to agree on the identity of the experts to be appointed to the panel(s), [ ] shall appoint such expert(s) within 30 days of any application for such appointment by either party.

(e) Within 7 days of appointment in relation to a particular dispute, the Adjudicator shall require the parties to submit in writing their respective arguments. The Adjudicator shall, in his absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.

(f) In any event, the Adjudicator shall provide to both parties his written decision on the dispute, within 28 days of appointment (or such other period as the parties may agree after the reference, or 42 days from the date of reference if the party which referred the dispute agrees). Unless the parties otherwise agree, the Adjudicator shall give reasons for his decision<sup>97</sup>. Unless and until revised, cancelled or varied by the Arbitrator, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.

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<sup>94</sup> The parties shall consider how they wish to deal with disputes of a financial (rather than solution development or operational) nature and ensure the Contract contains appropriate provisions. The parties may want to appoint a panel of financial experts in the way set out in Clause 25(d) or may prefer to appoint a financial expert by mutual agreement at the time of the dispute. As currently drafted, financial disputes could be referred straight to arbitration (see Clause 25(l)(i)) so parties may prefer to include an intermediate level of dispute resolution. The parties should also consider the likelihood of overlapping disputes arising of both a solution development and operational nature. If such disputes are likely, a procedure will need to be developed for deciding which of the Solution development Panel or Operational Panel should preside over the dispute's resolution.

<sup>95</sup> It is essential that such appointments are made as soon as possible after Contract signature so that the panel is in place in time to deal with any solution development disputes arising.

<sup>96</sup> If operational disputes are capable of arising prior to the Services Commencement Date, an earlier date should be specified for such appointments

<sup>97</sup> The reverse can be specified. It is up to the parties to choose whether or not they wish reasons to be given. The parties should ensure that the relevant insurers and insurance policies will recognise the Adjudicator's decision and process claims accordingly if this is the case, as this could have important implications for both parties.

(g) The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the reference, including legal costs and the costs and expenses of any witnesses.

(h) The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

(i) The Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Contract.

(j) All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 26.9 (Confidentiality), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.

(k) The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

(l) If:

(i) there is any dispute in respect of matters referred to in [Section 13 (Change in Service)], [Clause 14 (Change in Law)], [Clause 15 (Price Variation)], Clause 21.1.3 (Compensation on Nodal Agency Default), [Section 19.2.5 (Compensation on Termination for PPP Vendor Default)], Clause 21.3.4 (Compensation on Termination for Force Majeure), [Section 19.4.4 (Compensation on Termination for Corrupt Gifts and Fraud)] Clause 21.5.2 (Compensation on Voluntary Termination); or

(ii) either party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision made in accordance with Clause [ ]; or

(iii) both parties agree, then either party may (within [28] days of receipt of the Adjudicator's decision, where appropriate), notify the other party of its intention to refer the dispute to arbitration<sup>98</sup>. Such notification shall invite the other party to concur in the appointment of a sole arbitrator who shall be a solicitor, barrister or arbitrator recognised by the [ ] of not less than 10 years' standing. If the parties are unable within 14 days to agree the identity of the Arbitrator either party may request the [ ] to make the appointment.

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<sup>98</sup> The parties may incorporate provisions to go to court at this stage instead of arbitration if appropriate. In addition, the parties may wish to address expressly the right to apply to the courts for interlocutory relief at any stage in support of the adjudication or arbitration (assuming the arbitrator does not have such powers). If so, the need to appoint agents for service of process on overseas parties will arise.

(m) The Arbitrator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Contract, to vary or cancel the decision of the Adjudicator and, where appropriate, to order financial compensation to be paid by one party to the other. The arbitration shall take place in [City/Location ].

(n) The Arbitrator shall in his absolute discretion, make such procedural directions as he considers necessary such as ordering the parties to provide written submissions within such time period as he considers appropriate and/or to attend such hearings as he deems necessary.

(o) The Arbitrator shall deliver his decision on any matter referred to him within 28 days of concluding any hearings which may have been held in connection with the matter and in any event within 3 months (or such other period as the parties may agree) of his appointment. The Arbitrator's decision shall be in writing and shall state his reasons for his decision. The decision of the Arbitrator shall be final and binding on both parties. The costs of the arbitration will be in the discretion of the Arbitrator.

(p) The parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this Clause and shall give effect forthwith to every decision of the Adjudicator and the Arbitrator delivered under this Clause.

(q) If any dispute arising under this Contract raises issues which relate to:

(i) any dispute between the PPP Vendor and the Sub-Contractor arising under the Sub-Contract or otherwise affects the relationship or rights of the PPP Vendor and/or the Sub-Contractor under the Sub-Contract (the "Sub-Contract Dispute"); or

(ii) any dispute between the PPP Vendor and the Operating Sub-Contractor arising under the Operating Sub-Contract or otherwise affects the relationship or rights of the PPP Vendor and/or the Operating Sub-Contract under the Operating Sub-Contract (the "Operating Sub-Contract Dispute"), then the PPP Vendor may include as part of its submissions made to the Adjudicator or to the Arbitrator, where the dispute is referred to arbitration, submissions made by the Sub-Contractor or by the Operating Sub-Contractor as appropriate.

(r) The Adjudicator or the Arbitrator, as appropriate, shall not have jurisdiction to determine the Sub-Contract Dispute or the Operating Sub-Contract Dispute but the decision of the Adjudicator or the Arbitrator shall, subject to Clause 25(1), be binding on the PPP Vendor and the Sub-Contractor insofar as it determines the issues relating to the Sub-Contract Dispute and on the PPP Vendor and the Operating Sub-Contractor insofar as it determines the issues relating to the Operating Sub-Contract Dispute.

(s) Any submissions made by the Sub-Contractor or the Operating Sub-Contractor shall:

(i) be made within the time limits applicable to the delivery of submissions by the PPP Vendor; and

(ii) concern only those matters which relate to the dispute between the Nodal Agency and the PPP Vendor under this Contract.

(t) Where the Sub-Contractor or the Operating Sub-Contractor makes submissions in any reference before:

- (i) the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Nodal Agency and two-thirds by the PPP Vendor; and
- (ii) the Arbitrator, the costs of the arbitration shall be in the discretion of the Arbitrator.

(u) The Nodal Agency shall have no liability to the Sub-Contractor or the Operating Sub-Contractor arising out of or in connection with any decision of the Adjudicator or Arbitrator or in respect of the costs of the Sub-Contractor or the Operating Sub-Contractor in participating in the resolution of any dispute under this Contract.

(v) The PPP Vendor shall not allow the Sub-Contractor or the Operating Sub-Contractor access to any document relevant to the issues in dispute between the Nodal Agency and the PPP Vendor save where:

(i) the document is relevant also to the issues relating to the Sub-Contract Dispute or the Operating Sub-Contract Dispute as the case may be; and

(ii) the PPP Vendor has first delivered to the Nodal Agency a written undertaking from the Sub-Contractor and/or the Operating Sub-Contractor (as appropriate) addressed to the Nodal Agency that they shall not use any such document otherwise than for the purpose of the dispute resolution proceedings under this Contract and that they shall not disclose such documents or any information contained therein to any third party other than the Adjudicator or Arbitrator or any professional adviser engaged by the Sub-Contractor or the Operating Sub-Contractor (as appropriate) to advise in connection with the dispute.

## 26. NODAL AGENCY STEP-IN

### 26.1. Introduction

26.1.1. In some circumstances, the Nodal Agency may wish to take action itself in relation to the Service if there is a need to prevent or mitigate a serious risk to health, safety (person or property) or the environment or to discharge a statutory duty. Such a right may arise due to matters outside the scope of the work of the PPP Vendor or may arise due to the PPP Vendor being in breach of certain of its obligations under the Contract.

26.1.2. Such a right of the Nodal Agency is often referred to as “step-in” (and this is the terminology used here for that reason), as it involves the Nodal Agency taking over some or all of the obligations of the PPP Vendor for a period. It should, however, be viewed as being entirely different in nature and purpose from the PPP Vendor Default provisions (see Section 19.2 (Termination on PPP Vendor Default)). Essentially, the focus of the right is a serious short term problem that can or must be solved quickly, where the Nodal Agency is in a better position to do this than the PPP Vendor. The Nodal Agency should not in any situation be obliged to step-in.

### 26.2. Step-In – General

#### ILLUSTRATIVE DRAFTING:

##### **Nodal Agency Step-In**

- (a) If the Nodal Agency reasonably believes that it needs to take action in connection with the Service:
  - (i) because a serious risk exists to the health or safety of persons or property or to the environment; and/or
  - (ii) to discharge a statutory duty, then the Nodal Agency shall be entitled to take action in accordance with paragraphs (b) to (e) below.
- (b) If paragraph (a) applies and the Nodal Agency wishes to take action, the Nodal Agency shall notify the PPP Vendor in writing of the following:
  - (i) the action it wishes to take;
  - (ii) the reason for such action;
  - (iii) the date it wishes to commence such action;
  - (iv) the time period which it believes will be necessary for such action; and
  - (v) to the extent practicable, the effect on the PPP Vendor and its obligation to provide the Service during the period such action is being taken.
- (c) Following service of such notice, the Nodal Agency shall take such action as notified under paragraph (b) above and any consequential additional action as it reasonably believes is necessary (together, the “**Required Action**”) and the PPP Vendor shall give all reasonable assistance to the Nodal Agency while it is taking such Required Action.



### **26.3. Step-in without PPP Vendor Breach**

26.3.1. If there has been no breach, in the circumstances set out above (i.e. those set out in Clause 29(a) (Nodal Agency Step-In)) the Nodal Agency should notify the PPP Vendor that it plans to step-in and the extent of such step-in. To the extent the Nodal Agency steps in, it will be effectively removing any obligations affected by such step-in from the PPP Vendor and performing them itself.

26.3.2. During its step-in, as the Nodal Agency needs to act for reasons external to the Contract, the Nodal Agency should pay for the Service as if the Service had been fully performed, subject only to any deductions to be made in respect of parts of the Service still provided by the PPP Vendor (e.g. to reflect performance on that part) and unaffected by the Nodal Agency's step-in. To the extent aspects of the Service are affected by the Nodal Agency's step-in, the Nodal Agency should make full payment in respect of such aspects and the PPP Vendor's obligation to perform such part of the Services should be suspended. Payment should also be conditional upon the PPP Vendor agreeing to provide reasonable assistance to the Nodal Agency at this time (provided the Nodal Agency reimburses the PPP Vendor for any extra costs it incurs).

26.3.3. The Nodal Agency should bear all its own costs incurred by stepping-in, in this circumstance.

#### **ILLUSTRATIVE DRAFTING:**

If the PPP Vendor is not in breach of its obligations under the Contract, then for so long as and to the extent that the Required Action is taken, and this prevents the PPP Vendor from providing any part of the Service:

- (i) the PPP Vendor shall be relieved from its obligations to provide such part of the Service; and
- (ii) in respect of the period in which the Nodal Agency is taking the Required Action and provided that the PPP Vendor provides the Nodal Agency with reasonable assistance (such assistance to be at the expense of the Nodal Agency to the extent incremental costs are incurred), the Unitary Charge due from the Nodal Agency to the PPP Vendor shall equal the amount the PPP Vendor would receive if it were satisfying all its obligations and providing the Service affected by the Required Action in full over that period.

### **26.4. Step-in on PPP Vendor Breach**

26.4.1. If the PPP Vendor is in breach of an obligation under the Contract, the Nodal Agency should notify the PPP Vendor of such breach. This will generally occur through the monitoring arrangements and, in such circumstances, it is then up to the PPP Vendor to rectify the breach within the agreed timetable.

26.4.2. If the breach gives rise to a need for the Nodal Agency to step-in in the circumstances set out above (i.e. those set out in Clause 29 (a) (Nodal Agency Step-In)) and the PPP Vendor has failed to remedy the breach within the agreed time period, the Nodal Agency should have the right to

step-in and carry out such rectification itself (for example, using a third party) at the PPP Vendor's expense.

26.4.3. Where the Nodal Agency steps-in upon PPP Vendor breach, the Nodal Agency should continue to pay the PPP Vendor as where there is no breach (see Section 26.3.2). In addition, subject to Section 26.4.4 below, the full Unitary Charge should be paid for all aspects of the Service that are affected by the Nodal Agency's step-in, subject again here to the obligation on the PPP Vendor to provide reasonable assistance to the Nodal Agency. The PPP Vendor's obligation to perform such part of the Services should be suspended, though any existing right of the Nodal Agency to terminate for breach by the PPP Vendor should not be affected.

26.4.4. The Nodal Agency should, however, be entitled to set off any costs it incurs in stepping-in such circumstances (i.e. for both costs of work and advice and for time devoted to running the operations) against the Unitary Charge payable to the PPP Vendor. The PPP Vendor should be relieved of its obligations to continue the running of the relevant part of the operation concerned while the Nodal Agency has stepped in.

#### **ILLUSTRATIVE DRAFTING:**

- (a) If the Required Action is taken as a result of a breach of the obligations of the PPP Vendor under the Contract, then for so long as and to the extent that the Required Action is taken, and this prevents the PPP Vendor from providing any part of the Service:
  - (i) the PPP Vendor shall be relieved of its obligations to provide such part of the Service; and
  - (ii) in respect of the period in which the Nodal Agency is taking Required Action, the Unitary Charge due from the Nodal Agency to the PPP Vendor shall equal the amount the PPP Vendor would receive if it were satisfying all its obligations and providing the Service affected by the Required Action in full over that period, less an amount equal to all the Nodal Agency's costs of operation in taking the Required Action.

26.4.5. The Nodal Agency should behave in a reasonable manner, taking into account the relevant circumstances (e.g. it should try to avoid action which would detrimentally affect any compensation payable to the PPP Vendor on a termination) but an indemnity is only appropriate where the PPP Vendor is not in breach.

26.4.6. The rights referred to here should not be used as a means to undermine the carefully structured termination arrangements and should tie in with such arrangements. If the breach subsists following the Nodal Agency's step-in, the Nodal Agency should be entitled to terminate for PPP Vendor Default (see Section 19.2 (Termination on PPP Vendor Default)).

## **26.5. Related Issues**

26.5.1. Having stepped-in, in circumstances where there is no breach by the PPP Vendor, the Nodal Agency should act in accordance with good industry practice and to the extent there is a failure to

do so, then it should indemnify the PPP Vendor for any effects (including for any detrimental effect on any termination payment). Liability amounts should be outside any indemnity cap (for both parties).

26.5.2. The Nodal Agency should not be particularly concerned about such an indemnity being required as the price for a right of step-in. This is because to the extent the PPP Vendor is not in breach the Nodal Agency should honour the contractual structure and risk allocation in the Contract. If the PPP Vendor is in breach, then the termination provisions should ordinarily be sufficient to protect the Nodal Agency (with no indemnity) without any additional involvement of the Nodal Agency through step-in.

## 26.6. Rights of Access

26.6.1. An issue related to step-in rights (and at times confused with them) is that of rights of access of the Nodal Agency to the facilities.

26.6.2. This right exists in part to give the Nodal Agency the ability to monitor performance (see Section 10 (Payment Mechanism Management and Monitoring)) and carry out spot checks, to the extent required by the Contract.

### **ILLUSTRATIVE DRAFTING:**

#### **Rights of Access**

- (a) The Nodal Agency or a representative of the Nodal Agency may enter upon any property used by the PPP Vendor to perform the Service, to inspect the solution development, operation and maintenance of the Project and to monitor compliance by the PPP Vendor with its obligations.
- (b) The Nodal Agency and a representative of the Nodal Agency may at all times enter upon any property used by the PPP Vendor as training or workshop facilities and places where work is being prepared or materials being obtained for the Project.
- (c) The PPP Vendor shall procure that satisfactory facilities are made available to the Nodal Agency and any representative of the Nodal Agency and that reasonable assistance is given for the purposes of paragraphs (a) and (b) above, subject to the PPP Vendor's and Sub-Contractors' solution development or operational requirements not being adversely affected and to reimbursement of any reasonable costs or expenses of the PPP Vendor.
- (d) If the Nodal Agency is or becomes aware of a breach by the PPP Vendor of its obligations under Clause 11.1 (Maintenance) then the Nodal Agency may exercise its right of access and remedy such breach and shall be entitled to recover any costs or expenses incurred from the PPP Vendor.
- (e) The Nodal Agency and its representative shall at all times comply with any health and safety requirements when exercising its rights under this Clause.

- (f) If the Nodal Agency or its representative causes material damage to any asset in exercising any right under this Clause, then the Nodal Agency shall be liable to the PPP Vendor for the reasonable costs directly caused by such damage.

## **27. MISCELLANEOUS PROVISIONS**

**30.1** The Contract will also contain a number of relatively standard positions. The following suggests how some of these should be drafted:

### **27.1. Waiver**

- (a) No term or provision of this Contract shall be considered as waived by any party to this Contract unless a waiver is given in writing by that party.
- (b) No waiver under paragraph (a) shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Contract unless (and then only to the extent) expressly stated in that waiver.

### **27.2. Severability**

If any term, condition or provision contained in this Contract shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Contract.

### **27.3. Counterparts**

This Contract may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

### **27.4. Law of the Contract and Jurisdiction**

This Agreement shall all be governed and construed in accordance with the laws of India applicable to agreements made and to be performed in India [and subject to Clause 25 (Dispute Resolution), the parties submit to the exclusive jurisdiction of the [ Court].

### **27.5. Third Party Rights**

No term of this Contract is enforceable under the by a person who is not a party to this Contract.

### **27.6. Interest on Late Payments**

The parties will pay interest on any amount payable under this Contract not paid on the due date, for the period from that date to the date of payment at a rate equal to [ ]% above [ ] .

### **27.7. Continuing Obligations**

Save as otherwise expressly provided in this Contract or as already taken into account in the calculation of any Termination Sum or other payment of compensation on termination pursuant to this Contract:

- (a) termination of the Service Period shall be without prejudice to any accrued rights and obligations under this Contract as at the Termination Date; and

- (b) termination of the Service Period shall not affect the continuing rights of the Nodal Agency and the PPP Vendor under Clauses [ ] or under any other provision of this Contract which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.



# **MODEL RFP TEMPLATES FOR IT PPP PROJECTS**

**Ministry of Electronics & Information Technology**

**2017**

*This document is advisory in nature and aim to sensitize the bid management teams on good practices and harmonize/standardize the RFP clauses and terms & conditions.*

*All the documents are based on existing Central Government Guidelines, feedback from stakeholders and prevalent international practices. However it is possible that the State Government / Nodal Agencies may have their own specific procurement Guidelines which may or may not be consistent with the clauses of the RFP, Guidance notes or Contract Agreement.*

*It may be noted that these documents do not substitute or overrule any approvals currently required by the concerned Department/State Government Nodal Agency for finalization of the RFP. Accordingly it is advised that all necessary approvals are taken from appropriate authorities, as done before publishing of these model documents.*



## Glossary

1	A&M	Approach & Methodology
2	ATS	Annual Technical Support
3	BCA	Bachelor of Computer Applications
4	CCN	Change Control Notes
5	CD	Compact Disc
6	COTS	Commercially Off The Shelf
7	CS	Computer Science
8	CV	Curriculum Vitae
9	CVC	Central Vigilance Commission
10	DD	Demand Draft
11	DFID	Department for International Development
12	MEITY	Ministry of Electronics & Information Technology
13	DR	Disaster Recovery
14	EMD	Earnest Money Deposit
15	EMS	Enterprise Management System
16	EOI	Expression of Interest
17	ESH	Extended Service Hours
18	GFR	General Financial Rules, 2017
19	GIS	Geographical Information System
20	GoI	Government of India
21	ICT	Information and Communication Technology
22	INR	Indian National Rupee
23	IP	Implementation Partner
24	IT	Information Technology
25	LD	Liquidated Damages
26	LLP	Limited Liability Partnership
27	LoA	Letter of Award

28	LoI	Letter of Intent
29	MCA	Master of Computer Applications
30	MMP	Mission Mode Project
31	Contract Agreement	Contract Agreement
32	NeGP	National e-Governance Plan
33	O&M	Operations and Maintenance
34	OEM	Original Equipment Manufacturer
35	PAN	Permanent Account Number
36	PBG	Performance Bank Guarantee
37	PoA	Power of Attorney
38	PoC	Proof of Concept
39	QCBS	Quality Cum Cost Based Selection
40	RFE	Request for Empanelment
41	RFP	Request for Proposal
42	RFP	Request for Proposal
43	RoC	Registrar of Companies
44	SI	System Integrator
45	SLA	Service Level Agreement
46	SOW	Scope of Work
47	T&M	Time and Material
48	ToR	Terms of Reference
49	UAT	User Acceptance Test

## Terms and Legends for the Document

Symbol / Terms	Meaning
< >	Text to be inserted by the user of the template
[ ]	Tips provided to the user of the template. These are to be deleted by the user from the final document being created
<< >>	Text to be filled in by the bidder in response to this document. This is not to be inputted / tinkered by the user
<b>Nodal Agency</b>	The nodal agency which is responsible for executing the project and assists the Department in carrying out the bidding. Also this is known as State Designated Agency. In case the Government department itself decides to carry out the bidding and execute the project, then the term “Nodal Agency” should be replaced by the Department.
<b>Department or Authority (Optional)</b>	The Department is the ultimate “owner” of the project. The e-Governance is carried out within the domain of the department. Certain clauses are optional to be put in the document and would depend on certain conditions. These may be included in the RFP, post establishing the relevance of the clause.
<b>Bidder</b>	Supplier/Vendor of Software application development, Software products

## Key Highlights / Changes Introduced

<b>1 Preparation for establishing the feasibility of a e-Governance PPP project</b>	– Provided for enough pre-Tender planning and establishing financial and economic feasibility of the project
<b>2 Eco-System for managing the PPP Project</b>	– Defining roles of various entities for ensuring proper check and balances for creating a successful PPP project
<b>3 Balanced Sharing of Risks</b>	– Identification of risks and allocating it to the party best positioned to handle that risk
<b>4 Eligibility and Technical Evaluation</b>	– Rationalized the criteria in the Eligibility / Prequalification and the Technical evaluation (eliminated restrictive criteria)
<b>5 Promote Transparency of Information</b>	– Standards in the quality of information to be provided in the RFP document – Upfront sharing of Project Budget information
<b>6 Standardization / Clarity</b>	– Recommendations on Performance and Output specifications – Choice of PPP Model – Risk Allocation Matrix
<b>7 Focus on Outcomes</b>	– Payment Schedule linked to the outcomes/Transactions
<b>8 Rational approach to drafting of Service Level Agreements</b>	– Aligned as per International practices & procedures for establishing a baseline, service credits and earn-backs
<b>9 Updated Some of the Key Clauses</b>	– Conflict of interest – Clarifications Request/Appeal Post Technical Evaluation
<b>10 Promoted Small and Medium Enterprises</b>	– Allocation of % on Contract Value – Evaluation Score assigned



## Key Reference Documents

1. Standardization of Public Funded Initiatives (PFI) Contracts (Version 4), HM Treasury, © Crown Copyright 2007
2. Public-Private Partnerships in e-Governance: Knowledge Map An Infodev Publication Prepared By: The Institute for Public-Private Partnerships, June 2009
3. The Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects, European PPP Expertise Centre (EPEC)
4. Public-Private Partnership Handbook, Asian Development Bank (ADB)
5. PPP In India, Ministry of Finance, Government of India - <http://www.pppinindia.com/>
6. Toolkit for PPP in Roads and Highways, Public-Private Infrastructure Advisory Facility (PPIAF)
7. Payment Mechanisms In Operational PPP Projects, Financial Partnerships Unit, Finance Directorate, The Scottish Government
8. Model Request for Proposals and Quotations for PPP Projects, Department of Expenditure, Ministry of Finance, Government of India
9. PPP Template, Yesser Government, Saudi Arabia

## Table of Contents

<b>1</b>	<b>Model EOI Document</b>	<b>16</b>
1.1	Advertisement for Expression of Interest	16
1.2	Invitation for Expression of Interest	16
1.3	Introduction to the Project	16
1.4	Broad Scope of Work	16
1.5	Proof of Concept (PoC): Optional	17
1.5.1	Scope of Proof of Concept	17
1.5.2	Output Expected from the PoC	17
1.6	Instructions to the Bidders	18
1.6.1	Completeness of Response	18
1.6.2	EOI Proposal Preparation Costs & related issues	18
1.6.3	Pre-Bid Meeting	19
1.6.4	Responses to Pre-Bid Queries and Issue of Corrigendum	19
1.6.5	Right to Terminate the Process	20
1.6.6	Submission of Responses	20
1.6.7	Bid Submission Format	21
1.6.8	Venue and Deadline for Submission	21
1.6.9	Short Listing Criteria	21
1.6.10	Evaluation Process	21
1.6.11	Consortiums	22
1.7	Pre-Qualification Criteria	22
	Appendix I: Bid Submission forms	26
	Form 1: Covering Letter with Correspondence Details	27
	Form 2: Details of the Bidder's Operations and IT Implementation Business	28
	Form 3: Compliance Sheet for Pre-Qualification Criteria	29
	Form 4: Integrity pact	30
•	<b>Commitments of the BIDDER</b>	<b>31</b>
<b>2</b>	<b>Model RFP Document for PPP Vendor</b>	<b>39</b>
2.1	Fact Sheet	39
2.2	Request for Proposal	41
2.3	Structure of the RFP	41
2.4	Background Information	42

2.4.1	Basic Information.....	42
2.4.2	Project Background .....	43
2.4.3	Key Information .....	43
2.4.4	About the Department.....	43
2.4.5	Current Numbers of Transactions .....	43
2.5	Instructions to the Bidders.....	44
2.5.1	General.....	44
2.5.2	Compliant Bids / Completeness of Response.....	45
2.5.3	Pre-Bid Meeting & Clarifications .....	45
2.5.3.1	Pre-bid Conference .....	45
2.5.3.2	Responses to Pre-Bid Queries and Issue of Corrigendum.....	46
2.5.4	Key Requirements of the Proposal.....	46
2.5.4.1	Government's Right to No Selection .....	46
2.5.4.2	Contract Agreement.....	47
2.5.4.3	RFP Document Fees .....	47
2.5.4.4	Earnest Money Deposit (EMD).....	47
2.5.1	Consortiums.....	48
2.5.1.1	Inclusion of MSMEs in Project Delivery .....	48
2.5.1.2	Submission of Proposals .....	49
2.5.1.3	Authentication of Bids .....	49
2.5.2	Preparation and Submission of Proposal.....	50
2.5.2.1	Proposal Preparation Costs .....	50
2.5.2.2	Government Department Site Visit.....	50
2.5.2.3	Language .....	50
2.5.2.4	Venue & Deadline for Submission of Proposals.....	50
2.5.2.5	Late Bids.....	51
2.5.3	Deviations .....	51
2.5.4	Evaluation Process.....	52
2.5.4.1	Tender Opening.....	52
2.5.4.2	Proposal Validity.....	52
2.5.4.3	Proposal Evaluation.....	52
2.6	Criteria for Evaluation.....	53
2.6.1	Technical Evaluation Criteria .....	53
2.6.2	Commercial Proposal Evaluation.....	56



2.6.3	Combined and Final Evaluation .....	57
2.7	Appointment of Private Sector Vendor/Agency.....	58
2.7.1	Award Criteria .....	58
2.7.2	Right to Accept Any Proposal and To Reject Any or All Proposal(s) .....	58
2.7.3	Notification of Award .....	58
2.7.4	Contract Finalization and Award .....	58
2.7.5	Performance Guarantee .....	58
2.7.6	Signing of Contract .....	59
2.7.7	Failure to Agree with the Terms and Conditions of the RFP .....	59
2.8	Scope of Work.....	59
2.8.1	Key Personnel in Scope of Work Delivery.....	60
2.8.2	Positions identified for Key personnel .....	61
2.8.3	Initial Composition; Full Time Obligation; Continuity of Personnel.....	61
2.8.4	Evaluations.....	62
2.8.5	Replacement .....	62
2.8.6	High Attrition .....	63
2.8.7	Solicitation of Employees.....	63
2.9	Deliverables & Timelines .....	63
2.10	Service Level Agreements (Key Impact) .....	66
2.11	Acceptance Testing and Certification .....	66
2.12	Change Control .....	70
2.13	Conflict of Interest .....	73
2.14	Compliance to eGov standards.....	76
	Appendix I: Technical Bid Templates .....	84
	Form 1 : Compliance Sheet for Technical Proposal .....	85
	Form 2: Letter of Proposal.....	88
	Form 3: Project Citation Format .....	90
	Form 4: Proposed Solution .....	91
	Form 4 A : Solution Proposed.....	91
	Form 4 B : Bill of Material (Softwares).....	92
	Form 4 C : Bill of Material (Infrastructure) .....	92
	Form 4 D : Services Description .....	92
	Form 5: Proposed Work Plan .....	93
	Form 6: Team Composition .....	94
	Form 7: Curriculum Vitae (CV) of Key Personnel .....	95

Form 8: Deployment of Personnel.....	97
Form 9: Manufacturers'/Producers' Authorization Form .....	98
Form 10: No Conflict of Interest Declaration.....	99
Form 11: Power of Attorney Template in favour of Lead Bidder .....	100
Form 12: Bank Guarantee for Earnest Money Deposit .....	101
Appendix II: Financial Proposal Template .....	103
Form 1: Covering Letter for Commercial Proposal .....	103
Form 2: Financial Proposal .....	105
Form 2 A : Summary of Cost Component.....	105
Form 2 B : Details of Cost Components.....	106
Appendix III: Template for PBG & CCN .....	116
Form 1: Performance Bank Guarantee.....	116
Form 2 : Change Control Notice (CCN) Format.....	118

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## Structure of Template of EOI Document

### When do we need EOI

An **Expression of Interest (EOI)**, (also called Request for Information) is the channel for short listing bidders for a particular PPP Project in a 2 stage tendering process. The shortlisted bidders in the EOI process (first stage) compete through Technical and Financial bids (second stage).

The objective of issuance of EOI document is to shortlist a potential list of PPP Vendors who have the basic competency and capacity to implement the e-Governance project. Also, through this EOI, the Government / Nodal Agency can explore the market to understand the capability / interest level of the competent bidders to execute the assignment.

Since all the PPP contracts would exceed Rs. 500 Lakhs, the EOI process is recommended to be followed.

### What are the typical contents of an EOI

The following needs to be provided in a typical Request for EOI document.

S. No.	Document Structure		Desirability	Reference
1	Invitation for Expression of Interest		Mandatory	[Refer Section 1.2]
2	Introduction to Projects		Mandatory	[Refer Section 1.3]
3	Broad Scope of work		Mandatory	[Refer Section 1.4]
4	Instruction to Bidders		Mandatory	[Refer Section 1.6]
5	Pre-Qualification Criteria	Minimum criteria	Mandatory	[Refer Section 1.7]
6		* Additional Criteria	Optional	[Refer Section 1.7]
7	Bid Submission Forms		Mandatory	[Refer Appendix I]
8	Compliance Sheet for Pre-Qualification		Recommended	[Refer Appendix I Form 3]
9	Proof of Concept		Optional	[Refer Section 1.5]
10	Templates		NA	[Refer Templates]

# <Name of the proposed e-Governance Project>

<File reference No.>

## 1.0

### *[Template Document for Expression of Interest for PPP Vendor]*

S. No.	Particular	Details
1.	Start date of issuance / sale of EOI document	< >
2.	Last date for Submission of Queries	< >
3.	Pre-Bid Conference	< >
4.	Issue of Corrigendum	< >
5.	Last date for issuance / sale of EOI Document	< >
6.	Last date and time for EOI Submission	< >

## **MODEL RFP DOCUMENTS FOR PROCUREMENT OF SYSTEM IMPLEMENTATION / INTEGRATION SOLUTIONS AND SERVICES**

### **1 Model EOI Document**

#### **1.1 Advertisement for Expression of Interest**

*[Please refer Section 1.3.2 of “Guidance Notes : Model RFP Templates for Implementation Agencies” on publishing EOI for Implementation Agencies. Also refer Section 4.1 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for a template of the advertisement for request for EOIs]*

#### **1.2 Invitation for Expression of Interest**

The <Nodal Agency> invites EOIs from PPP Vendors (hereafter referred as ‘Agencies’) for the <Name of the e-Governance project> that has been initiated. The Scope of work will have to be carried out in accordance with the specifications in a detailed Request for Proposal (RFP) document which will be brought out by the <Nodal Agency> shortly on a PPP Model. <Nodal Agency> now seeks EOI from agencies of repute for <Project name> to <Summary of the Scope of work>. The agencies who meet the pre- qualification criteria specified in this document will be short-listed for the issue of the detailed Request for Proposal.

*[Please refer Section 1.3.2 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for more information on this section]*

#### **1.3 Introduction to the Project**

*[Please refer Section 1.3.3 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for more information under this section]*

#### **1.4 Broad Scope of Work**

*[Please refer Section 1.3.5 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for more information under this section]*

## 1.5 Proof of Concept (PoC): Optional

### 1.5.1 Scope of Proof of Concept

*[PoC is needed to understand a new technology area (e.g. biometrics). It should not be made a standard practice to include the PoC in the EOI, unless the nodal agency has allocated a separate budget for it and has made it a paid activity. Please refer Section 1.3.6 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]*

- a. Proof of concept for purpose of this EOI is defined as demonstration of capabilities for <insert the area which requires the demonstration / feasibility> to prove the idea and feasibility as envisioned by <Nodal Agency>.
- b. The demonstration could be done using a part of an existing solution and should provide a representative solution through a relatively small number of users acting in business roles to satisfy various aspects of the requirements listed below.
- c. A detailed list of test cases has been provided below. <Nodal Agency> and its authorized representatives shall witness the PoC results.
- d. Each shortlisted bidder based on the pre-qualification criteria shall demonstrate the PoC (or each EOI shall contain the Proof of Concept as one of the PQ for shortlisting) . The Bidder is expected to bear the cost of demonstrating the PoC and would also be responsible for making the demonstration.
- e. PoC shall be demonstrated in the following languages : <Languages>
- f. Each bidder shall demonstrate the process flow as mentioned above for the purpose of PoC demonstration which shall be assessed based on the following Test criterions:

S. No.	Key feature required in the PoC	Test Criterion

- g. Please note that this is an indicative process flow only and bidders can demonstrate value added features and functionalities as part of their solution, which may be taken note of and included in the RFP which will be shortly released by <Nodal Agency>.

### 1.5.2 Output Expected from the PoC

The objective of conducting a Proof of concept is to

*[Depending on the situation, the following points may be customized]*

- *Get a clarity on the design of the solution, before publishing of the RFP document*
- *Provide an opportunity for alternative solutions by encouraging innovations facilitated by interactions with the user department/Nodal Agency*
- *Clarify users' understanding of the system*
- *Verify the adequacy of specifications for the solution*
- *Verify system response time using a production data base*
- *Obtain user acceptance of procedures*
- *Validate initial productivity rates and cost/benefit projections*
- *Compute/Re-compute resource requirements*
- *Test interfaces with related business functions and information systems*
- *Feasible Solution stacks (including database)*
- *Verify the functionality of software*
- *Identify and address obstacles for the full scale implementation*
- *Produce samples of all outputs]*

## **1.6 Instructions to the Bidders**

*[Please refer Section 1.3.4 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for more information under this section]*

### **1.6.1 Completeness of Response**

- a. Bidders are advised to study all instructions, forms, terms, requirements and other information in the EOI documents carefully. Submission of the Proposal shall be deemed to have been done after careful study and examination of the EOI document with full understanding of its implications.
- b. The response to this RFP should be full and complete in all respects. Failure to furnish all information required by the RFP documents or submission of a proposal not substantially responsive to the RFP documents in every respect will be at the Bidder's risk and may result in rejection of its Proposal.

### **1.6.2 EOI Proposal Preparation Costs & related issues**

- a. The bidder is responsible for all costs incurred in connection with participation in this process, including, but not limited to, costs incurred in conduct of informative and other diligence activities, participation in meetings/discussions/presentations, preparation of proposal, in providing any additional information required by <Nodal Agency> to facilitate the evaluation process, *[or conduct of “Proof of Concept”, if relevant]*.
- b. <Nodal Agency> will in no case be responsible or liable for those costs, regardless of the conduct or outcome of the bidding process.



- c. This EOI does not commit <Nodal Agency> to award a contract or to engage in negotiations. Further, no reimbursable cost may be incurred in anticipation of award or for preparing this EOI.
- d. All materials submitted by the bidder will become the property of <Nodal Agency> and may be returned completely at its sole discretion.

### 1.6.3 Pre-Bid Meeting

- a. <Nodal Agency> shall hold a pre-bid meeting with the prospective bidders on <Date & time> at <Address of the Venue>
- b. The Bidders will have to ensure that their queries for Pre-Bid meeting should reach to  
<Name, Address, Fax and email id of the Nodal Officer>  
by post, facsimile or email on or before  
<Date & time>

*[Having a single contact person becomes a problem when the person is on leave or not available and the RFP communication is sent to him. Three levels of contacts is recommended: primary, secondary and executive. All communications should be addressed to all the three contacts]*

- c. All queries to be raised in the pre-bid meeting will relate to the EOI alone and no queries related to detailed analysis of Scope of work, payment terms and mode of selection will be entertained. These issues will be amply clarified at the RFP stage.

### 1.6.4 Responses to Pre-Bid Queries and Issue of Corrigendum

- a. The Nodal Officer notified by the <Nodal Agency> will endeavor to provide timely response to all queries. However, <Nodal Agency> makes no representation or warranty as to the completeness or accuracy of any response made in good faith, nor does <Nodal Agency> undertake to answer all the queries that have been posed by the bidders.
- b. At any time prior to the last date for receipt of bids, <Nodal Agency> may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Bidder, modify the EOI Document by a corrigendum.
- c. The Corrigendum (if any) & clarifications to the queries from all bidders will be posted on the <website address> and emailed to all participants of the pre-bid conference.
- d. Any such corrigendum shall be deemed to be incorporated into this EOI.

- e. In order to afford prospective Bidders reasonable time in which to take the corrigendum into account in preparing their bids, < Nodal Agency> may, at its discretion, extend the last date for the receipt of EOI Bids

*[The nodal agency should ensure clear scope and specific responses to bidder queries. Clarifications on Scope of work which say “as per RFP” should not be encouraged (only if there is a request for change in terms / condition, then “as per RFP” should be allowed). If bidders raise doubts about the scope, these should be addressed.]*

#### **1.6.5 Right to Terminate the Process**

- a. <Nodal Agency> may terminate the EOI process at any time and without assigning any reason. <Nodal Agency> makes no commitments, expression or implied that this process will result in a business transaction with anyone.
- b. This EOI does not constitute an offer by <Nodal Agency>. The bidder's participation in this process may result in <Nodal Agency> short listing the bidder to submit a complete technical and financial response at a later date.

#### **1.6.6 Submission of Responses**

- a. The bids shall be submitted in a single sealed envelope and superscripted <“Name of the Assignment”> and <File reference No.>. This envelope should contain two hard copies of EOI proposal marked as “First Copy” and “Second Copy” and one soft copy in the form of a non-rewriteable CD. CD media must be duly signed using a Permanent pen Marker and should bear the name of the bidder.
  - a. Bids shall consist of supporting proofs and documents as defined in the Pre-qualification section
  - b. Bidder shall submit all the required documents as mentioned in the Appendix including various templates (Form 1 to Form 3). It should be ensured that various formats mentioned in this EOI should be adhered to and no changes in the format should be done .
- b. Envelope should indicate clearly the name, address, telephone number, Email ID and fax number of the bidder
- c. Each copy of the EOI should be a complete document and should be bound as a volume. The document should be page numbered, must contain the list of contents with page numbers and shall be initialed by the Authorized Representative of the bidder.
- d. Different copies must be bound separately.
- e. Bidder must ensure that the information furnished by him / her in respective CDs is identical to that submitted by him in the original paper bid document.

In case of any discrepancy observed by the <Nodal Agency> in the contents of the CDs and original paper bid documents, the information furnished on original paper bid document will prevail over the soft copy.

- f. EOI document submitted by the bidder should be concise and contain only relevant information as required under this EOI.

#### **1.6.7 Bid Submission Format**

The entire proposal shall be strictly as per the format specified in this Invitation for Expression of Interest and any deviation may result in the rejection of the EOI proposal.

#### **1.6.8 Venue and Deadline for Submission**

- a. Proposals must be received at the address specified below latest by:  
< Date & time >  
<Address>
- b. Any proposal received by the <Nodal Agency> after the above deadline shall be rejected and returned unopened to the Bidder.
- c. The bids submitted by telex/telegram/fax/e-mail<sup>1</sup> etc. shall not be considered. No correspondence will be entertained on this matter.
- d. <Nodal Agency> shall not be responsible for any postal delay or non-receipt/non-delivery of the documents. No further correspondence on the subject will be entertained.
- e. <Nodal Agency> reserves the right to modify and amend any of the above-stipulated condition/criterion depending upon project priorities vis-à-vis urgent commitments.

#### **1.6.9 Short Listing Criteria**

- a. <Nodal Agency> will shortlist bidders who meet the Pre-Qualification criteria mentioned in this Invitation to Expression of interest.
- b. Any attempt by a Bidder to influence the bid evaluation process may result in the rejection of its EOI Proposal.

#### **1.6.10 Evaluation Process**

---

<sup>1</sup> It is strongly suggested that the Nodal Agency should consider using e-tendering platform for submission of EOI bids. In such a case, section needs modified accordingly.

- a. <Nodal Agency> will constitute a Proposal Evaluation Committee to evaluate the responses of the bidders
- b. The Proposal Evaluation Committee constituted by the <Nodal Agency> shall evaluate the responses to the EOI and all supporting documents & documentary evidence. Inability to submit requisite supporting documents or documentary evidence, may lead to rejection of the EOI Proposal.
- c. Each of the responses shall be evaluated to validate compliance of the bidders according to the Pre-Qualification criteria, Forms and the supporting documents specified in this document.
- d. The decision of the Proposal Evaluation Committee in the evaluation of responses to the Expression of Interest shall be final. No correspondence will be entertained outside the evaluation process of the Committee.
- e. The Proposal Evaluation Committee may ask for meetings with the bidders to evaluate its suitability for the assignment
- f. The Proposal Evaluation Committee reserves the right to reject any or all proposals

#### 1.6.11 Consortiums

Bidder can be individual an organization or in the form of Consortiums<sup>1</sup>.

*[The Nodal agency should evaluate whether to allow the consortium or disallow. The Nodal Agency should evaluate the value add which a consortium can bring in which a sub-contracting cannot bring in. Further it should evaluate the benefit of having single point of ownership or it has the capacity to manage multiple point of ownerships. <sup>2</sup>Please refer Section 1.4.10 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]*

### 1.7 Pre-Qualification Criteria

*[Please refer Section 1.4 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for providing necessary information under this section before finalization of the criteria]*

S. No.	Basic Requirement	Specific Requirements	Documents Required
1	Sales Turnover in System	Annual Sales Turnover generated from services related to System Integration during each of the last three	Extracts from the audited Balance

<sup>1</sup> Consortium may be considered for situations, where subsequently it would get transformed into a Special Purpose Vehicle. In such a case, each of the consortium partners would have an equity stake. This would also ensure that Nodal Agency does not get involved in reviewing the consortium agreements of each of the bidders and discourage the practice of "name lending"

<sup>2</sup> Consortium may be considered for situations, where subsequently it results in the formation of a Special Purpose Vehicle. In such a case, each of the consortium partners would have an equity stake, with a clear roles and responsibilities. This would also ensure that Nodal Agency does not get involved in reviewing the consortium agreements of each of the bidders and discourage the practice of "name lending"

S. No.	Basic Requirement	Specific Requirements	Documents Required
	Integration	financial years (as per the last published Balance sheets), should be at least Rs. <value>.  This turnover should be on account of ICT Systems Development and Implementation (i.e. revenue should be on account of System Integration/Turnkey solutions or products and their associated maintenance or implementation services, packaged software etc.) only.  <i>[Please refer Section 1.4.1 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>	sheet and Profit & Loss; OR  Certificate from the statutory auditor
2	Sales Turnover	<i>[Please refer Section 1.4.2 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>	Certificate from the statutory auditor
3	Net Worth	<i>[Please refer Section 1.4.3 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>	Certificate from the statutory auditor
4	Technical Capability	Systems Implementation agency must have <b>successfully completed at least the following numbers of ICT Systems Development and Implementation engagement(s)</b> of value specified herein : <ul style="list-style-type: none"> <li>- One project of similar nature not less than the amount &lt;value equal to 80% of estimated cost&gt;; OR</li> <li>- Two projects of similar nature not less than the amount equal &lt;value equal to 60% of estimated cost&gt;; OR</li> <li>- Three projects of similar nature not less than the amount equal &lt;value equal to 40% of estimated cost&gt;</li> </ul> <Provide the definition of "similar nature" to bring in the relevance factor required for this project>  <i>[Please refer Section 1.4.4 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>	Completion Certificates from the client; OR  Work Order + Self Certificate of Completion (Certified by the Statutory Auditor); OR  Work Order + Phase Completion Certificate from the client
5	Certifications	<i>[Please refer Section 1.4.7 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>	Copy of certificate
<b>Optional</b>			
7	Legal Entity	Should be Company registered under Companies Act, 1956 or a partnership firm registered under LLP Act, 2008  Registered with the Service Tax Authorities  Should have been operating for the last three years.	<ul style="list-style-type: none"> <li>- Certificates of incorporation</li> <li>- Registration Certificates</li> </ul>

S. No.	Basic Requirement	Specific Requirements	Documents Required
		<i>[Please refer Section 1.4.9 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>	
8	Manpower Strength	<i>[Please refer Section 1.4.6 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>	Self Certification by the authorized signatory with clear declaration of staff – year wise, level/designation wise.
9	Blacklisting [Optional, till the blacklisting process has been institutionalized by DIT, Gol]	<i>[Please refer Section 1.4.8 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]</i>  <i>[Optional, till the blacklisting process has been institutionalized by DIT, Gol]</i>	A Self Certified letter

#### Additional Pre-Qualification Criterion

*[The endeavor of the EOI is to have serious bidders, who can help the Nodal agencies in conceptualization of scope of work & other areas of the RFP for procurement of PPP Vendor. However in case it is expected that more than 8 bidders would be able to qualify the basic eligibility criterion, the additional requirement may be added to restrict this list to the best 8 contenders. The additional clauses may be added **ONLY** when more than 8 bidders are expected to bid.]*

*[This exercise should result at least 8 shortlisted bidders. In case there are only 8 or less bids, these requirements may be relaxed]*

Basic Requirements	Specific Requirements	Marks Allocated	Evaluation Criteria
Understanding of bidders	Suggested Solutions (one or more than one)	10	Minimum of 5 marks for the suggested Solution, which will be evaluated on : 1) Feasibility 2) Solution proposed as a stack 3) Technologies proposed 4) Demonstration of robustness of the proposed solution
	Bidder's Experience in "Similar" Projects (for which Work Order / Completion Certificates can be provided)	60	Minimum of 45 marks based on Qualitative Assessment on : 1) Solution implemented as a stack 2) Technologies used 3) Scale of implementation 4) Learning on Issues 5) Challenges, 6) Client References
	Bidder's Competence	30	Minimum of 15 marks based on Qualitative

Basic Requirements	Specific Requirements	Marks Allocated	Evaluation Criteria
			Assessment on : <ol style="list-style-type: none"> <li>1) Research Work/Centers of Excellence</li> <li>2) Patents</li> <li>3) Assets in the given project's domain</li> </ol>

#### Other Documents and Certificates

1. Power of Attorney in the name of the Authorized Signatory

*[Please refer Section 1.4.5 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for more information under this section]*

## **Appendix I: Bid Submission forms**

The bidders are expected to respond to the EOI using the forms given in this section and all documents supporting Pre-Qualification / EOI Criteria.

Proposal / Pre-Qualification Bid shall comprise of following forms :

Form 1 : Covering Letter with Correspondence Details

Form 2 : Details of the Bidder's Operations and IT Implementation Business

Form 3 : Compliance Sheet for Pre-Qualification Criteria

Form 4: Integrity Pact



**Form 1: Covering Letter with Correspondence Details**

&lt;Location, Date&gt;

&lt;Name of the Nodal Officer&gt;

&lt;Address of the Nodal Agency&gt;

Dear Sir,

We, the undersigned, offer to provide the IT Implementation services under PPP model for <Name of the Assignment>

Our correspondence details with regard to this EOI are:

S. No.	Information	Details
1	Name of the Contact Person	<Insert Name of Contact>
2	Address of the Contact Person	<Insert Address>
3	Name, designation and contact, address of the person to whom, all references shall be made, regarding this EOI.	<Insert Name of Contact>
4	Telephone number of the Contact Person.	<Insert Phone No.>
5	Mobile number of the Contact Person	<Insert Mobile No.>
6	Fax number of the Contact Person	<Insert Fax No.>
7	Email ID of the Contact Person	<Insert Email.>
8	Corporate website URL	<Insert Website URL.>

We are hereby submitting our Expression of Interest in both printed format (2 copies) and as a soft copy in a CD. We understand you are not bound to accept any Proposal you receive.

We fully understand and agree to comply that on verification, if any of the information provided here is found to be misleading the short listing process or unduly favours our company in the short listing process, we are liable to be dismissed from the selection process or termination of the contract during the project.

We hereby declare that our proposal submitted in response to this EOI is made in good faith and the information contained is true and correct to the best of our knowledge and belief.

Sincerely,

[Bidder's Name with seal]

&lt;Applicant's Name with seal&gt;

Name: &lt;&lt;Insert Name of Contact&gt;&gt;

Title: &lt;&lt;Insert Name of Contact&gt;&gt;

Signature: &lt;&lt;Insert Signature&gt;&gt;

**Form 2: Details of the Bidder's Operations and IT Implementation Business**

SI No.	Information Sought	Details to be Furnished
<b>A</b>	Name and address of the bidding Company	
<b>B</b>	Incorporation status of the firm (public limited / private limited, etc.)	
<b>C</b>	Year of Establishment	
<b>D</b>	Date of registration	
<b>E</b>	ROC Reference No.	
<b>F</b>	Details of company registration	
<b>G</b>	Details of registration with appropriate authorities for service tax	
<b>H</b>	Name, Address, email, Phone nos. and Mobile Number of Contact Person	

**Form 3: Compliance Sheet for Pre-Qualification Criteria***[Please customize this list on the basis of guidance provided in section 1.7 of this document]*

	Basic Requirement	Documents Required	Provided	Reference & Page Number
1	Sales Turnover in System Integration	Extracts from the audited Balance sheet and Profit & Loss; OR  Certificate from the statutory auditor	Yes / No	
2	Sales Turnover	Certificate from the statutory auditor	Yes / No	
3	Net Worth	Certificate from the statutory auditor	Yes / No	
4	Technical Capability	Completion Certificates from the client; OR  Work Order + Self Certificate of Completion (Certified by the Statutory Auditor); OR  Work Order + Phase Completion Certificate from the client	Yes / No	
5	Certifications	Copy of certificate	Yes / No	
6	Power of Attorney	Copy of Power of Attorney in the name of the Authorized signatory	Yes / No	
	<b>Optional</b>			
7	Legal Entity	Copy of Certificate of Incorporation; and  Copy of Service Tax Registration Certificate	Yes / No	
8	Manpower Strength	Self Certification by the authorized signatory	Yes / No	
9	Blacklisting	A self certified letter	Yes / No	

## Form 4: Integrity pact

### **INTEGRITY PACT**

This pre-bid pre-contract agreement (hereinafter called the “Integrity Pact” or “Pact”) is made on <<day>> of <<month, year>>, between, on one hand, the President of India acting through <<designation and department> Purchaser (hereinafter called the “BUYER”, which expression shall mean and include, unless the context otherwise requires, his successors in office and assigns) of the First Part

#### **AND**

M/s <<bidder’s legal entity >> represented by <<name and designation>> (hereinafter called the “BIDDER/Seller”, which expression shall mean and include, unless the context otherwise requires, his successors and permitted assigns) of the Second Part.

WHEREAS the BUYER proposes to engage the Managed Service Provider (MSP) for implementation and operations management of the Project and the BIDDER is willing to offer/has offered the services and

WHEREAS the BIDDER is a private company/public company/Government undertaking/partnership/registered export agency, constituted in accordance with the relevant law in the matter and the BUYER is a Ministry/Department of the Government of India performing its functions on behalf of the President of India.

#### **NOW, THEREFORE,**

To avoid all forms of corruption by following a system that is fair, transparent and free from any influence/prejudiced dealings prior to, during and subsequent to the currency of the contract to be entered into with a view to:-

Enabling the BUYER to obtain the desired services at a competitive price in conformity with the defined specification by avoiding the high cost and the distortionary impact of corruption on public procurement, and

Enabling BIDDERS to abstain from bribing or indulging in any corrupt practice in order to secure the contract by providing assurance to them that their competitors will also abstain from bribing and other corrupt practices and the BUYER will commit to prevent corruption, in any form, by its officials by following transparent procedures.

The parties hereto hereby agree to enter into this Integrity Pact and agree as follows:

#### **Commitments of the BUYER**

- 1.1 The BUYER undertakes that no official of the BUYER, connected directly or indirectly with the contract, will demand, take a promise for or accept, directly or through intermediaries, any bribe, consideration, gift, reward, favour or any material or immaterial benefit or any other advantage from the BIDDER, either for themselves or for any person, organisation or third

party related to the contract in exchange for an advantage in the bidding process, bid evaluation, contracting or implementation process related to the contract.

1.2 The BUYER will, during the pre-contract stage, treat all the BIDDERS alike, and will provide to all BIDDERS the same information and will not provide any such information to any particular BIDDER which could afford an advantage to that particular BIDDER in comparison to other BIDDERS.

1.3 All the officials of the BUYER will report to the appropriate Government office any attempted or completed breaches of the above commitments as well as any substantial suspicion of such a breach.

2. In case any such preceding misconduct on the part of such official(s) is reported by the BIDDER to the BUYER with full and verifiable facts and the same is prima facie found to be correct by the BUYER, necessary disciplinary proceedings, or any other action as deemed fit, including criminal proceedings may be initiated by the BUYER and such a person shall be debarred from further dealings related to the contract process. In such a case while an enquiry is being conducted by the BUYER the proceedings under the contract would not be stalled.

- **Commitments of the BIDDER**

3. The BIDDER commits itself to take all the measures necessary to prevent corrupt practices, unfair means and illegal activities during any stage of its bid or during any pre-contract or post-contract stage in order to secure the contract or in furtherance to secure it and in particular commit itself to the following:-

3.1 The BIDDER will not offer, directly or through intermediaries, any bribe, gift, consideration, reward, favour or any material or immaterial benefit or other advantage, commission, fees, brokerage or inducement to any official of the BUYER, connected directly or indirectly with the bidding process, or to any person, organisation or third party related to the contract in exchange for any advantage in the bidding, evaluation, contracting and implementation of the contract.

3.2 The BIDDER further undertakes that it has not given, offered or promised to give, directly or indirectly any bribe, gift, consideration, reward, favour, any material or immaterial benefit or other advantage, commission, fees, brokerage or inducement to any official of the BUYER or otherwise in procuring the Contract or forbearing to do or having done any act in relation to the obtaining or execution of the contract or any other contract with the

Government for showing or forbearing to show favour or dis-favour to any person in relation to the contract or any other contract with the Government.

- 3.3 BIDDER shall disclose the payments to be made by them to agents/brokers or any other intermediary, in connection with this bid/contract.
- 3.4 The BIDDER further confirms and declares to the BUYER that the BIDDER has not engaged any individual or firm or company whether Indian or foreign to intercede, facilitate or in any way to recommend to the BUYER or any of its functionaries, whether officially or unofficially to the award of the contract to the BIDDER, nor has any amount been paid, promised or intended to be paid to any such individual, firm or company in respect of any such intercession, facilitation or recommendation.
- 3.5 The BIDDER, either while presenting the bid or during pre-contract negotiations or before signing the contract, shall disclose any payments he has made, is committed to or intends to make to officials of the BUYER or their family members, agents, brokers or any other intermediaries in connection with the contract and the details of services agreed upon for such payments.
- 3.6 The BIDDER will not collude with other parties interested in the contract to impair the transparency, fairness and progress of the bidding process, bid evaluation, contracting and implementation of the contract.
- 3.7 The BIDDER will not accept any advantage in exchange for any corrupt practice, unfair means and illegal activities.
- 3.8 The BIDDER shall not use improperly, for purposes of competition or personal gain, or pass on to others, any information provided by the BUYER as part of the business relationship, regarding plans, technical proposals and business details, including information contained in any electronic data carrier. The BIDDER also undertakes to exercise due and adequate care lest any such information is divulged.
- 3.9 The BIDDER commits to refrain from giving any complaint directly or through any other manner without supporting it with full and verifiable facts.
- 3.10 The BIDDER shall not instigate or cause to instigate any third person to commit any of the actions mentioned above.
- 3.11 If the BIDDER who is involved in the bid process or any employee of such BIDDER or any person acting on behalf of such BIDDER, either directly or

indirectly, is a relative of any of the officers of the BUYER, or alternatively, if any relative of an officer of BUYER who is involved in the bid process has financial interest/stake in the BIDDER's firm, the same shall be disclosed by the BIDDER at the time of filing of tender.

- 3.12 The BIDDER shall not lend to or borrow any money from or enter into any monetary dealings or transactions, directly or indirectly, with any employee of the BUYER.

For the purposes of clauses 3.11 & 3.12, the listed words shall have the ascribed meanings as follows:

- i) "employee of such BIDDER or any person acting on behalf of such BIDDER" means only those persons acting on behalf of such Bidder who are involved in the bid process / Project.
- ii) "officers/employee of the BUYER", means only those persons who are involved in the bid process / Project.
- iii) "financial interest/stake in the BIDDER's firm" excludes investment in securities of listed companies".

**4. Previous Transgression**

- 4.1 The BIDDER declares that no previous transgression occurred in the last three years immediately before signing of this Integrity Pact, with any other company in any country in respect of any corrupt practices envisaged hereunder or with any Public Sector Enterprise in India or any Government Department in India that could justify BIDDER's exclusion from the tender process.
- 4.2 The BIDDER agrees that if it makes incorrect statement on this subject, BIDDER can be disqualified from the tender process or the contract, if already awarded, can be terminated for such reason.

**5. Earnest Money (EMD)**

- 5.1 The Bidder's EMD of Rs. <value> deposited along with the bid shall remain valid till the submission of performance guarantee by the BIDDER.
- 5.2 In case of the successful BIDDER, a clause would also be incorporated in the Performance Bank Guarantee that the provisions of Sanctions for Violation shall be applicable for forfeiture of Performance Bond in case of a decision by the BUYER to forfeit the same without assigning any reason for imposing sanction for violation of this Pact.
- 5.3 Within <21 days> of the receipt of notification of award from the employer,

the successful Bidder shall furnish the performance security equal to 10 per cent of the value of contract from a commercial bank in accordance with the conditions of the Agreement, in the proforma prescribed at Annexure 3 of Volume – I of the RFP.

- 5.4 Performance security should remain valid from date of execution of Contract to the expiry of 60 days after the date of completion of all contractual obligations including warranty obligations.
- 5.5 No interest shall be payable by the BUYER to the BIDDER on Earnest Money/ Performance Security for the period of its currency.

#### **6. Sanctions for Violations**

- 6.1 Any breach of the aforesaid provisions by the BIDDER or any one employed by it or acting on its behalf (whether with or without the knowledge of the BIDDER) shall entitle the BUYER to take all or any one of the following actions, wherever required:
  - (i) To immediately call off the pre contract negotiations without assigning any reason or giving any compensation to the BIDDER. However, the proceedings with the other BIDDER(s) would continue.
  - (ii) The Earnest Money Deposit (in pre-contract stage) and/or Performance Security (after the contract is signed) shall stand forfeited either fully or partially, as decided by the BUYER and the BUYER shall not be required to assign any reason therefore.
  - (iii) To immediately cancel the contract, if already signed, without giving any compensation to the BIDDER.
  - (iv) To recover all sums already paid by the BUYER, and in case of an Indian BIDDER with interest thereon at 2% higher than the prevailing prime lending rate of State Bank of India, while in case of a BIDDER from a country other than India with interest thereon at 2% higher than the LIBOR. If any outstanding payment is due to the BIDDER from the BUYER in connection with any other contract for any other stores, such outstanding payment could also be utilised to recover the aforesaid sum and interest.
  - (v) To encash the advance bank guarantee and performance bond/warranty bond, if furnished by the BIDDER, in order to recover the payments, already made by the BUYER, along with interest.
  - (vi) To cancel all or any other Contracts with the BIDDER. The BIDDER



shall be liable to pay compensation for any loss or damage to the BUYER resulting from such cancellation/rescission and the BUYER shall be entitled to deduct the amount so payable from the money(s) due to the BIDDER.

- (vii) To debar the BIDDER from participating in future bidding processes of the Government of India for a minimum period of five years, which may be further extended at the discretion of the BUYER.
- (viii) To recover all sums paid in violation of this Pact by BIDDER(s) to any middleman or agent or broker with a view to securing the contract.
- (ix) In cases where irrevocable Letters of Credit have been received in respect of any contract signed by the BUYER with the BIDDER, the same shall not be opened.
- (x) Forfeiture of Performance Bond in case of a decision by the BUYER to forfeit the same without assigning any reason for imposing sanction for violation of this Pact.

6.2 The BUYER will be entitled to take all or any of the actions mentioned at para 6.1 (i) to (x) of this Pact also on the Commission by the BIDDER or any one employed by it or acting on its behalf (whether with or without the knowledge of the BIDDER), of an offence as defined in Chapter IX of the Indian Penal code, 1860 or Prevention of Corruption Act, 1988 or any other statute enacted for prevention of corruption.

6.3 The decision of the BUYER to the effect that a breach of the provisions of this Pact has been committed by the BIDDER shall be final and conclusive on the BIDDER. However, the BIDDER can approach the Independent Monitor(s) appointed for the purposes of this Pact.

## **7. Fall Clause**

7.1 The BIDDER undertakes that under similar buying conditions, it has not supplied/is not supplying similar product/systems or subsystems at a price lower than that offered in the present bid in respect of any other Ministry/Department of the Government of India or PSU and if it is found at any stage that similar product/systems or subsystems was so supplied by the BIDDER to any other Ministry/Department of the Government of India or a PSU at a lower price, then that very price, with due allowance for elapsed time, will be applicable to the present case and the difference in the cost would be refunded by the BIDDER to the BUYER, if the contract has already

been concluded.

**8. Independent Monitors**

- 8.1 Shri <Name> has been appointed as Independent External Monitor (hereinafter referred to as Monitor) for overseeing and implementation of the Pre-Contract Integrity Pact for procurement of services in the <Purchaser's entity>. His contact details are as under:
- <Name>
- <Address>
- <Contact details>
- 8.2 The task of the Monitors shall be to review independently and objectively, whether and to what extent the parties comply with the obligations under this Pact.
- 8.3 The Monitors shall not be subject to instructions by the representatives of the parties and perform their functions neutrally and independently.
- 8.4 Both the parties accept that the Monitors have the right to access all the documents relating to the project/procurement, including minutes of meetings.
- 8.5 As soon as the Monitor notices, or has reason to believe, a violation of this Pact, he will so inform the Authority designated by the BUYER.
- 8.6 The BIDDER(s) accepts that the Monitor has the right to access without restriction to all Project documentation of the BUYER including that provided by the BIDDER. The BIDDER will also grant the Monitor, upon his request and demonstration of a valid interest, unrestricted and unconditional access to his project documentation. The same is applicable to Subcontractors. The Monitor shall be under contractual obligation to treat the information and documents of the BIDDER/Subcontractor(s) with confidentiality.
- 8.7 The BUYER will provide to the Monitor sufficient information about all meetings among the parties related to the Project provided such meetings could have an impact on the contractual relations between the parties. The parties will offer to the Monitor the option to participate in such meetings.
- 8.8 The Monitor will submit a written report to the designated Authority of BUYER/Secretary in the Department/ within 8 to 10 weeks from the date of

reference or intimation to him by the BUYER/BIDDER and, should the occasion arise, submit proposals for correcting problematic situations.

**9. Facilitation of investigation**

In case of any allegation of violation of any provisions of this Pact or payment of commission, the BUYER or its agencies shall be entitled to examine all the documents including the Books of Accounts of the BIDDER and the BIDDER shall provide necessary information and documents in English and shall extend all possible help for the purpose of such examination.

**10. Law and Place of Jurisdiction**

This Pact is subject to Indian Law. The place of performance and jurisdiction is New Delhi.

**11. Other Legal Actions**

The actions stipulated in this Integrity Pact are without prejudice to any other legal action that may follow in accordance with the provisions of the extant law in force relating to any civil or criminal proceedings.

**12. Validity**

- 12.1 The validity of this Integrity Pact shall be from date of its signing. In case of successful Bidder, this Integrity Pact shall expire on the date of signing of the contract with the successful Bidder for award of contract. In case of unsuccessful Bidder, this Integrity Pact shall expire after six months from the date of the signing of the contract with the successful Bidder for award of contract.
- 12.2 Should one or several provisions of this Pact turn out to be invalid, the remainder of this Pact shall remain valid. In this case, the parties will strive to come to an agreement to their original intentions.

**For and on behalf of the <legal name of bidding entity>**

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(Name, designation & signature of the authorised signatory)

**Date: <<date>>**

## <Name of the proposed e-Governance PPP Project>

<File Reference No.>

## 2.0

### *[Template Document for Request for Proposal for Selection of Private Vendor in E-Governance PPP Projects]*

S. No.	Particular	Details
1.	Start date of issuance / sale of RFP document	< >
2.	Last date for Submission of Queries	< >
3.	Pre-Bid Conference	< >
4.	Issue of Corrigendum	< >
5.	Last date for issuance / sale of RFP Document	< >
6.	Last date and time for RFP Submission	< >
7.	Date and time of opening of Pre-Qualification bids	< >
8.	Date and time for opening of Technical bids	< >
9.	Date and time for opening of Commercial bids	< >

## 2 Model RFP Document for PPP Vendor

### 2.1 Fact Sheet

The bidders should be provided with this **Fact Sheet** comprising of important factual data on the tender.

Clause Reference	Topic
<Section 2.6.3>	<p><b>The method of selection is: [Type text]</b>  <i>[Please refer Section 1.4.5 of “Guidance Notes : Model RFP Templates for Implementation Agencies” &amp; Section 5 of “Guidance Notes : Model RFP Templates for Public Private Partnership” for Method of Selection]</i></p> <p>Shortlisted firm/entity may associate with other shortlisted firm <i>[relevant only in the case where EOI process has been completed previously]</i>:</p> <p>Yes ____ No ____</p>
<Section 2.5.4.3>	<p>RFP can be            Collected from the following address on or before &lt;indicate date, time&gt; :            &lt;Name&gt;            &lt;Designation&gt;            &lt;Address&gt;            &lt;Phone Nos.&gt;            &lt;Fax Nos.&gt;            &lt;email id&gt;            by paying the document Fee of Rs. &lt;Amount&gt; by Demand Draft in favour of &lt;Bank Account Name&gt; and payable at &lt;Location / City&gt; from any of the scheduled commercial bank</p> <p>OR</p> <p>Downloaded from &lt;website address&gt;. However in this case, the bidders are required to submit the tender cost in the form of a demand draft (details mentioned in above para) along with the Proposal.</p>
<Section 2.5.4.4>	<p>Earnest Money Deposit of amount &lt;Amount&gt; by            Demand Draft in favour of &lt;Bank Account Name&gt; and payable at &lt;Location / City&gt; from any of the nationalized Scheduled commercial Bank</p> <p>OR</p> <p>Bank Guarantee as mentioned in Appendix I- Form 12</p>
<Section 2.8 0>	Procurement is linked to <PPP Services>
<Section 2.5.3>	<p>A pre-Bid meeting will be held on &lt; indicate date, time, and venue&gt;            The name, address, and telephone numbers of the Nodal Officer is:            &lt;Name&gt;</p>

Clause Reference	Topic
	<Designation> <Address> <Phone Nos.> <Fax Nos.> <email id> All the queries should be received on or before <indicate date, time>, either through post, fax or email.
<Section 2.5.2.3>	Proposals should be submitted in the following language(s): <Insert language>
<Section 2.5.4.2>	Proposals must remain valid <days> <i>[Normally 180 days]</i> after the submission date, i.e., until: <insert the date>
<Section 2.5.1.2>	Bidders must submit <ul style="list-style-type: none"> <li>• An original and &lt;one&gt; additional copies of each proposal along with &lt;one&gt; copy of non-editable CD for Prequalification &amp; Technical Proposal</li> <li>• One original copy of the Commercial Proposal</li> </ul>
<Section 2.5.2>	The proposal submission address is: <Name> <Designation> <Address> <Phone Nos.> <Fax Nos.>
<Section 2.5.2>	Proposals must be submitted no later than the following date and time: <insert the date and time>

## 2.2 Request for Proposal

Sealed bids are invited from eligible, reputed, qualified IT Firms with sound technical and financial capabilities for design, development, implementation and maintenance of an end to end IT solution along with the establishment and operation of related outsourced process operating units as detailed out in the Scope of Work under Section 2.8 of this RFP Document. This invitation to bid is open to all Bidders who have qualified the EOI Process.

The intent of this RFP is to invite proposals from the agencies/ Firms/Companies (also referred to as 'bidders') to enable the <Nodal Agency> to select a Systems Implementation Agency for implementation of e-Governance at <Nodal Agency> on a PPP Model.

## 2.3 Structure of the RFP

This Request for Proposal (RFP) document for the PPP project of implementing IT & ITeS Services for <Nodal Agency> comprises of the following.

- i. Instructions on the Bid process for the purpose of responding to this RFP. The broadly covers:
  - a. General instructions for bidding process
  - b. Bid evaluation process including the parameters for Pre-qualification and Technical evaluation with specific questions about bidder's proposed solution, technical qualifications and capabilities, development, implementation, operations and management approaches and strategy, to facilitate <Nodal Agency> in determining bidder's suitability as the implementation partner
  - c. Payment schedule
  - d. Commercial bid and other formats
- ii. Functional and Technical Requirements of the project. The contents of the document broadly cover the following areas:
  - a. About the project and its objectives
  - b. Scope of work for the Implementation Partner
  - c. Functional and Technical requirements
  - d. Project Schedule
  - e. Service levels for the implementation partner

The bidder is expected to respond to the requirements as completely and in as much relevant detail as possible, and focus on demonstrating bidder's suitability to become the implementation partner of <Nodal Agency>.

- iii. Contract Agreement (which includes Service Level Agreement (SLA) and Non Disclosure Agreement (NDA)<sup>1</sup>)

This document identifies areas where the PPP Vendor has to invest upfront and the payment gets recovered over a period of time as per the payment schedule during the life of the project.

The bidders are expected to examine all instructions, forms, terms, Project requirements and other information in the RFP documents. Failure to furnish all information required as mentioned in the RFP documents or submission of a proposal not substantially responsive to the RFP documents in every respect will be at the Bidder's risk and may result in rejection of the proposal and forfeiture of the EMD.

## 2.4 Background Information

*[Please refer Section 2.3.3 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for providing necessary information]*

### 2.4.1 Basic Information

- a) <Nodal Agency> invites responses (“Bids”) to this Request for Proposals (“RFP”) from PPP Vendors (“Bidders”) for the provision of e-Governance System Implementations and Management of Systems & Operations as described in Section 2.8 of this RFP, “Scope of Work” (“the e-Governance Implementation solutions and services”). <Nodal Agency> is the <Nodal Agency> for this Government procurement competition (“the <Government department/Nodal Agency>”).
- b) Any contract that may result from this Government procurement competition will be issued for a term of <Insert relevant period> (“the Term”).
- c) The <Nodal Agency> reserves the right to extend the Term for a period or periods of up to <insert relevant period> with a maximum of <insert relevant period> such extension or extensions on the same terms and conditions, subject to the <Name of Nodal Agency’s> obligations at law.
- d) Bids must be received not later than time, date and venue mentioned in the Fact Sheet. Bids that are received late WILL NOT be considered in this public procurement competition.

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<sup>1</sup> Please refer Annexure I - “Contract Agreement for Model RFP Template for Public Private Partnership”. The template for Service Level Agreement and Non-Disclosure Agreement has been provided in Annexure I of “Contract Agreement for Selection of System Integrators/ Implementation Agencies” (page 71 & 79 respectively)



### 2.4.2 Project Background

*[The “Project Background” should give project details around*

- Need for the solution, product(s) and services*
- Solution components with functional overview of each component*
- Expected outcome of the implemented solution]*

### 2.4.3 Key Information

*[The Introduction section should lay down:*

- Prime Objective of the project*
- When was the program initiated/sanctioned*
- Background about the Government program / initiative in terms of business challenges, issues faced and lack of efficiency etc*
- Project Dependencies*
- Stakeholder Details*
- Funds and sponsors for program - The estimated number of professional staff-months required for the assignment OR the sanctioned budget*
- Any downstream work expected from this assignment and any potential “Conflict of Interest” situation emerging from that*
- The inputs /facilities which would be provided to the successful bidder on award of this contract]*

### 2.4.4 About the Department

*[The “About” section contains the organizational profile of the Government entity/Department which is the end buyer and implementer of the procured solution.*

*The section should explain facts and figures about the Government entity in terms of its*

- Vision and organizational objectives*
- Key Functions of the Department*
- Organization structure of the Department (Comprising divisions/directorates etc.)*
- Manpower strength*
- Activities of the Department*
- Geographical spread and operating locations]*

### 2.4.5 Current Numbers of Transactions

*[The Nodal Agency should provide the current number of transactions for which the PPP would be responsible and his charges shall be dependent. Further the Nodal Agency shall guarantee a minimum number of transactions. In case that the minimum number of transactions is not achieved in a year, the Nodal Agency shall compensate for the difference in charges.*

*This guarantee is a critical part of the PPP Model. The “Contract Agreement for Model RFP Templates for Public Private Partnership” Clause 8.3 provides for project Governance mechanism which would be empowered to provide such a Guarantee]*

## 2.5 Instructions to the Bidders

### 2.5.1 General

- a) While every effort has been made to provide comprehensive and accurate background information and requirements and specifications, Bidders must form their own conclusions about the solution needed to meet the requirements. Bidders and recipients of this RFP may wish to consult their own legal advisers in relation to responding to the RFP.
- b) All information supplied by Bidders may be treated as contractually binding on the Bidders, on successful award of the assignment by the <Nodal Agency> on the basis of this RFP
- c) No commitment of any kind, contractual or otherwise shall exist unless and until a formal written contract has been executed by or on behalf of the <Nodal Agency>. Any notification of preferred bidder status by the <Nodal Agency> shall not give rise to any enforceable rights by the Bidder. The <Nodal Agency> may cancel this public procurement at any time prior to a formal written contract being executed by or on behalf of the <Nodal Agency>.
- d) This RFP supersedes and replaces any previous public documentation & communications, and Bidders should place no reliance on such communications.
- e) The Feasibility Report & Financial Assessment of PPP projects are being provided only as a preliminary reference document by way of assistance to the Bidders who are expected to carry out their own surveys, investigations and other detailed examination before submitting their Bids. Nothing contained in the Feasibility Report shall be binding on the <Name of Government department/Nodal Agency> nor confer any right on the Bidders, and the <Name of Government department/Nodal Agency> shall have no liability whatsoever in relation to or arising out of any or all contents of the Feasibility Report.

*[Please refer Section 4 of "Guidance Notes: Model RFP Templates for Public Private Partnerships". Also the Feasibility & Financial Assessment of PPP projects should either be provided along with the RFP or within 7 days of its issue]*

- f) Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft Contract Agreement shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Contract Agreement.
- g) The Bidder should submit a Power of Attorney authorizing the signatory of the Proposal to commit the Bidder. In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix I, Form 11.

- h) The Proposal shall consist of (Grant, Premium or Service Charge, as the case may be) to be quoted by the Bidder as per the terms and conditions of this RFP and the provisions of the Contract Agreement *[It needs to be specified whether the PPP vendor can retain part of the Service Charge from the fee collected or the Nodal Agency would compensate through payments]*.
- i) This RFP is not transferable. *[It may be noted that this RFP is circulated to the shortlisted bidders after completion of the EOI process]*
- j) Any award of Concession pursuant to this RFP shall be subject to the terms of Bidding Documents.

### **2.5.2 Compliant Bids / Completeness of Response**

- a) Bidders are advised to study all instructions, forms, terms, requirements and other information in the RFP documents carefully. Submission of the Proposal shall be deemed to have been done after careful study and examination of the RFP document with full understanding of its implications. The Bidders attention is also drawn to the Compliance sheet for Technical Proposal at Appendix I, Form 1.
- b) Failure to comply with the requirements of this paragraph may render the Proposal non-compliant and the Proposal may be rejected. Bidders must:
  - i. Include all documentation specified in this RFP;
  - ii. Follow the format of this RFP and respond to each element in the order as set out in this RFP;
  - iii. Comply with all requirements as set out within this RFP.

### **2.5.3 Pre-Bid Meeting & Clarifications**

#### **2.5.3.1 Pre-bid Conference**

- a. <Nodal Agency> shall hold a pre-bid meeting with the prospective bidders on <Date, Time> at <Address of the Venue>.
- b. The Bidders will have to ensure that their queries for Pre-Bid meeting should reach to <Name, Address, Fax and email id of the Nodal Officer> by post, facsimile or email on or before <Date & time>
- c. The queries should necessarily be submitted in the following format:

S. No.	RFP Document Reference(s) (Section & Page Number(s))	Content of RFP requiring Clarification(s)	Points of clarification
1.			
2.			
3.			
4.			
5.			
6.			

- d. <Nodal Agency> shall not be responsible for ensuring that the bidders' queries have been received by them. Any requests for clarifications post the indicated date and time may not be entertained by the Nodal Agency.

### 2.5.3.2 Responses to Pre-Bid Queries and Issue of Corrigendum

- a. The Nodal Officer notified by the <Nodal Agency> will endeavor to provide timely response to all queries. However, <Nodal Agency> makes no representation or warranty as to the completeness or accuracy of any response made in good faith, nor does <Nodal Agency> undertake to answer all the queries that have been posed by the bidders.
- b. At any time prior to the last date for receipt of bids, <Nodal Agency> may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Bidder, modify the RFP Document by a corrigendum.
- c. The Corrigendum (if any) & clarifications to the queries from all bidders will be posted on the <website address> and emailed to all participants of the pre-bid conference.
- d. Any such corrigendum shall be deemed to be incorporated into this RFP.
- e. In order to provide prospective Bidders reasonable time for taking the corrigendum into account, < Nodal Agency> may, at its discretion, extend the last date for the receipt of Proposals.

*[The clarification offered at the Pre-Bid conference should also be recorded [preferably video recording] and kept for record purposes.*

*Further, the nodal agency should ensure clear scope and specific responses to bidder queries. Clarifications on Scope of work which say "as per RFP" should not be encouraged (only if there is a request for change in terms / condition, then "as per RFP" should be allowed). If bidders raise doubts about the scope, these should be addressed.]*

## 2.5.4 Key Requirements of the Proposal

### 2.5.4.1 Government's Right to No Selection

- a. <Nodal Agency> may terminate the RFP process at any time and without assigning any reason. <Nodal Agency> makes no commitments, express or implied, that this process will result in a business transaction with anyone.

- b. This RFP does not constitute an offer by <Nodal Agency>. The bidder's participation in this process may result <Nodal Agency> selecting the bidder to engage towards execution of the contract.

#### **2.5.4.2 Contract Agreement**

The Contract Agreement (including SLA and NDA) sets forth the detailed terms and conditions for grant of the contract to the PPP Vendor, including the scope of the PPP Vendor's services and obligations. The bidder should study the contract agreement and identify the risks and appropriately factor in its costs & Commercial Proposal.

[The Contract Agreement should either be provided along with the RFP or at least 45 days before the Proposal Due Date and 21 days before the Pre-Bid Conference]

#### **2.5.4.3 RFP Document Fees**

- a. RFP document can be purchased at the address & dates provided in the Fact sheet by submitting a non refundable bank demand draft of <insert Amount>, drawn in favor of <Bank Account Name>, payable at <Location/City> from any scheduled commercial banks
- b. The bidder may also download the RFP documents from the website <Website address>. In such case, the demand draft of RFP document fees should be submitted along with Proposal. Proposals received without or with inadequate RFP Document fees shall be rejected.

#### **2.5.4.4 Earnest Money Deposit (EMD)**

- a. Bidders shall submit, along with their Bids, EMD of <Amount figure> only, in the form of a Demand Draft OR Bank Guarantee (in the format specified in Appendix I: Form 12) issued by any nationalized bank in favor of <Beneficiary Account name>, payable at <Location/city>, and should be valid for <Period> months from the due date of the tender / RFP.
- b. EMD of all unsuccessful bidders would be refunded by <Nodal Agency> within <Time Period> of the bidder being notified as being unsuccessful. The EMD, for the amount mentioned above, of successful bidder would be returned upon submission of Performance Bank Guarantee as per the format provided in Appendix III, Form 1.
- c. The EMD amount is interest free and will be refundable to the unsuccessful bidders without any accrued interest on it.
- d. The bid / proposal submitted without EMD, mentioned above, will be summarily rejected.
- e. The EMD may be forfeited:
  - If a bidder withdraws its bid during the period of bid validity.
  - In case of a successful bidder, if the bidder fails to sign the contract in accordance with this RFP.
- f. The EMD may be forfeited as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time, cost and effort of the Authority

without prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise, under the following conditions:

- If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in this RFP;
- If a bidder withdraws its Proposal during the period of Bid/Proposal validity
- If the Selected Bidder fails, within the specified time limit, :
  - to sign the Contract Agreement and/or
  - to furnish the Performance Bank Guarantee within the period prescribed therefore in the Contract Agreement

*[The <Nodal Agency> may, if deemed necessary, prescribe a higher EMD not exceeding 2% of the Estimated Project Cost. In case of a project having an Estimated Project Cost of Rs. 2,000 cr. or above, the Authority may reduce the EMD, but not less than 0.5% in any case. In case the project includes Capital Expenditure and Operational Expenses to be borne by the PPP Vendor, the “Project Cost” for the purposes of computation of PBG may be limited to the estimates value of the capital expenditure and one year of the Operational Expenses .]*

### 2.5.1 Consortiums

Bidder should be an individual organization. Consortium shall not be allowed<sup>1</sup>.

#### 2.5.1.1 Inclusion of MSMEs in Project Delivery

The Bidder would be encouraged to include Medium and Small & Medium Enterprises (MSMEs) in the delivery of the project, assuring it in the form of a certain proportion of the contract value, should there be sufficient reasons for the same.

This proportion is suggested to be <Percentage Value> of the contract value of the project, and should be applicable to cases which justify that including local partners through Consortiums, SPVs, Subcontracting or Outsourcing shall provide perceptible and quantifiable skill and economic advantage to the local community/regional economy and help in the development of skills and competency in that region. The inclusion of MSMEs shall also be exercised in the socio-economic interests of the local community.

There will be an Evaluation Criteria for inclusion of MSMEs that will be scored appropriately, recognizing the effort made by the bidders. In addition to this, the PPP Vendor may also benefit from the tax exemption on such amounts (as per applicable tax laws).

*[This is a successful good practice in many developed nations where they put a minimum limit for outsourcing work to MSME upto 20+% of the estimated value of the project for the MSME. This has*

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<sup>1</sup> Consortium may be considered for situations, where subsequently it would get transformed into a Special Purpose Vehicle. In such a case, each of the consortium partners would have an equity stake. This would also ensure that Nodal Agency does not get involved in reviewing the consortium agreements of each of the bidders and discourage the practice of “name lending”..

*been done successfully to encourage the MSME sector. Please refer Section 2.3.4.5 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for Guidance on inclusion of this clause]*

### **2.5.1.2 Submission of Proposals**

- a. The bidders should submit their responses as per the format given in this RFP in the following manner
  - Response to Pre-Qualification Criterion : (1 Original + <1 > Copies +<1>CD) in first envelope
  - Technical Proposal - (1 Original + <1> Copies +<1>CD) in second envelope
  - Commercial Proposal - (1 Original) in third envelope
- b. The Response to Pre-Qualification criterion, Technical Proposal and Commercial Proposal (As mentioned in previous paragraph) should be covered in separate sealed envelopes superscribing "Pre-Qualification Proposal", "Technical Proposal" and "Commercial Proposal" respectively. Each copy of each bid should also be marked as "Original" OR "Copy" as the case may be.
- c. Please Note that Prices should not be indicated in the Pre-Qualification Proposal or Technical Proposal but should only be indicated in the Commercial Proposal.
- d. The three envelopes containing copies of Pre-qualification Proposal, Technical Proposal and Commercial Proposal should be put in another single sealed envelope clearly marked "Response to RFP for <Name of the assignment> - < RFP Reference Number> and the wordings "DO NOT OPEN BEFORE <Date and Time>".
- e. The outer envelope thus prepared should also indicate clearly the name, address, telephone number, E-mail ID and fax number of the bidder to enable the Bid to be returned unopened in case it is declared "Late".
- f. All the pages of the proposal must be sequentially numbered and must contain the list of contents with page numbers. Any deficiency in the documentation may result in the rejection of the Bid.
- g. The original proposal/bid shall be prepared in indelible ink. It shall contain no interlineations or overwriting, except as necessary to correct errors made by the bidder itself. Any such corrections must be initialed by the person (or persons) who sign(s) the proposals.
- h. All pages of the bid including the duplicate copies, shall be initialed and stamped by the person or persons who sign the bid.
- i. In case of any discrepancy observed by <Nodal Agency> in the contents of the submitted original paper bid documents with respective copies, the information furnished on original paper bid document will prevail over others.
- j. Bidder must ensure that the information furnished by him in respective CDs is identical to that submitted by him in the original paper bid document. In case of any discrepancy observed by <Nodal Agency> in the contents of the CDs and original paper bid documents, the information furnished on original paper bid document will prevail over the soft copy.

### **2.5.1.3 Authentication of Bids**

A Proposal should be accompanied by a power-of-attorney in the name of the signatory of the Proposal.

## **2.5.2 Preparation and Submission of Proposal**

### **2.5.2.1 Proposal Preparation Costs**

The bidder shall be responsible for all costs incurred in connection with participation in the RFP process, including, but not limited to, costs incurred in conduct of informative and other diligence activities, participation in meetings/discussions/presentations, preparation of proposal, in providing any additional information required by < Nodal Agency> to facilitate the evaluation process, and in negotiating a definitive contract or all such activities related to the bid process.

< Nodal Agency> will in no case be responsible or liable for those costs, regardless of the conduct or outcome of the bidding process.

### **2.5.2.2 Government Department Site Visit**

The Bidder may visit and examine any of the offices of < Government department> at a time to be agreed with <Nodal Agency> and obtain for itself on its own responsibility all information on the existing processes and functioning of the <Government department> that may be necessary for preparing the Proposal document. The visit may not be used to raise questions or seek clarification on the RFP. All such queries or clarifications must be submitted in writing. The cost of such visits to the site(s) shall be at Bidder's own expense.

### **2.5.2.3 Language**

The Proposal should be filled by the Bidder in English language only. If any supporting documents submitted are in any language other than English, translation of the same in English language is to be duly attested by the Bidders. For purposes of interpretation of the Proposal documents, the English translation shall govern.

### **2.5.2.4 Venue & Deadline for Submission of Proposals**

Proposals, in its complete form in all respects as specified in the RFP, must be submitted to < Nodal Agency> at the address specified below:

<b>Addressed To</b>	<Name of Person/Designation to be addressed to>
<b>Name</b>	<Nodal Agency>
<b>Address</b>	<Address>
<b>Telephone</b>	<Telephone No.>
<b>Fax Nos.</b>	<Fax No.>
<b>Email ids</b>	<email id>
<b>Last Date &amp; Time of Submission</b>	<Date> before <Time>



### 2.5.2.5 Late Bids

- a. Bids received after the due date and the specified time (including the extended period if any) for any reason whatsoever, shall not be entertained and shall be returned unopened.
- b. The bids submitted by telex/telegram/fax/e-mail etc. shall not be considered. No correspondence will be entertained on this matter.
- c. <Nodal Agency> shall not be responsible for any postal delay or non-receipt/ non-delivery of the documents. No further correspondence on the subject will be entertained.
- d. <Nodal Agency> reserves the right to modify and amend any of the above-stipulated condition/criterion depending upon project priorities vis-à-vis urgent commitments.

### 2.5.3 Deviations

The bidder may provide deviation to the contents of the RFP document. It may be noted that once the deviation are provided, the bidder would not be allowed that to withdraw the deviation submitted.

The Proposal Evaluation Committee would evaluate and classify them as “material deviation” or “non material deviation”. In case of material deviation, the committee may decide to “monetize” the value of the deviations, which will be added to the price bid submitted by the bidder OR declare the bid as non-responsive.

The bidders would be informed in writing on the committee’s decision on the deviation, prior to the announcement of technical scores. The bidders would not be allowed to withdraw the deviations at this stage. No correspondence in this matter will be entertained.

In case of non-material deviations, the deviations would form a part of the proposal & contract.

*[As an illustrative framework for instant use, we have provided here a format that enables a bidder to clearly define, demarcate and declare deviations]*

No.	Deviation	Material	Non-Material	Impacted Deliverable(s)	Impacted Timeline(s)	Financial Impact
1.	<Deviation description>	<Yes / No>	<Yes / No>	<Name(s) of Deliverables to get affected by the Deviation>	<Effect on Timelines due to the Deviation>	<Value>
2.	<Deviation description>	<Yes / No>	<Yes / No>	<Name(s) of Deliverables to get affected by the Deviation>	<Effect on Timelines due to the Deviation>	<Value>
3.	<Deviation description>	<Yes / No>	<Yes / No>	<Name(s) of Deliverables to get affected by the Deviation>	<Effect on Timelines due to the Deviation>	<Value>
4.						

]

#### **2.5.4 Evaluation Process**

- a. <Nodal Agency> will constitute a Proposal Evaluation Committee to evaluate the responses of the bidders
- b. The Proposal Evaluation Committee constituted by the <Nodal Agency> shall evaluate the responses to the RFP and all supporting documents / documentary evidence. Inability to submit requisite supporting documents / documentary evidence, may lead to rejection.
- c. The decision of the Proposal Evaluation Committee in the evaluation of responses to the RFP shall be final. No correspondence will be entertained outside the process of negotiation/discussion with the Committee.
- d. The Proposal Evaluation Committee may ask for meetings with the Bidders to seek clarifications on their proposals<sup>1</sup>
- e. The Proposal Evaluation Committee reserves the right to reject any or all proposals on the basis of any deviations.
- f. Each of the responses shall be evaluated as per the criteria and requirements specified in this RFP.

##### **2.5.4.1 Tender Opening**

The Proposals submitted up to <Time> on <Date> will be opened at <Time> on <Date Time> by <Nodal officer> or any other officer authorized by <Nodal Agency>, in the presence of such of those Bidders or their representatives who may be present at the time of opening.

The representatives of the bidders are advised to carry the identity card or a letter of authority from the tendering firms to identify their bonafides for attending the opening of the proposal.

##### **2.5.4.2 Proposal Validity**

The offer submitted by the Bidders should be valid for minimum period of <180> days from the date of submission of Proposal.

##### **2.5.4.3 Proposal Evaluation**

- a. Initial Bid scrutiny will be held and incomplete details as given below will be treated as non-responsive, if Proposals :

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<sup>1</sup> As per "Good practices", the evaluation process does not comprise of Presentations, as it biases towards a particular bidder on the basis of good presentation. It may be noted that presentations are not contractually binding, unless a) they are communicated to the bidders b) video recorded to capture the entire proceedings

- Are not submitted in as specified in the RFP document
  - Received without the Letter of Authorization (Power of Attorney)
  - Are found with suppression of details
  - With incomplete information, subjective, conditional offers and partial offers submitted
  - Submitted without the documents requested in the checklist
  - Have non-compliance of any of the clauses stipulated in the RFP
  - With lesser validity period
- b. All responsive Bids will be considered for further processing as below.  
< Nodal Agency> will prepare a list of responsive bidders, who comply with all the Terms and Conditions of the Tender. All eligible bids will be considered for further evaluation by a Committee according to the Evaluation process define in this RFP document. The decision of the Committee will be final in this regard.

*[Please refer Section 2.3.4 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for Guidance on” Instruction to Bidders”]*

## 2.6 Criteria for Evaluation

### 2.6.1 Technical Evaluation Criteria

Bidders who meet the pre-qualifications/eligibility requirements would be considered as qualified to move to the next stage of Technical and Financial evaluations.

*[During the discussion with various stakeholders, it emerged that evaluation criterion is to be carefully designed. Discussions were held on the merit of each criterion and how does it help the Nodal Agency in getting the most suitable agency to execute the assignment. Accordingly several prevalent Technical evaluation criteria were rationalized (dropped or change in the weightage of marks allocated).*

*In case the Nodal Agency seeks to introduce new evaluation criterion or re-allocate the marks, the Nodal Agency should assure itself that the change does not lead to restriction in the competition.*

*The “litmus test” for drawing up the requirements for “Company profile” below should be that Nodal officer should assure himself that at least 8 bidders would be able to score minimum qualifying marks]*

***These criteria have been developed for a PPP RFP on a BOOT / BOT model for which the scope of work involves hardware supply & commissioning, software development, system integration, maintenance and operations.]***

S. No	Criteria	Basis for valuation	Max Marks	Supporting
1.	Business Model evaluation & Risk Management Plan	<p>Business Model proposed &amp; identification of risks of the project which has been identified in the RFP document (and inter alia the Feasibility Report and Financial Assessment) and which may have been advertently missed out. The qualitative evaluation would be based upon :</p> <ul style="list-style-type: none"> <li>– Risk identification in detail</li> <li>– Coverage of all costs &amp; risks element</li> <li>– Detailing of Operational aspects of Risk mitigation plan</li> <li>– Fall back mechanism in case of failure of business model</li> <li>– Economic analysis of the Business Model (cost/benefit analysis which is not linked to payment of PPP Vendor)</li> </ul> <p><i>[The Nodal Agency may monetize the above ares on the basis of fair market prices to compare the Business Model &amp; Risk elements of various bidders, so that the extra due diligence done by the bidder is commensurately compensated in the technical marks. In such a case the basis of such analysis should be shared in the RFP document]</i></p>	50%	Detailed Note containing the analysis
2.	Project Methodology, Support and Documentation	<p>Qualitative assessment based on</p> <ul style="list-style-type: none"> <li>– Understanding of the objectives of the assignment: The extent to which the Systems Implementer's approach and work plan respond to the objectives indicated in the Statement/Scope of Work</li> <li>– Completeness and responsiveness: The extent to which the proposal responds exhaustively to all the requirements of all the Terms of Reference</li> </ul>	10%	Note
3.	Functionality of all components of services	Meeting the requirements of <department> in terms of how close the proposal is to the functional requirements for the solution as have been proposed for <department> (In case it is COTS, it should be measured by degree of customization required)	5%	Compliance Note
4.	Technology	<p>Demonstrated robustness of the technology deployed across other installations around the world, including</p> <ul style="list-style-type: none"> <li>– Scalability</li> <li>– Security</li> <li>– Ease of implementation</li> </ul> <p><b>All the components of the solution and</b></p>	5%	Note

S. No	Criteria	Basis for valuation	Max Marks	Supporting
		<b>services need to be detailed out, specially with respect to :</b> <ol style="list-style-type: none"> <li>1. Application Software</li> <li>2. IT Infrastructure</li> <li>3. Data Migration</li> <li>4. Departmental Front Windows</li> <li>5. Record Room Management</li> <li>6. Regional Dispatch and Receipt Centres</li> <li>7. Central Help Desk</li> <li>8. Training</li> <li>9. Site Preparation</li> <li>10. Helpdesk</li> <li>11. Service Charge Collection</li> </ol>		
5.	India Specific Capabilities	Qualitative assessment based on the number of Projects of similar nature in India and size of those projects.	5%	Note; and Completion Certificates from the client; OR  Work Order + Self Certificate of Completion (Certified by the Statutory Auditor); OR  Work Order + Phase Completion Certificate (for ongoing projects) from the client
6.	Industry Specific Capabilities	Qualitative assessment based on the Past experience of the bidder in executing similar assignments, size of those assignments. <i>[The definition of “similar” should be such that it focuses on the areas which are “innovative” or where the technical feasibility is a challenge in the context of the project]</i>	5%	Note; and Completion Certificates from the client; OR  Work Order + Self Certificate of Completion (Certified by the Statutory Auditor); OR  Work Order + Phase Completion Certificate (for ongoing projects) from the client
7.	Training	Trainings proposed by the vendor and the amount of emphasis laid on Training the employees schedule details, locations,	3%	Note

S. No	Criteria	Basis for valuation	Max Marks	Supporting
		sessions and their description		
8.	Certifications and Credentials	Relevant certifications (SEI-CMMi, ISO, etc)	2%	Copy of certificates
9.	Profile of proposed team members	Relevant assignment experience / Years of experience / Number of Certifications in Technology specific to Solution proposed (Microsoft / Oracle certification / J2EE etc)	10%	CVs
10.	Inclusion of MSMEs in Project Delivery	As per requirement.	5%	Letter of evidence and commitment that MSME will be contracted for the required value of work.

*[For detailed understanding on Evaluation of bids, please refer Section 2.5.2.2 of “Guidance Notes : Model RFP Templates for Implementation Agencies” and Section 10 of “Guidance Notes : Model RFP Templates for Public Private Partnership ]*

Bidders, whose bids are responsive, based on minimum qualification criteria / documents as in Pre-Qualification Criteria and score at least <The minimum marks to obtain for qualifying> in the (given) defined scoring mechanism would be considered technically qualified. Price Bids of such technically qualified bidders alone shall further be opened.

## 2.6.2 Commercial Proposal Evaluation

- The Financial Bids of technically qualified bidders will be opened on the prescribed date in the presence of bidder representatives.
- Financial Bids that are less than <30>% of the average bid price will be disqualified (the average bid price is computed by adding all Financial Bid values of ALL the qualified bidders and dividing the same by the number of bidders).

*[for QCBS evaluation]*

- The bidder with lowest qualifying financial bid (L1) will be awarded 100% score (amongst the bidders which did not get disqualified on the basis of point b above). Financial Scores for other than L1 bidders will be evaluated using the following formula:

Financial Score of a Bidder (Fn) =

{(Commercial Bid of L1/Commercial Bid of the Bidder) X 100}%

(Adjusted to two decimal places)

*[OR, in case of a Lowest Cost Based Selection Bid, the para c should be replaced by the following :*

- The PPP Bidder, who has submitted the lowest Commercial bid, shall be selected as the L1 and shall be called for further process leading to the award of the assignment]*

- d. Only fixed price financial bids indicating total price for all the deliverables and services specified in this bid document will be considered.
- e. The bid price will include all taxes and levies and shall be in Indian Rupees and mentioned separately.
- f. Any conditional bid would be rejected
- g. Errors & Rectification: Arithmetical errors will be rectified on the following basis: "If there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected. If there is a discrepancy between words and figures, the amount in words will prevail".

The Proposal Evaluation Committee would evaluate the commercial bids in isolation and in comparison with other commercial bids to confirm whether all foreseeable & probable risks have been factored in appropriately at the fair market price. Also the ability of the bidder to absorb the adverse risk position shall also be evaluated.

In case the Proposal Evaluation Committee feels that the commercial risks has not factored in all such costs & risks mitigation plan and necessary contingency, the commercial bid proposal may be rejected.

The Proposal Evaluation Committee shall also confirm whether any new avenues of costs OR revenues should not be mentioned in the Commercial Proposal, which was not detailed out previously in the Technical Bid.

### 2.6.3 Combined and Final Evaluation

Combined and Final evaluation is relevant for QCBS bids only.

*[Please refer Section 2.5 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for providing necessary information for various evaluation models]*

- a. The technical and financial scores secured by each bidder will be added using weightage of <70%> and <30%> respectively to compute a Composite Bid Score. *[QCBS having weightage for technical & commercial score of 70:30 should be used generally for the PPP RFPs]*
- b. The bidder securing the highest Composite Bid Score will be adjudicated as the most responsive Bidder for award of the Project. The overall score will be calculated as follows:-
 
$$B_n = 0.70 * T_n + 0.30 * F_n$$

Where

B<sub>n</sub> = overall score of bidder

T<sub>n</sub> = Technical score of the bidder (out of maximum of 100 marks)

F<sub>n</sub> = Normalized financial score of the bidder

- c. In the event the bid composite bid scores are 'tied', the bidder securing the highest technical score will be adjudicated as the Best Value Bidder for award of the Project.

## **2.7 Appointment of Private Sector Vendor/Agency**

### **2.7.1 Award Criteria**

<Nodal Agency> will award the Contract to the successful bidder whose proposal has been determined to be substantially responsive and has been determined as the most responsive bids as per the process outlined above.

### **2.7.2 Right to Accept Any Proposal and To Reject Any or All Proposal(s)**

<Nodal Agency> reserves the right to accept or reject any proposal, and to annul the tendering process / Public procurement process and reject all proposals at any time prior to award of contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for <Nodal Agency> action.

### **2.7.3 Notification of Award**

Prior to the expiration of the validity period, <Nodal Agency> will notify the successful bidder in writing or by fax or email, that its proposal has been accepted. In case the tendering process / public procurement process has not been completed within the stipulated period, <Nodal Agency>, may like to request the bidders to extend the validity period of the bid.

The notification of award will constitute the formation of the contract. Upon the successful bidder's furnishing of Performance Bank Guarantee, <Nodal Agency> will notify each unsuccessful bidder and return their EMD.

### **2.7.4 Contract Finalization and Award**

The <Nodal Agency> shall reserve the right to negotiate with the bidder(s) whose proposal has been ranked best value bid on the basis of Technical and Commercial Evaluation to the proposed Project, as per the guidance provided by CVC.

On this basis the draft contract agreement would be finalized for award & signing.

*[Please refer Section 2.3.4.3 of "Guidance Notes : Model RFP Templates for Implementation Agencies" for information on this topic]*

### **2.7.5 Performance Guarantee**

The <Nodal Agency> will require the selected bidder to provide a Performance Bank Guarantee, within <15> days from the Notification of award, for a value equivalent to <10%> of the total cost of



ownership. The Performance Guarantee should be valid for a period of <months>. The Performance Guarantee shall be kept valid till completion of the project and Warranty period. The Performance Guarantee shall contain a claim period of three months from the last date of validity. The selected bidder shall be responsible for extending the validity date and claim period of the Performance Guarantee as and when it is due on account of non-completion of the project and Warranty period. In case the selected bidder fails to submit performance guarantee within the time stipulated, the <Nodal Agency> at its discretion may cancel the order placed on the selected bidder without giving any notice. <Nodal Agency> shall invoke the performance guarantee in case the selected Vendor fails to discharge their contractual obligations during the period or <Nodal Agency> incurs any loss due to Vendor's negligence in carrying out the project implementation as per the agreed terms & conditions.

#### **2.7.6 Signing of Contract**

After the <Nodal Agency> notifies the successful bidder that its proposal has been accepted, <Nodal Agency> shall enter into a contract, incorporating all clauses, pre-bid clarifications and the proposal of the bidder between <Nodal Agency> and the successful bidder. The Draft Legal Agreement is provided as a separate document as a template.

#### **2.7.7 Failure to Agree with the Terms and Conditions of the RFP**

Failure of the successful bidder to agree with the Draft Legal Agreement and Terms & Conditions of the RFP shall constitute sufficient grounds for the annulment of the award, in which event <Nodal Agency> may award the contract to the next best value bidder or call for new proposals from the interested bidders.

In such a case, the <nodal agency> shall invoke the PBG of the most responsive bidder.

### **2.8 Scope of Work**

*[Scope of Work (SOW) is the most of important component of any tendering process. It is for this that the whole bidding process is entered – to execute the scope of work and deliver outcomes that the Government strives for. Scope of work directly affects:*

- *Time to deliver the project*
- *Cost of delivering the project*
- *Intended business outcome for the Government from the project*
- *Delivery of Citizen benefits/services*

*Please refer Section 2.8 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for generic templates for Scope of Work, which may be referred or used as templates for drafting of Scope of work]*

*[Scope of Work for PPP projects should always focus Service outcomes or the Delivery of services required to meet Government's objectives]*

The PPP vendor has to provide the following services :

<Insert scope of work>:

To achieve the above services, the PPP Vendor is expected to carry out the following :

[

<b>S. No.</b>	<b>Component</b>	<b>Summary Scope of Work*</b>
1.	Application Software	Design, Development/Customization Testing, Deployment of The Application Software, including Biometric Integration, Application Support and other activities as per detailed scope of Work
2.	IT Infrastructure	Procurement, Deployment, Operationalization and maintenance of IT Infrastructure at various project locations (including Hardware & networking)
3.	Data Migration	Migration of Data from 'legacy application' and other departmental applications to the new system as per detailed scope of Work
4.	Departmental Front Windows	Setting up, Operations and Maintenance of Front Windows to provide citizen services as per detailed Scope of Work. Setting up, Operations and Maintenance of Service Centres
5.	Record Room Management	Setting up , Operations and maintenance of Record Rooms in departmental offices to manage the paper records as per detailed scope of work
6.	Regional Dispatch and Receipt Centres	Setting up, Operations and maintenance of Dispatch and Receipt Centres for dispatching and receiving departmental communication such as notices etc. in departmental offices as per detailed scope of work
7.	Central Help Desk	Setting up, Operations and maintenance of a Central Dealer cum IT Help Desk to resolve dealer queries regarding various processes, services of the department etc as well as internal user queries regarding the IT infrastructure, Application trouble shooting etc as per detailed scope of work
8.	Training	Preparation of Training Plan, Training Material, Delivery of Training to Departmental Staff and other activities as per detailed scope of work.
9.	Site Preparation	As per the project specific requirements
10.	Helpdesk	As per the project specific requirements
11.	Service Charge Collection	As per the project specific requirements
*Note: This is only the Indicative summary of the scope of work.		

]

### 2.8.1 Key Personnel in Scope of Work Delivery

*[This section should be kept for large IT projects only which require the availability of personnel in the same role to work for more than 18 months.]*

*It was observed by various stakeholder that resources proposed by the bidders are rarely deployed during the project implementation. One of the reasons was that it is impractical that the bidder would keep the resources on the bench in case there is a delay in the RFP Process. Hence as a solution, the following is being proposed:*

- 1. The evaluation of the resources should be limited to the key personnel, who would work on the project (part time or full time). The RFP document shall identify the positions for the Key Personnel, against which the bidder has to propose the CVs. However such position shall not be more than 15% of the total manpower expected to be deployed on the project.*
- 2. In case the RFP process is completed as per timelines, the bidder shall make available all the resources identified as Key resources for the project. Any non-availability of these resources would be treated as a breach in contract.*
- 3. In case the RFP process is delayed beyond one month as per original timelines, then*
  - a. The Senior Level Key resources would be still be made available by the successful bidder for the project. These senior level key personnel shall be present in all important meetings (generally once a month). Regular absence or change shall be considered as a breach in contract.*
  - b. All Junior level Key resources are permitted to change. However the bidder has to provide replacement resource who score at least the same marks as the resource proposed originally on the same evaluation parameters defined in this RFP document*

*.]*

## **2.8.2 Positions identified for Key personnel**

<Insert position identified for Key Personnel>

## **2.8.3 Initial Composition; Full Time Obligation; Continuity of Personnel**

- a) <PPP Vendor> shall ensure that each member of the Key Personnel devotes substantial working time to perform the services to which that person has been assigned as per the proposal.
- b) <PPP Vendor> shall use commercially reasonable efforts to ensure it retains the services of its Key Personnel, including provisioning of competitive compensation, benefits and other conditions to its Key Personnel so as to incentivize them to remain in <PPP Vendor>'s employment.
- c) <PPP Vendor> shall not make any changes to the composition of the Key Personnel and not require or request any member of the Key Personnel to cease or reduce his or her involvement in the provision of the Services during the Term (or agree to any request other than from <Nodal Agency/Government department> that would have the same effect):

- (i) unless that person resigns, is terminated for cause, dies, is long-term disabled, is on permitted mandatory leave under Applicable Law or retires; or
  - (ii) without <Nodal Agency/Government department>'s prior written consent.
- d) <PPP Vendor> shall promptly notify <Nodal Agency/Government department> of its intention to re-hire any member of the Key Personnel who had resigned from <PPP Vendor> in the previous 12-month period. <Nodal Agency/Government department> shall have the right to request that any member of the Key Personnel who resigns and is re-hired by <PPP Vendor> within 12 months of the resignation date be re-assigned to the provision of the Services.

#### **2.8.4 Evaluations**

- a) <PPP Vendor> shall carry out an evaluation of the performance of each member of the Key Personnel in connection with the Services at least once in each Contract Year. <PPP Vendor> shall provide reasonable written notice to <Nodal Agency/Government department> of the date of each evaluation of each member of the Key Personnel and <Nodal Agency/Government department> shall be entitled to provide <PPP Vendor> with input for each such evaluation.
- b) <PPP Vendor> shall promptly provide the results of each evaluation to <Nodal Agency/Government department>, subject to Applicable Law.

#### **2.8.5 Replacement**

- a) In case the resource has resigned then the bidder has to inform within one week of such resignation.
- b) <PPP Vendor> shall promptly initiate a search for a replacement and use commercially reasonable efforts (including the expenditure of reasonable sums, such as to engage the services of a recruiting firm) to ensure that the role of any member of the Key Personnel is not vacant for any longer than 30 days, subject to reasonable extensions requested by <PPP Vendor> of < Nodal Agency >
- c) Before assigning any replacement member of the Key Personnel to the provision of the Services, <PPP Vendor> shall provide < Nodal Agency > with:
  - (i) a resume, curriculum vitae and any other information about the candidate that is reasonably requested by <Nodal Agency >; and
  - (ii) an opportunity to interview the candidate.
- d) The bidder has to provide replacement resource who score at least the same marks as the resource proposed originally on the same evaluation parameters defined in this RFP document. Once this is confirmation, the <Nodal Agency> shall conduct an interview of the candidate and notify <PPP Vendor> within ten days after its interview (or if <Nodal Agency> does not request

an interview within ten working days after <PPP Vendor> has provided the information, then it would be deemed as accepted).

- e) If <Nodal Agency/Government department> does object to the appointment, <PPP Vendor> shall not assign the individual to that position and shall seek an alternative candidate in accordance with this Section.
- f) The bidder has to ensure at least 4 weeks of overlap period in such replacements

### **2.8.6 High Attrition**

- a) If in the first 6 month period from the Contract Effective Date or in any rolling 12 months period during the Term, 15 percent or more of the members of the Key Personnel cease or reduce their involvement in the Services for any reason other than with <Nodal Agency/Government department>'s prior written consent, <PPP Vendor> shall:
  - (i) provide <Nodal Agency/Government department> with a reasonably detailed explanation as to the reasons for such change, including, where applicable and permitted, notes from any exit interviews conducted by <PPP Vendor> with any departing member of the Key Personnel; and
  - (ii) if such change to Key Personnel has or is likely to have any material adverse impact on the provision of the Services or any substantial part thereof, undertake, at its own costs, such remediation acts as are reasonably necessary in order to improve the retention of the Key Personnel including making reasonable changes to the human resources policies and procedures applicable to the Key Personnel (including those related to compensation, benefits and other conditions so that they are competitive with the market) as may be necessary to ensure that such policies and procedures comply with Good Industry Practice.

### **2.8.7 Solicitation of Employees**

During the Termination Period and thereafter, <Nodal Agency > and its Affiliates shall have the right to solicit and hire:

- (i) in case of a termination for convenience, <nos.> members of the Key Personnel; and
- (ii) in case of a termination other than for convenience, all members of the Key Personnel; plus, in each case, any two members of the <PPP Vendor> Team (other than Key Personnel) of <Nodal Agency >'s choice and at its sole discretion.

## **2.9 Deliverables & Timelines**

*[The Deliverables are inherently linked to the Scope of Work defined for the project. Please refer Sections 2.7.12 and 2.9.1 of “Guidance Notes : Model RFP Templates for Implementation Agencies” for finalizing the Deliverables & Timelines]*

*[However, for illustrative purposes, the Deliverables and Milestones populating format of a typical PPP Project is provided here]*

S. No.	Project Activity the Track	Outputs/Outcomes/Services	Timelines (From Signing of Contract)
<b>Solution Design and Build</b>			
0.	Project Initiation & Solution Design	<ul style="list-style-type: none"> <li>• Suggesting Re-engineered processes (as per the industry’s best practices) after studying &amp; validating the existing documents</li> <li>• Software Requirement Specifications &amp; Design Documents</li> <li>• In case there is decision or clear reason to choose a COTS product/software, performing mapping report of COTS product with the FRS / To-Be processes as defined in RFP</li> <li>• Deployment plan including the testing &amp; acceptance plan</li> <li>• Hardware Requirement Report &amp; procurement plan</li> </ul>	<Timelines>
1.	Development / customization and implementation of the Software Solution to meet the requirements of the Client	Development / customization and implementation of the <Phase No.> modules	<Timelines>
		Development / customization and implementation of the <Phase No.> modules	<Timelines>
2.	Procurement, deployment and commissioning of the necessary Hardware at various define locations	Deployment of the hardware in appropriate quantity and as per the specified technical specifications at the appropriate locations to support functioning of <Phase No.>	<Timelines>
		Deployment of the hardware in appropriate quantity and as per the specified technical specifications at the appropriate locations to support functioning of <Phase No.>	<Timelines>
3.	Procurement, deployment and	Deployment of the necessary networking equipments and connectivity as per the	<Timelines>

S. No.	Project Activity the Track	Outputs/Outcomes/Services	Timelines (From Signing of Contract)
	commissioning of the necessary Networking equipments and Connectivity	requirements to support functioning of <Phase No.>	
		Deployment of the necessary networking equipments and connectivity as per the requirements to support functioning of <Phase No.>	<Timelines>
4.	Data Entry and digitization of the records available in the paper files and migration of the data available in the existing databases	Digitized and verified data for <Phase No.> modules	<Timelines>
		Digitized and verified data for <Phase No.> modules	<Timelines>
5.	Training to the staff members and stakeholders of the Corporation and necessary Change Management	Satisfactory training sessions to the staff members of the <Nodal Agency> for the <Phase No.> modules	<Timelines>
		Satisfactory training sessions to the staff members of the <Nodal Agency> for the <Phase No.> modules	<Timelines>
Operations and Service Delivery			
6.	Operations and maintenance (inclusive of Service Levels)	Operations and maintenance support for <Phase No.> modules	To be started from successful implementation of <Phase No.> modules till end of project
7.	Core Service Delivery	<ul style="list-style-type: none"><li>Service Transaction details</li><li>User base</li><li>Service Charges and Revenue Collection</li></ul>	To be started from the day of the PPP delivered Service becomes operational.  <i>[Final part of Build-Operate-Transfer (BOT) model]</i>
8.	Exit Management	<ul style="list-style-type: none"><li>Exit Management process as detailed out in the Schedule</li></ul>	<Timelines>



## 2.10 Service Level Agreements (Key Impact)

<Insert Service Level Agreement on key services to be provided by the PPP Vendor>

*[Please refer Section 6 of “Guidance Notes : Model RFP Templates for Public Private Partnership” for providing necessary information]*

## 2.11 Acceptance Testing and Certification

*[It is suggested that the services of STQC may be explored as third party agency for certifications. In case the TPA is to be appointed through a tender, the RFP template for consultancy services (Deliverables) may be used for tendering purposes. In this section the word “Third party agency” means any external agency involved in “audit assessment it may be a single or separate agencies appointed for each of these activities]*

The primary goal of Acceptance Testing and Certification is to ensure that the Project (including all the project components as discussed in the scope of work) meets requirements, standards, specifications and performance, by ensuring that the following are associated with clear, quantifiable metrics for accountability:

- Functional requirements
- Infrastructure (Hardware and Network) Compliance Review
- Availability of the project Services in the defined locations
- Performance
- Security
- Manageability
- SLA Reporting System
- Project Documentation (Design, development, configuration, training and administration manuals etc)
- Data Quality Review

As part of Acceptance testing, performed through a third party agency, <Nodal Agency> shall review all aspects of project development and implementation covering software, hardware and networking including the processes relating to the design of solution architecture, design of systems and sub-systems, coding, testing, business process description, documentation, version control, change management, security, service oriented architecture, performance in relation to defined requirements, interoperability, scalability, availability and compliance with all the technical and functional requirements of the RFP and the agreement.

The procedures and parameters for testing will be laid down by the Third Party Agency after approval from <Nodal Agency>; the solution deployed by the vendor has to satisfy third party



acceptance testing upon which the system shall go-live, subject to <Nodal Agency>/Departmental approval.

The Department / <Nodal Agency> will establish appropriate processes for notifying the selected vendor of any shortcomings from defined requirements at the earliest instance after noticing the same to enable the selected vendor to take corrective action. All gaps identified shall be addressed by the vendor immediately prior to Go-live of the solution. It is the responsibility of the selected Bidder to take any corrective action required to remove all shortcomings, before the roll out of the project.

It is to be noted that the involvement of the third party for acceptance testing and certification, does not absolve the vendor of his responsibilities to meet all SLAs as laid out in this RFP document.

It is to be noted that:

<Nodal Agency> may get the solution audited through a Third Party before Go-Live and periodically after Go-Live in order to ensure the success of the project. Such third-party agency for carrying out the acceptance testing and certification of the entire solution will be nominated by the Department. Following discusses the acceptance criteria to be adopted for the project as mentioned above. The list below is indicative and the activities will include but not be limited to the following:

#### **Functional Requirements Review**

The solution developed/customized by selected Bidder shall be reviewed and verified by the agency against the Functional Requirements signed-off between the <Nodal Agency> and the selected Bidder. All gaps, identified shall be addressed by the vendor immediately prior to Go-live of the solution. One of the key inputs for this testing shall be the traceability matrix to be developed by the vendor for the solution. Apart from Traceability Matrix, agency may develop its own testing plans for validation of compliance of system against the defined requirements. The acceptance testing w.r.t. the functional requirements shall be performed by independent third party agency (external audit) as well as the select internal department users (User Acceptance Testing) and system has to satisfy both third party acceptance testing and internal user acceptance testing, upon which the system shall go-live.

For conducting the User Acceptance Testing, <Nodal Agency>/ The Department shall identify the employees from respective divisions, who shall be responsible for day-to-day operations of the functions automated through the project. The system, during the functional requirements review, shall necessarily satisfy the user acceptance testing process.

#### **Infrastructure Compliance Review**

Third party agency shall perform the Infrastructure Compliance Review to verify the conformity of the Infrastructure (both IT, non IT as well as Network infrastructure) supplied by the selected Bidder against the requirements and specifications provided in the RFP and/or as proposed in the proposal submitted by the selected Bidder. Compliance review shall not absolve the vendor from ensuring that proposed infrastructure meets the SLA requirements.

#### **Security Review**

The software developed/customized shall be audited by the agency from a security and controls perspective. Such audit shall also include the IT infrastructure and network deployed for the project. Following are the broad activities to be performed by the Agency as part of Security Review. The security review shall subject the solution to at least the following activities.

- Audit of Network, Server and Application security mechanisms
- Assessment of authentication mechanism provided in the application /components/modules
- Assessment of data encryption mechanisms implemented for the solution
- Assessment of data access privileges, retention periods and archival mechanisms
- Server and Application security features incorporated etc

### **Performance**

Performance is another key requirement for the project and the agency shall review the performance of the deployed solution against certain key parameters defined in SLA. Such parameters include request-response time, work-flow processing time, concurrent sessions supported by the system etc, Disaster Recovery drill etc. The performance review also includes verification of scalability provisioned in the solution for catering to the project requirements.

### **Availability**

The solution should be designed to remove all single point failures. Appropriate redundancy shall be built into all the critical components to provide the ability to recover from failures. The agency shall perform various tests including network, server, security, DC/DR fail-over tests to verify the availability of the services in case of component/location failures. The agency shall also verify the availability of the project services to all the users in the defined locations.

### **Manageability Review**

The agency shall verify the manageability of the solution and its supporting infrastructure deployed using the Enterprise Management System (EMS) proposed by the selected Bidder. The manageability requirements include requirements such as remote monitoring, administration, configuration, inventory management, fault identification etc.

### **SLA Reporting System**

The selected Bidder shall design, implement/customize the Enterprise Management System (EMS) and shall develop any additional tools required to monitor the performance indicators listed as per the SLAs mentioned the RFP. The Acceptance Testing and Certification agency shall verify the accuracy and completeness of the information captured by the SLA monitoring system implemented by the vendor and shall certify the same. The EMS deployed for the project, based on SLAs, shall be configured by the selected Bidder to calculate the payment to be paid by the department after deducting the necessary penalties.

### **Project Documentation**

The Agency shall review the project documents developed by the selected Bidder including requirements, design, source code, installation, training and administration manuals, version control etc.

Any issues/gaps identified by the Agency, in any of the above areas, shall be addressed to the complete satisfaction of the Department.

**Data Quality**

The Agency shall perform the Data Quality Assessment for the Data digitized by selected Bidder and the data migrated by the vendor to the new system. The errors/gaps identified during the Data Quality Assessment shall be addressed by the vendor before moving the data into production environment, which is a key mile stone for Go-live of the solution.

## 2.12 Change Control

This Section describes the procedure to be followed in the event of any proposed change to a Contract Agreement ("Contract Agreement"), Project Implementation Phase, SLA and scope of work and functional requirement specifications. Such change shall include, but shall not be limited to, changes in the scope of services provided by the Implementation Partner and changes to the terms of payment as stated in the Terms of Payment Schedule.

The <Nodal Agency > or its nominated agencies and the PPP Vendor recognise that frequent change is an inevitable part of delivering services and that a significant element of this change can be accomplished by re-organizing processes and responsibilities without a material effect on the cost. The Vendor will endeavour, wherever reasonably practicable, to effect change without an increase in the terms of payment as stated in the Terms of Payment Schedule and <Nodal Agency> or its nominated agencies will work with the Private sector agency/vendor to ensure that all changes are discussed and managed in a constructive manner.

This Change Control Schedule sets out the provisions which will apply to all the changes to the **Agreement** and other documents except for the changes in SLAs for which a separate process has been laid out, such as:

"A notice of the proposed revision ("SLA Change Request") shall be served to the <Nodal Agency> or the Private sector agency/vendor as the case may be.

This Change Control Process sets out the provisions which will apply to changes to the:

- Contract Agreement; and/or
- Project Implementation; and/or
- Operations and Management SLA"

### 4.1 Change Control Note ("CCN")

4.1.1 Change requests in respect of the Contract Agreement (Contract Agreement), the Project Implementation, the operation, the SLA or Scope of work and Functional Requirement specifications will emanate from the Parties' respective Project Manager who will be responsible for obtaining approval for the change and who will act as its sponsor throughout the Change Control Process and will complete Form 2, provided in Appendix III hereto. CCNs will be presented to the other Party's Project Manager who will acknowledge receipt by signature of the CCN.

4.1.2 The PPP Vendor and the <Nodal Agency> or its nominated agencies, during the Project Implementation Phase during the Operations and Management Phase and while preparing the CCN, shall consider the change in the context of the following parameter, namely whether the change is beyond the scope of Services including ancillary and concomitant services required and as detailed in the Scope of Work related sections of the RFP and is suggested and applicable only after the testing, commissioning and certification of the Pilot Phase and the Project Implementation Phase as set out in this document & contract agreement.

## **4.2 Quotation**

4.2.1 The PPP Vendor shall assess the CCN and complete Change Control Note (CCN) format, provided as Form 2 of Appendix III. In completing the Part B of the CCN the PPP Vendor shall provide as a minimum:

1. a description of the change
2. a list of deliverables required for implementing the change;
3. a time table for implementation;
4. an estimate of any proposed change
5. any relevant acceptance criteria
6. an assessment of the value of the proposed change;
7. Material evidence to prove that the proposed change is not already covered within the Agreement and the scope of work.

4.2.2 Prior to submission of the completed CCN to the <Nodal Agency> or its nominated agencies, the Private vendor/agency will undertake its own internal review of the proposal and obtain all necessary internal approvals. As a part of this internal review process, the Private vendor/agency shall consider the materiality of the proposed change in the context of the Contract Agreement and the Project Implementation affected by the change and the total effect that may arise from implementation of the change.

## **4.3 Costs**

Each Party shall be responsible for its own costs incurred in the quotation, preparation of CCNs and in the completion of its obligations described in this process provided the Private vendor/agency meets the obligations as set in the CCN. In the event the Private vendor/agency is unable to meet the obligations, as defined in the CCN, then the cost of getting it done by third party will be borne by the Private vendor/agency.

## **4.4 Obligations**

The Implementation Partner shall be obliged to implement any proposed changes once approval in accordance with above provisions has been given, with effect from the date agreed for implementation and within an agreed timeframe.

*[Please refer Section 2.10 of Guidance Notes for “Model RFP Templates for Implementation Agencies”]*

- a. The Bidders/Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Selection Process. Notwithstanding anything to the contrary contained in this RFP, the <Nodal Agency> shall reject a Proposal without being liable in any manner whatsoever to the Bidder, if it determines that the Bidder has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice (collectively the “Prohibited Practices”) in the Selection Process. In such an event, the <Nodal Agency> shall, without prejudice to its any other rights or remedies, forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time, cost and effort of the Authority, in regard to the RFP, including consideration and evaluation of such Bidder’s Proposal.
- b. Without prejudice to the rights of the <Nodal Agency> under Clause above and the rights and remedies which the <Nodal Agency> may have under the LOI or the Agreement, if an Bidder or Systems Implementation Agency, as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Selection Process, or after the issue of the LOI or the execution of the Agreement, such Bidder or Systems Implementation Agency shall not be eligible to participate in any tender or RFP issued by the <Nodal Agency> during a period of <2 (two) years> from the date such Bidder or Systems Implementation Agency, as the case may be, is found by the <Nodal Agency> to have directly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as the case may be.
- c. For the purposes of this Section, the following terms shall have the meaning hereinafter respectively assigned to them:
  - i. “corrupt practice” means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the action of any person connected with the Selection Process (for avoidance of doubt, offering of employment to or employing or engaging in any manner whatsoever, directly or indirectly, any official of the <Nodal Agency> who is or has been associated in any manner, directly or indirectly with the Selection Process or the LOI or has dealt with matters concerning the Agreement or arising there from, before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the <Nodal Agency>, shall be deemed to constitute influencing the actions of a person connected with the Selection Process); or (ii) save as provided herein, engaging in any manner whatsoever, whether during the Selection Process or after the issue of the LOA or after the execution of the Agreement, as the case may be, any person in respect of any matter relating to the Project or the LOA or the Agreement, who at any time has been or is a legal, financial or technical consultant/ adviser of the <Nodal Agency> in relation to any matter concerning the Project;

- ii. “fraudulent practice” means a misrepresentation or omission of facts or disclosure of incomplete facts, in order to influence the Selection Process;
- iii. “coercive practice” means impairing or harming or threatening to impair or harm, directly or indirectly, any persons or property to influence any person’s participation or action in the Selection Process;
- iv. “undesirable practice” means (i) establishing contact with any person connected with or employed or engaged by <Nodal Agency> with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Selection Process; or (ii) having a Conflict of Interest; and
- v. “restrictive practice” means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of restricting or manipulating a full and fair competition in the Selection Process.

## 2.13 Conflict of Interest

- a. A bidder shall not have a conflict of interest that may affect the Selection Process or the Solution delivery (the “**Conflict of Interest**”). Any Bidder found to have a Conflict of Interest shall be disqualified. In the event of disqualification, the <Nodal Agency> shall forfeit and appropriate the EMD, if available, as mutually agreed genuine pre-estimated compensation and damages payable to the <Nodal Agency> for, *inter alia*, the time, cost and effort of the <Nodal Agency> including consideration of such Bidder’s Proposal, without prejudice to any other right or remedy that may be available to the <Nodal Agency> hereunder or otherwise.
- b. The <Nodal Agency> requires that the Implementation Agency provides solutions which at all times hold the <Nodal Agency>’s interests paramount, avoid conflicts with other assignments or its own interests, and act without any consideration for future work. The Systems Implementation Agency shall not accept or engage in any assignment that would be in conflict with its prior or current obligations to other clients, or that may place it in a position of not being able to carry out the assignment in the best interests of the <Nodal Agency>.
- c. *[Some guiding principles for identifying and addressing Conflicts of Interest have been illustrated within Section 2.4.10 of “Guidance Notes : Model RFP Templates for Implementation Agencies”].* Without limiting the generality of the above, an Bidder shall be deemed to have a Conflict of Interest affecting the Selection Process, if:
  - i. the Bidder, its consortium member (the “**Member**”) or Associates (or any constituent thereof) and any other Bidder, its consortium member or Associate (or any constituent thereof) have common controlling shareholders or other ownership interest; *provided that this disqualification shall not apply in cases where the direct or indirect shareholding or ownership interest of an Bidder, its Member or Associate (or any shareholder thereof having a shareholding of more than 5 per cent of the*

*paid up and subscribed share capital of such Bidder, Member or Associate, as the case may be*) in the other Bidder, its consortium member or Associate is less than 5% (five per cent) of the subscribed and paid up equity share capital thereof. For the purposes of this Clause, indirect shareholding held through one or more intermediate persons shall be computed as follows:

- where any intermediary controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the “**Subject Person**”) shall be taken into account for computing the shareholding of such controlling person in the Subject Person; where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on
    - a proportionate basis; provided, however, that no such shareholding shall be reckoned under this Sub-clause if the shareholding of such person in the intermediary is less than 26% (twenty six per cent) of the subscribed and paid up equity shareholding of such intermediary; or
  - ii. a constituent of such Bidder is also a constituent of another Bidder; or
  - iii. such Bidder or its Associate receives or has received any direct or indirect subsidy or grant from any other Bidder or its Associate; or
  - iv. such Bidder has the same legal representative for purposes of this Application as any other Bidder; or
  - v. such Bidder has a relationship with another Bidder, directly or through common third parties, that puts them in a position to have access to each others’ information about, or to influence the Application of either or each of the other Bidder; or
  - vi. there is a conflict among this and other Systems Implementation/Turnkey solution assignments of the Bidder (including its personnel and other members, if any) and any subsidiaries or entities controlled by such Bidder or having common controlling shareholders. The duties of the Systems Implementation Agency will depend on the circumstances of each case. While providing software implementation and related solutions to the <Nodal Agency> for this particular assignment, the Systems Implementation Agency shall not take up any assignment that by its nature will result in conflict with the present assignment; or
  - vii. A firm hired to provide System Integration/Turnkey solutions for the implementation of a project, and its Members or Associates, will be disqualified from subsequently providing goods or works or services related to the same project;
- d. An Bidder eventually appointed to implement software solutions for this Project, its Associates, affiliates and the Financial Expert, shall be disqualified from subsequently providing goods or works or services related to the construction and operation of the same Project and any breach of this obligation shall be construed as Conflict of Interest; provided that the restriction herein shall not apply after a period of 12 months from the completion of this assignment; provided further that this restriction shall not apply to software solutions delivered to the <Nodal Agency> in continuation of this systems implementation or to any



subsequent systems implementation executed for the <Nodal Agency> in accordance with the rules of the <Nodal Agency>.

## 2.14 Compliance to eGov standards

**2.14.1 Single-Sign On:** The application should enable single-sign-on so that any user once authenticated and authorized by system is not required to be re-authorized for completing any of the services in the same session. For employees of the department concerned, the browser based application accessed on the intranet, through single-sign-on mechanism, will provide access to all the services of the departments concerned (based on their roles and responsibilities), Help module, basic and advanced reporting etc. Similarly, for external users (citizens, etc), based on their profile and registration, the system shall enable single sign on facility to apply for various services, make payments, submit queries /complaints and check status of their applications.

**2.14.2 Support for PKI based Authentication and Authorization:** The solution shall support PKI based Authentication and Authorization, in accordance with IT Act 2000, using the Digital Certificates issued by the Certifying Authorities (CA) such as MTNL or NIC. In particular, 3 factor authentication (login id & password, biometric and digital signature) shall be implemented by the selected Bidder for officials/employees involved in processing citizen services as per the Functional requirement specification of the services specified in Section 2.8.

**2.14.3 Interoperability Standards:** Keeping in view the evolving needs of interoperability, especially the possibility that the solution shall become the focal point of delivery of services, and may also involve cross functionality with the e-Government projects of other departments / businesses in future, the solution should be built on Open Standards. Some of the states already have other applications deployed and running for delivering services to citizens. The SI shall ensure that the application developed is easily integrated with the existing applications. Every care shall be taken to ensure that the code does not build a dependency on any proprietary software, particularly, through the use of proprietary 'stored procedures' belonging to a specific database product.

**2.14.4 Scalability:** One of the fundamental requirements of the proposed application is its scalability. The architecture should be proven to be scalable (cater to increasing load of internal and external users and their transactions) and capable of delivering high performance for atleast four years from the date of deployment. In this context, it is required that the application and deployment architecture should provide for Scale-Up and Scale out on the Application and Web Servers, Database Servers and all other solution components. For pilot states, the scalability is very important and this aspect should be thoroughly tested before state wide roll out.

**2.14.5 Security:** The systems implemented for project should be highly secure, considering that it is intended to handle sensitive data relating to the citizens of the state. The overarching security considerations are described below.

- a. The security services used to protect the solution shall include: Identification, Authentication, Access Control, Administration and Audit and support for industry standard protocols.
- b. The solution shall support advanced user authentication mechanisms including digital certificates and biometric authentication.
- c. Security design should provide for a well-designed identity management system, security of physical and digital assets, data and network security, backup and recovery and disaster recovery system.
- d. The solution should provide for maintaining an audit trail of all the transactions and should also ensure the non-repudiation of audit trail without impacting the overall performance of the system.
- e. The overarching requirement is the need to comply with ISO 27001 standards of security.
- f. The application design and development should comply with OWASP top 10 principles

A sample list of information security requirements is specified below. (Needs to be customized as per project requirements)

S.No.	Security Areas	Specifications
1.	Physical Security	<ul style="list-style-type: none"> <li>Client premises, should be physically secured by the SI.</li> </ul>
2.	Network Security	<ul style="list-style-type: none"> <li>Appropriate firewalls, IPS, SSL devices etc. should be used to ensure Network security</li> <li>The solution should support SSL encryption mechanism for transferring data across network and between client and server</li> </ul>
3.	System Security	<ul style="list-style-type: none"> <li>Adequate access control procedures should be defined to secure the entire IT system, physically and logically.</li> <li>The access controls procedures should cover all stages in the life-cycle of user access, from the initial registration of new users to the final de-registration of users who no longer require access to information systems and services.</li> <li>The system should have 2 factor authentication mechanism either through One Time Password (OTP) or soft tokens based technologies for access control and user authentication.</li> </ul>
4.	Application Security	<ul style="list-style-type: none"> <li>The solution should have appropriate authentication mechanisms</li> <li>Application user authentication &amp; authorization related transactions should be encrypted.</li> </ul>

		<ul style="list-style-type: none"> <li>Operating system should be hardened on which the application is installed.</li> <li>A web application firewall shall be deployed to secure the web-layer.</li> <li>The web applications should be free from OWASP / SANS and CERT-IN web application vulnerabilities as released from time to time.</li> </ul>
5.	<b>Audit Trails &amp; Logs</b>	<ul style="list-style-type: none"> <li>Event logging should create an accurate record of user activity such as which users accessed which system, and for how long.</li> <li>The solution should log all types of events especially those related to security</li> </ul>
6.	<b>Data Protection</b>	<ul style="list-style-type: none"> <li>The solution should support SSL encryption mechanism for transferring data across network. Provision should be made to ensure that data in any form should not be copied on to any external media without authorization.</li> <li>The data transferred across network should be encrypted using Public Key (PKI) Infrastructure.</li> <li>Complete end point data protection should be provided at client site such that any type of data pilferage using unauthorized copying, storing and emailing could be prohibited.</li> <li>Access to all system resources including data files, devices, processes and audit files should be provided to the intended users only.</li> <li>All mobile applications should be designed and developed in a way that it ensures security of the application and data on the device.</li> <li>Ensure to protect documents by assigning security parameters and criteria in order to provide more effective protection for an electronic document in order to maintain Confidentiality, Authorization, Accountability, Integrity, Authenticity and Non-repudiation.</li> </ul>
7.	<b>Session Management</b>	<ul style="list-style-type: none"> <li>The system should limit to only one session per user or process ID.</li> <li>The system should put a limit on the maximum time length of an idle session, which should ensure that automatic session termination takes place after expiry of the specific time length.</li> </ul>
8.	<b>Data WareHouse Security</b>	<ul style="list-style-type: none"> <li>Users must not have access to the data warehouse prompt of the application. Access to the data warehouse prompt must be restricted only to the database administrator.</li> <li>“Super user” rights for the data warehouse must only be given to the administrator and the activities of these accounts must be properly logged.</li> </ul>
9.	<b>Application Deployment</b>	<ul style="list-style-type: none"> <li>All unused ports should be blocked at server</li> </ul>

		<p>machines.</p> <ul style="list-style-type: none"> <li>The application server should be segregated from internet zone through firewall or other filtering mechanism.</li> </ul>
10	Information Security Governance	<ul style="list-style-type: none"> <li>The employees working on the project should be made aware of his or her responsibilities with respect to Information Privacy and Information Security.</li> <li>Employees working on the project shall undergo security awareness training during induction.</li> </ul>
11	Storage Equipment	<ul style="list-style-type: none"> <li>All information storage media (e.g. hard disks, magnetic tapes, CD ROMs etc.) should be physically secured.</li> <li>Physical access to magnetic tape, disk, CD libraries etc. should be restricted to authorized personnel.</li> </ul>
12	Computing Environment	<ul style="list-style-type: none"> <li>All workstation hardware and associated peripheral equipment at Client site premises should be marked with a unique asset identification code. The asset identification code should follow a defined naming convention that would uniquely and appropriately identify the asset.</li> <li>USB ports should be disabled on specified desktops / laptops at Client site premises, so as to prevent use of pen drives, external disk drives etc.</li> <li>IT assets inventory must contain criticality of hardware in levels of importance (Confidentiality, Integrity and Availability).</li> </ul>
13	Email Security	<ul style="list-style-type: none"> <li>Email must have protection from inbound and outbound email threats. It should report compliance violations by scanning all inbound and outbound email content and attachments for sensitive data, real-time protection from spam, phishing, viruses, spoofing, zombies, directory harvest (DHA), Denial of Service (DoS) and other attacks.</li> </ul>
14	Virus Control	<ul style="list-style-type: none"> <li>Latest version of anti-virus should be installed on workstations and servers at Client premises.</li> <li>The anti-virus software should run on network file servers on a regular basis (preferably daily).</li> </ul>
15	Compliance to Security Standards	<ul style="list-style-type: none"> <li>Software/Hardware system should be in compliance with <b>&lt;Please specify security standards&gt;</b></li> </ul>
16	Security Information and Event Management System (SIEM)	<ul style="list-style-type: none"> <li>SI should install SIEM for Real-time analysis of security alerts generated by applications and infrastructure.</li> </ul>
17	Database Activity Monitoring	<ul style="list-style-type: none"> <li>SI should install DAM to monitor all database</li> </ul>

	<b>(DAM) Solution</b>	activities and internal users with privileged access.
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#### **2.14.6 Application Architecture:**

**2.14.6.1** It has been proposed that the applications designed and developed for the departments concerned must follow some best practice and industry standards. In order to achieve the high level of stability and robustness of the application, the system development life cycle must be carried out using the industry standard best practices and adopting the security constraints for access and control rights. The various modules / application should have a common Exception Manager to handle any kind of exception arising due to internal/ external factors.

**2.14.6.2** Similarly the modules of the application are to be supported by the Session and Transaction Manager for the completeness of the request and response of the client request. The system should have a module exclusively to record the activities/ create the log of activities happening within the system / application to avoid any kind of irregularities within the system by any User / Application.

#### **2.14.7 Proposed Application Architecture:**

An indicative 3-tier architecture (also referred to as multi-tier or N-tier architecture) has been proposed for the Application Solution.

The entire processing should take place in n-tier architecture:

- I. Front-end software (client tier) - responsible for the presentation of information, and provides user interface.
- II. Business Process / Service Layer – In the long SSDG may be used, as an Integrated Framework for delivery of Services.
- III. Application Layer – The Business logic for all the application as per the FRS document
- IV. Database Layer - responsible for the manipulation and storage of data.

**2.14.8 High Level Design (HLD):** Once the SRS are approved, the SI shall complete the High Level Designing and all HLD documents of all the functionalities, integration with existing application and external application. The SI shall prepare the HLD and have it reviewed and approved by the . State Nodal Office will sign off on the HLD documents based on the advice of SPMU.

**2.14.9 Detailed (Low Level) Design (LLD):** The LLD shall interpret the approved HLD to help application development and shall include detailed service descriptions and specifications, application logic (including “pseudo code”) and UI design (screen design and navigation). The preparation of test cases will also be completed during this stage. The SI shall have the design documents reviewed and approved by the state Nodal Agency. State Nodal Agency will sign off on the LLD documents based on the advice of SPMU.

**2.14.10 Test Plan:** Once the SRS is approved and design is started, the SI shall prepare all necessary Test Plans (including test cases), i.e., plans for Acceptance Testing. Test cases for Initial and Final User Acceptance Testing shall be developed in collaboration with domain experts identified at the state Nodal Agency. Initial and Final User Acceptance Testing shall involve Test Case development, Unit Testing, Integration and System Testing, Functional testing of Application, Performance testing of the Application including measurement of all Service Levels as mentioned in this RFP and finally SI shall also carryout Load/ Stress testing. The SI will submit the test plans and test result reports to the state Nodal Agency for comprehensive verification and approval.

**2.14.11 Adherence to Open Source Standard:** The solution must be designed following open standards, to the extent feasible and in line with overall system requirements set out in this RFP, in order to provide for good inter-operability with multiple platforms and avoid any technology or technology provider lock-in.

**2.14.12 Compliance with Government standards & policies**

The solution must comply with all the relevant standards & policies of the Government related with e-Governance application development.

*[An indicative list of standards and policies are given in cl. 2.9 e-Governance application features and architecture of Guidance Notes for Selection Of Implementation Agencies]*



### 2.14.13 Compliance with Industry Standards:

In addition to above, the proposed solution has to be based on and compliant with industry standards (their latest versions as on date) wherever applicable. This will apply to all the aspects of solution including but not limited to design, development, security, installation, and testing. There are many standards that are summarised below. However the list below is for reference purposes only and is not to be considered as exhaustive.

- ii. Portal development W3C specifications
- iii. Information access/transfer protocols SOAP, HTTP/HTTPS
- iv. Photograph JPEG (minimum resolution of 640 x 480 pixels)
- v. Scanned documents TIFF (Resolution of 600 X 600 dpi)
- vi. Biometric framework BioAPI 2.0 (ISO/IEC 19784-1:2005)
- vii. Latest HTML standards

### 2.14.14 Specification

- a) Finger print scanning IAFIS specifications
- b) Digital signature RSA standards
- c) Document encryption PKCS specifications IV. Information Security to be ISO 27001 compliant
- d) Operational integrity & security management to be ISO 17799 compliant
- e) IT Infrastructure management ITIL / EITM specifications VII. Service Management ISO 20000 specifications
- f) Project Documentation IEEE/ISO specifications for documentation
- g) While developing an application in response to this RFP, the SI shall adhere to all applicable policies and standards published by Government of India, which includes:

1. Ministry of Electronics and Information Technology, Government of India as updated from time to time. The latest version of the standards may be found at <https://egovstandards.gov.in>
2. National Informatics Corporation The latest version of the standards may be found at [web.guidelines.gov.in/](http://web.guidelines.gov.in/)
3. Guidelines for Indian Government Websites (GIGW), available at : [http://darpg.gov.in/sites/default/files/Guidelines\\_for\\_Government\\_websites\\_0\\_0.pdf](http://darpg.gov.in/sites/default/files/Guidelines_for_Government_websites_0_0.pdf)
4. "Policy on Open Application Programming Interfaces (APIs) for Government of India" available at: <http://www.egazette.nic.in/WriteReadData/2015/164238.pdf>
5. "Policy on Adoption of Open Source Software for Government of India" available at URL <http://www.egazette.nic.in/WriteReadData/2015/163746.pdf>
6. "Policy On Collaborative Application Development by Opening the Source Code of Government Applications", available at : <http://www.egazette.nic.in/WriteReadData/2015/164611.pdf>

"Policy on Adoption of Open Source Software for Government of India", available at URL <http://www.egazette.nic.in/WriteReadData/2015/163746.pdf>

## Appendix I: Technical Bid Templates

The bidders are expected to respond to the RFP using the forms given in this section and all documents supporting Technical Evaluation Criteria.

Technical Proposal shall comprise of following forms :

### **Forms to be used in Technical Proposal**

- Form 1 : Compliance Sheet for Technical Proposal
- Form 2: Letter of Proposal
- Form 3: Project Citation Format
- Form 4: Proposed Solution
- Form 4 A : Solution Proposed
- Form 4 B : Bill of Material (Softwares)
- Form 4 C : Bill of Material (Infrastructure)
- Form 4 D : Services Description
- Form 5: Proposed Work Plan
- Form 6: Team Composition
- Form 7: Curriculum Vitae (CV) of Key Personnel
- Form 8: Deployment of Personnel
- Form 9: Manufacturers'/Producers' Authorization Form
- Form 10: No Conflict of Interest Declaration
- Form 11: Power of Attorney Template
- Form 12: Bank Guarantee for Earnest Money Deposit

### Form 1 : Compliance Sheet for Technical Proposal

(The Technical proposal should comprise of the following basic requirements. The documents mentioned in this compliance sheet along with this form, needs to be a part of the Technical proposal)

S. No.	Specific Requirements	Documents Required	Compliance	Reference & Page Number
1.	Covering Letter for Technical Proposal	As per Form 2	Yes / No	
2.	Business Model evaluation & Risk Management Plan	<b>A note containing the following information</b> <ul style="list-style-type: none"> <li>– Risk identification in detail</li> <li>– Coverage of all costs &amp; risks element</li> <li>– Detailing of Operational aspects of Risk mitigation plan</li> <li>– Fall back mechanism in case of failure of business model</li> <li>– Economic analysis of the Business Model (cost/benefit analysis which is not linked to payment of PPP Vendor)</li> </ul>	Yes / No	
3.	<b>Project Methodology, Support and Documentation</b>	Form 5 & additional notes/document for support & documentation	Yes / No	
4.	<b>Solution Overview:</b> Meeting the requirements of <department> in terms of how close the proposal is to the functional requirements for the solution as have been proposed for <department>	<b>A note containing the Mapping as per information provided</b>  Form 4, 4A, 4B,4C and 4D	Yes / No	
5.	<b>Technology:</b> Demonstrated robustness of the technology deployed across other installations around the world, including <ul style="list-style-type: none"> <li>– Scalability</li> <li>– Security</li> <li>– Ease of implementation</li> </ul>	<b>A note containing details on</b> <ul style="list-style-type: none"> <li>a) Solution architecture</li> <li>b) Security</li> <li>c) System Performance</li> <li>d) Supported Platform Operating System</li> <li>e) Client Hardware Operating System</li> <li>f) Database</li> <li>g) System Management</li> <li>h) Web Server Support</li> </ul>	Yes / No	

S. No.	Specific Requirements	Documents Required	Compliance	Reference & Page Number
		i) Application Server Support j) Single Sign-on k) Presentation l) Session Management m) Integration capabilities n) Auditing / Reporting features o) Disaster recovery & back-up  <b>And Form 3</b> Demonstrated robustness of the technology deployed across other installations around the world, including <ul style="list-style-type: none"> <li>– Scalability</li> <li>– Security</li> <li>– Ease of implementation</li> </ul>		
6.	<b>India Specific Capabilities:</b> Number of Projects of similar nature in India and size of those projects in the past 5 years	Completion Certificates from the client; OR  Work Order + Self Certificate of Completion (Certified by the Statutory Auditor); OR  Work Order + Phase Completion Certificate (for ongoing projects) from the client  Project citation (Form 3)	Yes / No	
7.	<b>Industry Specific Capabilities:</b> Past experience of the bidder in executing similar assignments, size of those assignments in the past five years.  [The definition of “similar” should be such that it focuses on the areas which are “innovative” or where the technical feasibility is a challenge in the context of the project]	Completion Certificates from the client; OR  Work Order + Self Certificate of Completion (Certified by the Statutory Auditor); OR  Work Order + Phase Completion Certificate (for ongoing projects) from the client  Project citation (Form 3)	Yes / No	
8.	<b>Training:</b> Trainings proposed by the vendor and the amount of emphasis laid on Training the employees schedule details, locations,	A note on training containing <ul style="list-style-type: none"> <li>a) Training model</li> <li>b) Approach</li> <li>c) Deliverables</li> </ul>	Yes / No	

S. No.	Specific Requirements	Documents Required	Compliance	Reference & Page Number
	sessions and their description			
9.	<b>Certifications and Credentials:</b> Quality of processes (SEI-CMMi, ISO, Six Sigma), Security etc.	A copy of certificates	Yes / No	
10.	<b>Profile of proposed team members:</b> Relevant assignment experience / Years of experience / Number of Certifications in Technology specific to Solution proposed (Microsoft / Oracle certification / J2EE etc)	Form 6, 7 and 8	Yes / No	
11.	<b>Inclusion of MSMEs in Project Delivery</b>	Letter of evidence and commitment that MSME will be contracted the required value of work	Yes / No	
12.	Tools and Assets As per requirement specified in Technical evaluation)	Tools and Assets which could be leveraged for the assignment [for e.g. Test Case Builders, Effort Estimators, PMU Tool, Load testing etc., depending on the relevance to the Scope of work]  A note and demonstration of the Tool/Assets	Yes / No	
13.	Manufacturers'/Producers' Authorization Form	Form 9	Yes / No	
14.	No Conflict of Interest Declaration	Form 10	Yes / No	
15.	Power of Attorney Template (for consortium)	Form 11	Yes / No	
16.	Earnest Money Deposit	Demand Draft / Bank Guarantee (Form 12)	Yes / No	
17.	Document Fee	Demand Draft	Yes / No	
18.	Power of Attorney	Copy of Power of Attorney in the name of the Authorized signatory	Yes / No	
19.	Particulars of the Bidders	As per Form 3	Yes / No	

## Form 2: Letter of Proposal

To:

<Location, Date>

<Name>

<Designation>

<Address>

<Phone Nos.>

<Fax Nos.>

<email id>

**Subject:** Submission of the Technical bid for <Name of the Systems Implementation assignment>

Dear Sir/Madam,

1. Technical Response

We confirm having submitted this proposal as required by you in your Request for Proposal document. In case you require any other further information/documentary proof in this regard for evaluation of our bid, we agree to furnish the same in time to your satisfaction.

2. Bid Security

We have enclosed a bid security as per this RFP. This bid security is liable to be forfeited in accordance with the provisions of bid documents.

3. Deviations

We declare that all the services shall be performed strictly in accordance with the bid documents except for the variations and deviations, all of which have been detailed out exhaustively in the Statement of Deviations from Technical Requirements, irrespective of whatever has been stated to the contrary anywhere else in our bid.

Further we agree that additional conditions, if any, found in the bid documents, other than those stated in deviation schedule, shall not be given effect to.

4. Performance Bank Guarantee

We hereby declare that in case the contract is awarded to us, we shall submit the contract performance bank guarantee in the form prescribed in this RFP.

5. Validity of this Bid

We agree to abide by this tender response for a period of 180 days from the date of opening of the bid and it shall remain binding upon us with full force and virtue, until within this period a formal contract is prepared and executed, this tender response, together with your written acceptance thereof in your notification of award, shall constitute a binding contract between us and <Nodal Agency>.

6. We undertake, if our proposal is accepted, to adhere to the implementation plan put forward in RFP or such adjusted plan as may subsequently be mutually agreed between us and <Nodal Agency> or its appointed representatives.
7. We hereby declare that our bid is made in good faith, without collusion or fraud and the information contained in the bid is true and correct to the best of our knowledge and belief.
8. We understand that our bid is binding on us and that you are not bound to accept a Bid you receive.
9. It is hereby confirmed that I/We are entitled to act on behalf of our company/ corporation/ firm/ organization and empowered to sign this document as well as such other documents, which may be required in this connection.

Thanking you,  
Yours faithfully

(Signature of the Authorized signatory of the Bidder)

Name :  
Designation :  
Seal :  
Date :  
Place :

Business Address

**Form 3: Project Citation Format**

Relevant IT project experience (provide no more than 5 projects in the last 5 years)	
<b>General Information</b>	
Name of the project	
Client for which the project was executed	
Name and contact details of the client	
<b>Project Details</b>	
Description of the project	
Scope of services	
Service levels being offered/ Quality of service (QOS)	
Technologies used	
Outcomes of the project	
<b>Other Details</b>	
Total cost of the project	
Total cost of the services provided by the respondent	
Duration of the project (no. of months, start date, completion date, current status)	
<b>Other Relevant Information</b>	
Letter from the client to indicate the successful completion of the projects	
Copy of Work Order	



### Form 4: Proposed Solution

Technical approach, methodology and work plan are key components of the Technical Proposal. This needs to be provided for :

1. Application Software
2. IT Infrastructure
3. Data Migration
4. Departmental Front Windows
5. Record Room Management
6. Regional Dispatch and Receipt Centres
7. Central Help Desk
8. Training
9. Site Preparation
10. Helpdesk
11. Service Charge Collection

You are suggested to present Approach and Methodology divided into the following sections for each of the above areas:

- a) Solution Proposed
- b) Understanding of the project (how the solution proposed is relevant to the understanding)
- c) Technical Approach and Methodology

For all the hardware and related software, warrantee etc. needs to be provided as per Forms 4 A, 4B and 4C.

### Form 4 A : Solution Proposed

S. No	Proposed Solution (Provide the Product Name or fill Custom Built, in case of a new development)	Version & Year of Release	OEM	Features & Functionalities	O&M Support (Warranty/ATS/ : as required as per RFP)	Reference in the Submitted Proposal (Please provide page number/section number/ volume)

**Form 4 B : Bill of Material (Softwares)**

S. No	Item	Proposed Solution (Provide the Product Name or fill Custom Built, in case of a new development)	Unit of Measurement	Number of Licenses (Development Environment)	Number of Licenses (UAT)	Number of Licenses (Training)	Number of Licenses (Data Center Production)	Number of Licenses (DR Site)

**Form 4 C : Bill of Material (Infrastructure)**

For each hardware, provide the following information in a table

- (i) Reference of the server/storage information in the Submitted Proposal (Please provide page number/section number/ volume)
- (ii) Services proposed to be hosted on the Server
- (iii) Quantity
- (iv) Make and Model
- (v) Year of Introduction
- (vi) Operating System along with version (if applicable)
- (vii) Processor and Number of Cores Offered (if applicable)
- (viii) Architecture (RISC/EPIC/CISC) (if applicable)
- (ix) RAM/HDD/LAN Ports/ HBA (as relevant)
- (x) Additional Information as required to indicate the compliance to the requirements in the RFP (ex, Capacity, Disk Space) (if applicable)

**Form 4 D : Services Description**

For the services provided by the PPP Vendor, the following needs to be provided :

1. Process documentation
2. Service levels
3. Manpower deployed
4. Quality adherence process
5. Check & Controls
6. Details of sub-contractor (if relevant)

**Form 5: Proposed Work Plan**

No	Activity <sup>1</sup>	Calendar Months													
		1	2	3	4	5	6	7	8	9	10	11	12	n	
1															
2															
3															
4															
5															
N															

- 1 Indicate all main activities of the assignment, including delivery of reports (e.g.: inception, interim, and final reports), and other benchmarks such as Nodal Agency approvals. For phased assignments indicate activities, delivery of reports, and benchmarks separately for each phase.
- 2 Duration of activities shall be indicated in the form of a bar chart.
- 3 All activities should meet the 8/80 criteria i.e should at least take 8 hours and a maximum of 80 hours.

**Form 6: Team Composition**

Name of Staff with qualification and experience	Area of Expertise	Position Assigned	Task Assigned	Time committed for the engagement

**Form 7: Curriculum Vitae (CV) of Key Personnel**

<b>General Information</b>	
Name of the person	
Current Designation / Job Title	
Current job responsibilities	
Proposed Role in the Project	
Proposed Responsibilities in the Project	
Academic Qualifications: <ul style="list-style-type: none"> <li>• Degree</li> <li>• Academic institution graduated from</li> <li>• Year of graduation</li> <li>• Specialization (if any)</li> <li>• Key achievements and other relevant information (if any)</li> </ul>	
Professional Certifications (if any)	
Total number of years of experience	
Number of years with the current company	
Summary of the Professional / Domain Experience	
Number of complete life cycle implementations carried out	
The names of customers (Please provide the relevant names)	
Past assignment details (For each assignment provide details regarding name of organizations worked for, designation, responsibilities, tenure)  Prior Professional Experience covering: <ul style="list-style-type: none"> <li>• Organizations worked for in the past               <ul style="list-style-type: none"> <li>○ Organization name</li> <li>○ Duration and dates of entry and exit</li> <li>○ Designation Location(s)</li> <li>○ Key responsibilities</li> </ul> </li> <li>• Prior project experience               <ul style="list-style-type: none"> <li>○ Project name</li> <li>○ Client</li> <li>○ Key project features in brief</li> <li>○ Location of the project</li> </ul> </li> </ul>	

<ul style="list-style-type: none"><li>○ Designation</li><li>○ Role</li><li>○ Responsibilities and activities</li><li>○ Duration of the project</li></ul> <p>Please provide only relevant projects.</p>	
Proficient in languages (Against each language listed indicate if speak/read/write)	

**Form 8: Deployment of Personnel**

No	Name of Staff	Staff input in Months (in the form of a bar chart) <sup>2</sup>														Total staff man-months proposed
		1	2	3	4	5	6	7	8	9	10	11	12	n	Total	
1																
2																
3																
N																
										Total						

1. Professional Staff the input should be indicated individually; for Support Staff it should be indicated by category
2. Months are counted from the start of the assignment.



Full time input



Part time input

## Form 9: Manufacturers' /Producers' Authorization Form

No. Date:

To:

OEM Authorization Letter

Dear Sir:

**Ref: Your RFP Ref: [\*] dated [\*]**

We who are established and reputable manufacturers / producers of \_\_\_\_\_  
having factories / development facilities at (*address of factory / facility*) do hereby authorize M/s  
\_\_\_\_\_ (*Name and address of Agent*) to submit a Proposal, and sign the contract  
with you against the above Proposal Invitation.

We hereby extend our full guarantee and warranty for the Solution, Products and services offered by  
the above firm against this Proposal Invitation.

We also undertake to provide any or all of the following materials, notifications, and information  
pertaining to the Products manufactured or distributed by the Supplier:

- a. Such Products as the Bank may opt to purchase from the Supplier, provided, that this option  
shall not relieve the Supplier of any warranty obligations under the Contract; and
- b. in the event of termination of production of such Products:
  - i. advance notification to the Bank of the pending termination, in sufficient time to  
permit the Bank to procure needed requirements; and
  - ii. Following such termination, furnishing at no cost to the Bank, the blueprints, design  
documents, operations manuals, standards, source codes and specifications of the  
Products, if requested.

We duly authorize the said firm to act on our behalf in fulfilling all installations, Technical support  
and maintenance obligations required by the contract.

Yours faithfully,

**(Name)**

**(Name of Producers)**

*Note: This letter of authority should be on the letterhead of the manufacturer and should be signed  
by a person competent and having the power of attorney to bind the manufacturer. The Bidder in its  
Proposal should include it.*



## Form 10: No Conflict of Interest Declaration

### <On Letter head of Bidding Organization>

**To**

<Name of Government Department/Nodal Agency>  
<Address of Government Department/Nodal Agency>,  
<Telephone Contact of Government Department/Nodal Agency>  
<Email of Government Department/Nodal Agency>

### **Sub: Self Certificate regarding No Conflict of Interest**

Sir,

This is to affirm that we do not have any existence of, absence of, or potential for conflict of interest on our part due to prior, current, or proposed contracts, engagements, or affiliations with the <Name of Government Department/Nodal Agency> or its nominated / associated agencies, which shall impede us from bidding for this Project "Implementation of e-Governance Solution and Services in <Name of Assignment> for <Name of Government Department/Nodal Agency>.

Thanking you,  
Yours faithfully

(Signature of the Authorized signatory of the Bidding organization)

**Name** :  
**Designation** :  
**Seal** :  
**Date** :  
**Place** :  
  
**Business Address** :

### Form 11: Power of Attorney Template in favour of Lead Bidder

Know by all men by these presents, We.....(Name of the Bidder and address of their registered office) do hereby constitute, appoint and authorize Mr. / Ms.....(name and residential address of Power of Attorney holder) who is presently employed with us and holding the position of .....

as our attorney, to do in our name and on our behalf, all such acts, deeds and things necessary in connection with or incidental to our Proposal for the Implementation of e-Governance in <Name of Government Department/Ministry> including signing and submission of all documents and providing information / responses to <Name of Government Department/Nodal Agency>, representing us in all matters before <Name of Government Department/Nodal Agency>, and generally dealing with <Name of Government Department/Nodal Agency> in all matters in connection with our Proposal for the said Project.

We hereby agree to ratify all acts, deeds and things lawfully done by our said attorney pursuant to this Power of Attorney and that all acts, deeds and things done by our aforesaid attorney shall and shall always be deemed to have been done by us.

For

---

Name:

Designation:

Accepted,

..... (Signature)

(Name, Title and Address of the Attorney)

**Note:**

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required the same should be under common seal affixed in accordance with the required procedure.*
- *The Power of Attorney shall be provided on Rs.100/- stamp paper.*
- *The Power of Attorney should be supported by a duly authorized resolution of the board of directors of the Bidder authorizing the person who is issuing this power of attorney on behalf of the Bidder*

## Form 12: Bank Guarantee for Earnest Money Deposit

To,

<Name>

<Designation>

<Address>

<Phone Nos.>

<Fax Nos.>

<email id>

Whereas <<Name of the bidder>> (hereinafter called 'the Bidder') has submitted the bid for Submission of RFP # <<RFP Number>> dated <<Date>> for <<Name of the assignment>> (hereinafter called "the Bid") to <<Nodal Agency>>

Know all Men by these presents that we << >> having our office at <<Address>> (hereinafter called "the Bank") are bound unto the <<Nodal Agency>> (hereinafter called "the Purchaser") in the sum of Rs. <<Amount in figures>> (Rupees <<Amount in words>> only) for which payment well and truly to be made to the said Purchaser, the Bank binds itself, its successors and assigns by these presents. Sealed with the Common Seal of the said Bank this <<Date>>

The conditions of this obligation are:

1. If the Bidder having its bid withdrawn during the period of bid validity specified by the Bidder on the Bid Form; or
2. If the Bidder, having been notified of the acceptance of its bid by the Purchaser during the period of validity of bid
  - (a) Withdraws his participation from the bid during the period of validity of bid document; or
  - (b) Fails or refuses to participate in the subsequent Tender process after having been short listed;

We undertake to pay to the Purchaser up to the above amount upon receipt of its first written demand, without the Purchaser having to substantiate its demand, provided that in its demand the Purchaser will note that the amount claimed by it is due to it owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions.

This guarantee will remain in force up to <<insert date>> and including <<extra time over and above mandated in the RFP>> from the last date of submission and any demand in respect thereof should reach the Bank not later than the above date.

**NOTWITHSTANDING ANYTHING CONTAINED HEREIN:**

- I. Our liability under this Bank Guarantee shall not exceed Rs. <<Amount in figures>> (Rupees <<Amount in words>> only)
- II. This Bank Guarantee shall be valid upto <<insert date>>)
- III. It is condition of our liability for payment of the guaranteed amount or any part thereof arising under this Bank Guarantee that we receive a valid written claim or demand for payment under this Bank Guarantee on or before <<insert date>>) failing which our liability under the guarantee will automatically cease.

(Authorized Signatory of the Bank)

Seal:

Date:

## Appendix II: Financial Proposal Template

### Form 1: Covering Letter for Commercial Proposal

To:

<Location, Date>

<Name>

<Designation>

<Address>

<Phone Nos.>

<Fax Nos.>

<email id>

**Subject:** Submission of the Financial Proposal for <Provide Name of the PPP Assignment>

Dear Sir/Madam,

We, the undersigned, offer to provide the Implementation services for <Title of PPP Implementation Services> in accordance with your Request for Proposal dated <Date> and our Proposal (Technical and Financial Proposals). Our attached Financial Proposal for each transaction as defined in the RFP is <<Service Charge per transaction>>. We understand that the service charges would be governed as per the draft Contract Agreement provided along with the RFP document.

#### 1. PRICE AND VALIDITY

- All the prices mentioned in our Proposal are in accordance with the terms as specified in the RFP documents. All the prices and other terms and conditions of this Proposal are valid for a period of <days> calendar days from the date of opening of the Proposal.
- We hereby confirm that our prices include all taxes. However, all the taxes are quoted separately under relevant sections.
- We have studied the clause relating to Indian Income Tax and hereby declare that if any income tax, surcharge on Income Tax, Professional and any other corporate Tax is altered under the law, it shall be governed as per the draft Contract Agreement.

#### 2. UNIT RATES

We have indicated in the relevant schedules enclosed, the unit rates for the purpose of on account of payment as well as for price adjustment in case of any increase to / decrease from the scope of work under the contract.

#### 3. DEVIATIONS

We declare that all the services shall be performed strictly in accordance with the Proposal documents except for the variations and deviations, all of which have been detailed out exhaustively in the following statement, irrespective of whatever has been stated to the contrary anywhere else in our Proposal.

Further we agree that additional conditions, if any, found in the Proposal documents, other than those stated in deviation schedule, shall not be given effect to.

**4. PROPOSAL PRICING**

We further confirm that the prices stated in our Proposal are in accordance with your Instruction to Bidders included in Proposal documents.

**5. QUALIFYING DATA**

We confirm having submitted the information as required by you in your Instruction to Bidders. In case you require any other further information/documentary proof in this regard before evaluation of our Proposal, we agree to furnish the same in time to your satisfaction.

**6. PROPOSAL PRICE**

We declare that our Proposal Price is for the entire scope of the work as specified in the RFP. These prices are indicated Commercial Proposal attached with our Proposal as part of the Proposal.

**7. PERFORMANCE BANK GUARANTEE**

We hereby declare that in case the contract is awarded to us, we shall submit the Performance Bank Guarantee as specified in this RFP document.

Our Financial Proposal shall be binding upon us subject to the modifications resulting from Contract negotiations, up to expiration of the validity period of the Proposal, i.e., [Date].

We understand you are not bound to accept any Proposal you receive.

We hereby declare that our Proposal is made in good faith, without collusion or fraud and the information contained in the Proposal is true and correct to the best of our knowledge and belief.

We understand that our Proposal is binding on us and that you are not bound to accept a Proposal you receive. We confirm that no Technical deviations are attached here with this commercial Proposal.

Thanking you,

We remain,

Yours sincerely,

**Authorized Signature:**

**Name and Title of Signatory:**

**Name of Firm:**

**Address:**

**Form 2: Financial Proposal**

Number of Transactions Guaranteed in the First Year (X1) : <To be provided by Nodal Agency>

Service Charge Per Transaction : **TPC (defined below) / X1** = <<To be provided by Bidder, as per the indicated formula>>

*[The charges of other services should be indexed to the above service charges. This helps in comparing the two bids in case there are multiple services which cannot be linked to the main service]*

**Form 2 A : Summary of Cost Component**

S. No.	Item	Total Price	Taxes in % (wherever applicable)	Total cost (total price + taxes)
a)	IT Infrastructure costs including N/W Equipment (other than DC / DR) (A1)			
b)	Data Centre / Disaster Recovery Site Costs including N/W Equipment (A2)			
c)	Networking Costs (A3)			
d)	Application related Costs (A4)			
e)	Site Preparation Costs (A5)			
f)	Manpower Costs (A6)			
g)	Data Migration Costs (A7)			
h)	Training Costs (A8)			
i)	Operating Cost (A10)			
j)	Additional Infrastructure for existing system (A11)			
k)	Any Other (A12)			
l)	Less Value of Existing Infrastructure (Buy-Back) (A13)			
m)	Data Digitization (A14)			
n)	Technical Experts Man-Month Rate (A15)			
<b>Total cost of the project inclusive of taxes and any other levies &amp; duties (TPC):</b> <b>In Words: &lt;Please specify&gt;</b> <b>In figures: &lt;Please specify&gt;</b>				

**Note:** The commercial figure quoted above is an all-inclusive figure – inclusive of out-of pocket expenses and all taxes, duties, etc payable. No out-of-pocket expenses will be reimbursed separately.

## Form 2 B : Details of Cost Components

Note:

- Bidders are required to adhere to the format and order of various locations and components indicated in the excel sheet.
- Other than the components listed, Bidder must ensure that any other component whose cost has been included to arrive at the Total Project Cost (TPC) is listed individually and as a separate item. Additional rows and columns may be added in the respective tables at the end, wherever necessary for details of these additional components
- All System Software / Licenses etc should also be mentioned as a separate item

Please refer the attached Excel Sheet “Format – Financial Bid” for the detailed format for submission of Financial Bid.

### A1: IT Infrastructure including Networking equipment (All locations other than equipment at Data Centre and Disaster Recovery Site) costs

S. No.	Location			Min Users / Counters	Proposed Users /	QUANTITY / No. of UNITS															
						Thin Clients	Desktops	Laptops	Laser Printers	Network Printers	Scanners	Photocopier	POS terminal	PDA	QMS	UPS	Generator	LAN	Router	Switch	Others (specify)
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	
<b>DEPARTMENTAL OFFICES</b>																					
1.	Div	1	...																		
2.	Div	2	...																		
3.	Div	3	...																		
4.	Div	4	...																		
5.	Div	5	...																		
6.	Dist	1	...																		
7.	Dist	2	...																		
<b>FRONT WINDOWS</b>																					
...	...	1	...																		
...	...	2	...																		
...	...	3	...																		
...	...	4	...																		
...	...	5	...																		
<b>DISPATCH AND RECEIPT</b>																					
...	...	1	...																		
...	...	2	...																		



S. No.	Location			Min Users / Counters	Proposed Users /	QUANTITY / No. of UNITS															
						Thin Clients	Desktops	Laptops	Laser Printers	Network Printers	Scanners	Photocopier	POS terminal	PDA	QMS	UPS	Generator	LAN	Router	Switch	Others (specify)
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	
...	...	3	...																		
...	...	4	...																		
...	...	5	...																		
<b>HELPER</b>																					
...	...	...	<...																		
<b>DISPATCH AND RECEIPT</b>																					
...	...	...	...																		
...	...	...	...																		
...	...	...	...																		
<b>TOTAL UNITS (ALL - RR)</b>						0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Infrastructure Cost (per unit)																					
One time Infra Installation/Testing / Misc Charges per Unit																					
Annual Maintenance Cost per Unit																					
Period for which Maintenance Provided (years)																					
<Tax 1>				<Specify %>																	
<Other>				<Specify %>																	
<b>Sub total (i)</b>			0			0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

## A2: Data Centre and Disaster Recovery Site Costs including Networking Equipment

### Data Centre Procurement

- Only for components that are to be procured by the PPP Vendor for establishment of Data Centre *[or gap components required for the State Data Centre]*
- Any system software required for the equipments listed below mentioned as a separate item

S. No	Component (including Networking equipment if any at Data Centre)	Quantity of Components procured	Infrastructure Cost (per unit)	One time Infrastructure Installation and Testing / Miscellaneous Charges per Unit	Annual Maintenance Cost per Unit	Period for which Maintenance provided	Tax (T)	Other (O)	Total Cost
-------	--	---------------------------------	--------------------------------	---	----------------------------------	---------------------------------------	---------	-----------	------------

		(X)	(Y)	(Z)	(M)	(P)	<Specify %>	<Specify %>	(X * (Y+(P*M)+Z) + T+O)
1.	Equipment 1								
	Equipment 2								
	.....								
	Equipment n								
Sub Total (i)									

**Disaster Recovery Site Procurement**

- a) Only for components that are to be procured by the PPP Vendor for establishment of Disaster Recovery Site
- b) Any system software required for the equipments listed below mentioned as a separate item

S. No.	Component	Quantity of Components procured	Infrastructure Cost (per unit)	One time Infrastructure Installation and Testing / Miscellaneous Charges per Unit	Annual Maintenance Cost per Unit	Period for which Maintenance provided	Tax (T)	Other (O)	Total Cost
	(including Networking equipment if any at Disaster Recovery Site)								
		(X)	(Y)	(Z)	(M)	(P)	<Specify %>	<Specify %>	(X * (Y+(P*M)+Z) + T+O)
1	Equipment 1								0
2	Equipment 2								0
3	.....								0
	Equipment n								0
Sub Total (iii):									0

**A3: Networking Costs****A3-i: Connectivity of Data Centre with DR Site and Helpdesk**

S. No.	Component	One time Laying / and Testing / Miscellaneous Charges	Annual Bandwidth Charges (B)	Period for which connectivity provided	Tax (T)	Other (O)	Total Cost
--------	-----------	---	------------------------------	--	---------	-----------	------------

		(C)	(B)	(P)	<Specify %>	<Specify %>	(C + B * P) + T + O
1.	Leased line connectivity between DC and DR Site (including network redundancy)						
Sub Total (i):							0
S. No.	Component	Internet Charges per user	Annual Recurring Cost	No. of Users	Tax (T)	Other (O)	Total Cost
		(I)	(R)	(N)	<Specify %>	<Specify %>	N * (I + R * 5) + T + O
2.	Internet Charges						0
Sub Total (ii):							0

#### A3-ii: Charges for Additional Bandwidth (over and above 10 Kbps per user)

S. No.	Location			Additional Bandwidth per User	Total Additional Bandwidth	Annual Additional Bandwidth Charges	Period for which Bandwidth provided	Tax (T)	Other (O)	Total Cost
1	2	3	4	7	8	(B)	(P)	<Specify %>	<Specify %>	(B * P) + T + O
1.										
2.										
3.										
4.										
5.										
Sub total (iii)										
Total A3: Sub Total (i) + Sub Total (ii) + Sub Total (iii)							0			

#### A4: Application related Costs

##### A4-1: COTS Product

S.	Name of the module	Cost of	No. of Licenses	Rate per License	Total Cost
----	--------------------	---------	-----------------	------------------	------------

No.		Module (M)	(N)	(L)	M+ (N*L)
1.	1	User Management			
	2	Workflow Management			
	3	Smart Forms			
	4	Grievance Module			
	5	Helpdesk			
	6	Record Rooms			
	7	Dispatch and Receipt			
	8	Any other (not mentioned above)			
	9	MIS			
	...				
	...				
	...				
	...				
	...				
	...				
	...				
	...	Portal			
	...	Others (Please specify)			
	Tax (T)			<Specify %>	
2.	Total cost of Customization, integration, development and deployment of the solution as per requirements mentioned in the RFP				
	Tax (T)			<Specify %>	
	<b>Sub Total (ii):</b>				0

**A4-2: Be-Spoke Development / Enhancement of existing Application**

S. No.	Name of the module		No. of Composite Man-Months Effort	Composite Man-Month Rate	Total Cost M+ (N*L)
			(M)	(N)	
1.	1	User Management			
	2	Workflow Management			
	3	Smart Forms			
	4	Grievance Module			
	5	Helpdesk			
	6	Record Rooms			
	7	Dispatch and Receipt			
	8	Any other (not mentioned above)			
	9	MIS			
	...				
	...				
	...				
	...				

S. No.	Name of the module		No. of Composite Man-Months Effort	Composite Man-Month Rate	Total Cost M+ (N*L)
			(M)	(N)	
		***			
		***			
		***			
	***	Portal			
	***	Others (Please specify)			
	Tax (T)			<Specify %>	
2.	Total cost of Customization, integration, development and deployment of the solution as per requirements mentioned in the RFP				
	Tax (T)			<Specify %>	
	<b>Sub Total (ii):</b>				0

**A4-3: Maintenance Cost**

S. No.	Category (COTS / Be-Spoke Development)	Man-Months Estimated Annually (A)	Man-Month Rate	No. of Years	Total Cost (A*R*Y)
			(R)	(Y)	
1.	Annual Maintenance Charges for Application				0
	Tax (T)			<Specify %>	
Sub Total (iii):					0
Total A4: Sub Total (i) + Sub Total (ii) + Sub Total (iii)					0

**A5: Site Preparation Cost**

S. No.	Location	Cost Per User (X)	Total No. of Users (Y)	Annual Site Maintenance Cost per User (M)	Period for which Maintenance Provided (P)	Tax (T)	Other (O)	Total Cost (X*Y) + (Y*M*P) + T + O
						<Specify %>	<Specify %>	
1.	Head Office							
2.	District Offices							
3.	Divisional Offices							
4.	****							
***	****							
***	Others (Please specify)							

<b>Total A5:</b>					
------------------	--	--	--	--	--

**A6: Manpower Costs**

In case the number of manpower provided by the Bidder is different for peak and non-peak periods, the same may be added as a separate line item in the table below.

Eg. Helpdesk (Peak Period) and Helpdesk (Non-Peak Period) may be added as 2 separate line items with the same Man-Month rates

S. No.	Location	No. proposed by Implementation Partner	Man month rates	Period (months)	Total Cost
		(B)	(R )	(M)	(B * R * M)
1.	Front Window Operator				
2.	Help Desk Operator				
3.	Record Room Operator				
4.	Dispatch and Receipt Operator				
5.	Field Level Technical Support				
6.	Manpower for day-to-day changes / support on Application				
7.	Others (Please specify)				
	Tax (T)			<Specify %>	
<b>Total A6 :</b>		<b>0</b>			

**A7: Data Migration**

S. No.	Category	Cost	Tax (T)	Total Cost
		(C )	<Specify %>	(C + T)
1.	Cost of Migrating Data from existing system to new system			
2.	Testing of migrated data			
3.	Any other associated cost			
<b>Total A7:</b>				<b>0</b>

**A8: Training Costs**

S. No.	Training Category	Cost of training per Participant* (A)	No. of Participant (B)	Total Cost (A)*(B)
<b>Internal Staff members</b>				
1.	Sensitization Training			
2.	Project Management Training			
3.	Training on new business processes			

S. No.	Training Category	Cost of training per Participant*	No. of Participant	Total Cost (A)*(B)
4.	Hands on Training on usage of different modules/ Functions of the Software Application			
5.	Basic Computer Skills			
6.	Specialized Technology Training			
7.	Others (Please specify)			
	Tax (T)		<Specify %>	
<b>Sub Total (i):</b>				
S. No.	Training Category	Cost of training per Batch (A)	Approx No. of Participants (B)	Total Cost (A)*(B)
<b>External members</b>				
8.	Workshop on change in processes of taxpayer interface with the Department			
9.	Others (Please specify)			
	Tax (T)		<Specify %>	
<b>Sub Total (ii):</b>				
<b>Total A8: Sub Total (i) + Sub Total (ii)</b>				

**A10: Operating Cost**

S. No.	Category	Monthly Charges (A)	Months (M)	Tax (T )	Total Cost (A*M) + T	
				<Specify %>		
<b>DG Set running Cost (Fuel &amp; other maintenance charges)</b>						
1.	DG Set Category 1					
2.	DG Set Category 2					
3.	.....DG Set Category n					
<b>Storage Media</b>						
1.	.....					
2.	.....					
<b>Sub Total (i):</b>						
S. No.	Category	Cost per User per Month (A)	Months (M)	No. of Users (B)	Tax (T )	Total Cost (A*M*B) + T
					<Specify %>	
<b>Other Consumables Cost</b>						

3.	.....					
4.	.....					
<b>Sub Total (ii):</b>						
<b>Total A10: Sub Total (i) + Sub Total (ii)</b>						

**A11: Additional Infrastructure for existing system**

a) Any system software required for the equipments listed below mentioned as a separate item

	Component	Quantity of Components procured	Infrastructure Cost (per unit)	One time Infrastructure Installation and Testing / Miscellaneous Charges per Unit	Annual Maintenance Cost per Unit	Period for which Maintenance provided	Tax (T)	Other (O)	Total Cost
S. No.		(X)	(Y)	(Z)	(M)	(P)	<Specify %>	<Specify %>	( X * (Y+(P*M)+Z))+ T+O
1.	Equipment 1								
	Equipment 2								
	.....								
	Equipment n								
<b>Total A11:</b>									

**A12: Any other Cost heads not covered from A1-A11**

S. No.	Component				Total Cost
1.	<Component>				
	<Component>				
	<Component>				
	<Component>				
<b>Total A12:</b>					

**A13: Any details of Buyback value that Bidder may want to give**

S. No.	Component				Total Cost
--------	-----------	--	--	--	------------



1.	<Component>				
	<Component>				
	<Component>				
	<Component>				
<b>Total A13:</b>					

**A14: Data Digitization**

S. No.	Category	Cost of Digitization
1	Cost of digitization (per Kb data digitized)	
2	Cost of verification (per Kb data digitized)	
3	Cost of Scanning per Page	
4	Other (Misc)	
<b>Total A14:</b>		

**A15: Technical Experts Man-Month Rates**

S. No.	Category	Total Cost
1.	Developer	
2.	System Architect	
3.	Project Manager	
4.	Test Lead	
5.	Composite Man-Month Rate for application support	
6.	Any other	
<b>TOTAL A15:</b>		

## Appendix III: Template for PBG & CCN

### Form 1: Performance Bank Guarantee

#### PERFORMANCE SECURITY:

<Name>  
<Designation>  
<Address>  
<Phone Nos.>  
<Fax Nos.>  
<email id>

Whereas, <<name of the supplier and address>> (hereinafter called “the bidder”) has undertaken, in pursuance of contract no. <Insert Contract No.> dated. <Date> to provide Implementation services for <<name of the assignment>> to <Nodal Agency> (hereinafter called “the beneficiary”)

And whereas it has been stipulated by in the said contract that the bidder shall furnish you with a bank guarantee by a recognized bank for the sum specified therein as security for compliance with its obligations in accordance with the contract;

And whereas we, <Name of Bank> a banking company incorporated and having its head /registered office at <Address of Registered Office> and having one of its office at <Address of Local Office> have agreed to give the supplier such a bank guarantee.

Now, therefore, we hereby affirm that we are guarantors and responsible to you, on behalf of the supplier, up to a total of Rs.<Insert Value> (**Rupees <Insert Value in Words> only**) and we undertake to pay you, upon your first written demand declaring the supplier to be in default under the contract and without cavil or argument, any sum or sums within the limits of Rs. <Insert Value> (**Rupees <Insert Value in Words> only**) as aforesaid, without your needing to prove or to show grounds or reasons for your demand or the sum specified therein.

We hereby waive the necessity of your demanding the said debt from the bidder before presenting us with the demand.

We further agree that no change or addition to or other modification of the terms of the contract to be performed there under or of any of the contract documents which may be made between you and the Bidder shall in any way release us from any liability under this guarantee and we hereby waive notice of any such change, addition or modification.

This Guarantee shall be valid until <<Insert Date>>)

Notwithstanding anything contained herein:

- I. Our liability under this bank guarantee shall not exceed **Rs. <Insert Value> (Rupees <Insert Value in Words> only).**
- II. This bank guarantee shall be valid up to <Insert Expiry Date>)
- III. It is condition of our liability for payment of the guaranteed amount or any part thereof arising under this bank guarantee that we receive a valid written claim or demand for payment under this bank guarantee on or before <Insert Expiry Date>) failing which our liability under the guarantee will automatically cease.

**Form 2 : Change Control Notice (CCN) Format**

<b>Change Control Note</b>		<b>CCN Number:</b>
<b>Part A: Initiation</b>		
Title:		
Originator:		
Sponsor:		
Date of Initiation:		
<b>Details of Proposed Change</b>		
(To include reason for change and appropriate details/specifications. Identify any attachments as A1, A2, and A3 etc.)		
Authorized by :	Date:	
Name:		
Signature:	Date:	
Received by the PPP Vendor		
Name:		
Signature:		
<b>Change Control Note</b>		<b>CCN Number:</b>
<b>Part B : Evaluation</b>		
(Identify any attachments as B1, B2, and B3 etc.)		
Changes to Services, charging structure, payment profile, documentation, training, service levels and component working arrangements and any other contractual issue.		
<b>Brief Description of Solution:</b>		
<b>Impact:</b>		
<b>Deliverables:</b>		
<b>Timetable:</b>		

**Charges for Implementation:**

(including a schedule of payments)

**Other Relevant Information:**

(including value-added and acceptance criteria)

**Authorized by the Implementation  
Partner**

**Date:**

**Name:**

**Signature:**

## ANNEXURE I

### CONTRACT AGREEMENT FOR MODEL RFP TEMPLATE FOR PUBLIC PRIVATE PARTNERSHIP (TRANSACTION BASED PRICING MODEL) VENDOR

#### *Cross Utility of this document*

*While this document has been developed for PPP contracts, it has been structured to manage large and complex projects involved in e-Governance Service Delivery.*

*Since these projects are long duration projects, there are a lot of risks involving demand (number of transactions), Design, Maintenance, Technology, Inflation etc. It has been observed that in case the Government tries to pass-on these risks to the private sector during the procurement process, it has an adverse affect of the chances of success. This model contract agreement focuses on a partnerships approach where the risk is shared between the Government and private partner in the e-Governance journey.*

*Hence to that extent this Model RFP can be used for large, complex and long duration projects (more than 7 years) involving service delivery. Also this template can also be used for taking over a live project after the completion of the contract period of the incumbent vendor (i.e. less of development work and more of Operations and Maintenance work).*

ASSUMPTIONS: This model contract document for PPP was prepared based upon the following assumptions:

- This draft contract will be used in transactions that are significant in terms of scope and potential revenue and involve large, sophisticated solution that are well represented by consultants and legal advisers.
- This template agreement was designed to robustly address current industry issues and to address the legitimate interests of both PPP Vendor and the Government, with the goal of enhancing the success of PPP projects in India.
- This draft contract was designed to present relatively balanced terms and conditions so that many issues important to the Government are addressed immediately while still preserving PPP Vendor's room to compromise during negotiations. To the extent that the Government takes a partnership approach, PPP Vendor should consider taking out the risk element on the project and focus on the outcomes.

## Table of Contents

<b>SCHEDULES .....</b>	<b>7</b>
<b>1. DEFINITIONS .....</b>	<b>9</b>
1.1. Definitions.....	9
<b>2. AGREEMENT TERM; RENEWAL.....</b>	<b>9</b>
2.1. Agreement Term.....	9
2.2. Renewal.....	9
<b>3. SOLUTION DEVELOPMENT .....</b>	<b>12</b>
3.1. Base Services Commencement Date.....	12
3.2. Solution Development Services.....	12
3.3. Solution Development Plan.....	12
3.4. Conduct of the Solution Development.....	13
<b>4. SERVICES.....</b>	<b>15</b>
4.1. Overview.....	15
4.2. Base Services.....	15
4.3. Changing Nature of Services.....	15
4.4. Application Development Services.....	16
4.5. Disaster Recovery Services.....	17
4.6. New Services.....	17
4.7. No Exclusivity.....	19
4.8. Primary Supplier.....	19
4.9. Fundamental Assumptions.....	20
4.10. Ongoing Cooperation.....	23
4.11. Reliance on Instructions.....	23
4.12. <Nodal Agency> Service Responsibilities.....	23
4.13. Out of Scope Responsibilities and Acknowledgement.....	25
4.14. Third-Party Products.....	26
4.15. Excused Obligations.....	26
<b>5. PERFORMANCE METRICS.....</b>	<b>28</b>
5.1. Service Levels.....	28
5.2. Customer Satisfaction.....	30
5.3. Benchmarking.....	30
5.4. Liquidated Damages.....	30
<b>6. RESOURCES.....</b>	<b>34</b>
6.1. Transferred Assets.....	34
6.2. <PPP Vendor>-Managed Agreements.....	34
6.3. <Nodal Agency>-Owned and Leased Hardware.....	35
6.4. <Nodal Agency>-Licensed Software.....	36
6.5. <Nodal Agency>-Owned Software.....	36
6.6. <PPP Vendor> Software.....	37
6.7. Critical <PPP Vendor>-Licensed Software.....	38



6.8.	Additional Resources.....	38
6.9.	Consents.....	39
6.10.	Efficiency.....	39
6.11.	Technological/Industry Advancements.....	39
6.12.	Refresh; Maintenance.....	40
6.13.	Asset Obligations.....	42
6.14.	Non-Transferred <Nodal Agency> Property.....	42
6.15.	Preferred <Nodal Agency> Vendor.....	42
6.16.	Further Assurances.....	43
6.17.	Escrow Agreement.....	43
7.	<b>SERVICE LOCATIONS; HEALTH AND SAFETY .....</b>	<b>44</b>
7.1.	Service Locations.....	44
7.2.	Access to <Nodal Agency> Service Locations and Items.....	45
7.3.	Use of <Nodal Agency> Service Locations.....	45
7.4.	<Nodal Agency> Service Location Policies.....	45
7.5.	Relocation from <Nodal Agency> Service Locations.....	46
7.6.	Relocation resulting from Changes in Laws and Regulations.....	46
7.7.	Control of Service Locations.....	46
7.8.	Additional Facilities.....	47
7.9.	Health and Safety Provisions.....	47
8.	<b>RELATIONSHIP GOVERNANCE .....</b>	<b>49</b>
8.1.	<PPP Vendor> Account Representative.....	49
8.2.	<Nodal Agency> Account Representative.....	49
8.3.	Establishment of Service Management Steering Committee.....	49
8.4.	Key Management Positions.....	50
8.5.	Continuity of <PPP Vendor> Account Personnel.....	51
8.6.	Account Documentation.....	52
8.7.	Reports.....	52
8.8.	Meetings and Conference Calls.....	53
8.9.	Relationships with <Nodal Agency> Contractors.....	53
8.10.	<PPP Vendor> Subcontractors.....	54
8.11.	System Change Control.....	55
8.12.	Contract Change Control.....	55
9.	<b>HUMAN RESOURCE MATTERS.....</b>	<b>57</b>
9.1.	Transition of <Nodal Agency> Personnel.....	57
9.2.	General Principles Regarding <PPP Vendor> Personnel.....	57
9.3.	Limitations on Recruiting.....	57
10.	<b>PRICE &amp; PAYMENT .....</b>	<b>58</b>
10.1.	Service Charges.....	58
10.2.	Reimbursement of Expenses.....	58
10.3.	Pass-Through Expenses.....	58
10.4.	Retained Expenses.....	59
10.5.	Inflation Adjustments.....	59
10.6.	Invoices; Method of Payment; Finance Charges.....	60
10.7.	Proration.....	62

10.8.	Unused Credits.....	62
10.9.	Refundable Items.....	62
10.10.	Disputed Charges.....	62
10.11.	Taxes.....	63
11.	REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS .....	66
11.1.	<PPP Vendor> Representations and Warranties.....	66
11.2.	<Nodal Agency> Representations and Warranties.....	66
11.3.	Additional Undertakings.....	67
11.4.	Warranty Regarding <PPP Vendor> Work Product.....	68
11.5.	Pass-Through Warranties; Third-Party Software.....	69
11.6.	Disclaimer of Warranties.....	70
12.	CONFIDENTIALITY; SAFEGUARDING OF DATA.....	71
12.1.	Confidentiality.....	71
12.2.	<Nodal Agency> Data.....	73
12.3.	Unauthorised Acts.....	73
13.	PROPRIETARY RIGHTS.....	75
13.1.	Ownership of <Nodal Agency>-Owned Software.....	75
13.2.	Ownership of <PPP Vendor>-Owned Software.....	75
13.3.	Ownership of Work Product.....	75
13.4.	Embedded <PPP Vendor> Software.....	75
13.5.	Proprietary Items.....	76
13.6.	Knowledge Capital.....	77
14.	AUDIT RIGHTS .....	78
14.1.	Operational Audits.....	78
14.2.	Financial Audits.....	78
14.3.	General Principles Regarding Audits.....	79
14.4.	Audit Conferences.....	79
15.	INDEMNIFICATION .....	81
15.1.	Infringement Indemnity.....	81
15.2.	Indemnification Procedures.....	82
16.	LIMITATION OF LIABILITY AND RISK ALLOCATION .....	84
16.1.	Limitation of Liability.....	84
16.2.	Limitation on Category of Liability.....	84
16.3.	Contractual Limitation of Action.....	85
16.4.	Recourse.....	85
16.5.	Insurance.....	85
16.6.	Allocation of Risks; Acknowledgements and Applicability of Limitations.....	86
16.7.	Particular Liabilities.....	87
17.	TERMINATION .....	88
17.1.	Termination for Cause.....	88
17.2.	Termination for Convenience.....	89
17.3.	Termination for Existence of Benchmarking Condition.....	90

17.4.	Termination for Insolvency.....	90
17.5.	Extension of Termination Effective Date.....	90
17.6.	Termination Amounts.....	90
17.7.	Termination Assistance Services.....	91
17.8.	Survival of Provisions.....	91
18.	DISPUTES .....	92
18.1.	Informal Dispute Resolution.....	92
18.2.	Alternative Dispute Resolution.....	93
18.3.	Exceptions to Dispute Resolution Procedure.....	96
18.4.	Jurisdiction.....	96
19.	FORCE MAJEURE .....	97
19.1.	Force Majeure Events.....	97
20.	MISCELLANEOUS .....	99
20.1.	<Nodal Agency> Affiliates.....	99
20.2.	Injunctive Relief.....	99
20.3.	Assignment.....	100
20.4.	Cooperation; Consents.....	100
20.5.	Compliance with Laws and Regulations.....	100
20.6.	Relationship of Parties.....	101
20.7.	Notice.....	101
20.8.	Severability.....	102
20.9.	No Third-Party Beneficiaries.....	102
20.10.	Publicity.....	102
20.11.	Amendment.....	103
20.12.	Entire Agreement/Priority.....	103
20.13.	Governing Law.....	103
20.14.	Rules of Construction.....	103
20.15.	Inconsistencies.....	104
20.16.	Counterparts.....	104
SCHEDULE 1.1	.....	105

## SCHEDULES

*It may be noted that the following Schedules would be specific to the project. Hence this these Schedules would be appended with RFP template for Legal Agreement.*

*The Schedules have to be drafted for each project specific to it requirement during the course it is being finalized for a project by the Nodal Agency. The contents of these schedules are self explanatory with the title of these Schedules.*

Schedule 1.1	Definitions
Schedule 3.3(a)	Solution Development and Implementation Plan
Schedule 4.2	Base Services
Schedule 4.4(a)	Application Development Services
Schedule 4.4(b)	Common Elements of Acceptance Criteria
Schedule 4.4(c)	Acceptance Testing of Developed Applications
Schedule 4.5	Disaster Recovery Services
Schedule 4.9	Fundamental Assumptions
Schedule 4.12	<Nodal Agency> Service Responsibilities
Schedule 5.1	Service Levels
Schedule 6.1	Transferred Assets
Schedule 6.1-A	Transferred Equipment
Schedule 6.1-B	Transferred Third-Party Software Licenses
Schedule 6.1-C	Transferred Third-Party Equipment Leases
Schedule 6.1-D	Transferred Third-Party Service Agreements
Schedule 6.1-E	Transferred Tangible Personal Property
Schedule 6.1-F	Allocation of Purchase Price for Transferred Assets
Schedule 6.2(a)	<PPP Vendor>-Managed Agreements
Schedule 6.3(a)	<Nodal Agency>-Owned Hardware and <Nodal Agency> Leased Hardware
Schedule 6.4(a)	<Nodal Agency> Licensed Software
Schedule 6.5(a)	<Nodal Agency>-Owned Software
Schedule 7.1	Service Locations
Schedule 9.1	Employment Matters
Schedule 9.1-A	Employees Offered Employment
Schedule 10.1	Service Charges
Schedule 10.3(a)	Pass-Through Expenses
Schedule 10.4	Retained Expenses
Schedule 17.6(a)	Termination Amounts
Schedule 17.6(a)-A	Termination Fee
Schedule 17.7	Termination Assistance Services
Schedule 17.7-A	Description of Termination Assistance Services

**<PPP (IT/BUSINESS PROCESS) OUTSOURCING> AGREEMENT**

**dated \_\_\_\_\_**

**between**

**[<NODAL AGENCY>]**

**and**

**<PPP VENDOR><sup>1</sup>**

THIS <PPP (IT/BUSINESS PROCESS) OUTSOURCING> AGREEMENT (“Agreement”) is made on <date>

BETWEEN:

<Name of the Nodal Agency> [*Insert full legal name of <Nodal Agency>*], a [public limited company] whose registered office is at <address of Nodal Agency> (“<Nodal Agency>”); and

<PPP Vendor><PPP Vendor>, a <limited liability company > whose registered office is at <address> (“<PPP Vendor>”),

each a “Party” and together the “Parties.”

**INTRODUCTION:**

This Agreement provides the terms and conditions under which <PPP Vendor> will provide, and <Nodal Agency> will purchase, certain specified [*business process (or) transformational (or) information technology*] type of outsourcing services. [*Insert more detail for particular transaction and services to be provided*].

**THE PARTIES AGREE AS FOLLOWS:**

---

<sup>1</sup> Within the text of this template, we have included certain italicised clauses as “alternate” clauses which address certain specialised issues (e.g., international transactions) or alternative approaches to standard issues (e.g., exclusivity). See footnote discussion of issues accompanying such italicised provisions.

## 1. DEFINITIONS

### 1.1. Definitions.

As used in this Agreement, the terms set out in Schedule 1.1 will have the respective meanings set out therein. Other terms used in this Agreement are defined in the context in which they are used and will have the meanings therein indicated.

## 2. AGREEMENT TERM; RENEWAL

### 2.1. Agreement Term.

This Contract and the rights and obligations of the parties to this Contract shall take effect on the [date of this Contract][Effective Date]. Unless earlier terminated in accordance with the terms of this Agreement, the Service Period will commence on the Service Commencement Date and terminate on the earlier of:

- i. the Expiry Date; and
- ii. the Termination Date.

### 2.2. Renewal.

The term of this Agreement will automatically be renewed on the terms and conditions then in effect, including any inflation adjustment, or such other terms and conditions as the Parties otherwise agree, for successive one-year<sup>2</sup> periods unless either Party gives written notice to the other Party, at least [six] months before the scheduled date of expiration of the initial term or any renewal term, that the term of this Agreement will not be so extended.<sup>3</sup> The initial term of this Agreement, together with any such renewal terms, is referred to herein as the “Agreement Term.”

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<sup>2</sup> Nodal Agencies may seek longer-term renewal periods in order to lengthen the period of time before a full renegotiation

<sup>3</sup> Clause 17.5 gives the Nodal Agency the ability to extend the effective date of the expiration of the agreement for up to six months for termination transition purposes. This is a limited extension right designed to facilitate a smooth transition to another service provider. Nodal Agencies often seek the unilateral right to extend the agreement term on the then-existing pricing and other terms. These requested unilateral options may involve a possible term extension of up to five years. Vendors typically resist any long-term extension rights on the basis that the only circumstances in which the Nodal Agency would extend the agreement term would be in circumstances economically advantageous to the Nodal Agency (and disadvantageous to the vendor). Vendors typically want the ability to renegotiate such an extension.

### **2.3. Conditions Precedent**

Subject to express terms to the contrary, the rights and obligations under this Agreement shall take effect only upon fulfillment of all the Conditions Precedent set out below. However, Nodal Agency or its nominated agencies may at any time at its sole discretion waive fully or partially any of the Conditions Precedent for the Implementation Agency.

#### **(a). Conditions Precedent of the Implementing Partner**

The Implementation Agency shall be required to fulfill the Conditions Precedent in which is as follows:

- (i) to provide the Performance Security/Guarantee and other guarantees/ payments within <21 days> of the receipt of notification of award from the purchaser; and
- (ii) to provide the Nodal Agency or its nominated agencies certified true copies of its constitutional documents and board resolutions authorizing the execution, delivery and performance of this Agreement by the Implementation Agency.

#### **(b) Conditions Precedent of the Nodal Agency (needs to be customized)**

The Nodal Agency shall be required to fulfill the Conditions Precedent in which is as follows:

- (i) handing over of site
- (ii) Necessary clearances
- (iii) Approval of the Project by a Competent Authority, etc.

For the avoidance of doubt, it is expressly clarified that the obligations of the Parties except the financial obligations of Nodal Agency or its nominated agencies under this Agreement shall commence from the fulfillment of the Conditions Precedent as set forth above.

#### **(c) Extension of time for fulfilment of Conditions Precedent**

The Parties may, by mutual agreement extend the time for fulfilling the Conditions Precedent and the Term of this Agreement.

For the avoidance of doubt, it is expressly clarified that any such extension of time shall be subject to imposition of penalties on the Implementation Agency linked to the delay in fulfilling the Conditions Precedent.

#### **(d) Non-fulfillment of the Implementation Agency's Conditions Precedent**

In the event that any of the Conditions Precedent of the Implementation Agency have not been fulfilled within <21 days> of signing of this Agreement and the same have not been waived fully or partially by Nodal Agency or its nominated agencies, this Agreement shall cease to exist;

In the event that the Agreement fails to come into effect on account of non fulfillment of the Implementation Agency's Conditions Precedent, the Nodal Agency or its nominated agencies shall not be liable in any manner whatsoever to the Implementation Agency and the Nodal Agency shall forthwith forfeit the Performance Guarantee.

In the event that possession of any of the Nodal Agency or its nominated agencies facilities has been delivered to the Implementation Agency prior to the fulfillment of the Conditions Precedent, upon

the termination of this Agreement such shall immediately revert to Nodal Agency or its nominated agencies, free and clear from any encumbrances or claims.



### 3. SOLUTION DEVELOPMENT

#### 3.1. Base Services Commencement Date/"Go-Live".

As of <Date> or such other date as the Parties may mutually agree following completion of the Solution Development (the "Base Services Commencement Date"), <PPP Vendor> will assume operational responsibility for, and commence providing, the Base Services. <Nodal Agency> will retain responsibility for its operations that will comprise the Base Services until the Base Services Commencement Date.

#### 3.2. Solution Development Services.

As to be more fully described in the Solution Development Plan referred to below, <PPP Vendor> will perform such tasks ("Solution Development Services") as are necessary to commence the Base Services. Solution Development Services will include, as applicable, pre-solution planning, software application development, identification and employment of personnel (from <Nodal Agency> and elsewhere), assignment of appropriately trained personnel from within <PPP Vendor>'s organisation, engagement of subcontractors as appropriate, preparation of an <PPP Vendor> facility for the Services, migration to such <PPP Vendor> facility, acquisition of Hardware, Network equipments and resources necessary for the Base Services and appropriate coordination with third-party vendors, all as provided for in the Solution Development Plan (collectively, the "Solution Development").<sup>4</sup>

#### 3.3. Solution Development Plan.

- (a) The Parties will plan, prepare for and conduct the Solution Development in accordance with a written Solution Development plan (the "Solution Development Plan"). Schedule 3.3(a) sets out an initial draft of the Solution Development Plan.
- (b) The Solution Development Plan will include (i) the overall approach of the Solution Development; (ii) a schedule of Solution Development milestones and other activities, including test plans and acceptance criteria; (iii) a detailed description of the respective Solution Development tasks and responsibilities of <Nodal Agency> and <PPP Vendor>; (iv) details of certain personnel matters; and (v) other related information.
- (c) <PPP Vendor> will update and modify the Solution Development Plan from time to time, if appropriate. Each revision of the Solution Development Plan will include

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<sup>4</sup> Revise as appropriate to reflect the particulars of the project.

such modifications as may be reasonably requested by <Nodal Agency> that do not, individually or in the aggregate, materially<sup>5</sup> increase <PPP Vendor>'s costs for the Solution Development Services or delay completion of the Solution Development. *[The Parties will cooperate to finalise the Solution Development Plan at least [one] month before commencement of the Solution Development.]* The Solution Development Plan will constitute part of this Agreement.

### 3.4. Conduct of the Solution Development.<sup>6</sup>

- (a) <PPP Vendor> will plan and prepare for the Solution Development with <Nodal Agency>'s reasonable assistance. The objectives of the Parties during the Solution Development will be mutually to plan for and implement the Solution Development (i) to minimise disruption to <Nodal Agency>'s applicable operations and degradation in documented Service Levels and (ii) so that the Solution Development is completed in all material respects no later than the scheduled completion date specified in the Solution Development Plan.
- (b) The Solution Development will not commence, unless otherwise agreed, until both Parties are satisfied with the plans to conduct the Solution Development in such a manner as to minimise disruption to <Nodal Agency>'s applicable business processes and operations. Prior to the Solution Development, <PPP Vendor> will discuss with <Nodal Agency> all known <Nodal Agency>-specific material risks with regard to such material disruptions or material adverse effects, and will not proceed with the Solution Development until <Nodal Agency> is reasonably satisfied with the plans with regard to such risks.
- (c) <PPP Vendor> will be responsible for overall management of the Solution Development and to the extent within its control, will use reasonable efforts to keep the Solution Development on schedule. Each of the Parties will perform the tasks required of it by the Solution Development Plan in accordance with the schedule for the completion of such tasks. <Nodal Agency> will cooperate with <PPP Vendor> and provide to <PPP Vendor> such reasonable assistance, resources, information and other input to coordinate the Solution Development activities and to effect the Solution Development in a timely and efficient manner. Upon identification of any issues that would reasonably be expected to delay or otherwise adversely effect the

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<sup>5</sup> Confirm that PPP Vendor is willing to assume financial responsibility for "immaterial" increased costs.

<sup>6</sup> Even the best IT PPP projects can be difficult. Nodal Agency will often desire assurances that all will go smoothly (e.g., that the PPP vendor should be solely responsible for the planning and implementation of a the solution plan as well as for any disruptions in service or service levels as a result of the project implementation). The success of a project is dependent on the Nodal Agency's considerable cooperation, so to relieve them of responsibility will encourage the wrong behaviour and increase the risk in the project. A compromise position may be to provide a transition period in which service levels are measured but during which no service level credits are paid. In any event, the Nodal Agency must acknowledge and take responsibility for its role in facilitation the project implementation.

completion of any Solution Development activity, <PPP Vendor> will promptly notify <Nodal Agency> and the Parties will cooperate to establish a mutually acceptable action plan to minimise the delay or other adverse effect.

- (d) During the Solution Development, the <Nodal Agency> Account Representative and the <PPP Vendor> Account Representative, together with other appropriate representatives of the Parties, will periodically review the status of all Solution Development-related activities.
- (e) <Nodal Agency> may monitor, test and otherwise participate in the Solution Development, as <Nodal Agency> may from time to time reasonably request. If <PPP Vendor> determines that such activities may delay or otherwise adversely affect the Solution Development, <PPP Vendor> will notify <Nodal Agency> and the Parties will cooperate to establish a mutually acceptable resolution.

## 4. SERVICES

### 4.1. Overview.

During the Agreement Term, <PPP Vendor> will provide to <Nodal Agency>, and <Nodal Agency> will obtain from <PPP Vendor> (i) the Solution Development Services in accordance with Clause 3; (ii) the Base Services in accordance with Clause 4.2; (iii) the Application Development/Project/Transformational Services in accordance with Clause 4.4;<sup>7</sup> (iv) the Disaster Recovery Services in accordance with Clause 4.5; (v) the New Services in accordance with Clause 4.6; and (vi) the Termination Assistance Services in accordance with Clause 17.7 (collectively, the “Services”).

### 4.2. Base Services.

Commencing on the Base Services Commencement Date and during the remainder of the Agreement Term, <PPP Vendor> will provide to <Nodal Agency>, and <Nodal Agency> will obtain from <PPP Vendor>, the base services described in Schedule 4.2 (the “Base Services”). As more fully set out in Schedule 4.2,<sup>8</sup> the Base Services will generally consist of *[Insert non-exclusive, representative list of services]*.<sup>9</sup>

### 4.3. Changing Nature of Services.

Over the term of the Agreement, the Parties will evaluate new business processes, technology and improvements for application to the Services. Where commercially viable for <PPP Vendor> and after consultations with <Nodal Agency>, <PPP Vendor> may implement such improvements within the framework of the existing Services description and Charges.

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<sup>7</sup> Incorporate additional services as appropriate. Such services should be fully described in Schedule 4.4

<sup>8</sup> The Services Schedule should be a specific and detailed list of tasks that the Nodal Agency expects PPP Vendor to perform during the term of the agreement. Services Schedules initially prepared by Nodal Agency’s legal advisers generally contain a number of pitfalls: (i) very vague and open-ended language that could be interpreted broadly and could force PPP Vendor to provide new services that are unanticipated, have not been priced and could be quite costly, (ii) items that overlap with provisions of the contract and that are materially less favourable to PPP Vendor than the corresponding negotiated provisions of the contract, and (iii) endless repetition. The Services Schedule is negotiable and Nodal Agencies are relatively amenable to changes to fix the problems identified above. In most cases, PPP Vendor should strive to remove duplication, to narrow and clarify language and to reconcile the Services listed to the manner in which such services were being performed by the Nodal Agency at the contract start date. In addition, the Services Schedule should explicitly state that any differences or changes to the Services after the contract start date would be subject to a change order

<sup>9</sup> Nodal Agency may seek to expand the contractual requirements of PPP Vendor by defining Base Services to include “inherent,” “implied” or “incidental” services (i.e., those services that are not specifically described in the Agreement or the Services Schedule but that are necessary to or implied by the Services listed in the Services Schedule) and services performed during a “look-back” period of six or twelve months prior to the Service Commencement Date by persons being displaced or transferred by the outsourcing. These provisions have the potential to significantly broaden the scope of work and thereby increase the risk of the project

All Changes to the Services will be performed in accordance with the Change Control procedures set out in Clause 8.12.<sup>10</sup>

#### **4.4. Application Development Services.<sup>11</sup>**

- (a) *General.* Commencing on the Base Services Commencement Date and during the remainder of the Agreement Term, <PPP Vendor> will provide to <Nodal Agency>, and <Nodal Agency> will obtain from <PPP Vendor>, the application development services described in Schedule 4.4(a) (the “Application Development Services”).
- (b) *Establishment of Acceptance Criteria; Acceptance Testing.* Prior to being placed into production or live running, the Parties will subject each Developed Application to acceptance testing to verify that it satisfies the acceptance criteria established for such Developed Application. The Parties will establish objective acceptance criteria for each Developed Application using <Nodal Agency>, <PPP Vendor> and industry standards. Acceptance criteria may vary by Developed Application; [provided, however, that the Parties anticipate that all Developed Applications will utilise the common acceptance criteria elements specified in Schedule 4.4(b).] Such objective criteria will be mutually agreed upon in writing by <Nodal Agency> and <PPP Vendor> as soon as practicable but in any event no later than 30 days after the date on which detailed design specification and detailed scoping is completed for the applicable Developed Application. Prior to being placed into production, each Developed Application will be subject to acceptance testing based upon the agreed-upon acceptance criteria. Such acceptance testing will be conducted in accordance with Schedule 4.4(c). If no acceptance provisions are specified, the Developed Application will be deemed accepted if, within ten (10) days after delivery, <Nodal Agency> has not provided to <PPP Vendor> written notice identifying specifically any basis for not approving such Developed Application.
- (c) *Sign-Offs of Interim Deliverables.* From time to time, the Parties may develop mutually acceptable objective sign-off criteria and procedures for the interim deliverables comprising part of the Developed Applications. The purpose of these sign-off procedures is to identify and address issues relating to the Application Development Services early and to assist in the timely completion of each Developed Application. If <Nodal Agency> expresses concerns regarding the quality and level of completion of the deliverables, the Parties will cooperate to establish a

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<sup>10</sup> Nodal Agencies will often insist on language stating that the Services will be automatically improved and modified by vendor over time as technological advances are made and the overall cost of technology declines.

<sup>11</sup> Strongly consider this clause for PPP deals including a significant application development component, these clauses specifying clear deliverables and sign-offs by the Nodal Agency, should be documented and agreed. Customary “break fix” services could alternatively be described in the Services Schedule as part of Base Services

mutually acceptable resolution of these issues as soon as practicable. Compliance with such procedures with respect to any interim deliverable will not constitute Final Acceptance of the Developed Application to which such interim deliverable relates but will constitute an important element<sup>12</sup> of establishing Final Acceptance of the Developed Application.

- (d) *Premature Implementation.* In the event that <Nodal Agency> determines that a Developed Application should be placed into a production or live running before satisfactory completion of Acceptance Testing, the Developed Application will be deemed to have been accepted by <Nodal Agency> and <Nodal Agency> will bear all related risks which may include business disruption, degraded Service Levels and additional fees. <PPP Vendor> reserves the right (but is not obligated) to refuse to implement a Developed Application that has not satisfactorily completed Acceptance Testing where in <PPP Vendor>'s professional judgment, implementing the Developed Application at that time would be injurious to the <Nodal Agency>'s or <PPP Vendor>'s business or reputation.

#### **4.5. Disaster Recovery Services.**

Commencing on the Base Services Commencement Date and during the remainder of the Agreement Term, <PPP Vendor> will provide to <Nodal Agency>, and <Nodal Agency> will obtain from <PPP Vendor>, the disaster recovery assistance, cooperation and services described in Schedule 4.5 (the "Disaster Recovery Services"). <PPP Vendor> has no responsibility for <Nodal Agency>'s business continuity planning or disaster recovery, except as may otherwise be expressly specified in Schedule 4.5<sup>13</sup>.

#### **4.6. New Services<sup>14</sup>**

- (a) <Nodal Agency> may request <PPP Vendor> to provide services [*that are outside the scope of the then-current Services*] [*that are materially different from and in addition to the then-current Services*] that require resources for which there is no current

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<sup>12</sup> Consider whether sign-offs of interim deliverables should constitute irrevocable partial acceptance of the Developed Application

<sup>13</sup> For avoidance of doubt it is stated that for each project, there may be different level of responsibility allocated to PPP Vendor. Under the NeGP scenario where the State Data Centre and State Wide Area Network is to be used, the risks for the PPP vendor is limited to that extent.

<sup>14</sup> There are a number of issues to consider regarding New Services. This draft adopts a default definition that defines New Services as those for which no charging methodology or baseline performance exists. In other words, if the New Service can be priced by reference to an existing service and performance service levels, there is a pricing methodology already established, then the requested service is not a New Service. If, however, no appropriate charging methodology exists, then the requested service is a New Service and the parties must negotiate a price for the service..

resource baseline or charging methodology (“New Services”).<sup>15</sup> Any agreement of the Parties with respect to such New Services will be separately specified in an amendment to this Agreement in accordance with Clause 20.11, which will include such matters as project scope, staffing, schedule, deliverables, acceptance, <Nodal Agency> responsibilities and price.

- (b) To request a New Service, <PPP Vendor> or <Nodal Agency>, as applicable, will deliver a written request (the “New Service Request”) to the <PPP Vendor> Account Representative or the <Nodal Agency> Account Representative, as the case may be, specifying in reasonable detail to the extent known (i) the proposed New Service; (ii) the objective or purpose of such New Service; (iii) the requirements and specifications of the services and deliverables to be delivered pursuant to such New Service (including an estimation of anticipated additional volumes of services required); and (iv) the requested prioritisation and schedule for such New Service.
- (c) The Parties will cooperate with each other in good faith in discussing the scope and nature of the New Service Request, the availability of <PPP Vendor> personnel, expertise and resources to provide such New Service and the time period in which such New Service will be implemented or delivered. As soon as reasonably practicable thereafter and to the extent applicable, <PPP Vendor> will prepare and deliver to the <Nodal Agency> Account Representative a written statement (the “New Service Response”) describing any changes in products, services, assignment of personnel and other resources that <PPP Vendor> believes would be required. In addition, such New Service Response will include, as appropriate or applicable, (i) an estimation of the net increase or decrease in the pricing that would be required; (ii) the categories of costs to be avoided as a result of such New Services or the substitution of the New Service for the Service then being provided; (iii) a description of how the proposed New Service would be implemented; (iv) a description of the effect, if any, such New Service would have on this Agreement, including, without limitation, on Service Levels; (v) an estimation of all resources required to implement such New Service, including a description of the delivery risks and associated risk mitigation plans; and (vi) such other information as may be relevant to the proposed New Service. The <PPP Vendor> Account Representative and the <Nodal Agency> Account Representative will meet to determine whether they desire for <PPP Vendor> to proceed with the implementation of the proposed New Service in accordance with the New Service Response.

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<sup>15</sup> These alternative provisions represent other approaches to the definition of New Services. The first alternative is the most-PPP Vendor favourable definition while the second alternative is the preferred definition of some Nodal Agency legal advisers.

- (d) In the event of any dispute between the Parties (including any dispute as to whether a requested service is a New Service or the pricing at which a New Service will be provided to <Nodal Agency>), <PPP Vendor> will begin providing the Service if requested by <Nodal Agency>. Notwithstanding the foregoing, if a good faith dispute exists between the Parties regarding such New Service, <PPP Vendor> will not be required to (i) expend capital to acquire assets or to incur other material costs [except on a pass-through basis], or (ii) expend any amounts that, in the aggregate, exceed INR <specify amount>. In addition, whilst any dispute remains ongoing, all employee time used to provide such New Service will be charged using <PPP Vendor>'s standard commercial rates and invoiced in accordance with Clause 10.6.

#### 4.7. No Exclusivity.<sup>16</sup>

<Nodal Agency> retains the right in its sole discretion (i) in connection with the procurement of services within the scope of this Agreement, to solicit and use providers other than <PPP Vendor> and its Affiliates; (ii) to perform any of the Services itself; or (iii) to resource any of the Services for provision by one or more providers other than <PPP Vendor> and its Affiliates, subject in each case to the minimum volumes set out in Schedule 10.1. Any election by <Nodal Agency> to insource or resource any of the Services in accordance with this provision will be subject to the operation of Clause 17.2.

*[Exclusivity. <PPP Vendor> shall be the sole and exclusive provider of the Services and equivalent services within the scope of this Agreement to <Nodal Agency> during the Agreement Term.]*

#### 4.8. Primary Supplier.<sup>17</sup>

- (a) <Nodal Agency> will notify <PPP Vendor> of all significant future opportunities to provide outsourcing or consulting services to <Nodal Agency> or its Affiliates (a

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<sup>16</sup> This clause allows for exclusivity (PPP Vendor's preferred position) and non-exclusivity (not preferred but often mandated by Nodal Agencies). Few major outsourcings today are completely "exclusive" arrangements in which the Nodal Agency forgoes any right to resource services or to outsource services to other vendors. In these non-exclusive deals, the Services Schedule consists of a list of services that Nodal Agency can expect to receive from PPP Vendor during the term of the contract, and unless explicitly stated, the Nodal Agency is able to transfer the work to another vendor or do the work internally. Arrangements that are exclusive generally will be found only in cases in which there is some other relationship with the Nodal Agency (such as a joint venture or other strategic investment). Protection from unilateral reductions in scope or volume of services comes in the form of minimum volume commitments, escalating unit pricing as volumes are reduced, or other pricing mechanisms (e.g., a baseline-structured pricing methodology with ARC's and RRC's (Additional Resource Component and Reduced resource Components) with appropriate collars) and, at some threshold, payment of termination for convenience fees to compensate for lost investment and opportunity cost.

As often exclusivity is not achieved, the Pricing Schedule includes provisions for pricing mechanisms (such as volume collars) and tower or billing element minimums. These provisions allow Nodal Agencies to reduce spending but protect vendors by triggering price adjustments (requiring price renegotiations if service volumes fall outside of a predetermined threshold) or partial terminations (requiring Nodal Agency to pay a termination fee to PPP Vendor). See Pricing Schedule 10.1 and Clause 17.2.

<sup>17</sup> Nodal Agencies generally resist provisions giving a vendor any preferred provider status. Accordingly, these provisions are rarely found in larger deals. Preferred provider provisions are more common, however, where there is some other relationship with the Nodal Agency (for instance, if there is a SPV). Nevertheless, the provision included here may be used as the basis for discussion. It includes a rather modest requirement that the Nodal Agency inform PPP Vendor of any appropriate opportunities and allow PPP Vendor to bid on the work after ensuring that there is no undue advantage to the PPP vendor.



*“Covered Opportunity”). <Nodal Agency> will cooperate in good faith with <PPP Vendor> with respect to pursuing such Covered Opportunity. <Nodal Agency> will also notify <PPP Vendor> in writing no less than ten days in advance of <Nodal Agency>’s intended award of each such Covered Opportunity to another provider and address any impact on the Services through the Change Control Procedures.*

- (b) *In addition, (i) <PPP Vendor> will be included as part of <Nodal Agency>’s overall business process [and information technology] planning and (ii) <PPP Vendor> will be permitted to propose on new business process [and information technology] efforts for <Nodal Agency> and its Affiliates.*

#### **4.9. Fundamental Assumptions.<sup>18</sup>**

The Parties acknowledge that the Services, Service Levels, schedules, Service Charges and related items in this Agreement are dependent upon the accuracy of the information provided by the <Nodal Agency> and fundamental assumptions set out in Schedule 4.9. As a result, during the period of time beginning on the Effective Date and ending on the one-year anniversary thereof, <PPP Vendor> and <Nodal Agency> will cooperate with each other, and <Nodal Agency> will provide to <PPP Vendor> such documents, reports and other information as is reasonably necessary or desirable for <PPP Vendor> to verify the information received from the <Nodal Agency> and items on such schedule. If <PPP Vendor> reasonably determines as a result of such review that any of such information or fundamental assumption is inaccurate or incomplete, in any material respect (an “Adjustment Event”), <PPP Vendor> will inform <Nodal Agency> as to its estimates of the impact of the Adjustment Event on <PPP Vendor>’s ability to provide the Services in accordance with the terms of this Agreement (whether positive or negative). In such event, the Parties will seek to establish mutually acceptable alternative arrangements and to make any appropriate adjustments to their respective obligations under this Agreement (including the charges payable to <PPP Vendor>) through the execution of an amendment pursuant to Clause 8.12. Any such adjustment will be made only to the extent necessary to reflect the impact of the Adjustment Event. If the Parties are unable to reach agreement on remediation within [thirty (30)] days after the <Nodal Agency> has been notified of the Adjustment Event, <PPP Vendor> shall have the right to invoke the dispute escalation procedures specified in Clause 18.

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<sup>18</sup> Generally Nodal Agencies will require vendors to negotiate a definitive price for the services prior to execution of the Services Agreement. This negotiation places PPP Vendor at risk for any pricing errors discovered after due diligence and contract signing, especially in cases in which there is some doubt as to the adequacy or accuracy of the due diligence information. In a very limited number of circumstances, vendors have been able to negotiate provisions allowing pricing to be adjusted after contract signing. The alternate provisions “Fundamental Assumptions” and “True-Up” provide two different methods of adjustment. Note also the “Identified Resources” portion of the True-Up provision. This language allows for ad hoc adjustments to pricing if asset schedules are not complete, and may be more acceptable to Nodal Agencies than a full review of pricing assumptions

**Alternate 4.9. True-Up.**

- (a) *Introduction. Because the Parties did not have sufficient opportunity prior to the execution of this Agreement to verify the accuracy and completeness of the <Nodal Agency> information on which the Services and the Service Charges were developed, including the information in the Schedules, the Parties have agreed to true-up certain matters in accordance with this Clause 4.9. Notwithstanding any provision of this Clause 4.9 to the contrary, such true-up will be performed only during the [first year] [first six months] after the Base Services Commencement Date (the “True-Up Period”) and only with respect to the specific matters set out in this Clause 4.9. A general principle to be used in such true-up process is that Services to be provided by <PPP Vendor> to <Nodal Agency> as part of the Service Charges after the Base Services Commencement Date will be limited to those services that are included in the Services Schedule. The Parties recognise the importance of the true-up process to equitably allocate responsibility with respect to the matters set out in this Agreement and will use reasonable efforts in connection with conducting such true-up process and bringing it to a successful conclusion.*
- (b) *Specific Item True-Up. The Parties have established the process in this Clause 4.9 to verify the following items [add specific items to be trued-up, such as depreciation, contracts, third-party maintenance agreements, personnel costs, straddle agreements (<Nodal Agency>’s third-party agreements covering both in-scope and out-of-scope operations),] and any other items mutually agreed to by the Parties.*
- (c) *Adjustment of Pricing. From time to time during the True-Up Period, <PPP Vendor> will provide written notice to <Nodal Agency> of any item referred to in Clause 4.9(b) above requiring an adjustment (either upwards or downwards) to the Service Charges, setting out a description of such adjustment and the amount of the proposed adjustment. The Parties will meet promptly and cooperate with each other to determine whether such adjustment is appropriate. In connection with such determination, each of the Parties will provide to the other such excerpts from its respective books and records to the extent relevant for such determination. Upon mutual agreement of the Parties, the Parties will equitably adjust (either upwards or downwards) the Service Charges in the amount of such adjustment (and any billing unit prices, billing volumes, additional resource charges or reduced resource charges). In addition, <PPP Vendor> will adjust (either upwards or downwards and on a retroactive basis) the next invoice sent by <PPP Vendor> to <Nodal Agency> to reflect any increase or decrease in the pricing for Services that would have been paid by <Nodal Agency> if such adjustment to the Service Charges had been made on the Base Services Commencement Date.*
- (d) *Identified Resources. If in the course of the true-up process in this Clause 4.9 the Parties identify any asset not previously included in the Schedules under Clause 6 (each, an “Identified Resource”), the following will apply:*

- (i) *until the identification of such Identified Resource, <Nodal Agency> will provide <PPP Vendor> with access to and use and benefit of the asset or service and will have financial responsibility for such asset or service;*
  - (ii) *upon identification, the Identified Resource will be added to the appropriate schedule and <PPP Vendor> will have the use of, and from that date forward the Parties will have such responsibility for, such Identified Resource (including responsibility for any Consents) as though such resource had originally been listed on the applicable schedule; and*
  - (iii) *the Parties recognise that the Service Charges may be increased upon identification of the Identified Resources as the Parties agree to reflect items that should have been included in the applicable schedules.*
- (e) *Services.<sup>19</sup> <PPP Vendor> will review (i) the Services to determine whether this Agreement and supporting Schedules accurately and completely describes the services, functions and responsibilities comprising the Services and (ii) Schedule 4.12 (<Nodal Agency> Service Responsibilities) to determine whether such Schedule accurately and completely describes the services, functions and responsibilities comprising the <Nodal Agency> Service Responsibilities. <PPP Vendor> will, no later than the [six-month] anniversary of the Base Services Commencement Date, deliver to <Nodal Agency> a report (the "Base Services Report") setting out any proposed changes to the Services Schedules and Schedule 4.12 and identifying specifically the basis for the additions and deletions sought by <PPP Vendor>. Promptly after the delivery of such Base Services Report, the Parties will meet and discuss the proposed additions and deletions. The Parties will establish in good faith to agree on any additions or deletions set out in the Services Report before the [nine-month anniversary] of the Base Services Commencement Date. Upon the mutual agreement of the Parties, the Parties will amend Services Schedules and Schedule 4.12 to reflect any agreed upon additions and deletions.*
- (f) *Cooperation. The Parties will cooperate with each other in good faith with respect to the true-up matters set out in this Clause 4.9. <Nodal Agency> will in a timely manner provide to <PPP Vendor> such personnel, resources, books and records, reports and other information as is reasonably necessary or desirable to conduct the reviews set out in this Clause 4.9 and to complete the true-up process. Each Party will participate in true-up related meetings requested by the other Party. If the parties*

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<sup>19</sup> This true-up topic would be important in circumstances in which the Base Services were intended primarily to be those services that (i) were previously performed by the Nodal Agency's employees who were transferred or displaced as a result of this PPP IT project and (ii) were included in the baseline pricing case. Often the Services Schedule prepared by the Nodal Agency's legal advisers is much broader and covers a "wish list" of services that were not regularly performed by the Nodal Agency and therefore are not included in the cost model

*are unable to reach agreement on remediation within [thirty (30)] days after the <Nodal Agency> has been notified of the required true-up adjustment, <PPP Vendor> shall have the right to invoke the dispute escalation procedures specified in Clause 18.*

#### **4.10. Ongoing Cooperation.**

<Nodal Agency> and <PPP Vendor> will cooperate in planning and implementing the Services and changes thereto in an efficient, cost-effective and commercially reasonable manner.

#### **4.11. Reliance on Instructions.**

In performing its obligations under this Agreement, <PPP Vendor> will be entitled to reasonably rely upon any routine instructions, authorisations, approvals or other information provided to <PPP Vendor> by the <Nodal Agency> Account Representative or, as to areas of competency specifically identified by the <Nodal Agency> Account Representative, by any other <Nodal Agency> personnel identified by the <Nodal Agency> Account Representative, from time to time, as having authority to provide the same on behalf of <Nodal Agency> in such person's area of competency.<sup>20</sup>

#### **4.12. <Nodal Agency> Service Responsibilities.**

- (a) In addition to the obligations specified elsewhere in this Agreement, during the Agreement Term and in connection with <PPP Vendor>'s performance of its obligations hereunder, <Nodal Agency> will, at its own cost and expense, have the obligations, and retain the responsibilities, described in Schedule 4.12 (the "<Nodal Agency> Service Responsibilities"). <Nodal Agency> will perform such <Nodal Agency> Service Responsibilities and acknowledges that <PPP Vendor>'s performance is dependent on <Nodal Agency>'s timely and effective performance of the <Nodal Agency> Service Responsibilities and other timely decisions and approvals. <Nodal Agency> will be responsible for its operation and use of the Services and for ensuring that the scope of Services meets <Nodal Agency>'s requirements.
- (b) If, during and to the extent that <Nodal Agency>'s failure to perform any <Nodal Agency> Service Responsibilities causes <PPP Vendor> to fail to perform its

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<sup>20</sup> In general, Nodal Agencies will take the view that the employees of the Nodal Agency who are responsible for dealing with the vendor on a daily basis will make oral agreements with the vendor and generally circumvent the protections that the Nodal Agency has negotiated in the terms and conditions. Accordingly, several experienced outsourcing law firms prefer to have the vendor and the Nodal Agency go through the formal change order process if the instructions are more than routine

responsibilities under this Agreement, <PPP Vendor>'s failure to perform such responsibilities will be excused. Notwithstanding the foregoing, <PPP Vendor> will use reasonable efforts (including emergency fixes and workarounds) to perform its responsibilities under this Agreement. <PPP Vendor> will be entitled to be compensated for any additional costs incurred as a result of any delay or failure to perform on the part of <Nodal Agency>.

- (b) **Alternate (b).**<sup>21</sup> *<Nodal Agency>'s failure to perform any of its obligations set out in this Agreement (other than as set out in Clause 17.1) will not be deemed to be grounds for termination of this Agreement by <PPP Vendor>. <PPP Vendor> will be excused in its performance of its obligations for any period and to the extent that it is prevented from performing such obligations by <Nodal Agency>'s failure to perform its obligations under this Agreement, provided that <PPP Vendor> uses reasonable efforts to perform its obligations notwithstanding <Nodal Agency>'s or its agents' or subcontractors' failure to perform. <PPP Vendor> will notify <Nodal Agency> in writing of any such failure to perform within a reasonable period of time after <PPP Vendor> has become aware of such failure. If <PPP Vendor> uses reasonable efforts to perform notwithstanding <Nodal Agency>'s failure to perform, <Nodal Agency> will reimburse <PPP Vendor> for its incremental costs and expenses incurred in such effort to perform. Such reimbursement will be on a "pass-through" basis if such failure to perform is a one-time or non-recurring event. However, if such failure to perform occurs on a recurring basis or where the total costs and expenses incurred under this provision exceed INR <Amount>, <PPP Vendor>'s performance of such <Nodal Agency> obligations will be deemed to constitute New Services and subject to the operation of Clause 4.6. Notwithstanding any provision of this Agreement to the contrary, under no circumstances will <PPP Vendor> be obligated to perform or deemed to be at fault in any way for any failure or delay in performing any of <Nodal Agency>'s responsibilities set out in this Agreement.*

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<sup>21</sup> Subclause (b) and alternate (b) are alternative introductions to the so-called "savings clause" relative to the Nodal Agency's obligations. Subclause (b) is an PPP Vendor-friendly version and the alternate (b) represents a negotiated form of the version often requested by legal advisers. Nodal Agency may argue that vendors should (almost) never have the ability to terminate a contract. Their rationale is that in most cases the Nodal Agency is the party most harmed and most vulnerable to a termination of the contract. Nodal Agency may push this issue so far as to question whether a vendor should even have the right to unilaterally terminate for the Nodal Agency's non-payment. As a result, Nodal Agency may insist in the savings clause that a vendor must use reasonable efforts to perform even if the Nodal Agency fails to perform. The vendor's sole remedy for Nodal Agency non-performance is to be reimbursed for any incremental costs of performing. (suggested language: "Nodal Agency will reimburse PPP Vendor for incremental out-of-pocket expenses for third-party materials and services and for incremental labour costs for PPP Vendor's services incurred in such effort to perform to the extent that such costs cannot be reasonably avoided or mitigated.") A compromise may be to offer incremental reimbursement for one-time extra expenses, but if the Nodal Agency non-performance is a recurring event, then such non-performance should trump the vendor's obligation, except through the change order procedure. See Clause 4.15 for the complete savings clause

#### 4.13. Out of Scope Responsibilities and Acknowledgement <sup>22</sup>

- (a) *In addition to its responsibilities specified elsewhere in this Agreement and as may be described in Schedule 4.12, <Nodal Agency> is responsible for (i) management oversight, determining accounting policies, transaction initiation, and for authorising, interpreting and creating specifications for the financial reporting information; (ii) establishing, maintaining and evaluating the effectiveness of its disclosure controls and procedures and internal controls; (iii) determining the quality and other standards for the Services comprising the [Finance and Administration] and with which <PPP Vendor> (upon its agreement therewith) will be required to comply; (iv) determining when, whether and how the recommendations made by <PPP Vendor> and <PPP Vendor> Affiliates regarding finance policies and procedures are to be implemented by <Nodal Agency>; and (v) ensuring that it complies with its legal and regulatory obligations. Each of the Parties acknowledges and agrees that (a) the scope of the Services is limited to mechanical processing and administration; (b) <PPP Vendor> is not licensed or certified in any jurisdiction to take over any of the sovereign function of the Government; (c) <PPP Vendor> cannot represent or express any opinions or assurances that the Services, or any reports generated thereby, will conform to any recognised third-party standards, apart from the GoI standards on <http://www.meity.gov.in/content/standards-policies> ; (d) the Services shall be deemed to exclude functions that by law or custom are provided by, or reserved to, certified professionals; and (e) <PPP Vendor> will not provide <Nodal Agency> with legal advice of any kind in connection with the Services. Further, <Nodal Agency> will be responsible for providing <PPP Vendor> with accurate and complete data and information and for reviewing and verifying all data and reports provided by <PPP Vendor> under this Agreement. Except for applicable Service Level Credits, if any, <PPP Vendor> shall have no liability for <Nodal Agency>'s use of data and reports provided by <PPP Vendor>, and <PPP Vendor>'s sole liability with respect to errors introduced into data or reports by <PPP Vendor> during the course of the Services shall be to reperform the necessary, applicable Services (subject at all times to the limitations and exclusions of liability set out in Clause 16).*
- (b) *<Nodal Agency> is responsible for (i) management oversight and determining human resources policies and establishing, maintaining and evaluating the effectiveness of such policies; (ii) determining the quality and other standards for the Services with which <PPP Vendor> (upon its agreement therewith) will be required to comply; and (iii) determining when, whether and how any recommendations made by <PPP Vendor> regarding human resources policies are to be implemented by <Nodal*

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<sup>22</sup> Insert this provision when the engagement includes the assumption of finance and/or human resources functions from the Nodal Agency.

*Agency>. <Nodal Agency> will be responsible for providing <PPP Vendor> with accurate and complete source data and information and for reviewing and verifying all data and reports provided by <PPP Vendor> under this Agreement in connection with <Nodal Agency>'s human resources policies. Except for applicable Service Level Credits, if any, <PPP Vendor> shall have no liability for <Nodal Agency>'s use of data and reports provided by <PPP Vendor>, and <PPP Vendor>'s sole liability with respect to errors introduced into data or reports by <PPP Vendor> during the course of the Services shall be to reperform the necessary, applicable Services (subject at all times to the limitations and exclusions of liability set out in Clause 16).*

#### **4.14. Third-Party Products.**

Established relationships with many major hardware and software technology providers and other vendors enable <PPP Vendor> directly or through an Affiliate to resell these providers' products in connection with <PPP Vendor>'s services. To the extent that <PPP Vendor>'s pricing is competitive (established through a tender process or in case of urgency - pricing established by an open tender carried out by any Government or its agency after adjustment of the taxes), <Nodal Agency> agrees to consider in good faith acquiring such products required for the provision of the Services by utilising <PPP Vendor>'s reseller agreements.

#### **4.15. Excused Obligations.**

<PPP Vendor>'s failure to perform its obligations under this Agreement will be excused, and not included in any calculation of Service Level Default or Calculation, to the extent such failure is related to or caused by any of the following:

- (a) <Nodal Agency> not performing its obligations under Clauses 4.12 and 4.13;
- (b) Any breach of this Agreement by <Nodal Agency> or other failure of <Nodal Agency> or <Nodal Agency>'s employees, agents or third parties to perform its obligations under this Agreement, including Clauses 6.2 to 6.5, inclusive;
- (c) Infringements of third party Intellectual Property Rights by <Nodal Agency> or <Nodal Agency>'s employees, agents or other third party service providers;
- (d) Violations of law by <Nodal Agency> or <Nodal Agency>'s employees, agents or third parties;
- (e) Service or resource reductions or other special production jobs, testing procedures or other services which are given priority as requested or approved by <Nodal Agency> and agreed to by the Parties in accordance with the Change Control procedures set out in Clause 8.12;

- (f) Implementation of a disaster recovery plan in response to a disaster;
- (g) The applicability of any other provision of this Agreement that provides for relief from Service Level Credits in accordance with such provision;
- (h) Any significant increase in processing volumes or business which was not foreseen and communicated by the <Nodal Agency>, sufficiently prior to the event which could help the <PPP Vendor> to prepare for the additional volumes
- (i) Any significant change in the manner in which <Nodal Agency> conducts its business; or
- (j) Any matter constituting Force Majeure, as provided in Clause 19.



## 5. SLA PERFORMANCE METRICS

### 5.1. Service Levels.<sup>23</sup>

- (a) *General.* Schedule 5.1 sets out certain Service Levels (“Service Levels”) that will be used to measure <PPP Vendor>’s performance of the Base Services under this Agreement. <PPP Vendor> agrees that, from and after the Base Services Commencement Date, its performance of the Services will meet or exceed each of the applicable Service Levels set out in Schedule 5.1, subject to the limitations and in accordance with the provisions set out in this Agreement. If the Services provided pursuant to this Agreement are changed, modified or enhanced (whether by Change Request or through the provision of New Services), the Parties will review the Service Levels then in effect and will in good faith determine whether such Service Levels should be adjusted and whether additional Service Levels should be implemented.
- (b) *Service Credits.*
  - (i) If <PPP Vendor> fails to meet any Service Level, then <PPP Vendor> will (i) promptly perform a root-cause analysis to identify the cause of such failure; (ii) use reasonable efforts to correct such failure and to begin meeting the Service Levels as promptly as practicable; (iii) provide <Nodal Agency> with a report detailing the cause of, and procedure for correcting, such failure; and (iv) if appropriate under the circumstances, take action to avoid such failure in the future. *[The determination of whether action may be appropriate under (iii) above will take into account, among other factors, the causes of such failure, the cost/benefit analysis associated with such action and whether the failure reflects a declining performance trend in such Service Level. Performance trends with respect to Service Levels will be determined based upon a review of applicable performance data over the prior, rolling 12-month period.]*

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<sup>23</sup> Service Levels are usually one of the most contentious issues during negotiations. See the annotations to the Service Level Schedule for a discussion of these issues. One key issue will be whether PPP Vendor will have sufficient opportunity to conduct due diligence prior to the Effective Date to establish all initial Service Levels in the Agreement. This draft provides (i) for the establishment of certain Service Levels in the schedule at contract signing (e.g., Service Levels for which there is at least 12 months of recent historical performance data), (ii) that during the Transition period, PPP Vendor will have the opportunity to validate the information used to establish these Service Levels and adjust the Service Levels if actual performance varied from the information provided, and (iii) that during the Transition period, the parties will establish certain additional Service Levels and determine the cost of measuring and implementing such new Service Levels. (See Schedule 5.1).

- (ii) In addition, upon the occurrence of a Service Level Default with respect to which a Service Level Credit applies that is not excused in accordance with this Agreement, <PPP Vendor> will provide the corresponding Service Level Credit to <Nodal Agency> against the immediately succeeding payments that become due to <PPP Vendor> under this Agreement, all in accordance with Schedule 5.1.<sup>24</sup> If any Service Level Credit remains outstanding upon the expiration or termination of this Agreement and no Service Charges remain payable, <PPP Vendor> will pay <Nodal Agency> such remaining amount within 30 days after such expiration or termination.
  - (iii) <PPP Vendor> shall have the right to earn back Service Level Credits by exceeding (by 5% over the minimum) the Service Levels on which the Service Level Credits were predicated.
  - (iv) In the event that <PPP Vendor> exceeds the Service Levels specified in Schedule 5.1 by 10% over the minimum, <Nodal Agency> will pay the Service Level Bonus set out in Schedule 5.1
- (c) *Periodic Review; Annual Improvement.*<sup>25</sup> On an annual basis during the Agreement Term, the Parties will jointly review (i) the then-current Service Levels; (ii) the percentage difference between <PPP Vendor>'s actual performance and the then-current Service Levels; (iii) generally available information indicating industry-wide improvements of delivery of substantially similar services; (iv) improved performance capabilities, including those associated with advances in technology and methods used to provide the Services; and (v) reduced performance capabilities, including those associated with resource reductions requested or approved by <Nodal Agency>. The Service Levels may be adjusted on an optional basis, as will be mutually agreed based on the preceding review with the objective of obtaining annual performance improvements. As part of such review process, the Parties may jointly establish additional Service Levels and Service Level Credits to be added in accordance with Schedule 5.1.
- (d) *Measurement and Monitoring Tools.* <PPP Vendor> will implement its measurement and monitoring tools and procedures to measure and monitor <PPP Vendor>'s performance against the applicable Service Levels. Such measurement and

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<sup>24</sup> Clause 16.1(d) provides that the Service Level Credits will constitute the Nodal Agency's sole and exclusive remedy for the corresponding Service Level Default. However the agreement could also include that PPP Vendor's failure to comply with any particular Service Level will be deemed to constitute a material breach of the agreement.

<sup>25</sup> Many Nodal Agencies will seek an automatic upward ratchet of Service Levels. In other words, the Service Levels are readjusted (upwards) each year depending on the actual levels achieved during the prior year. In this provision it is proposed to have an optional readjustment based upon the factors stated. See the Service Level Schedule for an example of an automatic ratchet. To the extent productivity or service level improvements require incremental investment, the agreement should allocate the cost of such improvements

monitoring may be subject to audit by <Nodal Agency> upon reasonable request. Upon <Nodal Agency>'s request from time to time, <PPP Vendor> will provide <Nodal Agency> with information and access to such tools and procedures for purposes of verification.

- (e) *Quality Assurance.* <PPP Vendor> will provide and implement the quality assurance procedures that are reasonably necessary for the Services to be provided in accordance with the Service Levels. Such procedures will include checkpoint reviews, testing, acceptance and other procedures for <Nodal Agency> to monitor the quality of <PPP Vendor>'s performance and will be included in the Account Documentation.

## 5.2. Customer Satisfaction.

No later than the one-year anniversary of the Base Services Commencement Date and on an annual basis thereafter during the Agreement Term, <PPP Vendor> will conduct a satisfaction survey designed to capture <Nodal Agency> perceptions in respect of the delivery of the Services. The survey will cover a representative sample of end users of the Services and the senior officers of the concerned Department. Results of the survey will be reviewed with <Nodal Agency> by the <PPP Vendor> Account Representative.<sup>26</sup>

## 5.3. Benchmarking.<sup>27</sup>

- (a) *Establishment of Process.* After the [second]-year anniversary of the Base Services Commencement Date,<sup>28</sup> <Nodal Agency>, at its option, may institute an objective measurement and comparison process (utilising mutually identified baselines and industry standards) to measure the quality and cost-effectiveness of the Services under the terms of this Agreement, taken as a whole, as compared to the quality and cost-effectiveness of comparable services customarily being provided to other organisations in the e-Governance industry by PPP Service providers/IT Turnkey service providers<sup>29</sup> (the "Benchmarking Process").

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<sup>26</sup> Many Nodal Agencies will request that a total quality management performance standard be met here. If PPP Vendor utilises a standardised approach to conducting these surveys, consider outlining their scope and content in a schedule

<sup>27</sup> Despite some skepticism about whether the process works or is even helpful, most Nodal Agencies will insist on a periodic benchmarking of contract pricing. The benchmarking provision will be among the most highly negotiated provisions in the Agreement. See the footnotes in this provision for a discussion of many of the key benchmarking issues.

<sup>28</sup> Nodal Agencies will press for the right to benchmark as soon as possible. While "baselining" service levels and costs is often appropriate early on, particularly if the Nodal Agency has no baselines prior to outsourcing, benchmarking is not appropriate until the transition or transformation period has ended and the changes have had a chance to take hold. This "no benchmarking" period is usually no less than one year, but could easily extend to the third anniversary depending on the transition or transformation period and protects PPP Vendor from repricing a deal very early in the contract when some of the early costs of the contract have not yet been earned back. ("No benchmarking" periods of less than 2 years are an exception to PPP Vendor standards)

<sup>29</sup> PPP Vendor should be compared to its peers in the IT Turnkey / IT PPP working in Government, not internal IT shops or specialty providers.

- (b) *Third Party Benchmark.*<sup>30</sup> Within 60 days after <Nodal Agency>'s request to institute the Benchmarking Process, the Parties shall mutually agree as to the identity of and mutually engage<sup>31</sup> an independent third-party (the "Third-Party Benchmark") to perform the Benchmarking Process. The cost of the Benchmarking Process, including the fees and expenses of the Third-Party Benchmark, will be equally shared by <Nodal Agency> and <PPP Vendor>. As a condition to its engagement, the Third-Party Benchmark will execute a confidentiality agreement reasonably satisfactory to the Parties.
- (c) *Determination of Applicable Information.* Throughout the Benchmarking Process, all instructions to such Third-Party Benchmark will be given jointly by <Nodal Agency> and <PPP Vendor>. <Nodal Agency> and <PPP Vendor> shall agree upon and instruct the Benchmark on (i) the items or metrics to be benchmarked; (ii) the factors necessary to ensure "like-for-like" comparison of services, including service levels, volumes, term, pricing structure including investments made, global/regional scope, risk allocation, ownership of intellectual property rights and other material terms and conditions; and (iii) the information that the Third-party Benchmark will use based on their proposals, which shall be compared at least to a [six (*variable number (but no less than 3)*)] IT outsourcing contracts of similar service levels, volumes, term, investments made, global/regional scope, risk allocation, ownership of intellectual property rights and other material terms and conditions. <Nodal Agency> and <PPP Vendor> will cooperate to facilitate the Benchmarking Process, including by providing such reasonable information as is necessary to conduct the Benchmarking Process<sup>32</sup>.
- (d) *Lack of Adequate Data to Perform Benchmarking.* The Parties acknowledge that given the uniqueness of <Nodal Agency>'s requirements and of this Agreement, it is very possible that the Third-Party Benchmark will not have or will not be able to obtain comparative information on material terms or conditions as set out in Clause 5.3(c) above. The Third-Party Benchmark shall inform the Parties of that result as

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<sup>30</sup> It is most common for the benchmarking to be performed by an independent third party (rather than by the provider or by provider and Nodal Agency jointly). Accordingly, it is important that the Agreement (i) allocate the associated costs of the benchmark and (ii) provide appropriate confidentiality provisions, including execution of a confidentiality agreement. In addition, if both parties do not have approval rights over the benchmarker's selection, the agreement should establish that the benchmarker must be selected by the Nodal Agency and that at the time of a benchmarker's selection, it must meet certain minimum criteria such as (i) the benchmarker must be an independent, established and industry-recognised third party with demonstrated benchmarking expertise, methodology and data sources, (ii) the benchmarker must not be a competitor of either party, and (iii) the benchmarker must not be affiliated or associated with either party in such a manner to give it a material conflict of interest and hence be unable to conduct the benchmarking objectively and independently.

<sup>31</sup> Mutual engagement and mutual instructions helps ensure that the Benchmark will not be prejudiced in favour of one party or the other.

<sup>32</sup> For purposes of this initial draft, the Benchmarking Condition exists only after taking into account the entire Agreement (i.e., not on a limited scope, application or "tower" basis). If a transaction allows a Benchmarking Condition to exist on a tower basis, additional consideration will need to be paid to any "cross-tower subsidisation" and other related consequences. For example, one issue will be whether such a Benchmarking Condition will allow the Nodal Agency to terminate the entire Agreement or only the parts of the Agreement related to such tower. If the latter, then termination fees and Termination Assistance Services will need to be segregated on a tower-by-tower basis, adding to the complexity of the deal. To avoid cherry picking, alternatives could include the Nodal Agency choosing one tower to benchmark and PPP Vendor choosing the other, pre-determining the tower or mix of towers to be benchmarked or other possibilities based on the pricing within the particular deal

soon as possible and shall not proceed without the mutual written consent of the Parties. The Parties, working with the Third-Party Benchmark, will agree on an appropriate process to accommodate the incomplete data. Furthermore, if the Benchmarking Process does continue, the lack of comparable data shall be noted in the Benchmarking Report, along with the accommodation agreed to by the Parties, and in any summary thereof provided to <Nodal Agency> and <PPP Vendor> management.<sup>33</sup>

- (e) *Review of Benchmarking Report.* The Third-Party Benchmark will deliver a draft report to <Nodal Agency> and <PPP Vendor> who will have no less than 15 and no more than 30 days to review and provide comments to the Third-Party Benchmark. The Third-Party Benchmark will make appropriate amendments or otherwise respond to comments received. Promptly after delivery of a final report by the Third-Party Benchmark summarising the results of the Benchmarking Process (the “Benchmarking Report”), <Nodal Agency> and <PPP Vendor> shall meet to review the results of the Benchmarking Process. A “Benchmarking Condition” will be deemed to exist if (i) the final report results reflect that the Services, the Service Levels or the pricing for the Services are not competitive<sup>34</sup> (after taking into account the Agreement as a whole and a comparison of “like-for-like” services, including like service levels, volumes, term, pricing structure including investments made, global/regional scope, risk allocation, ownership of intellectual property rights and other material terms and conditions), with similar services then being provided to other organisations in the e-Governance industry by PPP Vendors/Turnkey Solution providers; (ii) such non-competitiveness is due to factors other than <Nodal Agency>’s particular requirements; and (iii) the Benchmark does not lack sufficient comparable information regarding any material terms or conditions as noted in Clause 5.3(d) above. A Benchmarking Condition will also be deemed to exist if the Benchmarking Report shows that <PPP Vendor>’s performance or price are more favourable to <Nodal Agency> than the nearest comparable provider by 5% or more.
- (f) *Frequency of Benchmarking.* Benchmarking shall be conducted no earlier than [24] months after the date of the conclusion of the prior Benchmarking Process, up to and including the resolution of any issues arising from the prior Benchmarking Report.

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<sup>33</sup> Benchmarkers almost never admit they don’t have adequate data or processes. The contract should proactively state what is required (e.g., 3/6 similar engagements) and agree how it can work around the lack of data or they will make the adjustments on their own

<sup>34</sup> This Agreement provides that a benchmark condition occurs only when PPP Vendor is found to be “not competitive.” Nodal Agencies may ask that PPP Vendor be “best in class” in all respects. An alternate formulation would be to specify what competitive means (e.g., the top quartile of all providers) or to establish a range (e.g., +/- 5%) beyond which a Benchmarking Condition would exist.

- (g) *Consequences of Benchmarking Condition.*<sup>35</sup> If a Benchmarking Condition exists, the Parties promptly will meet and cooperate to determine whether agreement may be reached to effect an adjustment to the Services, the Service Levels, right or risk allocations or the pricing for the Services to make the same competitive (after taking into account a comparison of “like-for-like” services, including like service levels, volumes, term, pricing structure including investments made, global/regional scope, risk allocation, ownership of intellectual property and other material terms and conditions) with similar services then being provided to other organisations in the e-Governance industry by PPP Vendors/Turnkey Solution providers (“Benchmarking Adjustment”) and a plan to implement such Benchmarking Adjustment. If a Benchmarking Condition exists and the Parties are unable to reach agreement with respect to any Benchmarking Adjustment after following the Informal Dispute Resolution process set out in Clause 18.1, then <Nodal Agency> will have the right to terminate this Agreement pursuant to Clause 17.3.
- (h) *Disputes.* Either <Nodal Agency> or <PPP Vendor> may in good faith dispute the results of the Benchmarking Process or whether a Benchmarking Condition exists in accordance with Clause 18; provided, however, that the sole and exclusive consequence of the Parties’ failure to reach agreement with respect to a Benchmarking Adjustment will be that <Nodal Agency> will have the right to terminate this Agreement pursuant to Clause 17.3.

#### **5.4. Liquidated Damages.**

- (a) In the event of delay or any gross negligence, for causes attributable to the <PPP Vendor>, in meeting the deliverables or milestone, the Nodal Agency shall be entitled at its option to recover from the <PPP Vendor> as agreed, liquidated damages, a sum of 0.5% of the value of the deliverable or milestone which suffered delay or gross negligence for each completed week or part thereof subject to a limit of 10% of the value of the total contract value.
- (b) This right to claim any liquidated damages shall be without prejudice to other rights and remedies available to Nodal Agency under the contract and law.

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<sup>35</sup> Nodal Agencies often take the position that once the price has been established through a tender process, it is difficult to change the price in a Government set-up. This benchmarking exercise would give a requisite basis as a price discovery mechanism to revisit the key assumptions taken prior to the PPP tender. Further the Nodal Agency can also task out to the Benchmarking to review the financial model of the PPP Vendor and look at the key financial ratios and give observations on how it has varied for changes post the award of the tender to the PPP Vendor. In line with the good practices in the successful PPP models, the Nodal Agency has to be flexible to compensate for the “losses” incurred by PPP vendor on account of changes not within the control of the PPP Vendor.

Further the Nodal Agency should be empowered to manage such issues (including financial) pertaining to the PPP initiative. The Nodal Agency may consider creation of an SPV jointly with the PPP Vendor as a good option to achieve the desired flexibility

## 6. RESOURCES<sup>36</sup>

### 6.1. Transferred Assets.<sup>37</sup>

Schedule 6.1 sets out the terms and conditions under which <Nodal Agency> will sell, transfer, convey, assign and deliver to <PPP Vendor>, and <PPP Vendor> will [*purchase for the amount set out in Schedule 10.1 and*] assume, certain third-party software licences, equipment leases and service agreements and certain equipment and other assets owned by <Nodal Agency> and used or held for use in connection with <Nodal Agency>'s operations.<sup>38</sup>

### 6.2. <PPP Vendor>-Managed Agreements.

- (a) Commencing on the Base Services Commencement Date, <PPP Vendor> will manage, administer and maintain, on a Pass-Through Expense basis, the lease, licence, maintenance, service and other third party agreements to be retained by <Nodal Agency> and which are identified in Schedule 6.2(a). <Nodal Agency> will provide a copy of such agreements and all modifications of such (collectively, the "<PPP Vendor>-Managed Agreements") to <PPP Vendor>. This Agreement does not effect an assignment of the <PPP Vendor>-Managed Agreements to <PPP Vendor> and <Nodal Agency> will continue to be liable for any and all obligations under an <PPP Vendor>-Managed Agreement except as provided in this Clause 6.2.
- (b) If <PPP Vendor> determines that it is able to negotiate arrangements with any third-party vendor that will enable <PPP Vendor> to use alternative software, equipment or services to provide the Services in accordance with Service Levels at a lower cost than maintaining a separate <PPP Vendor>-Managed Agreement solely for <Nodal Agency>'s use, <PPP Vendor> will notify <Nodal Agency> of the potential for budget

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<sup>36</sup> The provisions of this Clause 6 will reflect the specific terms of the business deal between the parties. However, with respect to the resources utilised by the Nodal Agency for its services, this draft assumes that (i) certain Nodal Agency-owned equipment and Nodal Agency licence and lease agreements for leased equipment, third-party software and third-party services will be assigned and transferred to PPP Vendor for a specified cash purchase price (see Clause 6.1), (ii) certain Nodal Agency-owned assets will be retained by the Nodal Agency but access thereto will be made available to PPP Vendor (see Clauses 6.2 and 6.3), (iii) Nodal Agency facilities and real estate leases will be retained by the Nodal Agency, but access thereto will be made available to PPP Vendor (see Clause 7.2) and (iv) certain Nodal Agency personnel will be transferred to PPP Vendor (see Clause 9.1)

<sup>37</sup> This draft assumes that any asset purchase to be effected pursuant to this agreement will be limited to relatively small and straightforward transactions. Larger or more complex asset purchase transactions should be effected pursuant to a separate asset purchase agreement to allow for more flexibility in the treatment of representations and warranties, indemnification and other issues. Generally PPP Vendor will not want to take over (or enter into) real property leases. A sublease from the Nodal Agency with a termination that mirrors contract termination provisions/timing is a preferred approach

<sup>38</sup> When PPP Vendor purchases hardware, software and other assets from the Nodal Agency, PPP Vendor generally will be responsible for paying the transaction taxes (e.g., sales and value added tax) due on the sale. If PPP Vendor is planning to purchase hardware, etc. from the Nodal Agency, the tax costs associated with such purchase should be factored into the pricing model

or performance improvements. At its option, <Nodal Agency> may request <PPP Vendor> to pursue such alternative arrangements for the applicable <PPP Vendor>-Managed Agreement. The Parties will cooperate and use reasonable efforts to reduce <Nodal Agency>'s financial responsibility under any <PPP Vendor>-Managed Agreements.

- (c) Each of the Parties will abide by, and will not breach, the terms of any <PPP Vendor> Agreement and will cooperate with each other to prevent or stay any such breach. To the extent permitted pursuant to the <PPP Vendor> Agreements, <Nodal Agency> hereby appoints <PPP Vendor> (or its applicable subcontractors) as <Nodal Agency>'s sole, limited purpose agent for the matters pertaining to the <PPP Vendor> Agreements referred to in this Clause 6.2.
- (d) Each Party will promptly inform the other of any breach of, misuse or fraud in connection with any <PPP Vendor> Agreements and any <Nodal Agency> retained assets to which they pertain and will cooperate with each other to prevent or stay any such breach, misuse or fraud.
- (e) <Nodal Agency> will be financially and administratively responsible for obtaining any Consents required to enable <PPP Vendor> and its applicable subcontractors to administer the <PPP Vendor> Agreements and access, use, copy, modify and enhance the relevant assets to the extent necessary for <PPP Vendor>'s performance under this Agreement.

### **6.3. <Nodal Agency>-Owned and Leased Hardware.**

- (a) Schedule 6.3(a) sets out certain Hardware owned by <Nodal Agency> (the "<Nodal Agency>-Owned Hardware") and certain Hardware leased by <Nodal Agency> (the "<Nodal Agency>-Leased Hardware") (i) with respect to which <Nodal Agency> will retain financial, administrative and maintenance responsibility and (ii) use of which will be required by <PPP Vendor> for purposes of this Agreement. <Nodal Agency> will be the sole and exclusive owner of the <Nodal Agency>-Owned Hardware. <Nodal Agency> may change, upgrade or otherwise modify the <Nodal Agency>-Owned Hardware and the <Nodal Agency>-Leased Hardware without <PPP Vendor>'s prior approval, provided that such changes, upgrades or modifications do not, in the aggregate, materially increase <PPP Vendor>'s cost and expenses or affect other aspects of delivery of the Services. Any such change, upgrade or modification of the <Nodal Agency>-Owned Hardware or the <Nodal Agency>-Leased Hardware that, in the aggregate, materially increases <PPP Vendor>'s cost and expenses will be subject to the operation of Clause 8.12. <Nodal Agency> will be financially and administratively responsible for maintenance of the <Nodal Agency>-Owned Hardware and the <Nodal Agency>-Leased Hardware.



- (b) <Nodal Agency> will be financially and administratively responsible for obtaining any Consents required for <PPP Vendor> (and applicable <PPP Vendor> subcontractors) to use the <Nodal Agency>-Owned Hardware and the <Nodal Agency>-Leased Hardware, all to the extent necessary for <PPP Vendor>'s performance under this Agreement.
- (c) <PPP Vendor> and its applicable subcontractors will use such <Nodal Agency>-Owned Hardware and <Nodal Agency>-Leased Hardware, at no cost to <PPP Vendor>, (i) solely for purposes of this Agreement; (ii) solely during the Agreement Term; and (iii) in compliance with any applicable use restrictions that are identified in writing to, and acknowledged by, <PPP Vendor>. <PPP Vendor> will establish an access control procedure to limit <PPP Vendor>'s use accordingly.

#### **6.4. <Nodal Agency>-Licensed Software.**

- (a) Schedule 6.4(a) sets out certain third-party software, tools, data, databases and methodologies, together with related documentation, licensed by <Nodal Agency>, (i) with respect to which <Nodal Agency> will retain financial, administrative and maintenance responsibility and (ii) access to which will be required for <PPP Vendor> for purposes of this Agreement. Such items together with any other subsequently identified third-party software, tools, data, databases and methodologies licensed by <Nodal Agency> access to which will be provided to <PPP Vendor> (or its subcontractors) under this Agreement are collectively referred to herein as "<Nodal Agency>-Licensed Software."
- (b) <Nodal Agency> will be financially and administratively responsible for (i) obtaining any Consents required for <PPP Vendor> (and applicable <PPP Vendor> subcontractors) to access, use, copy, modify and enhance such <Nodal Agency>-Licensed Software in such form and on such media as <PPP Vendor> may reasonably request, together with appropriate documentation, all to the extent necessary for <PPP Vendor>'s performance under this Agreement and (ii) maintenance of the <Nodal Agency>-Licensed Software, including upgrades necessary to correct defects.
- (c) <PPP Vendor> and its applicable subcontractors will access, use, copy, modify and enhance such <Nodal Agency>-Licensed Software (i) solely for purposes of this Agreement; (ii) solely during the Agreement Term; and (iii) in compliance with any applicable use restrictions that are identified in writing to, and acknowledged by, <PPP Vendor>. <PPP Vendor> will establish an access control procedure to limit <PPP Vendor>'s access and use accordingly.

#### **6.5. <Nodal Agency>-Owned Software.**

- (a) Any software, tools, databases, data and methodologies owned by <Nodal Agency> (together with related documentation) to which <PPP Vendor> needs access for

purposes of this Agreement, including the <Nodal Agency>-owned software identified in Schedule 6.5(a) are collectively referred to herein as the “<Nodal Agency>-Owned Software.”

- (b) As between the Parties, <Nodal Agency> will be the sole and exclusive owner of the <Nodal Agency>-Owned Software. <Nodal Agency> hereby grants to <PPP Vendor> (and applicable <PPP Vendor> subcontractors) a non-exclusive, non-transferable, royalty-free licence to access, use, copy, modify and enhance such <Nodal Agency>-Owned Software, all to the extent necessary for <PPP Vendor>’s performance under this Agreement. Such licence will terminate upon the expiration or termination of this Agreement.
- (c) <Nodal Agency> will be financially and administratively responsible for (i) obtaining any Consents required for <Nodal Agency>’s grant of such licence and (ii) maintenance of the <Nodal Agency>-Owned Software, including upgrades necessary to correct defects.
- (d) <PPP Vendor> and its applicable subcontractors will access, use, copy, modify and enhance such <Nodal Agency>-Owned Software (i) solely for purposes of this Agreement; (ii) solely during the Agreement Term; and (iii) in compliance with any applicable use restrictions that are identified in writing to, and acknowledged by, <PPP Vendor>. <PPP Vendor> will establish an access control procedure to limit <PPP Vendor>’s access and use accordingly.

#### **6.6. <PPP Vendor> Software.**

- (a) Any software, tools, databases, data or methodologies that are (i) owned by <PPP Vendor> or <PPP Vendor> Affiliates before the Effective Date or acquired by <PPP Vendor> after the Effective Date, (ii) developed by <PPP Vendor> or <PPP Vendor> Affiliates other than pursuant to this Agreement or any other agreement with <Nodal Agency>, or (iii) licensed by <PPP Vendor> or <PPP Vendor> Affiliates from a third party (other than third-party software that is the subject of licences included in the Transferred Assets), including any such items used by <PPP Vendor> or <PPP Vendor> Affiliates to provide the Services to <Nodal Agency>, are collectively referred to herein as the “<PPP Vendor> Software.” As between the Parties, <PPP Vendor> will be the sole and exclusive owner of the <PPP Vendor> Software.
- (b) <PPP Vendor> will be financially and administratively responsible for (i) obtaining any Consents required to provide the Services using the <PPP Vendor> Software, and (ii) maintenance of the <PPP Vendor> Software, including upgrades necessary to correct defects.
- (c) With respect to <Nodal Agency>’s access and use of any <PPP Vendor> Software, <Nodal Agency> will comply with any applicable use restrictions that are identified in

writing to, and acknowledged by, <Nodal Agency>. <Nodal Agency> will establish an access control procedure to limit <Nodal Agency>'s access and use accordingly.

#### **6.7. Critical <PPP Vendor>-Licensed Software.**

- (a) Any <PPP Vendor> Software licensed from a third party that is being used to provide the Services upon any expiration or termination of this Agreement and that would be required by <Nodal Agency> or an alternative service provider for the continuity of the Services after the expiration or termination of this Agreement, other than generally available commercial software, is referred to herein as the "Critical <PPP Vendor>-Licensed Software." <PPP Vendor> will (i) inform <Nodal Agency> of the existence and ownership of, and the extent of <PPP Vendor>'s rights to, all such Critical <PPP Vendor>-Licensed Software and (ii) use reasonable efforts to obtain for <Nodal Agency> a perpetual (or to the extent customarily available, automatically renewing), nonexclusive licence to use such Critical <PPP Vendor>-Licensed Software effective upon the expiration or termination of this Agreement and upon the third-party vendor's standard terms and conditions but at no additional charge.
- (b) If <PPP Vendor> is unable to obtain the licence (or the agreement to grant a licence) described in Clause 6.7(a) above, <PPP Vendor> will not introduce such Critical <PPP Vendor>-Licensed Software to provide the Services except as follows:
  - (i) Prior to introducing such Critical <PPP Vendor>-Licensed Software, <PPP Vendor> will notify <Nodal Agency> of its inability to obtain for <Nodal Agency> such a licence or agreement and the cost and viability of any other software that can perform the requisite functions and with respect to which <PPP Vendor> has the ability to grant or transfer such a licence or agreement (or to procure the same). Such notice will contain the proposed Critical <PPP Vendor>-Licensed Software vendor's then-current terms and conditions, if any, for making the software available to <Nodal Agency> upon expiration or termination of this Agreement.
  - (ii) With <Nodal Agency>'s prior approval, <PPP Vendor> may then introduce such Critical <PPP Vendor>-Licensed Software for use in providing the Services.

#### **6.8. Additional Resources.**

If any additional resources, whether in the form of equipment, software or otherwise, are required by <PPP Vendor> to meet its obligations during the Agreement Term, whether in addition to or in replacement of any then existing hardware or software, <PPP Vendor> will inform <Nodal Agency> and <Nodal Agency>, at <Nodal Agency>'s expense and on such other terms and conditions as the Parties mutually agree, will provide <PPP Vendor> with such resources. If <Nodal Agency> does not approve an acquisition proposed by <PPP Vendor>, <PPP

Vendor> will be excused from any responsibility for any resulting adverse impact on <Nodal Agency>, the Services or the Service Levels, but will use reasonable efforts to mitigate such impact.

## **6.9. Consents.**

The following provisions apply when this Agreement imposes upon a Party the responsibility to obtain any Consent:

- (a) The Party administratively responsible for obtaining the Consent will use reasonable efforts to obtain such Consent. The other Party will provide reasonable assistance to the responsible Party in obtaining such Consent. The Parties will cooperate to obtain such Consents in a cost effective and efficient manner.
- (b) When this Agreement provides that a Party will be financially responsible for obtaining any Consents, such responsibility will include (subject to Clause 6.9(c) below) the payment of any required transfer, upgrade, access, licence or similar fees or charges related thereto. If one Party is administratively responsible and the other Party is financially responsible, the financially responsible Party will promptly (but in no event later than 30 days after notification) reimburse the other Party for any of the foregoing fees or charges.
- (c) If any Consent cannot be obtained on a commercially reasonable basis, the Parties will (i) make any appropriate adjustments to their respective obligations under this Agreement, including, where necessary relieving <PPP Vendor> of any Service or Service Level obligations or adjusting the charges set out in this Agreement, all to the extent necessary due to a failure to obtain such Consents, and (ii) seek to establish mutually acceptable alternative arrangements so that the Parties may perform their respective obligations under this Agreement by alternative means.
- (d) <PPP Vendor> will identify for <Nodal Agency> any applicable <PPP Vendor> subcontractors that should be included within the scope of a Consent to be obtained by <Nodal Agency>.

## **6.10. Efficiency.**

<PPP Vendor> will use reasonable efforts to efficiently administer, manage, operate and use the resources employed by <PPP Vendor> to provide and perform the Services that are chargeable to <Nodal Agency> under this Agreement.

## **6.11. Technological Refresh.**

On at least an [annual] basis, the Parties will meet to review any new technology <PPP Vendor> is developing or general technology or industry trends and directions. In addition,

<PPP Vendor> will keep <Nodal Agency> reasonably apprised of any new developments, including new software and hardware developments, that <PPP Vendor> generally makes available to other similarly situated <Nodal Agency>s of <PPP Vendor> and that <PPP Vendor> believes could have a significant impact on the quality and cost-effectiveness of the Services. Consistent with <Nodal Agency>'s then existing budget parameters, <PPP Vendor> will use reasonable efforts to maintain the technology and processes utilised in providing the Services at a level that is comparable with the level of advancement generally attained in providing similar services in the *[insert applicable <Nodal Agency> industry segment]* industry. Any <Nodal Agency> request for additional assistance or services regarding new technology will constitute a New Service Request pursuant to Clause 4.6.

#### **6.12. Refresh; Maintenance.<sup>39</sup>**

- (a) The PPP Vendor shall ensure on a continuing basis that at all times its maintenance and operating procedures are sufficient to ensure that:
  - (i) the Service is continuously available ;
  - (ii) it can maintain the design intention of the assets to achieve their full working life; and
  - (iii) [the Assets are handed back to the Nodal Agency on the Expiry Date in a condition complying with the requirements of this Clause.]
- (b) Each Party will establish and maintain appropriate third-party maintenance arrangements for the maintenance of hardware and software for which it has operational responsibility under this Agreement.
- (c) With respect to hardware and third-party software for which a Party has financial and administrative responsibility under this Agreement:
  - (i) The Party will be responsible for the upgrading and refreshing of such hardware and third-party software. In consultation with the other Party, each Party may defer upgrading or refreshing any such hardware or software to the extent it has reasonable concerns regarding the stability of such hardware or software or whether the use of such equipment hardware or software will impair the ability of <PPP Vendor> to meet the Service Levels. <PPP Vendor> will not be responsible for any upgrade, modification

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<sup>39</sup> This provision will need to be reconciled with the business deal and the other provisions of Clause 6. To the extent the Nodal Agency is supplying hardware and software pursuant to Clauses 6.2 to 6.5 that is necessary to support PPP Vendor's performance and the Service Levels, the Nodal Agency must maintain and refresh such equipment/licenses.

or enhancement of any out-of-scope equipment or software required by any refresh of in-scope hardware or software performed by <PPP Vendor>.

- (ii) The objective of the Parties over time is to maintain in-scope software at releases that are no older than “N-x.”<sup>40</sup> However, the Parties recognise that <Nodal Agency>’s historical practices have not always maintained such software at “N-1” release levels in the past. The Parties will cooperate to assess the impact, including the economic impact, of maintaining such “N-x” upgrades on each in-scope software product. Among the factors that the Parties will take into account will be licensing concerns, the impact of regression testing and actual Service requirements.
- (iii) If <Nodal Agency> elects to maintain software under this Agreement at release levels that are not then generally supported by the applicable third-party vendor, then <PPP Vendor> will not be responsible for any failure to meet a Service Level if and to the extent that such failure arises because such software is not supported by the third-party vendor. Subject to the operation of Clause 8.11, <PPP Vendor> will use reasonable efforts to maintain such software at multiple release levels.
- (iv) If a vendor is unable or unwilling to bring its hardware or software into substantial conformance with its specifications, the Parties will cooperate to modify any impacted business process and this Agreement to the extent necessary to minimise the impact of the problem caused by such non-conformance.
- (d) With respect to any hardware and third-party software for which <Nodal Agency> has financial and administrative responsibility under this Agreement, or which <Nodal Agency> has requested that <PPP Vendor> not replace, <Nodal Agency> will be responsible for such maintenance as performed by third parties [*on a Pass-Through Expenses basis*] and will bear the cost of replacing such equipment or software.

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<sup>40</sup> Replace “x” with the relevant number. A “1” means that the software will be maintained to within one revision of commercial availability of new releases. Appropriate provision depends, in part, upon (i) what is included in the transaction’s costing model and (ii) currency of the Nodal Agency’s software releases in its operating environment.

### **6.13. Asset Obligations.<sup>41</sup>**

Unless other responsibilities are set out in the schedule identifying the applicable asset, the Parties' respective administrative, operational and financial responsibilities with respect to assets are summarised in this Clause 6.13. For purposes of this Clause 6 and Clauses 15.1 and 15.2, except as otherwise provided in this Clause 6, a Party having administrative, operational or financial responsibility for any particular asset will mean the following:

- (a) A Party who has administrative responsibility for an asset means that such Party will be responsible for managing such asset, including the tracking of renewal dates and licence compliance provisions;
- (b) A Party who has operational responsibility for an asset means that such Party will be responsible for operational support of the asset including the maintenance of such asset; and
- (c) A Party who has financial responsibility for an asset means that such Party will be responsible for all financial obligations with respect to such asset, including acquisition costs, maintenance costs, refresh and upgrade costs and, with respect to leased assets and except as provided for in Clause 6.3, any financial obligations set out in such lease.

### **6.14. Non-Transferred <Nodal Agency> Property.**

Except for property to which title is transferred to <PPP Vendor> as evidenced by a bill of sale or comparable written instrument of conveyance or pursuant to Clause 6.1, no interest or obligation is conferred upon <PPP Vendor> under this Agreement regarding <Nodal Agency>'s property beyond the limited right to use such property for purposes of this Agreement. All such property remains in the care, custody and control of <Nodal Agency>.

### **6.15. Preferred <Nodal Agency> Vendor.<sup>42</sup>**

*Upon the request of <Nodal Agency>, <PPP Vendor> will give due consideration to the use of a <Nodal Agency> preferred equipment or software vendor in connection with the acquisition (whether effected in one transaction or a series of related transactions) of any equipment or software assets in excess of [INR 1.0 million] annually. However, except as expressly provided*

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<sup>41</sup> This provision will need to be reconciled with the business deal and the other provisions of Clause 6

<sup>42</sup> In some cases, Nodal Agencies will ask that PPP Vendor use a particular hardware, software or service provider in connection with the services. Clause 6.15 illustrates this type of provision. The provision protects PPP Vendor from the price and service level consequences of a Nodal Agency's preference.

*in this Clause 6, the selection of any such preferred vendor will be subject to the prior written consent of <PPP Vendor>. If <PPP Vendor> consents to use any such <Nodal Agency> preferred equipment or software vendor, <Nodal Agency> will pay to <PPP Vendor> the incremental costs (including acquisition and support costs) of using such preferred vendor. Prior to using such preferred vendor, <PPP Vendor> will notify <Nodal Agency> of <PPP Vendor>'s estimates of such incremental costs. In addition, if prior to using such preferred vendor, <PPP Vendor> notifies <Nodal Agency> of its good faith belief that the <Nodal Agency> requested equipment or software may impair <PPP Vendor>'s ability to meet the Service Levels, <PPP Vendor> will not be responsible for any failure to meet a Service Level if and to the extent that such failure arises out of a failure of such equipment or software.*

#### **6.16. Further Assurances.**

<PPP Vendor> and <Nodal Agency> agree to execute and deliver such other instruments and documents as either Party reasonably requests to evidence or effect the transactions contemplated by this Clause 6.

#### **6.17. Escrow Agreement.**

- (a) <PPP Vendor> shall comply with the escrow provisions below for all Public Material and Proprietary Vendor Material (including subcontractor-owned materials and other Third Party Material incorporated in <PPP Vendor>'s Proprietary Material), except to the extent <PPP Vendor> demonstrates to the satisfaction of the Nodal Agency that compliance is not permitted by the nature of <PPP Vendor>'s limited rights in such material.
- (b) Within <ninety (90) days> after the Nodal Agency's acceptance of the Developed Solution, the Parties shall enter into a software escrow agreement ("Escrow Agreement") with a reputable, independent, third party that provides software escrow services among its principal business offerings ("Escrow Agent"). The Escrow Agreement shall provide for the regular deposit into escrow of all source code (including without limitation all make files, configurational files, data tables upon which execution is dependent, and the like, collectively the "Source Code"), object code, and documentation with respect to all Public Material and <PPP Vendor>'s Proprietary Material (and cumulative updates thereof), together with (a) continually updated instructions as to the compilation, installation, configuration, deployment, and use of the Source Code, and (b) a list of all non-deposited third party software used in conjunction with the Source Code to provide the full functionality of the deposited materials. In the event of the termination or expiration of the initial Escrow Agreement or any successor agreement, with minimal delay the Parties shall enter into a substantially equivalent agreement with a successor provider of software escrow services (who shall then be known as the "Escrow Agent").



- (c) <PPP Vendor> will make its initial deposit of Source Code within fifteen (15) days after the effective date of the Escrow Agreement.
- (d) <PPP Vendor> shall periodically update the escrow deposit as the Parties shall agree in the Escrow Agreement. In addition to other usual and customary terms, the Escrow Agreement shall provide that the Nodal Agency shall be entitled to obtain the deposited materials from escrow upon the Nodal Agency's making a proper claim for release from escrow in the event that (c) proper written notice is given to the Escrow Agent that release of the copy of the deposited materials is pursuant to applicable Central or Nodal Agency bankruptcy, insolvency, reorganization, or liquidation statute; (d) <PPP Vendor> files articles of dissolution (but not if <PPP Vendor> is consolidated or merged into another entity); (e) the Agreement expires or terminates for Material Breach of <PPP Vendor>.
- (e) The release of deposited materials from escrow shall not confer upon the Nodal Agency any right of ownership in the deposited materials or the underlying intellectual property embodied therein. In the event of the release of deposited materials to the Nodal Agency from escrow, the Nodal Agency shall use the deposited materials solely for the benefit of the Nodal Agency and its constituents, consistently with the grants of license set forth in Section 13 of this Agreement.
- (f) The release of materials from escrow, without more, shall not cause any further amounts to accrue as payable to <PPP Vendor> by the Nodal Agency, and the term of the Nodal Agency's possessory and usage rights with respect to the released materials shall be perpetual.
- (g) The Escrow Agreement shall provide for its automatic termination upon the earlier of five (5) years after the expiration or termination of this Agreement, or, release of all Source Code to the Nodal Agency and the Nodal Agency's subsequent confirmation of compliance with the terms of the Escrow Agreement. <PPP Vendor> shall pay the escrow costs, as well as all costs associated with causing its subcontractors and other third parties to abide by the Escrow Agreement.

## **7. SERVICE LOCATIONS; HEALTH, SAFETY AND SECURITY**

### **7.1. Service Locations.**

The Services will initially be provided at the <Nodal Agency> Service Locations and the <PPP Vendor> Service Locations identified in Schedule 7.1.<sup>43</sup> Notwithstanding Schedule 7.1, <PPP Vendor> may change <PPP Vendor> Service Locations without <Nodal Agency> approval provided such change does not detrimentally impact the obligations of <PPP Vendor> or Service Charges under this Agreement.

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<sup>43</sup> This draft assumes that the Services will be provided to the Nodal Agency primarily at one location and incidentally at other locations. It may be appropriate to identify the Services to be provided at each Service Location. If Services are to be provided at multiple locations, Tax and Legal issues needs to be factored in and communicated during the tendering stage. The Service Locations play an important role in the tax exposure of the transaction.

## **7.2. Access to <Nodal Agency> Service Locations and Items.**

During the Agreement Term, at no cost to <PPP Vendor> and to the extent necessary for <PPP Vendor> to provide the Services, <Nodal Agency> will provide <PPP Vendor> with (i) access to the <Nodal Agency> Service Locations 24 hours a day, seven days a week; (ii) suitable office space in <Nodal Agency>'s principal facility and at other mutually designated <Nodal Agency> facilities; and (iii) the following services and other items at each <Nodal Agency> facility, all on a mutually agreed basis<sup>44</sup>: (i) desks, storage, furniture and other normal office equipment support; (ii) adequate computer resources; (iii) photocopying facilities; (iv) telephone and facsimile equipment and services (including voice mail services); (v) stationery (excluding <PPP Vendor> specific items); (vi) postal and courier services; (vii) archiving facilities; (viii) secretarial support and word processing; (ix) general office supplies; (x) security and janitorial support; (xi) parking; and (xii) such other items, services and resources as the Parties may agree are reasonably necessary for <PPP Vendor> to perform its obligations under this Agreement (collectively, "<Nodal Agency> Service Location Items"). <PPP Vendor> may terminate its receipt of any <Nodal Agency> Service Location Items by giving <Nodal Agency> at least 30 days' prior written notice.

## **7.3. Use of <Nodal Agency> Service Locations.**

Unless otherwise approved by <Nodal Agency>, <PPP Vendor> may use the <Nodal Agency><sup>45</sup> Service Locations and the <Nodal Agency> Service Location Items only in connection with the provision of Services to <Nodal Agency> and not for the provision of services to other <Nodal Agency>s or customers of <PPP Vendor>.

## **7.4. <Nodal Agency> Service Location Policies.**

When working at any <Nodal Agency> Service Locations or other <Nodal Agency> facilities, <PPP Vendor> personnel will comply with <Nodal Agency>'s standard workplace security, administrative, safety and other policies and procedures applicable to <Nodal Agency>'s own employees. <Nodal Agency> will provide <PPP Vendor> with a copy of each such policy and procedure and will notify <PPP Vendor> of any subsequent modifications or amendments thereto. To the extent that any of such policies or procedures prevent <PPP Vendor> personnel from performing <PPP Vendor>'s obligations under this Agreement, <PPP Vendor> will not be in breach of this Agreement. If any such policies or procedures impose materially increased costs or obligations on <PPP Vendor>, the Parties will seek to establish mutually acceptable alternative arrangements and to make appropriate

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<sup>44</sup> It is assumed that the facilities mentioned here are not a part of the scope of work / services. In the event this is not true, this section needs to be amended

adjustments to their respective obligations under this Agreement (including the charges payable to <PPP Vendor>).

#### **7.5. Relocation from <Nodal Agency> Service Locations.**

*[The Parties currently anticipate that <PPP Vendor> will provide a significant portion of the Services on-site at the <Nodal Agency> Service Locations.]*<sup>46</sup> Prior to moving any material portion of the Services from a <Nodal Agency> Service Location, <PPP Vendor> will seek <Nodal Agency>'s written approval, which will not be unreasonably withheld. If <PPP Vendor> elects to relocate from a <Nodal Agency> Service Location without <Nodal Agency>'s consent, <PPP Vendor> will be financially & legally responsible for the related relocation expenses and new facility expenses except as provided in Clause 7.6.

#### **7.6. Relocation resulting from Changes in Laws and Regulations.**

The Parties acknowledge and agree that the Services are being provided offshore to leverage the use of lower cost offshore resources and the Service Charges are based on the use of such lower cost resources. In the event any laws or regulations are promulgated, changed, amended or otherwise come into effect at any time during the Agreement Term that impose taxes, tariffs, restrictions or limitations on, or prohibit, the offshore portion of the Services and <Nodal Agency> has benefited through savings attributed to the offshoring for whole or in part , <Nodal Agency> will either pay for the added expenses of performing the work offshore or pay the Solution Development expenses associated with relocating to an onshore <PPP Vendor> Service Location and increased Service Charges resulting from providing the Services from such <PPP Vendor> Service Location.

#### **7.7. Control of Service Locations.**

- (a) No interest or obligation of the <Nodal Agency> Service Locations or <Nodal Agency> Service Location Items is conferred upon <PPP Vendor> beyond the limited right to use such <Nodal Agency> Service Locations and <Nodal Agency> Service Location Items for purposes of this Agreement. All such facilities and items will remain in the care, custody and control of <Nodal Agency>.
- (b) No interest or obligation of the <PPP Vendor> Service Locations is conferred upon <Nodal Agency>. All such facilities will remain in the care, custody and control of <PPP Vendor>. <PPP Vendor> may use such facilities to provide services to other customers and <Nodal Agency>s.

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<sup>46</sup> Confirm if this is true

## **7.8. Additional Facilities.**

Unless <PPP Vendor>'s need for additional facilities increases as a result of New Services, <PPP Vendor> will be financially responsible for any additional facilities <PPP Vendor> requires for the performance of its obligations under this Agreement.

## **7.9. Health and Safety Provisions.**

- (a) The respective responsibilities of <Nodal Agency> and <PPP Vendor> under this Agreement for the purposes of ensuring compliance with the relevant Laws.
- (b) <Nodal Agency> warrants that, in respect of each of the <Nodal Agency> Service Locations set out in [Schedule 7.1] to this Agreement:
  - (i) as at the date of this Agreement, the <Nodal Agency> Service Locations comply in all respects with the standards set out in the Health & Safety Laws in relation to the workplace;
  - (ii) <Nodal Agency> will during <PPP Vendor>'s use and occupation of the <Nodal Agency> Service Locations rectify any defect or want of repair which constitutes a breach of or non-compliance with the Health & Safety Laws as soon as <Nodal Agency> is aware or ought to be aware of such defect or want of repair; and
  - (iii) in the event of any defect or want of repair to any part of the <Nodal Agency> Service Locations which is under the ownership, management and control of a third party, <Nodal Agency> shall serve a formal notice on that third party requiring the repair or remedy to be carried out forthwith, and shall furnish <PPP Vendor> with a copy of such notice given to the third party.
- (c) <Nodal Agency> warrants that, in respect of the workstations which are provided by <Nodal Agency> for use by <PPP Vendor> at the <Nodal Agency> Service Locations:
  - (i) each workstation, at the date of this Agreement and throughout its duration, comprises the furniture and equipment specified in <PPP Vendor>'s minimum workstation requirement;
  - (ii) <Nodal Agency> will without delay, replace, modify or renew any workstation furniture or equipment which ceases to meet the requirements; and
  - (iii) <Nodal Agency> will allocate sufficient space in each of the <Nodal Agency> Service Locations to accommodate the minimum number of workstations agreed by the parties for each respective <Nodal Agency> Service Location.

- (d) In the event that <Nodal Agency> fails to discharge its obligations under any of Clauses 7.9(b)(ii), 7.9(c)(ii) or 7.9(c)(iii) above within what, in <PPP Vendor>'s sole discretion, is a reasonable period of time, <PPP Vendor> shall be entitled to remedy any defect or want of repair, or substandard specification, or if in <PPP Vendor>'s reasonable opinion, such remedy is impossible or uneconomic, to renew or replace the affected part of the <Nodal Agency> Service Locations or workstation furniture and equipment and to recover any cost incurred in so doing from <Nodal Agency> forthwith.

#### **7.10. Security Guidelines.**

- (a) <PPP Vendor> shall comply with the relevant security, safety and other requirements specified in the Information Technology Act or Telegraph Act including the regulations issued by dept. of telecom (wherever applicable), IT Security Manual of the Nodal Agency and any other directions issued from time to time by the Nodal Agency and follow the industry standards related to safety and security, insofar as it applies to the provision of the Services. In case of any change to the technical requirements, it will be handled in accordance with change control procedure as set out in the Change Control Schedule.
- (b) Each Party to the Agreement shall also comply with Nodal Agency or the Government of India, and the respective State's security standards and policies in force from time to time at each location of which Nodal Agency make the <PPP Vendor> aware in writing insofar as the same apply to the provision of the Services.
- (c) The Parties to the Agreement shall use reasonable endeavours to report forthwith in writing to each other all identified attempts (whether successful or not) by unauthorized persons (including unauthorized persons who are employees of any Party) either to gain access to or interfere with the Nodal Agency as the case may be or any of their nominees data, facilities or Confidential Information.
- (d) <PPP Vendor> shall upon reasonable request by the Nodal Agency as the case may be or their nominee(s) participate in regular meetings when safety and information technology security matters are reviewed.
- (e) As per the provisions of the Agreement, the <PPP Vendor> shall promptly report in writing to the Nodal Agency, any act or omission which they are aware that could have an adverse effect on the proper conduct of safety and information technology security at the facilities of Nodal Agency as the case may be.

## **8. RELATIONSHIP GOVERNANCE**

### **8.1. <PPP Vendor> Account Representative.**

During the Agreement Term,<sup>47</sup> <PPP Vendor> will designate an individual who will be primarily dedicated to <Nodal Agency>'s account who (i) will be the primary contact for <Nodal Agency> in dealing with <PPP Vendor> under this Agreement; (ii) will have overall responsibility for managing and coordinating the delivery of the Services; (iii) will meet regularly with the <Nodal Agency> Account Representative; and (iv) will have the authority to make decisions with respect to actions to be taken by <PPP Vendor> in the ordinary course of day-to-day management of <PPP Vendor>'s account in accordance with this Agreement (the "<PPP Vendor> Account Representative").

### **8.2. <Nodal Agency> Account Representative.**

During the Agreement Term, <Nodal Agency> will designate a senior level individual who (i) will be the primary contact for <PPP Vendor> in dealing with <Nodal Agency> under this Agreement; (ii) will have overall responsibility for managing and coordinating the receipt of the Services; (iii) will meet regularly with the <PPP Vendor> Account Representative; and (iv) will have the authority to make decisions with respect to actions to be taken by <Nodal Agency> in the ordinary course of day-to-day management of this Agreement (the "<Nodal Agency> Account Representative").

### **8.3. Establishment of Service Management Steering Committee.**

<PPP Vendor> and <Nodal Agency> will appoint a Service Management Steering Committee (the "Service Management Steering Committee"), made up of a number of key executives from each Party (inclusive of the <PPP Vendor> Account Representative and the <Nodal Agency> Account Representative), which will meet, from time to time, and at such time as its members or the Parties deem appropriate to (i) review and analyse the monthly performance reports for the preceding period and the Parties' overall performance under this Agreement; (ii) review progress on the resolution of issues; (iii) provide a strategic outlook for <Nodal Agency>'s requirements; and (iv) attempt to resolve, or designate individuals to attempt to resolve, any disputes or disagreements under this Agreement. Although the <Nodal Agency> Account Representative and the <PPP Vendor> Account Representative will remain as members of the Service Management Steering Committee,

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<sup>47</sup> Consider setting a deadline (30 days after Effective Date, for instance) for the parties to designate Account Representatives and the Service Management Steering Committee members

either Party may change its other representatives from time to time upon written notice to the other. In addition, the Parties may mutually agree to increase or decrease the size, purpose or composition of the Service Management Steering Committee in an effort for <PPP Vendor> to better provide, and for <Nodal Agency> to better utilise, the Services. The members of the Service Management Steering Committee will not have separate voting rights; all actions of the Service Management Steering Committee required under this Agreement will require the mutual consent of the Parties.

#### **8.4. Key Management Positions.<sup>48</sup>**

- (a) In an effort to develop an environment in which the Services may be provided in an effective manner, the Parties may jointly designate from time to time certain key <PPP Vendor> account management positions, including the <PPP Vendor> Account Representative (“Key Management Positions”).<sup>49</sup> <PPP Vendor> will cause each of the personnel serving in a Key Management Position to devote a substantial part of his or her business time and effort to the provision of Services under this Agreement. With respect to the appointment of the initial and any replacement <PPP Vendor> personnel to Key Management Positions, the Parties will cooperate with each other to fill the Key Management Positions with individuals who are reasonably acceptable to <Nodal Agency>. Before assigning an individual to a Key Management Position, whether as an initial assignment or a replacement, <PPP Vendor> will (i) notify <Nodal Agency> of the proposed assignment; (ii) introduce the individual to appropriate <Nodal Agency> representatives; and (iii) subject to applicable law (including, without limitation, data protection legislation), obligations of confidentiality and <PPP Vendor>’s standard personnel practices, provide <Nodal Agency> with a curriculum vitae, and any other information about the individual reasonably requested by <Nodal Agency>. If <Nodal Agency> has a good faith objection to any such assignment within ten days, <PPP Vendor> will not assign the proposed individual, and will propose to <Nodal Agency> the assignment of another individual of suitable ability and qualifications, within a mutually agreed upon timeframe.
- (b) Except in the event of resignation, death, disability or termination of employment, <PPP Vendor> will notify <Nodal Agency> in writing at least 30 days prior to replacing any <PPP Vendor> personnel serving in a Key Management Position. In the event of any replacement of <PPP Vendor> personnel serving in Key Management Positions, <PPP Vendor> will provide for an appropriate transition (overlap) period

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<sup>48</sup> This draft does not require that (i) PPP Vendor Account Representative or any other individual serving in a Key Management Position serve for a specified minimum term or (ii) the compensation of such individuals be tied to PPP Vendor’s performance under the Agreement

<sup>49</sup> If these account positions have been established at contract signing, they can be identified in a schedule.



for the new individual and use reasonable efforts to minimise any disruption such replacement may cause in the performance of <PPP Vendor>'s obligations under this Agreement.<sup>50</sup>

- (c) If <Nodal Agency> determines, in good faith and consistent with applicable law, that the continued assignment of any <PPP Vendor> personnel serving in a Key Management Position is not in the best interests of <Nodal Agency>, <Nodal Agency> will notify <PPP Vendor> requesting the replacement of the individual and providing a confidential summary of the reasons why the replacement is needed. Promptly after receiving such request, the Parties will consult the matters stated in the request and either institute mutually agreeable corrective action or replace the individual within a mutually agreed upon timeframe. The replacement individual will have suitable ability and qualifications reasonably acceptable to <Nodal Agency>. This Clause 8.4(c) will not be construed to give <Nodal Agency> the ability to terminate the employment of any <PPP Vendor> personnel (or subcontractor personnel).
- (d) <PPP Vendor> will establish and maintain an up-to-date succession plan for all individuals serving in Key Management Positions.

## **8.5. Continuity of <PPP Vendor> Account Personnel.**

Consistent with the necessity for people to have the opportunity for promotion, the Parties agree that it is in their best interests to keep the attrition rate of <PPP Vendor> personnel (primarily dedicated to the <Nodal Agency> account to a level) that would not reasonably be likely to have an adverse effect on <PPP Vendor>'s performance under this Agreement. Accordingly, if <Nodal Agency> reasonably and in good faith believes that the attrition rate of such <PPP Vendor> personnel does not meet such standard, <Nodal Agency> may request a report stating the attrition rate for the previous 24 months. If requested by <Nodal Agency>, the Parties will meet and discuss the reasons for the attrition rate. If appropriate, <PPP Vendor> will submit to <Nodal Agency> its proposals for reducing the attrition rate, and the Parties will use reasonable efforts to bring the attrition rate to a mutually acceptable level.<sup>51</sup>

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<sup>50</sup> This draft does not prohibit PPP Vendor from reassigning or transferring any key account personnel without the Nodal Agency's approval.

<sup>51</sup> The scope of this attrition provision could be limited to individuals assigned to Key Management Positions, the Hired Employees or identified key Hired Employees rather than the entire account team. Nodal Agencies occasionally request that the agreement provide (i) for the designation of certain Hired Employees as critical to the continued provision of the Services, (ii) that, during a specified period of time, the employment of these critical Hired Employees may not be terminated except for cause, and (iii) that these critical Hired Employees may not be transferred or reassigned without the Nodal Agency's approval. In addition, Nodal Agencies occasionally request that the contract specify that the attrition rate will not exceed a specified maximum rate. If the parties pursue this approach, consider establishing the attrition rate by reference to the Nodal Agency's historical attrition rate



## 8.6. Account Documentation.

- (a) On or before the [six]-month anniversary of the Base Services Commencement Date, <PPP Vendor> will prepare appropriate “Account Documentation” which will summarise <PPP Vendor>’s enterprise-wide practices regarding how <PPP Vendor> will provide the Services under this Agreement, refer to any applicable documentation (e.g., operations manuals, user guides, specifications, etc.) that provides further details of such activities, describe the activities <PPP Vendor> proposes to undertake to provide the Services, including, where appropriate, those reporting, planning and oversight activities normally undertaken at facilities that provide services of the type <PPP Vendor> will provide under this Agreement, and summarise the management reporting procedures for <Nodal Agency>/<PPP Vendor> interaction and communication under this Agreement.
- (b) <PPP Vendor> will incorporate <Nodal Agency>’s reasonable comments or suggestions to the Account Documentation that do not, individually or in the aggregate, impose materially increased costs or obligations on <PPP Vendor>. <PPP Vendor> will periodically update the Account Documentation to reflect changes in the operations or procedures described therein within a reasonable time after such changes were made. All such Account Documentation is <PPP Vendor>’s Confidential Information.
- (c) Subject to the terms of this Agreement, both Parties will perform in accordance with the Account Documentation. In the event of a conflict between the provisions of this Agreement and the Account Documentation, the provisions of this Agreement will prevail.

## 8.7. Reports.

On or before the [six]-month anniversary of the Base Services Commencement Date, the Parties will establish an appropriate set of periodic reports regarding the provision of the Services by <PPP Vendor> to be delivered by <PPP Vendor> to <Nodal Agency> from time to time under this Agreement. Such reports will be no less comprehensive than <Nodal Agency>’s internal reporting as of the Effective Date and will be delivered at a frequency consistent with <Nodal Agency>’s historical practices as specified herein. On a monthly basis, <PPP Vendor> will provide, at a minimum, the following reports in a form mutually established by the Parties:

- (a) *[specify minimum reporting requirements during ramp-up]*; and
- (b) a monthly Changes report that describes (i) all Changes that have been made by <PPP Vendor> since the date of the last report and (ii) any ongoing or planned Changes during the upcoming month.

## 8.8. Meetings and Conference Calls.

On or before the [six]-month anniversary of the Base Services Commencement Date, the Parties will determine an appropriate set of periodic meetings or Video/telephone conference calls to be held between representatives of <Nodal Agency> and <PPP Vendor>. The Parties contemplate that such meetings will include the following:

- (a) a monthly meeting among the <Nodal Agency> Account Representative, the <PPP Vendor> Account Representative and any other appropriate operational personnel to discuss daily performance and planned or anticipated activities that may adversely affect performance or any Changes;
- (b) a quarterly management meeting of the Service Management Steering Committee; and
- (c) an annual senior management meeting to review relevant performance and other issues.

At either Party's request, the other Party will publish its proposed agenda for any meeting sufficiently in advance of the meeting to allow meeting participants a reasonable opportunity to prepare. All meetings will be held in a location mutually agreed by the Parties.

## 8.9. Relationships with <Nodal Agency> Contractors.

- (a) [Subject to the operation of Clause 4.6], <PPP Vendor> will cooperate with <Nodal Agency> and any other third-party contractor employed by <Nodal Agency> ("<Nodal Agency> Contractors") in the integration, where required, of <PPP Vendor>'s work under this Agreement with any other services, work, materials and equipment supplied by <Nodal Agency> or any <Nodal Agency> Contractor. Such cooperation will include providing (i) written requirements, standards and policies for systems operation so that the enhancements or developments of <Nodal Agency> Contractors may be operated by <PPP Vendor>, as applicable; (ii) assistance and support services to <Nodal Agency> Contractors at the charges specified in Schedule 10.1 if such charges are so specified, and at [*<PPP Vendor>'s standard commercial rates*], if none are specified; and (iii) access to the systems and the architecture configurations to the extent reasonably required for the activities of such <Nodal Agency> Contractors. Notwithstanding anything in this Agreement, <PPP Vendor> is not required to disclose its Confidential Information to competitors of <PPP Vendor>. <PPP Vendor> will promptly notify <Nodal Agency> if <PPP Vendor> determines that an act or omission of a <Nodal Agency> Contractor will delay or otherwise impair the provision of Services. <Nodal Agency> will be responsible for managing and supervising <Nodal Agency> Contractors and for any

failure of <Nodal Agency> Contractors to comply with <Nodal Agency>'s applicable obligations under this Agreement.

- (b) If the work performed by any <Nodal Agency> Contractor affects the Services being performed by <PPP Vendor> under this Agreement or such <Nodal Agency> Contractor otherwise uses resources furnished by <PPP Vendor>, <Nodal Agency> will use reasonable efforts to ensure that such <Nodal Agency> Contractor (i) cooperates with <PPP Vendor>; (ii) follows reasonable <PPP Vendor> standards, methodologies and procedures (including confidentiality and security procedures); (iii) complies with the licence and confidentiality requirements of vendors of the software on which such <Nodal Agency> Contractor is performing work; and (iv) executes, delivers and complies with any customary confidentiality and nondisclosure agreements reasonably required by <PPP Vendor> or such vendors. If a <Nodal Agency> Contractor notifies <Nodal Agency> that it does not in good faith believe that <PPP Vendor> standards, methodologies or procedures are reasonable in the industry or appropriate in the particular situation, then <Nodal Agency> will so notify <PPP Vendor> and the Parties will seek to establish mutually acceptable alternative arrangements.

#### **8.10. <PPP Vendor> Subcontractors.**

- (a) Except as provided in Clause 8.10(b) below, <PPP Vendor> will not subcontract all or any part of the Services without <Nodal Agency>'s consent, which will not be unreasonably withheld.
- (b) <Nodal Agency>'s consent under Clause 8.10(a) above is not required with respect to (i) <PPP Vendor> Affiliates; (ii) subcontractors that provide services customarily purchased from third-party vendors such as facilities maintenance, hardware and software maintenance, security, storage and other ancillary services; (iii) subcontractors proposed in the tender submitted by the <PPP Vendor> or (iii) any subcontractor not dedicated to <Nodal Agency> or any subcontractor who is providing services in a shared environment.
- (c) <PPP Vendor> will remain responsible for obligations under this Agreement performed by any <PPP Vendor> subcontractors to the same extent as if such obligations were performed by <PPP Vendor>'s employees. <PPP Vendor> will remain <Nodal Agency>'s sole point of contact regarding the Services. Any reference in this Agreement to <Nodal Agency> granting a right to, or conferring a benefit upon, <PPP Vendor> in order to facilitate the provision of the Services will be deemed to include <PPP Vendor>'s subcontractors unless the context indicates otherwise.
- (d) If <Nodal Agency> expresses any concerns to <PPP Vendor> regarding *bona fide* performance issues with any <PPP Vendor> subcontractors, <PPP Vendor> will

cooperate with <Nodal Agency> to resolve such concerns on a mutually acceptable basis.

### **8.11. System Change Control.**

<PPP Vendor> will comply with the following System Change control procedures:

- (a) <PPP Vendor> will schedule its implementation of System Changes so as not to unreasonably interrupt <Nodal Agency>'s business operations.
- (b) <PPP Vendor> will make no System Changes that would materially alter the functionality of the systems used to provide the Services or materially degrade the performance of the Services, without first obtaining <Nodal Agency>'s approval. <PPP Vendor> may make temporary System Changes at any time and without <Nodal Agency> approval, to the extent such System Changes are necessary, in <PPP Vendor>'s good faith judgment, (i) to maintain the continuity of the Services, or (ii) to correct an event or occurrence that would substantially prevent, hinder or delay the operation of <Nodal Agency>'s critical business functions. <PPP Vendor> will promptly notify <Nodal Agency> of all such temporary System Changes.
- (c) <PPP Vendor> will review, and perform a root-cause analysis of, any deviation from scheduled System Changes and failed System Changes.
- (d) Prior to using any software or equipment to provide the Services, <PPP Vendor> will utilise customary testing efforts to verify that the item has been properly installed, is operating substantially in conformance with its specifications, and is performing its intended functions in a reliable manner.
- (e) <PPP Vendor> will follow a formalised methodology in migrating programs from development and testing environments into production environments.

### **8.12. Contract Change Control.**

The Parties will comply with the following Contract Change control procedures to revise, amend, alter or otherwise change the Services being provided under this Agreement. These procedures do not apply to changes that result in New Services, which are initiated in accordance with Clause 4.6.

- (a) To request a Contract Change, <PPP Vendor> or <Nodal Agency>, as applicable, will deliver a written request (the "Change Request") to the <PPP Vendor> Account Representative or the <Nodal Agency> Account Representative, as the case may be, specifying in reasonable detail to the extent known (i) the proposed Contract Change; (ii) the objective or purpose of such Contract Change; (iii) the particular

Agreement and/or Schedule provisions that are affected by the Contract Change; and (iv) the requested prioritisation and schedule for such Contract Change.

- (b) The Parties will cooperate with each other in good faith in discussing the scope and nature of the Change Request. As soon as practicable and to the extent applicable, <PPP Vendor> will prepare and deliver to the <Nodal Agency> Account Representative a written statement (the "Change Response") describing any changes in methodology, procedures, prioritisation, products, services, assignment of personnel and other resources that <PPP Vendor> believes would be required to effect the Change. In addition, such Change Response will include, as appropriate or applicable (i) an estimation of the net increase or decrease in the pricing that would be required; (ii) the categories of costs to be avoided as a result of such Contract Change; (iii) a description of how the proposed Contract Change would be implemented; (iv) a description of the effect, if any, such Contract Change would have on this Agreement, including, without limitation, on Service Levels; (v) an estimation of all resources required to implement such Contract Change, including a description of the delivery risks and associated risk mitigation plans; and (vi) such other information as may be relevant to the proposed Contract Change. The <PPP Vendor> Account Representative and the <Nodal Agency> Account Representative will meet to determine whether they desire for <PPP Vendor> to proceed with the implementation of the proposed Contract Change in accordance with the Change Response.
- (c) Upon agreement of the Parties, the Change Response will amend this Agreement in accordance with Clause 20.11.

## **9. HUMAN RESOURCE MATTERS**

### **9.1. Transition of <Nodal Agency> Personnel.**

Schedule 9.1 sets out the terms and conditions under which <PPP Vendor> (or its subcontractors) will employ certain employees of <Nodal Agency> and certain human resource and related obligations of the Parties.

### **9.2. General Principles Regarding <PPP Vendor> Personnel.**

Except as provided in Clause 8.4, <PPP Vendor> reserves the right to determine which personnel will be assigned to perform Services, and to replace or reassign such personnel during the Agreement Term. The personnel assigned to the <Nodal Agency> account by <PPP Vendor> (or its subcontractors) will be and remain employees of <PPP Vendor> (or such subcontractors), and <PPP Vendor> (or such subcontractors) will provide for and pay the compensation and other benefits of such personnel, including salary, health, accident and workers' compensation benefits and all taxes and contributions that an employer is required to pay with respect to the employment of employees.

### **9.3. Limitations on Recruiting.**

Except as provided in Schedule 17.7 and unless otherwise agreed by the Parties in writing, during the Agreement Term and twelve months thereafter, neither Party will, directly or indirectly, knowingly solicit for employment, offer employment to or employ or retain (whether as an employee, officer, agent, consultant, advisor or in any other capacity) any employee of the other Party who is or was actively involved in the performance or evaluation of the Services. If a Party breaches this Clause 9.3, the breaching Party shall pay compensation to the non-breaching Party in the form of liquidated damages equal to the greater of six (6) month compensation either (a) offered to the Personnel by the breaching Party or (b) paid or offered to the Personnel by the non-breaching Party. Notwithstanding the foregoing, the Parties acknowledge and agree that this Agreement will not prohibit (i) solicitations through general public advertising or other publications of general public circulation or (ii) the hiring of any employee of a Party who contacts the other Party without such other Party having solicited such employee.

## **10. PRICE & PAYMENT**

### **10.1. Service Charges.**

In consideration for the performance of the Services, <Nodal Agency> will pay to <PPP Vendor> the charges specified in Schedule 10.1 ("Service Charges") plus Taxes and other amounts described in this Clause 10. <Nodal Agency> acknowledges that any Application Development / Project / Transformational Services described in Schedule 4.4(a) are independent of and non-contingent to the Base Services described in Schedule 4.2. Accordingly, <Nodal Agency> agrees to pay for the Application Development / Project / Transformational Services regardless of the Base Services obligations.

### **10.2. Reimbursement of Expenses.**

- (a) <Nodal Agency> will pay, or reimburse <PPP Vendor> for, the reasonable out-of-pocket expenses, including travel and travel-related expenses incurred by <PPP Vendor> with the prior written consent of <Nodal Agency>. <PPP Vendor> will invoice <Nodal Agency> separately for all such reimbursable expenses, as per the travel policy of the <PPP Vendor>.
- (b) Except as expressly provided in this Agreement, expenses that <PPP Vendor> expects to incur in performing the Services (including expenses for travel) are included in <PPP Vendor>'s charges and rates set out in this Agreement. Accordingly, such <PPP Vendor> expenses are not separately reimbursable by <Nodal Agency>, except as provided in (a) above.

### **10.3. Pass-Through Expenses.<sup>52</sup>**

- (a) Schedule 10.3(a) sets out certain expenses relating to the Services that will be incurred by <PPP Vendor> and will be passed through to <Nodal Agency> at <PPP Vendor>'s actual, direct cost (*i.e.*, with no handling fees, overhead or other markup by <PPP Vendor>) for payment by <Nodal Agency> directly to the applicable vendor ("Pass-Through Expenses"). Except as otherwise provided in this Agreement, <Nodal Agency> will not be responsible for any additional Pass Through Expenses without its prior consent.

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<sup>52</sup> Pass-through expenses should not include telecommunication expenses. Generally, from a discount perspective, it is better to have the telecommunications portion of the transaction contracted directly between BSNL and the Nodal Agency.

- (b) Promptly after <PPP Vendor>'s receipt of the third-party invoice for such expenses, <PPP Vendor> will use reasonable efforts to correct any errors therein and provide the invoice to <Nodal Agency> together with a statement that <PPP Vendor> has reviewed the invoiced charges and determined that such charges appear to be valid and should be paid by <Nodal Agency>/invalid and should be questioned by <Nodal Agency>. <PPP Vendor> will submit such invoice to <Nodal Agency> for payment within a reasonable period of time prior to the due date or, if a discount for early payment is applicable, the date on which <Nodal Agency> may pay such invoice with a discount. *[To the extent that <PPP Vendor>'s failure to submit an invoice to <Nodal Agency> in a timely manner results in a loss of a discount or a late fee with respect to such invoice, <PPP Vendor> will be responsible for the amount of such discount or late fee.]*
- (c) Promptly after <Nodal Agency>'s payment of Pass-Through Expenses, <Nodal Agency> will confirm such payment to <PPP Vendor> in writing. If <Nodal Agency> fails to pay the Pass-Through Expenses in a timely manner, <PPP Vendor> may advance such expenses on behalf of <Nodal Agency>, and <Nodal Agency> promptly will reimburse <PPP Vendor> for such payments.

#### **10.4. Retained Expenses.**

Schedule 10.4 sets out certain categories of expenses relating to the Services that will be retained by <Nodal Agency> ("Retained Expenses"). <Nodal Agency> will be responsible for administration and payment of all Retained Expenses. Furthermore, in addition to any other financial responsibilities of <Nodal Agency> contemplated by this Agreement, <Nodal Agency> will pay all costs and expenses with respect to which financial responsibility has not been expressly assigned to <PPP Vendor>, and which are not reasonably related to <PPP Vendor>'s express obligations under this Agreement.

#### **10.5. Inflation Adjustments.**

[The amounts identified in Schedule 10.1 as being subject to adjustment pursuant to this Clause 10.5 (the "Adjustable Amounts") are subject to adjustment as set out in this Clause 10.5. If *[the relevant inflation index.]*,<sup>53</sup> will at any anniversary of the Effective Date (the "Current Index"), increase from the applicable 12 months prior thereto (the "Base Index"), then effective as of such anniversary, the Adjustable Amounts, as previously adjusted, will be increased by the percentage that the Current Index increased from the Base Index.<sup>54</sup> In

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<sup>53</sup> The inflation index could be customized for the PPP project where it can be a weighted composite of Consumer Price Index, and other relevant indices etc.

<sup>54</sup> Nodal Agencies often insist that only the labour-based component of the pricing should be adjusted for Inflation. In these cases, Nodal Agencies will generally want to negotiate a fixed percentage of the particular inflation index to apply to each service tower or segment



such event, <PPP Vendor> will provide to <Nodal Agency> a recalculation of the Adjustable Amounts.

#### **10.6. Invoices; Method of Payment; Finance Charges.**

- (a) <PPP Vendor> will render a single consolidated invoice in [*advance/arrears*] for each month's charges. Each invoice will include such detail as reasonably requested by <Nodal Agency> to satisfy <Nodal Agency>'s internal accounting and chargeback requirements, consistent with <Nodal Agency>'s historical practices provided in writing to <PPP Vendor> prior to the Effective Date. Upon the request of <Nodal Agency>, such invoices will allocate charges among Service components, locations and departments, consistent with <Nodal Agency>'s historical practices provided in writing to <PPP Vendor> prior to the Effective Date.
- (b) Any amount due to <PPP Vendor> under this Agreement for which a time for payment is not otherwise specified herein, will be due and payable 25 days after <Nodal Agency>'s receipt of <PPP Vendor>'s invoice.
- (c) All amounts to be paid to <PPP Vendor> under this Agreement will be paid in [Indian National Rupee] by Electronic Fund Transfer to the account or accounts designated by <PPP Vendor> from time to time or by such other method as is mutually determined by the Parties. In the event of delay in payment of undisputed amount beyond <30 working days>, Implementation Agency shall be entitled to a late payment interest of <Specify rate of Interest> per annum from the date of completion of <30 working days> after submission of invoice. This interest is subject to a limit of <10%> of the total contract value.
- (d) Exchange rate variation:  
  
[Option 1:]To work out the variation due to changes (if any) in the exchange rate(s), the base date for this purpose will be the due date of opening of tenders/seven days prior to the due date of opening of tenders (the purchase organization is to decide and adopt a particular suitable date). The variation may be allowed between the above base date and the date of remittance to the foreign principal/mid-point of manufacture of the foreign component/or the actual purchase schedule provided by the bidder (the purchase organization is to choose the appropriate date). The applicable exchange rates as above will be according to the TT Selling Rates of Exchange as quoted by authorized Exchange Bankers approved by the Reserve Bank of India on the dates in question. No variation in price in this regard will be allowed if the variation in the rate of exchange remains within the limit of plus/minus 2.5 percent. Any increase or decrease in the Customs Duty by reason of the variation in the rate of exchange in terms of the contract will be to the buyer's account. In case Delivery period is refixed/ extended, ERV will not be admissible, if this is due to

default of the supplier. The following documents should be furnished by the supplier for claiming ERV:

- A bill of ERV claim enclosing working sheet (may be taken as a part of the financial bid)
- Schedule for placing order from OEM for the component
- Copies of import order placed on supplier
- Invoice of supplier for the relevant import order
- Banker's Certificate/debit advice detailing F.E. paid, date of remittance and exchange rate

[Option 2:]To work out the variation due to changes (if any) in the exchange rate(s), the base date for this purpose will be the due date of opening of tenders/seven days prior to the due date of opening of tenders (the purchase organization is to decide and adopt a particular suitable date).

The variation reimbursed to the vendor shall be calculated on the difference between (a) the invoice value based on the previous three months average exchange rate; and (b) invoice value based on the price quoted by the vendor on the bid submission date. The applicable exchange rates as above will be according to the TT Selling Rates of Exchange as quoted by authorized Exchange Bankers approved by the Reserve Bank of India on the dates in question. No variation in price in this regard will be allowed if the variation in the rate of exchange remains within the limit of plus/minus <2.5> percent.

Any increase or decrease in the Customs Duty by reason of the variation in the rate of exchange in terms of the contract will be to the buyer's account. In case Delivery period is refixed/ extended, ERV will not be admissible, if this is due to default of the supplier.

*[Note:*

- 1. The exchange rate variation clause in 13.2(f) shall be retained only for projects involving hardware procurement, wherein period of implementation/ Go-Live Date is beyond a period of one (1) year from Effective Date.*
- 2. At the time of executing the agreement the Purchaser shall specify the exchange rate and the base date, which shall be either the due date of opening of tenders/seven days prior to the due date of opening of tenders*
- 3. The applicable exchange rates will be according to the TT Selling Rates of Exchange as quoted by authorized Exchange Bankers approved by the Reserve Bank of India.]*

### **10.7. Proration.**

Periodic charges under this Agreement are to be computed on a calendar month basis and will be prorated on a per diem basis for any partial month.

### **10.8. Unused Credits.**

Any unused credits against future payments owed to either Party by the other pursuant to this Agreement will be paid to the applicable Party within 30 days after the expiration or termination of this Agreement.

### **10.9. Refundable Items.**

- (a) If it is determined that <Nodal Agency> has prepaid for a service or function for which <PPP Vendor> is assuming financial responsibility under this Agreement, <PPP Vendor> will credit <Nodal Agency> that portion of such prepaid expense that is attributable to periods after the *[Effective Date]* *[Base Services Commencement Date]* against <PPP Vendor>'s invoice for such applicable period. <Nodal Agency> will reimburse <PPP Vendor>, upon expiration or termination of this Agreement, for that portion of any amounts prepaid by or on behalf of <PPP Vendor> that are attributable to periods on and after the effective date of expiration or termination of this Agreement.
- (b) If <Nodal Agency> receives a refund, credit or other rebate for goods or services paid for by <PPP Vendor> pursuant to this Agreement, <Nodal Agency> will promptly notify <PPP Vendor> of such refund, credit or rebate and pay the full amount thereof to <PPP Vendor>.

### **10.10. Disputed Charges.**

<Nodal Agency> may withhold payment of particular charges that <Nodal Agency> reasonably and in good faith disputes.<sup>55</sup> Any amounts (or portions thereof) not so disputed otherwise will be paid by the applicable payment due date, as determined pursuant to Clause 10.6. <Nodal Agency> will notify <PPP Vendor> in writing on or before the payment due date of any disputed charges for which <Nodal Agency> is withholding payment and describe, in reasonable detail, the reason for such withholding. <Nodal Agency> and <PPP

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<sup>55</sup> Although this draft allows the Nodal Agency to withhold payment of disputed changes, it does not grant the Nodal Agency the occasionally requested general right to set off against any PPP Vendor invoice any amount that PPP Vendor is obligated to pay the Nodal Agency.

Vendor> will diligently pursue an expedited resolution of such dispute. If the Parties are unable to resolve such dispute within 30 days after <Nodal Agency>'s receipt of the invoice and the aggregate amount of all charges then under dispute pursuant to this Clause 10.10 exceeds INR \_\_\_\_\_, <Nodal Agency> will deposit into an escrow account the total amount so withheld (including the first INR \_\_\_\_\_ thereof) within five days after the receipt of an <PPP Vendor> written request. <Nodal Agency> will promptly furnish evidence of any escrow deposit to <PPP Vendor>. The Parties will mutually establish such escrow account at a major national bank mutually acceptable to the Parties, and the costs thereof will be borne by the Parties in inverse proportion to the distribution to which each Party is entitled from such account. The escrow account will be established pursuant to an escrow agreement that provides that the funds therein, including accrued interest, will be disbursed to <PPP Vendor> or <Nodal Agency>, as applicable, in accordance with the result of the dispute resolution process referred to in Clause 17 or by mutual agreement of the Parties. For as long as <Nodal Agency> makes such escrow deposits while the dispute remains ongoing, and pays all undisputed amounts, <PPP Vendor> will continue to provide the Services to <Nodal Agency>, subject to the termination rights set out in Clause 17. If <Nodal Agency> fails to escrow payments as required by this Agreement, <PPP Vendor> may apply to any court of competent jurisdiction to seek injunctive relief for such failure and will have the right to terminate this Agreement pursuant to Clause 17.1. Upon resolution of the dispute, any amounts owed to <PPP Vendor> shall be paid with interest at the rate set forth in clause 10.6.c above accruing from the date such amounts were originally due.

#### **10.11. Taxes.**

**[ Note : need to consider VAT on payments from <Nodal Agency> to <PPP Vendor> with respect to redundancy]**

- (a) Each party shall remain liable to pay such taxes that are imposed by any Central, State, or Local governmental entity on any property or income or gains from their own respective trading and/or investment activities. Each Party shall also remain liable to pay taxes due on wages or other emoluments of their employee(s), sub-contractor(s), or any person engaged by the Party that is legally imposed by the appropriate legislation.
- (b) All charges payable under this Agreement shall be exclusive of sales, value added, goods and services, and all other similar taxes (hereinafter referred to as "Transaction Tax") imposed by any Central, State, or local governmental entity for any supply provided under this Agreement. The <Nodal Agency> shall pay in addition to the consideration payable under this Agreement, such Transaction Tax at the appropriate prevailing rate provided that <PPP Vendor> shall not only itemizes such Transaction Taxes separately but also, issues a proper local Transaction Tax compliant or such other approved invoice(s) to the <Nodal Agency>

- (c) Where any supply provided by the <PPP Vendor> under this Agreement is exempt from Transaction Tax imposed by any Central, state, or local governmental entity, <PPP Vendor> shall be entitled to pass on to the <Nodal Agency>, as additional part of the consideration for such a supply, any amount of such Transaction Tax that <PPP Vendor> is not permitted to obtain credit for or recover from the relevant authority (hereinafter referred to as “non recoverable input Transaction Tax”). The input Transaction Tax is any tax charged or incurred on any purchase of any supply of goods or services by <PPP Vendor> in order to be able to provide Supplies under this Agreement. In recognition of the complexities involved in establishing and computing the amount of non recoverable input Transaction Tax, both parties hereby agree that the non recoverable input Transaction Tax shall be computed as <....%> of the output Transaction Tax that <PPP Vendor> would normally charge on the consideration if the said supply were, indeed, subject to VAT (or such other similar taxes) at the standard rate.
- (d) Where any supply under this Agreement is deemed to take place in a jurisdiction outside the jurisdiction where <PPP Vendor>’s normal place of business is located, and <PPP Vendor> is required to register for local Transaction Tax, for avoidance of any doubt, the Parties hereby agree that <PPP Vendor> is permitted to charge the Transaction Tax of that jurisdiction at the appropriate prevailing rate.
- (e) [*With <Nodal Agency>’s prior approval*] if <PPP Vendor> Personnel are required to perform Services outside the city or state in which such <PPP Vendor> Personnel are based, <Nodal Agency> will reimburse <PPP Vendor> for increased taxes (and assignment related costs) incurred by <PPP Vendor>
- (f) The Parties will cooperate to segregate the Service Charges into the following separate payment streams: (i) those for taxable Services; (ii) those for non-taxable Services; (iii) those for Pass-Through Expenses where <PPP Vendor> functions merely as a paying agent for <Nodal Agency> in receiving goods, supplies or services (including leasing and licensing arrangements); and (iv) reimbursable expenses. <PPP Vendor> will not collect or include in its invoices any sales or use taxes for which <Nodal Agency> has furnished a properly executed and valid exemption certificate.
- (g) If <PPP Vendor> is assessed a deficiency (including penalties and interest thereon) for taxes payable by <Nodal Agency> pursuant to this Agreement, <PPP Vendor> will use reasonable efforts to promptly notify <Nodal Agency> of such assessment and will administratively contest such assessment to the extent it is requested in a timely manner or authorised to do so by <Nodal Agency>. <Nodal Agency> shall indemnify and hold harmless <PPP Vendor> from any such tax deficiency (including penalties and interest).
- (h) The Parties will reasonably cooperate with each other to more accurately determine each Party’s tax liability and to minimise such liability to the extent legally

permissible. <Nodal Agency> and <PPP Vendor> will provide and make available to the other any resale certificates, withholding tax certificates, information regarding out-of-state sales or use of equipment, materials or services, and other exemption certificates or information reasonably requested by either Party.

- (i) For purposes of this Agreement, taxes shall include taxes incurred on transactions between and among <PPP Vendor>, its Affiliates and third party subcontractors.

## **11. REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS**

### **11.1. <PPP Vendor> Representations and Warranties.**

<PPP Vendor> hereby represents and warrants to <Nodal Agency> as follows:

- (a) *Organization; Power.* <PPP Vendor> [*limited liability company*] has all requisite power and authority to execute and deliver this Agreement and to perform its obligations hereunder.
- (b) *Authority; Enforceability.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorised by all requisite action on the part of <PPP Vendor>. This Agreement constitutes the legal, valid and binding agreement of <PPP Vendor>, enforceable against <PPP Vendor> in accordance with its terms (except insofar as such enforceability may be limited by applicable bankruptcy, insolvency, reorganisation, moratorium or similar laws affecting creditors' rights generally, or by principles governing the availability of equitable remedies).
- (c) *Non-contravention.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby will not materially conflict with, or result in any material violation or breach of, any contract to which <PPP Vendor> is a party.

### **11.2. <Nodal Agency> Representations and Warranties.**

<Nodal Agency> hereby represents and warrants to <PPP Vendor> as follows:

- (a) *Organization; Power.* <Nodal Agency> is a [*public limited company/ Society*] duly registered and validly existing under the relevant laws of India. <Nodal Agency> has all requisite power and authority to execute and deliver this Agreement and to perform its obligations hereunder.
- (b) *Authority; Enforceability.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, have been duly authorised by all requisite corporate action on the part of <Nodal Agency>. This Agreement constitutes the legal, valid and binding agreement of <Nodal Agency>, enforceable against <Nodal Agency> in accordance with its terms (except insofar as such enforceability may be limited by applicable bankruptcy, insolvency, reorganisation, moratorium or similar laws affecting creditors' rights generally, or by principles governing the availability of equitable remedies).

- (c) *Non-contravention.* The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby will not conflict with, or result in any violation or breach of, any contract to which <Nodal Agency> is a party.
- (d) *Assets, Employees and Facilities Necessary to Business.* [Except as specifically disclosed in Schedule 11.2(d),] The hardware, software and other assets owned, licensed or leased by <Nodal Agency> which are to be transferred to, or assumed by <PPP Vendor>, or to which <PPP Vendor> is granted rights to use under this Agreement, along with the Employees Offered Employment, contractors and the office space, other facilities and Service Location Items to be provided or made available to <PPP Vendor> under this Agreement [together with the persons who would otherwise occupy vacant in-scope positions] are, in the aggregate, sufficient in all material respects to carry on that portion of the operations presently conducted by <Nodal Agency> that comprise the Base Services.<sup>56</sup> Furthermore, the information furnished by <Nodal Agency> on which <PPP Vendor> based the Services and Service Charges as set out in this Agreement is accurate and complete in all material respects.

### **11.3. Additional Undertakings.** <sup>57</sup>

- (a) *Performance.* <PPP Vendor> will perform the Services in a good and workmanlike manner.
- (b) *Viruses.* Each Party will use reasonable efforts through the use of industry standard virus protection software and other customary procedures to screen any software provided or made available by it to the other Party hereunder to avoid introducing any “virus” or other computer software routine or hardware components that materially disrupts the proper operation of or provides improper access to the systems. If such a virus is found to have been introduced by <PPP Vendor> into such systems, <PPP Vendor> will use reasonable efforts to assist <Nodal Agency> in mitigating the effects of the virus, if any, on that portion of <Nodal Agency>’s information technology environment relating to the Base Services.
- (c) *Adequacy of Employees.* <PPP Vendor> will use adequate numbers of qualified personnel to perform the Services (where the pricing for such Services is not measured by a number of people, full-time equivalents, a time-based billing mechanism or similar metric). <PPP Vendor> undertakes that the <PPP Vendor>

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<sup>56</sup> The purpose of this representation is to minimise gaps between the in-scope employees, facilities and assets to be provided to PPP Vendor and the scope of the services description

<sup>57</sup> Nodal Agencies occasionally ask that these “undertakings” be styled as representations and warranties (presumably to make more favourable claims or remedies available to the Nodal Agency, if litigation is ever initiated).



employees utilised in the provision of Services to <Nodal Agency> will possess suitable training, education, experience and skill to perform the Services.

- (d) *Disabling Codes.* <PPP Vendor> will not, without notifying <Nodal Agency>, knowingly insert, or knowingly allow to be inserted, into the software used to provide the Services any code or other device that is designed to disable, damage, erase, delay or otherwise shut down all or any portion of the Services or the hardware, software or data used in providing the Services.

#### **11.4. Warranty Regarding <PPP Vendor> Work Product.<sup>58</sup>**

- (e) <PPP Vendor> warrants that any software comprising Work Product developed by <PPP Vendor> pursuant to this Agreement (the “<PPP Vendor> Warranty Item”) will substantially conform during the Warranty Period to the applicable written design specifications agreed upon by the Parties with respect to such item. In addition, (i) the documentation for such <PPP Vendor> Warranty Item will be sufficient to allow a reasonably knowledgeable and experienced systems programmer to maintain and support such <PPP Vendor> Warranty Item and (ii) any user documentation for such <PPP Vendor> Warranty Item will accurately describe in terms understandable by a typical end user the functions and features of such <PPP Vendor> Warranty Item and the procedures for exercising such functions and features.
- (f) <Nodal Agency> will notify <PPP Vendor> in writing of any defects in such <PPP Vendor> Warranty Item that cause it not to substantially conform to the applicable design specifications during the Warranty Period and will provide <PPP Vendor> with adequate information to identify the circumstances in which such defects were discovered.
- (g) <Nodal Agency>’s sole and exclusive remedy for any breach of such warranty will be the correction by <PPP Vendor> of any defects in such <PPP Vendor> Warranty Item that cause it not to substantially conform to the applicable design specifications. <PPP Vendor> will provide such corrections at no charge to <Nodal Agency> in addition to the Service Charges. <Nodal Agency> will provide to <PPP Vendor> access, in a timely manner, to any technical support, facilities, hardware, software or information in <Nodal Agency>’s possession necessary for <PPP Vendor> to complete such work. <PPP Vendor> will correct such defects as soon as reasonably practicable and furnish <Nodal Agency> with a revised or updated <PPP Vendor> Warranty Item reflecting any corrections made pursuant to this Clause 11.4.

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<sup>58</sup> The appropriateness of this provision will depend upon the nature of the Services provided. For example, this provision is appropriate with project (or true development) work. It would probably not be appropriate with maintenance and enhancement work

- (h) Notwithstanding the foregoing, this warranty will not apply to the extent an <PPP Vendor> Warranty Item does not substantially conform to the applicable written design specifications as a result of a defect arising from (i) any act or omission of <Nodal Agency>; (ii) any Person (other than <PPP Vendor> or any Person under the express direction of <PPP Vendor>) making any revisions or modifications to the <PPP Vendor> Warranty Item after its provision to <Nodal Agency>; (iii) the malfunction of any <Nodal Agency>-supplied software or equipment; (iv) <Nodal Agency> operation of the <PPP Vendor> Warranty Item other than in accordance with applicable documentation or design, or on hardware not recommended, supplied or approved by <PPP Vendor>; or (v) the occurrence of any Force Majeure Event. In any such event, the warranty described herein with respect to the portion of the <PPP Vendor> Warranty Item so affected will not apply to such defect, and the Parties will seek to establish mutually agreed alternative arrangements thereto through the execution of a New Service Request pursuant to Clause 4.6.
- (i) This Clause 11.4 will not apply to third-party software.

#### **11.5. Pass-Through Warranties; Third-Party Software.**

With respect to all third-party products and services purchased by <PPP Vendor> for <Nodal Agency> in connection with the provision of the Services, <PPP Vendor> will pass through or assign to <Nodal Agency> the rights <PPP Vendor> obtains from the manufacturers and/or vendors of such products and services (including warranty and indemnification rights), all to the extent that such rights are assignable. *[If pass-through warranties and indemnities reasonably acceptable to <Nodal Agency> are not available from a subcontractor or supplier whose services or products are dedicated to <Nodal Agency>, or that are not provided in a shared environment, then <PPP Vendor> will discuss the matter with <Nodal Agency> prior to engaging the particular subcontractor or supplier, and the Parties will mutually determine to either accept the terms available from such subcontractor or supplier, in which case <PPP Vendor> will enforce the applicable warranty or indemnity on behalf of <Nodal Agency> as provided below, or deal with another vendor of comparable products or services that will provide warranties and indemnities reasonably acceptable to <Nodal Agency>. In the event of a third-party software or hardware nonconformance, <PPP Vendor> will coordinate with, and be the point of contact for resolution of the problem through, the applicable vendor and, upon becoming aware of a problem, will notify such vendor and will use reasonable efforts to cause such vendor to promptly repair or replace the nonconforming item in accordance with such vendor's warranty. If any warranties or indemnities may not be passed through, <PPP Vendor> will, upon the request of <Nodal Agency>, take reasonable action to enforce any applicable warranty or indemnity that is enforceable by <PPP Vendor> in its own name. However, <PPP Vendor> will have no obligation to resort to litigation or other formal dispute resolution procedures to enforce any such warranty or indemnity.]*

### **11.6. Disclaimer of Warranties.**

Except as otherwise expressly provided in this Clause 11, the Parties make no representations or warranties, and hereby exclude all conditions, express or implied, regarding any matter, including fitness for a particular purpose, merchantability, informational content, systems integration, non-infringement, interference with enjoyment, or results to be derived from the use of any Service, software, hardware, deliverables, work product or other materials provided under this Agreement. <PPP Vendor> expressly disclaims any warranty or condition as to the accuracy or completeness of data, operational criteria or parameters provided by <Nodal Agency>. <PPP Vendor> does not represent or warrant, nor is it a condition of this Agreement, that the operation of any software will be uninterrupted or error free.

## **12. CONFIDENTIALITY; SAFEGUARDING OF DATA**

### **12.1. Confidentiality.**

- (a) In connection with this Agreement, each of the Parties has disclosed and may continue to disclose to the other Party information that relates to the disclosing Party's business operations, financial condition, customers, products, services or technical knowledge. Except as otherwise specifically agreed in writing by the Parties, <PPP Vendor> and <Nodal Agency> each agree that (i) all information communicated to it by the other and identified as confidential, whether before or after the Effective Date; (ii) all information identified as confidential to which it has access in connection with the Services, whether before or after the Effective Date; (iii) all information communicated to it that reasonably should have been understood by the receiving Party, because of confidentiality or similar descriptions, the circumstances of disclosure or the nature of the information itself, to be confidential to the disclosing Party; and (iv) the terms and conditions of this Agreement (collectively, the "Confidential Information"), will be and will be deemed to have been received in confidence and will be used only for purposes of this Agreement. The Parties acknowledge that third-party software may be subject to additional confidentiality restrictions imposed by the applicable vendor's licence or other agreement.
- (b) [Each Party's Confidential Information will remain the property of that Party except as otherwise expressly provided in this Agreement.] Each of the Parties will use at least the same degree of care to safeguard and to prevent disclosing to third parties the Confidential Information of the other as it employs to avoid unauthorised disclosure or publication of its own information (or information of its customers) of a similar nature, and in any event, no less than reasonable care. Each Party may disclose relevant aspects of the other Party's Confidential Information to its employees, Affiliates, subcontractors and agents to the extent such disclosure is reasonably necessary for the performance of its obligations, or the enforcement of its rights, under this Agreement; provided, however, that such Party will use reasonable efforts to ensure that such employees, Affiliates, subcontractors or agents comply with these confidentiality provisions. Each Party will be responsible for any improper disclosure of Confidential Information by such Party's employees, Affiliates, subcontractors or agents. A Party may reuse for its own purposes with third parties the terms and conditions of this Agreement, provided that (i) such use in no way may be attributed to the other Party, this Agreement or the relationship between <PPP Vendor> and <Nodal Agency> and (ii) such use is not used in negotiations with the other Party or any of the other Party's Affiliates for any other contractual arrangement.

- (c) Neither Party will (i) make any use or copies of the Confidential Information of the other except as contemplated by this Agreement; (ii) acquire any right in or assert any lien against the Confidential Information of the other; or (iii) sell, assign, lease or otherwise commercially exploit the Confidential Information (or any derivative works thereof) of the other Party. Neither Party may withhold the Confidential Information of the other Party or refuse for any reason (including due to the other Party's actual or alleged breach of this Agreement) to promptly return to the other Party its Confidential Information (including copies thereof) if requested to do so. Upon expiration or termination of this Agreement and completion of a Party's obligations under this Agreement, each Party will (except as otherwise provided in this Agreement) return or destroy, as the other Party may direct, all documentation in any medium that contains or refers to the other Party's Confidential Information, and retain no copies. Subject to the foregoing confidentiality obligations, either Party may retain copies of the Confidential Information of the other Party to the extent required for (i) in the case of <PPP Vendor>, compliance with applicable professional standards or quality assurance purposes and (ii) in the case of <Nodal Agency>, its continuing operations or internal business purposes.
- (d) This Clause 12.1 will not apply to any particular information that either Party can demonstrate (i) was, at the time of disclosure to it, in the public domain; (ii) after disclosure to it, is published or otherwise becomes part of the public domain through no fault of the receiving Party; (iii) was in the possession of the receiving Party at the time of disclosure to it and was not the subject of a pre-existing confidentiality obligation; (iv) was received after disclosure to it from a third party who had a lawful right to disclose such information (without corresponding confidentiality obligations) to it; or (v) was independently developed by the receiving Party without use of the Confidential Information of the disclosing Party.
- (e) In addition, a Party will not be considered to have breached its obligations under this Clause 12.1 for disclosing Confidential Information of the other Party to the extent required to provide information under Right to Information' 2005 (as and when it is applicable for PPP projects), satisfy any legal requirement of a competent governmental or regulatory authority, provided that promptly upon receiving any such request and to the extent that it may legally do so, such Party advises the other Party prior to making such disclosure in order that the other Party may object to such disclosure, take action to ensure confidential treatment of the Confidential Information, or (subject to applicable law) take such other action as it considers appropriate to protect the Confidential Information.
- (f) Nothing contained in this Clause 12.1 will be construed as obligating a Party to disclose its Confidential Information to the other Party, or as granting to or conferring on a Party, expressly or impliedly, any rights or licence to the Confidential Information of the other Party.

## **12.2. <Nodal Agency> Data.**

- (a) As between the Parties, <Nodal Agency> will be the sole and exclusive owner of all <Nodal Agency> Data. <PPP Vendor> will utilise the <Nodal Agency> Data solely for purposes of this Agreement and will not sell, assign, lease or otherwise commercially exploit the <Nodal Agency> Data. <Nodal Agency> Data will be deemed <Nodal Agency> Confidential Information for purposes of Clause 12.1. <PPP Vendor> is hereby authorised to have access to and to make use of the <Nodal Agency> Data during the Agreement Term to the extent reasonably necessary or appropriate for the performance by <PPP Vendor> of its obligations hereunder.
- (b) <PPP Vendor> will observe <Nodal Agency>'s pre-existing written procedures and safeguards against the destruction, loss or alteration of <Nodal Agency> Data in <PPP Vendor>'s possession where they are provided to <PPP Vendor> in advance. To the extent such procedures have not been established by <Nodal Agency>, <PPP Vendor> will maintain safeguards no less rigorous than those maintained by <PPP Vendor> for its own similar data. <Nodal Agency> will be responsible for the sufficiency of such policies and safeguards. With respect to the <Nodal Agency> Data in the possession of <PPP Vendor>, <PPP Vendor> will be responsible for compliance with such procedures and safeguards. <Nodal Agency> may establish backup security for the <Nodal Agency> Data and keep backup data and data files in its possession if it so chooses. Any change in the Services required by law or regulation that increases <PPP Vendor>'s costs and expenses with respect to compliance with this Clause 5.1(b) will be subject to the operation of Clause 8.12.
- (c) <PPP Vendor> may retain archival copies of <Nodal Agency> Data as reasonably necessary to verify <PPP Vendor>'s compliance with this Agreement. <PPP Vendor> will identify such data to <Nodal Agency> at the time such archival copies are withheld.

## **12.3. Unauthorised Acts.**

Each Party will:

- (a) notify the other Party promptly of any material unauthorised possession, use or knowledge, or attempt thereof, of the other Party's Confidential Information by any Person that may become known to such Party;
- (b) promptly furnish to the other Party details of the unauthorised possession, use or knowledge, or attempt thereof, and use reasonable efforts to assist the other Party in investigating or preventing the recurrence of any unauthorised possession, use or knowledge, or attempt thereof, of Confidential Information;

- (c) use reasonable efforts to cooperate with the other Party in any litigation and investigation against third parties deemed necessary by the other Party to protect its proprietary rights; and
- (d) promptly use reasonable efforts to prevent a recurrence of any such unauthorised possession, use or knowledge of Confidential Information.

The Party whose Confidential Information is the subject of such activity will reimburse any out-of-pocket expenses incurred by the other Party as a result of compliance with this Clause 12.3.

[The Nodal Agency can further contractually strengthen the safety of information by signing a separate Non-Disclosure Agreement. The template of Non-Disclosure Agreement is provided in Annexure I :Agreement for Selection of System Integrators/ Implementation Agencies, Page 69]

## **13. PROPRIETARY RIGHTS**

### **13.1. Ownership of <Nodal Agency>-Owned Software.**

As between the Parties, <Nodal Agency> will be the sole and exclusive owner of the <Nodal Agency>-Owned Software. Any derivative works, modifications, enhancements or improvements to the <Nodal Agency>-Owned Software (or its related documentation) developed by <PPP Vendor> will be considered Work Product and subject to Clause 13.3.

### **13.2. Ownership of <PPP Vendor>-Owned Software.**

As between the Parties, <PPP Vendor> will be the sole and exclusive owner of the <PPP Vendor>-Owned Software. Any derivative works, modifications, enhancements or improvements to the <PPP Vendor>-Owned Software (or its related documentation) developed by <PPP Vendor> will not be considered Work Product and will be owned exclusively by <PPP Vendor>.

### **13.3. Ownership of Work Product.**

- (a) Upon final payment, <Nodal Agency> will have a perpetual, non-exclusive paid-up right and licence to use, copy, modify and prepare derivative works of the Work Product, subject to any restrictions of any third-party materials embodied in the Work Product and disclosed to <Nodal Agency>. <Nodal Agency>'s rights in the Work Product will be for purposes of <Nodal Agency>'s internal business and, to the extent any Work Product contains <PPP Vendor> Confidential Information, will be subject to Clause 12.
- (b) Each Party agrees to execute any appropriate documents and take any other appropriate actions reasonably requested by the other Party to give effect to the provisions of this Clause 13.3.

### **13.4. Embedded <PPP Vendor> Software.**

<PPP Vendor> will use reasonable efforts to avoid incorporating or embedding any <PPP Vendor> Software into any Work Product without the prior written consent of <Nodal Agency>; provided, however, that if <PPP Vendor> does incorporate or embed <PPP Vendor> Software into any Work Product, then the following provisions will apply:

- (a) If <PPP Vendor> incorporates or embeds any <PPP Vendor> Software into any Work Product ("Embedded <PPP Vendor> Software"), <PPP Vendor> will not be deemed to have transferred or assigned any rights therein to <Nodal Agency>. <PPP Vendor>



will grant to <Nodal Agency> a nonexclusive, non-transferrable, worldwide, royalty-free, perpetual licence to use, maintain, modify, enhance and create derivative works of such Embedded <PPP Vendor> Software (i) to the extent necessary to use or maintain such Work Product for <Nodal Agency>'s normal business purposes and (ii) solely as used in such Work Product and not as a "stand-alone" product or separately from such Work Product in which it is embedded.<sup>59</sup>

- (b) Notwithstanding such licence, <PPP Vendor> will be the sole and exclusive owner of any modifications, enhancements and improvements to, or derivative works of, any Embedded <PPP Vendor> Software made by <Nodal Agency> or its contractors pursuant to the above licence (the "<PPP Vendor> Software Enhancements"). All <PPP Vendor> Software Enhancements will be owned by <PPP Vendor> (subject to the above licence to <Nodal Agency>). <Nodal Agency> hereby assigns to <PPP Vendor> without further consideration <Nodal Agency>'s copyright and ownership rights in and to such <PPP Vendor> Software Enhancements. All <PPP Vendor> Software Enhancements will be deemed part of the licence granted to <Nodal Agency> pursuant to Clause 5.1(a).
- (c) <Nodal Agency> agrees to execute any appropriate documents and take any other appropriate actions reasonably requested by <PPP Vendor> to give effect to the provisions of this Clause 13.4.
- (d) <Nodal Agency> will not have any interest in or claim to any <PPP Vendor> Software, other than the above licence to the Embedded <PPP Vendor> Software.

### **13.5. Proprietary Items.**

In the course of performing its obligations under this Agreement, <PPP Vendor> may use products, materials, tools and methodologies that are proprietary to <PPP Vendor> or to third parties (collectively, "Proprietary Items"). As between <Nodal Agency> and <PPP Vendor>, Proprietary Items will be deemed Confidential Information of <PPP Vendor> for purposes of Clause 12.1. <Nodal Agency> will neither have nor obtain any rights in such Proprietary Items (or in any modifications or enhancements thereto) other than (i) to use them as authorised by <PPP Vendor> in writing from time to time solely for purposes of performing its responsibilities under this Agreement; (ii) to the extent the Proprietary Items constitute Embedded <PPP Vendor> Software under Clause 13.4 to use them as part thereof as provided in Clause 13.4; or (iii) pursuant to <PPP Vendor>'s standard licence for such Proprietary Items or, in the case of Proprietary Items owned by third parties, pursuant to terms acceptable to the applicable third party. If Proprietary Items are made available to

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<sup>59</sup> Tax treatment of such a licence will need to be addressed on a case-by-case basis

<Nodal Agency> under (i) or (ii) above, they will be made available on an “as is” basis and, to the extent permitted by applicable law, without express or implied warranties of any kind. Proprietary Items made available under (iii) above will be subject to the terms of the applicable licence.

### **13.6. Knowledge Capital.**

Nothing in this Agreement will preclude <PPP Vendor> from acquiring, marketing, developing, distributing, licensing or using for itself or others, services, products or technology that are the same as or similar to those provided to <Nodal Agency> by <PPP Vendor> pursuant to this Agreement. Furthermore, <PPP Vendor> will continue to be free to use the general knowledge, skills and experience and any ideas, concepts, know-how and techniques that are acquired or used in the course of providing the Services. This Clause 13.6 will not diminish <PPP Vendor>’s obligations regarding Confidential Information under Clause 12.1.

## 14. AUDIT RIGHTS

### 14.1. Operational Audits.

Subject to the provisions of Clause 14.3, <PPP Vendor> will provide to such auditors (including third-party auditors and <Nodal Agency>'s internal audit staff) as <Nodal Agency> may designate in writing, access to any facility at which the Services are being performed, to appropriate <PPP Vendor> management personnel and material subcontractors, and to the data and records maintained by <PPP Vendor> with respect to the Services: (i) for the purpose of performing audits and inspections of <Nodal Agency> and its businesses (including any audits necessary to enable <Nodal Agency> to meet its applicable regulatory requirements); (ii) to verify the integrity of <Nodal Agency> Data; [(iii) to examine the systems that process, store, support and transmit such <Nodal Agency> Data;] and (iv) to confirm that the Services are being provided in accordance with this Agreement, including the Service Levels. To the extent applicable to the Services performed by <PPP Vendor>, the scope of such audits may include, without limitation, (a) <PPP Vendor>'s practices and procedures; (b) the adequacy of general controls (e.g., organisational controls, input/output controls, system modification controls, processing controls, system design controls, and access controls) and security practices and procedures; and (c) the adequacy of disaster recovery and back-up procedures. Any such audits will be conducted at <Nodal Agency>'s expense.

### 14.2. Financial Audits.

- (a) In order to document the Services and the Service Charges paid or payable by <Nodal Agency> under this Agreement, <PPP Vendor> will retain its standard records and supporting documentation for at least [three] years.
- (b) Subject to the provisions of Clause 14.3, <PPP Vendor> will provide to such auditors as <Nodal Agency> may designate in writing, access to such records and supporting documentation as may be reasonably requested by <Nodal Agency>. <Nodal Agency> may audit the Service Charges charged to <Nodal Agency> to determine that such Service Charges are accurate and were calculated in accordance with this Agreement.
- (c) Any such audits will be conducted at <Nodal Agency>'s expense; provided, however, that if, as a result of such audit, <Nodal Agency> determines that <PPP Vendor> has overcharged <Nodal Agency>, <Nodal Agency> will notify <PPP Vendor> of the amount of such overcharge and <PPP Vendor> will promptly pay to <Nodal Agency> the amount of the overcharge. If the audit reveals an undercharge, <Nodal Agency>

will promptly pay to <PPP Vendor> the amount of the undercharge, minus the out-of-pocket costs and expenses incurred for such audit.

#### **14.3. General Principles Regarding Audits.**

- (a) <Nodal Agency> and its auditors will use reasonable efforts to conduct such audits in a manner that will result in a minimum of inconvenience and disruption to <PPP Vendor>'s business operations. Audits may be conducted only during normal business hours and no more frequently than annually unless material issues are discovered. <Nodal Agency> and its auditors will not be entitled to audit (i) data or information of other customers or <Nodal Agency>s of <PPP Vendor>; (ii) any <PPP Vendor> proprietary data including cost information unless such is the basis of a reimbursable or Pass-Through Expense; or (iii) any other Confidential Information of <PPP Vendor> that is not relevant for the purposes of the audit. <Nodal Agency> will provide <PPP Vendor> with reasonable prior written notice of an audit. <PPP Vendor> will use reasonable efforts to cooperate in the audit, will make available on a timely basis the information reasonably required to conduct the audit and will assist the designated employees of <Nodal Agency> or its auditors as reasonably necessary. Any request for additional assistance will constitute a New Service Request pursuant to Clause 4.6. To the maximum extent possible, audits will be designed and conducted (in such manner and with such frequency) so as not to interfere with the provision of the Services. All information learned or exchanged in connection with the conduct of an audit, as well as the results of any audit, constitutes Confidential Information of <Nodal Agency> and <PPP Vendor> and will be subject to Clause 12.1.
- (b) <Nodal Agency> will not use any competitors of <PPP Vendor> (or any significant <PPP Vendor> subcontractor under this Agreement) in the IT outsourcing industry to conduct such audits. Upon the request of <Nodal Agency>, <PPP Vendor> will promptly identify any such competitors.
- (c) The auditors and other representatives of <Nodal Agency> will execute and deliver such confidentiality and non-disclosure agreements and comply with such security and confidentiality requirements as <PPP Vendor> may reasonably request in connection with such audits.

#### **14.4. Audit Conferences.**

- (a) Following any audit or examination, <Nodal Agency> will conduct (in the case of an internal audit), or request its external auditors or examiners to conduct, an exit conference with <PPP Vendor> to obtain factual concurrence with issues identified in the review and provide <PPP Vendor> a copy of the audit report.

- (b) The Parties will meet to review each audit report promptly after the issuance thereof and mutually agree upon the appropriate manner, if any, in which to respond to the changes suggested by the audit report. <PPP Vendor> will respond promptly to audit reports in writing, but in no event more than 30 days from receipt of each report.

## 15. INDEMNIFICATION

### 15.1. Infringement Indemnity.

- (a) <PPP Vendor> will indemnify, defend and hold harmless <Nodal Agency>, any <Nodal Agency> Affiliates and their respective employees, principals (partners, shareholders or other holders of an ownership interest, as the case may be) and agents from and against any and all Losses to any third party from claims that any Work Product or <PPP Vendor> Software (or the access or other rights thereto) provided by <PPP Vendor> to <Nodal Agency> pursuant to this Agreement (i) infringes a patent incorporated in India or a copyright held by that third party [, or (ii) constitutes misappropriation or unlawful disclosure or use of that third-party's trade secrets] (collectively, "Infringement Claims").
- (b) <Nodal Agency> will indemnify, defend and hold harmless <PPP Vendor>, any <PPP Vendor> Affiliates and their respective employees, principals (partners, shareholders or other holders of an ownership interest, as the case may be) and agents from and against any and all Losses arising from claims by third parties that any equipment, software (including <Nodal Agency>-Owned Software), information or other resources or items (or the access or other rights thereto) provided by <Nodal Agency> to <PPP Vendor> pursuant to this Agreement (i) infringes a patent incorporated in India or a copyright held by that third party [, or (ii) constitutes misappropriation or unlawful disclosure or use of a third party's trade secrets].
- (c) Notwithstanding anything to the contrary herein, neither Party will have any liability or obligation to the other Party, such other Party's Affiliates or any other Person under Clause 15.1(a) or 15.1(b) above to the extent that the Infringement Claim is based upon (i) modifications to any item made by or on behalf of the indemnitee in a manner that causes the infringement; (ii) use of any item in combination with any hardware, software or other products or services in a manner that causes the infringement and where such combination was not within the reasonable contemplation of the Parties given the intended use of the item; (iii) the failure of a Party to use corrections or enhancements to such deliverables that are made available by the other Party; (iv) detailed, non-discretionary designs or specifications provided by the indemnitee that necessarily caused such Infringement Claim; or (v) the indemnitee's distribution, marketing or use for the benefit of third parties (other than to provide Services to the <Nodal Agency> hereunder) of the deliverable or item. In addition, <PPP Vendor> will not be liable for claims of infringement arising from or related to the provision of help desk services, call centre services or automated attendant services using computer telephony integration.

- (d) If any deliverable or item provided by a Party hereunder is, or in such Party's reasonable judgment is likely to become, the subject of an Infringement Claim, the providing Party, at its expense and in addition to defending the claim and paying amounts as required by (a) or (b) above, will use reasonable efforts to procure for the other Party the right to use and continue using such deliverable or replace it with a non-infringing equivalent or modify it to make its use hereunder non-infringing, provided that such replacement or modification does not result in a degradation of the performance or quality of the deliverable. If such option is not available on commercially reasonable terms in the providing Party's good faith judgment, the providing Party will so notify the other Party, whereupon (i) the other Party will cease use of such deliverable or Service and return it to the providing Party and (ii) the Parties will equitably adjust the Service Charges to reflect the added expenses or discontinuation of Services. In such event, the Parties will seek to establish mutually acceptable alternative arrangements and to make any appropriate adjustments to their respective obligations under this Agreement through the execution of a Change Request pursuant to Clause 8.12.
- (e) The foregoing provisions of this Clause 15.1 constitute the Parties' sole and exclusive remedies and each Party's entire liability with respect to infringement claims.

## **15.2. Indemnification Procedures.**

The following procedures will apply with respect to indemnification for third-party claims arising in connection with this Agreement:

- (a) Promptly after receipt by a Person entitled to indemnification hereunder (an "Indemnitee") of written notice of the assertion or the commencement of any claim, demand, action, cause of action or other proceeding by a third party, whether by legal process or otherwise (a "Claim"), with respect to any matter within the scope of Clause 15.1 the Indemnitee will give written notice thereof to the Party from whom indemnification is sought pursuant hereto (the "Indemnitor") and will thereafter keep the Indemnitor reasonably informed with respect thereto; provided, however, that the failure of the Indemnitee to give the Indemnitor such prompt written notice will not relieve the Indemnitor of its obligations hereunder except to the extent such failure results in prejudice to Indemnitor's defence of such Claim. Within 15 days following receipt of written notice from the Indemnitee relating to any claim, but no later than 10 days before the date on which any response to a complaint or summons is due, the Indemnitor will notify the Indemnitee in writing that the Indemnitor will assume control of the defence and settlement of such claim (the "Notice").
- (b) If the Indemnitor delivers the Notice relating to any claim within the required notice period, the Indemnitor will be entitled to have sole control over the defence and settlement of such claim; provided, however, that the Indemnitee will be entitled to

participate in the defence of such claim and to employ legal advisers at its own expense to assist in the handling of such claim. After the Indemnitor has delivered a Notice relating to any claim in accordance with the preceding Clause 15.2(a), the Indemnitor will not be liable to the Indemnatee for any legal expenses subsequently incurred by such Indemnatee in connection with the defence of such claim.

- (c) If the Indemnitor fails to assume the defence of any such Claim within the prescribed period of time, then the Indemnatee may assume the defence of any such Claim at the cost and expense of the Indemnitor. The Indemnitor will not be responsible for any settlement or compromise made without its consent, unless the Indemnatee has tendered notice and the Indemnitor has then failed to assume and defend the claim and it is later determined that the Indemnitor was liable to assume and defend the claim. The Indemnitor will reimburse the Indemnatee for its costs and expenses incurred as a result of Indemnitor's failure to assume the defence of such Claim.
- (d) The Indemnatee will provide reasonable assistance to the Indemnitor (at the Indemnitor's expense), including reasonable assistance from the Indemnitor's employees, agents, independent contractors and Affiliates, as applicable. Notwithstanding any provision of this Clause 15.2 to the contrary, the Indemnitor will not consent to the entry of any judgment or enter into any settlement that provides for injunctive or other non-monetary relief affecting the Indemnatee without the prior written consent of the Indemnatee, which consent will not be unreasonably withheld or delayed.



## 16. LIMITATION OF LIABILITY AND RISK ALLOCATION

### 16.1. Limitation of Liability.

- (a) Subject to Clause 16.1(b), the aggregate liability of each Party (and its Affiliates) to the other Party (and its Affiliates) for any Losses arising in connection with this Agreement, whether based upon an action or claim in contract, tort (including negligence), misrepresentation, equity or otherwise (including any action or claim arising from the acts or omissions of the liable Party (or, as the case may be, its Affiliate)) shall not exceed in aggregate an amount equal to the Charges for Services paid to <PPP Vendor> under this Agreement during the [six]-month<sup>60</sup> period immediately preceding the most recent event (of if such event occurs in the first [six] months of the Agreement Term, the amount estimated to be paid in the first [six] months of the Agreement Term).
- (b) The limitation described in Clause 16.1(a) above will not apply to (i) <PPP Vendor>'s obligations under Clauses 12.1 [*Confidentiality*] or 15.1(a) [*Infringement Indemnity*], (ii) <Nodal Agency>'s obligations under Clauses 12.1 or 15.1(b) or (iii) <Nodal Agency>'s non-performance of its payment obligations for Services provided or for termination or related charges pursuant to this Agreement.<sup>61</sup>
- (c) Each Party has a duty to mitigate the damages and any amounts payable under an indemnity that would otherwise be recoverable from the other Party pursuant to this Agreement by taking appropriate and commercially reasonable actions to reduce or limit the amount of such damages or amounts.
- (d) The provision of Service Level Credits will constitute <Nodal Agency>'s key remedy for the corresponding Service Level Default.

### 16.2. Limitation on Category of Liability.

- (a) [Subject to Clause 16.2(b),] in no event will the measure of damages payable by either Party (or any of its Affiliates) include, nor will either Party (or any of its Affiliates) be liable for (i) any indirect or consequential loss or damage, or (ii) business interruption, loss of profits, loss of production, loss of savings, loss of competitive advantage or loss of goodwill (in each case, whether such loss or

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<sup>60</sup> The six-month period can be extended to 12 months for projects. Many vendors consider the overall margin of all outsourcing when agreeing to a cap and will often resist caps that exceed the overall margin on the outsourcing

<sup>61</sup> These exclusions from the limitation of liability provision do not contain common exclusions for (i) gross negligence or willful misconduct or (ii) wrongful termination or abandonment of the agreement by PPP Vendor.

damage is direct or indirect), arising from or related to this Agreement, regardless of the type of claim, whether in contract, tort (including negligence), misrepresentation, strict liability or other legal or equitable theory, whether or not foreseeable, and regardless of the cause of such damages even if the Party has been advised of (or is otherwise aware of) the possibility of such damages in advance.

- (b) The limitation set out in Clause 16.2(a) above will not apply to the liability of the applicable Party to the extent such liability results from (i) <PPP Vendor>'s breach of its obligations under Clause 12.1 relating to Confidential Information, (ii) <Nodal Agency>'s breach of its obligations under Clause 12.1 relating to Confidential Information, or (iii) <Nodal Agency>'s non-performance of its payment obligations for Services provided or for termination or related charges pursuant to this Agreement.

### **16.3. Contractual Limitation of Action.**

Neither Party may assert against the other Party any claim through mediation, arbitration or litigation for breach or non performance in connection with this Agreement unless the asserting Party has given the other Party written notice of the claim within three years after the asserting Party first knew or reasonably should have known of the underlying facts giving rise to such claim.

### **16.4. Recourse.**

The Parties agree that they will look only to the corporate or firm assets of the other Party in connection with any liabilities hereunder and in no event will they have any claim against any shareholder, partner or holder of an ownership interest in the other Party in connection with this Agreement.

### **16.5. Insurance.**

16.5.1 In connection with the provision of the Services, <PPP Vendor> must have and maintain:

- (a) for the Agreement Period, valid and enforceable insurance coverage for:
  - (i) public liability;
  - (ii) either professional indemnity or errors and omissions;
  - (iii) product liability;
  - (iv) workers' compensation as required by law; and
  - (v) any additional types specified in Schedule I; and

- (b) for <one> years following the expiry or termination of the Agreement, valid and enforceable insurance policies,

in the amount not less than the Insurance Cover specified in Schedule <Insert the reference of Schedule>.

- 16.5.2 Providing and maintaining adequate insurance coverage described herein shall be a material obligation of the <PPP Vendor> and is of the essence of this Agreement. All such insurance shall meet the applicable laws of India. <PPP Vendor> shall at all times comply with the terms of such insurance policies and all requirements of the insurer under any such insurance policies. The limits of coverage under each insurance policy maintained by the <PPP Vendor> shall not be interpreted as limiting or expanding the <PPP Vendor>'s liability and obligations under the Agreement.
- 16.5.3 <PPP Vendor> agrees to name <Nodal Agency> as an additional insured on <PPP Vendor>'s Professional Liability Insurance policy for claims resulting from <PPP Vendor>'s negligence. <PPP Vendor>'s policy shall be primary and <Nodal Agency>'s policy shall be non-contributing for claims for which <PPP Vendor> owes the <Nodal Agency> an indemnity.
- 16.5.4 Within 10 days of the execution of this Agreement, <PPP Vendor> must, on request by the <Nodal Agency>, provide current relevant confirmation of insurance documentation from its insurance brokers certifying that it has insurance as required by this Clause 16.5. <PPP Vendor> agrees to replace any coverage prior to the date of expiry/cancellation.. <PPP Vendor> must notify the Nodal Agency immediately of any material adverse change in insurance coverage, including, but not limited to, changes in limits, coverage, or status of the policy. Each party shall cause its insurer to provide 30 days' prior written notice of cancellation to the other party.
- 16.5.5 <Nodal Agency> may, at its election, terminate this Agreement upon the failure of <PPP Vendor>, or notification of such failure, to maintain the required insurance coverage. Inadequate insurance coverage for any reason shall not relieve <PPP Vendor> of its obligations under this Agreement.

## **16.6. Allocation of Risks; Acknowledgements and Applicability of Limitations.**

Each Party acknowledges to the other that it understands the legal and economic ramifications of this Clause 16. Each Party acknowledges that (i) the Parties are sophisticated commercial enterprises with relatively equal bargaining power; (ii) the provisions of this Clause 16 constitute an essential element of this Agreement; (iii) such provisions, together with the indemnities, representations and warranties set out the bargained-for allocation of risk under this Agreement; (iv) such Party actively considered such provisions in determining

the specific risks that it assumed in agreeing to its obligations under this Agreement and the price to be paid to <PPP Vendor> in consideration for its services under this Agreement; and (v) the Parties had meaningful choices with respect to such provisions, and such provisions are not unreasonably favourable to either Party. Each Party irrevocably accepts the limitations and exclusions contained in this Clause 16.

### **16.7. Particular Liabilities**

<PPP Vendor> undertakes to indemnify <Nodal Agency> (the "Indemnified Party") from and against all Losses on account of bodily injury, death or damage to tangible personal property arising in favour of any person, corporation or other entity (including the Indemnified Party) attributable to the Indemnifying Party's negligence or willful default in performance or non-performance under this Agreement.

## 17. TERMINATION

### 17.1. Termination for Cause.

- (a) <Nodal Agency> may after (i) complying with Clause 18, and (ii) giving at least <30> days' prior written notice identifying specifically the basis for such notice and referring to this Clause 17.1(a), terminate this Agreement, in whole but not in part, for <PPP Vendor>'s material breach of its material service obligations<sup>62</sup> under this Agreement unless <PPP Vendor> has within such 30-day period either (a) cured such breach (if such breach is curable) or (b) made substantial progress to cure such breach (if such breach is curable) and implemented a plan that results in a cure of such breach within 60 days. Such notice will specify the effective date of such termination.
- (b) <PPP Vendor> may after (i) complying with Clause 18, and (ii) giving at least <30> days' prior written notice identifying specifically the basis for such notice and referring to this Clause 17.1(b), terminate this Agreement, in whole but not in part, for (a) the failure by <Nodal Agency> to pay undisputed charges owed to <PPP Vendor> when due under this Agreement totalling at least [one] month's charges; (b) or the failure by <Nodal Agency> to comply with its obligation to place disputed amounts in escrow pursuant to Clause 10.10, unless <Nodal Agency> has within such <30>-day period cured such breach; or (c) <Nodal Agency>'s material breach of its obligations under Clause 12 or Clause 13 , subject to complying with Clause 18. Such notice will specify the effective date of such termination.
- (c) Notwithstanding any provision of this Agreement to the contrary, although <PPP Vendor> has undertaken the contractual obligation to meet the Service Levels set out in Schedule 5.1, neither <PPP Vendor>'s failure to comply with any particular Service Level nor any Service Level Default may be deemed to constitute a material breach of this Agreement.

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<sup>62</sup> This draft does not include a general, mutual termination for cause provision triggered by a material breach of any of the agreement's provisions. Nodal Agencies generally refuse to allow vendors to terminate the agreement, except in very limited circumstances. See the footnote discussion accompanying Clause 4.12. Nodal Agencies argue that because their business operations are much more vulnerable to a termination than vendors, the only circumstance in which Nodal Agencies should have the ability to terminate the agreement is for non-payment (and possibly for Nodal Agency's breach of its escrow obligations for disputed payments). Given this approach, this draft also limits the circumstances in which the Nodal Agency may terminate the agreement; i.e., for PPP Vendor's material breach of its service obligations. In other words, the termination for cause right is limited to the parties' "fundamental value exchange" obligations (services for payment). This seeks to establish a "level playing field" between the parties. For example, Nodal Agency should not have the ability to terminate the agreement for cause due to vendor's breach of its confidentiality obligations when the vendor does not have a reciprocal right. Under this draft, neither party would have a termination right for such a breach, but both parties could seek a damages claim or injunctive or other equitable relief.

## 17.2. Termination for Convenience.

- (a) On or after the [two]-year anniversary of the [Base Services Commencement/Effective Date], <Nodal Agency> may terminate this Agreement, in whole but not in part, for convenience (*i.e.*, for any reason or for no reason) upon at least [six] months' prior written notice to <PPP Vendor> and payment of the Termination Amount set out in Schedule 17.6(a). (Note: The two years lock-in can be changed based on project to project)
- (b) *On and after the [two]-year anniversary of the [Base Services Commencement/Effective Date],* <Nodal Agency> may terminate this Agreement in part for convenience (*a "Service Discontinuance"*) as follows.
  - (i) To effect a Service Discontinuance, <Nodal Agency> will deliver a written request (a "Discontinuance Notice") to the <PPP Vendor> Account Representative, specifying in reasonable detail (i) the proposed Service Discontinuance and (ii) the requested date of such discontinuance. In no event will the requested date for a Service Discontinuance be less than six months from the date of the Discontinuance Request. The Parties will cooperate with each other in good faith in discussing the scope and nature of the Discontinuance Request, including the time period in which such Service Discontinuance will be implemented. Upon a Service Discontinuance, <Nodal Agency> will pay to <PPP Vendor> the amount of any proportional Termination Fee including Demobilisation Costs and Stranded Costs, as set out in Schedule 17.6(a), resulting from such Service Discontinuance.
  - (ii) As soon as reasonably practicable thereafter (but in no event more than 30 days after receipt of the Discontinuance Notice) and to the extent applicable, <PPP Vendor> will prepare and deliver to the <Nodal Agency> Account Representative a written statement (the "Discontinuance Response") describing any changes in products, services, assignment of personnel and other resources that <PPP Vendor> believes would be required to implement the Service Discontinuance. In addition, such Discontinuance Response will include, as applicable (i) an estimation of the increase or decrease in the <PPP Vendor> Service Charges that would be required, including appropriate back-up documentation to justify such estimates; (ii) an estimation of the Demobilisation Costs and Stranded Costs that would result from such Service Discontinuance; (iii) a description of how the proposed Service Discontinuance would be implemented; (iv) a description of the effect, if any, such Service Discontinuance would have on this Agreement, including without limitation, the Service Levels; (v) a description of any transition or termination services that will be provided in respect of such Service Discontinuance; and (vi) such other information as may be relevant to the proposed Service Discontinuance. Each Party will

take reasonable measures to mitigate expenses incurred in order to effect such Service Discontinuance. The <PPP Vendor> Account Representative and the <Nodal Agency> Account Representative will meet to discuss the Discontinuance Response and to determine the appropriate schedule for such Service Discontinuance.

### **17.3. Termination for Existence of Benchmarking Condition.**

If a Benchmarking Condition exists and the Parties do not effect any Benchmarking Adjustment pursuant to Clause 5.3(g), then <Nodal Agency> may terminate this Agreement, in whole but not in part, upon at least 90 days' prior written notice to <PPP Vendor> and payment of Termination Amount set out in Schedule 17.6(a).

### **17.4. Termination for Insolvency.**

In addition to all other rights or remedies provided for in this Agreement or by law, either Party may terminate this Agreement in whole, but not in part, in the event that: (a) the other Party makes a composition with or assignment for the benefit of creditors; (b) the other Party becomes or is unable to pay debts as they fall due; (c) a trustee, liquidator, administrator or receiver (including an administrative receiver) or similar official is appointed with respect to the other Party or any substantial part of such Party's assets; (d) any action is taken by or against the other Party under any bankruptcy or insolvency laws or laws relating to the relief of debtors; or (e) the other Party is the subject of a winding-up petition which is not dismissed within five business days, or a resolution is passed for its winding-up.

### **17.5. Extension of Termination Effective Date.**

Upon at least 60 days' prior written notice to <PPP Vendor>, <Nodal Agency> may extend, from time to time, the effective date of expiration or termination of this Agreement (except in the case of a termination by <PPP Vendor> pursuant to Clause 17.1) until the [six]-month anniversary of the original effective date of the expiration or termination of this Agreement. Charges for such periods of extension will be as provided in Schedule 10.1.

### **17.6. Termination Amounts.**

- (a) Upon any termination or expiration of this Agreement, the provisions of Schedule 17.6(a) will apply.<sup>63</sup>

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<sup>63</sup> Schedule 17.6(a) should lay out all of the Termination Fees and demobilisation expenses that PPP Vendor would want to recover in a given deal for termination for the Nodal Agency's convenience

- (b) If <Nodal Agency> purportedly terminates this Agreement pursuant to Clause 17.1 but <PPP Vendor> disputes <Nodal Agency>'s right to so terminate this Agreement and it is ultimately determined that <Nodal Agency> did not have the right to terminate this Agreement pursuant to Clause 17.1, then for purposes of determining the amounts payable to <PPP Vendor> pursuant to Schedule 17.6(a), such termination will be deemed to have been a termination for convenience effected pursuant to Clause 17.2.

### **17.7. Termination Assistance Services.**

Commencing at the later of (i) six months prior to the scheduled expiration date of this Agreement, or (ii) the delivery of any notice of termination or non-renewal of this Agreement (or such other date as mutually agreed by the Parties), and continuing until the effective date of the expiration or termination (the "Termination Assistance Period"), <PPP Vendor> will provide to <Nodal Agency>, or at <Nodal Agency>'s request to <Nodal Agency>'s designee, such reasonable cooperation, assistance and services as specified in Schedule 17.7 (the "Termination Assistance Services"). Upon at least 30 days' prior written notice to <PPP Vendor>, <Nodal Agency> may extend, from time to time, the Termination Assistance Period until the [six]-month anniversary of the effective date of the expiration or termination of this Agreement.<sup>64</sup>

### **17.8. Survival of Provisions.**

Upon the expiration or termination of this Agreement for any reason, the provisions of Clauses 12, 13, 15, 16, 18, and 20 will survive indefinitely.

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<sup>64</sup> The Termination Assistance Services Schedule should be carefully reviewed during negotiations as many Nodal Agencies may require PPP Vendor to do a number of things on termination that vendors would normally not do. Termination Assistance Services should normally encompass such activities as (i) drafting a transition plan, (ii) facilitating relocation/return of hardware and software, (iii) providing backup media and reports pertinent to Nodal Agency's environments, (iv) listing and providing copies of all third party contracts, if such disclosure is permitted under the terms of those contracts and (v) training Nodal Agency or successor as appropriate while protecting PPP Vendor's proprietary information and processes. If additional resources are required, the rates for these should be specified in Schedule 10.1 or negotiated prior to performing such additional activities.



## **18. DISPUTES**

### **18.1. Informal Dispute Resolution.**

- (a) Prior to the initiation of formal dispute resolution procedures, the Parties will first attempt to resolve any dispute, controversy or claim arising under or in connection with this Agreement (a “Dispute”) informally, as follows:
- (i) First, the <Nodal Agency> Account Representative and the <PPP Vendor> Account Representative will meet as often, for a duration and as promptly as the Parties deem necessary to discuss the Dispute and negotiate in good faith in an effort to resolve the Dispute.
  - (ii) If the <Nodal Agency> Account Representative and the <PPP Vendor> Account Representative are unable to resolve the Dispute within 30 days after the referral of the Dispute to them, the Dispute will be referred to the Service Management Steering Committee. The Service Management Steering Committee will use reasonable efforts to resolve such Dispute or, if appropriate, to negotiate a modification or amendment to this Agreement. The Service Management Steering Committee will meet as often, for a duration and as promptly as the Parties reasonably deem necessary to discuss the Dispute and negotiate in good faith in an effort to resolve the Dispute.
  - (iii) If the Service Management Steering Committee<sup>65</sup> is unable to resolve the Dispute within 30 days after such referral, then each of <PPP Vendor> and <Nodal Agency> will appoint one senior executive who is not involved on a day-to-day basis with the subject matter of this Agreement. Such senior executives will meet as often, for a duration and as promptly as the Parties reasonably deem necessary to discuss the Dispute and negotiate in good faith in an effort to resolve the Dispute.
  - (iv) During the course of such discussions, all reasonable requests made by one Party to another for non-privileged information, reasonably related to the Dispute, will be honoured in order that each of the Parties may be fully apprised of the other’s position. The specific format for such discussions will

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<sup>65</sup> The Service Management Steering Committee should be empowered to take decisions to resolve the issues. This currently is not the practice in the e-Governance projects. However this process is required to be introduced through appropriate process. This manner of resolving disputes is the key the PPP projects and has to be institutionalised, in case PPP projects/output based are to be promoted

be left to the discretion of the Parties, but may include the preparation of agreed-upon statements of fact or written statements of position.

- (b) Formal proceedings for the resolution of a Dispute may not be commenced until the earlier of:
  - (i) the good faith determination by the appointed senior executives that amicable resolution through continued negotiation of the matter does not appear likely; or
  - (ii) 30 days following the date that the Dispute was first referred to the appointed senior executives.

## **18.2. Alternative Dispute Resolution.**

If a Dispute cannot be resolved as provided in Clause 18.1, the Parties will cooperate in good faith to utilise mutually agreed upon alternative dispute resolution techniques prior to resorting to litigation (Adjudicator or Arbitrator).

- (a) The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts appointed in accordance with the following:
  - (i) there shall be two panels of experts, one in respect of solution development matters (the “Solution development Panel”) and one in respect of operational and maintenance matters (the “Operational Panel”)<sup>66</sup>. All the experts on each panel shall be wholly independent of the PPP Vendor, the Nodal Agency, the relevant Sub-Contractor and any of the major competitors of the PPP Vendor or relevant Sub-Contractor;
  - (ii) the Solution development Panel shall be comprised of [3] experts who shall be appointed jointly by the PPP Vendor and the Nodal Agency. Such appointments shall take place within [28] days of the date of this Contract<sup>67</sup>,
  - (iii) the Operational Panel shall be comprised of [3] experts who shall be appointed jointly by the PPP Vendor and the Nodal Agency. Such

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<sup>66</sup> The parties shall consider how they wish to deal with disputes of a financial (rather than solution development or operational) nature and ensure the Contract contains appropriate provisions. The parties may want to appoint a panel of financial experts in the way set out in Clause 25(d) or may prefer to appoint a financial expert by mutual agreement at the time of the dispute. As currently drafted, financial disputes could be referred straight to arbitration so parties may prefer to include an intermediate level of dispute resolution. The parties should also consider the likelihood of overlapping disputes arising of both a solution development and operational nature. If such disputes are likely, a procedure will need to be developed for deciding which of the Solution development Panel or Operational Panel should preside over the dispute’s resolution

<sup>67</sup> It is essential that such appointments are made as soon as possible after Contract signature so that the panel is in place in time to deal with any solution development disputes arising

appointments shall take place on or before the Service Commencement Date<sup>68</sup>,

- (iv) if any member of a panel resigns during the term of the Contract, a replacement expert shall be appointed by the PPP Vendor and the Nodal Agency as soon as practicable;
  - (v) if the Nodal Agency and the PPP Vendor are unable to agree on the identity of the experts to be appointed to the panel(s), [ ] shall appoint such expert(s) within 30 days of any application for such appointment by either party.
- (b) Within 7 days of appointment in relation to a particular dispute, the Adjudicator shall require the parties to submit in writing their respective arguments. The Adjudicator shall, in his absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.
  - (c) In any event, the Adjudicator shall provide to both parties his written decision on the dispute, within 28 days of appointment (or such other period as the parties may agree after the reference, or 42 days from the date of reference if the party which referred the dispute agrees). Unless the parties otherwise agree, the Adjudicator shall give reasons for his decision<sup>69</sup>. Unless and until revised, cancelled or varied by the Arbitrator, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.
  - (d) The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the reference, including legal costs and the costs and expenses of any witnesses.
  - (e) The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the Indian Arbitration and Conciliation Act, 1996 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
  - (f) The Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Contract.

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<sup>68</sup> If operational disputes are capable of arising prior to the Services Commencement Date, an earlier date should be specified for such appointment

<sup>69</sup> The reverse can be specified. It is up to the parties to choose whether or not they wish reasons to be given. The parties should ensure that the relevant insurers and insurance policies will recognise the Adjudicator's decision and process claims accordingly if this is the case, as this could have important implications for both parties.

- (g) All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 12 (Confidentiality), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.
- (h) The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- (i) either party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision made in accordance, then either party may (within [28] days of receipt of the Adjudicator's decision, where appropriate), notify the other party of its intention to refer the dispute to arbitration. Such notification shall invite the other party to concur in the appointment of a sole arbitrator who shall be a solicitor, barrister or arbitrator recognised by the [ ] of not less than 10 years' standing. If the parties are unable within 14 days to agree the identity of the Arbitrator either party may request the [ ] to make the appointment.
- (j) The Arbitrator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Contract, to vary or cancel the decision of the Adjudicator and, where appropriate, to order financial compensation to be paid by one party to the other. The arbitration shall take place in [City/Location ].
- (k) The Arbitrator shall in his absolute discretion, make such procedural directions as he considers necessary such as ordering the parties to provide written submissions within such time period as he considers appropriate and/or to attend such hearings as he deems necessary.
- (l) The Arbitrator shall deliver his decision on any matter referred to him within 28 days of concluding any hearings which may have been held in connection with the matter and in any event within 3 months (or such other period as the parties may agree) of his appointment. The Arbitrator's decision shall be in writing and shall state his reasons for his decision. The decision of the Arbitrator shall be final and binding on both parties. The costs of the arbitration will be in the discretion of the Arbitrator.
- (m) The parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this Clause and shall give effect forthwith to every decision of the Adjudicator and the Arbitrator delivered under this Clause.

### **18.3. Exceptions to Dispute Resolution Procedure.**

The provisions of Clauses 18.1 and 18.2 will not be construed to prevent a Party from:

- (a) seeking a temporary order or injunctive or other equitable relief with respect to a breach (or attempted breach) of this Agreement by the other Party; or
- (b) instituting litigation or other formal proceedings to the extent necessary (i) to avoid the expiration of any applicable limitations period or (ii) to preserve a superior position with respect to other creditors (iii) (iii) to recover any undisputed charges owed to <PPP Vendor> when due under this Agreement.”

### **18.4. Jurisdiction.**

Subject to Clauses 18.1 and 18.2, the Court of <City, India > have [exclusive] jurisdiction to settle any Dispute, including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity. The parties agree that the Court of <City, India > are the most appropriate and convenient courts to settle any Dispute and, accordingly, that they will not argue to the contrary.

## 19. FORCE MAJEURE

### 19.1. Force Majeure Events.<sup>70</sup>

- (a) Each Party will be excused from performance under this Agreement (other than obligations to make payments that have become due and payable pursuant to this Agreement) for any period and to the extent that it is prevented from performing any obligations pursuant to this Agreement, in whole or in part, as a result of a Force Majeure Event. If either Party is prevented from, or delayed in performing any of its obligations under this Agreement by a Force Majeure Event, it will promptly notify the other Party by telephone (to be confirmed in writing within five days of the inception of the delay) of the occurrence of a Force Majeure Event and describe, in reasonable detail, the circumstances constituting the Force Majeure Event and of the obligations, the performance of which are thereby delayed or prevented. Such Party will continue to use reasonable efforts to recommence performance whenever and to whatever extent possible without delay.
- (b) A “Force Majeure Event” will mean the occurrence of an event or circumstance beyond the reasonable control of a Party, provided that (i) the non-performing Party is without fault in causing or failing to prevent such occurrence and (ii) such occurrence cannot be circumvented by reasonable precautions and could not have been circumvented through the use of commercially reasonable alternative sources, workaround plans or other means (including, with respect to <PPP Vendor>, by <PPP Vendor> meeting its disaster recovery obligations described in this Agreement). “Force Majeure Events” will include, without limitation,

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<sup>70</sup> Some agencies believe that a force majeure event only exists if there is an event that, in fact, prevents the vendor from instituting its reasonable back-up plans. In other words, a hurricane that causes the shutdown of a data center is not a force majeure event. To have caused a force majeure event, the hurricane would have had to destroy the back-up data center and perhaps the third-party facility with which the vendor had contracted for disaster recovery services (assuming that it was reasonable for the vendor to have relied on that particular back-up facility and third party disaster recovery facility in the first place). It is only at this point that these legal advisers believe the vendor may be excused for non-performance and not subject to service credit penalties or in material breach of the contract. The rationale here is that only the vendor is in a position to manage the risks of its business and to plan appropriately for unanticipated events. Since PPP Vendor should be able to anticipate and plan for most interruptions through the use of back-up systems, third-party disaster recovery arrangements, or, if necessary, business interruption insurance, PPP Vendor should not be excused from performance until these back-up measures also fail.

However in the scenario of e-Governance, when the Data Centre is already set up by a SDC Vendor (a third party), not within the control of the PPP Vendor, the situation is different. However the given the nature of the project, the Nodal Agency may decide whether the such risks should be with the PPP Vendor or passed on to another agency responsible for SDC. In case a) the SDC and Disaster recovery centre are not upto the design expected to secure the data against such eventuality b) SLAs and penal provisions of the SDC Vendor are not similar to PPP Outsourcing contract, the Nodal Agency would be at risk. In such a case, the Nodal agency can put a case for having a separate data centre which would be operated by the PPP Vendor. However in such a case, the issues of strategic control would be relevant. Hence the final decision should be taken after considering both the issues.

- (i) explosions, fires, flood, earthquakes, catastrophic weather conditions, or other elements of nature or acts of God;
  - (ii) acts of war (declared or undeclared), acts of terrorism, insurrection, riots, civil disorders, rebellion or sabotage;
  - (iii) acts of national, local or foreign governmental authorities or courts;
  - (iv) labour disputes, lockouts, strikes or other industrial action, whether direct or indirect and whether lawful or unlawful;
  - (v) nuclear, chemical or biological contamination;
  - (vi) failures or fluctuations in electrical power or telecommunications service or equipment; or
  - (vii) delays or failures caused by the other Party or the other Party's performance or third-party non-performance (except that a Party will not be excused for delays or failures caused by such Party's subcontractors or agents unless the event or circumstance is a Force Majeure Event as to such subcontractor or agent); or
  - (viii) could not have been prevented by the non-performing Party's reasonable precautions or commercially accepted processes, or could not reasonably be circumvented by the non-performing Party through the use of substitute services, alternate sources, work-around plans, the implementation of appropriate security measures or the disaster recovery procedures required of Vendor.
- (c) *[If a Force Majeure Event relating to <PPP Vendor> or one of its subcontractors substantially prevents, hinders or delays performance of the Services necessary for the performance of one or more critical <Nodal Agency> business functions<sup>71</sup> for more than [three] consecutive days, then at <Nodal Agency>'s option: (i) <Nodal Agency> may procure replacement services from an alternate source [and the Parties will share equally] the amount paid by <Nodal Agency> for such replacement services to the extent that such charges exceed <PPP Vendor>'s charges hereunder for the Services so replaced; or (ii) <Nodal Agency> may terminate the Service so affected (or*

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<sup>71</sup> Vendors prefer to know the functions on which to concentrate restoration efforts in the event of a force majeure event. Additional clarity can be added by defining these critical business functions (in descending order of clarity and preference) as (i) as those functions specified on a schedule, (ii) to include only those functions that are essential and critical to Nodal Agency's business operations that are reasonably and in good faith determined by Nodal Agency and identified in writing to Nodal Agency from time to time or (iii) to include only those functions that are essential and critical to Nodal Agency's business operations, as determined in a manner consistent with Nodal Agency's disaster recovery practices prevailing as of the Effective Date.

*if the Force Majeure Event only affects one or more geographic areas, the Service in the areas so affected). <Nodal Agency> will use reasonable efforts to minimise the charges to be incurred for such replacement services. In the event of any Service termination (or Service termination in a limited geographic area), <Nodal Agency> will pay all Costs resulting from such termination. Other than as provided in this Clause 19.1(c), <PPP Vendor> will not have the right to any additional payments from <Nodal Agency> as a result of any Force Majeure Event, other than <Nodal Agency>'s payment of amounts otherwise due for Services provided prior to such termination. At such time that <PPP Vendor> resumes, or is reasonably prepared to resume, providing the Services that were so prevented, hindered or delayed, (i) <PPP Vendor> will no longer be obligated to share any of the incremental charges for such replacement services, and (ii) the termination right described in this Clause 19.1(c) will terminate with respect to such Force Majeure Event.]*

- (d) Nothing in this Clause 19.1 will relieve <PPP Vendor>'s obligations to provide Disaster Recovery Services in accordance with this Agreement.
- (e) For the avoidance of doubt, it is expressly clarified that the failure on the part of the <PPP Vendor> under this Agreement to implement any disaster contingency planning and back-up and other data safeguards in accordance with the terms of this Agreement against natural disaster, fire, sabotage or other similar occurrence shall not be deemed to be a Force Majeure Events. For the avoidance of doubt, it is further clarified that any negligence in performance of Services which directly causes any breach of security like hacking *aren't the forces of nature and hence wouldn't be qualified under the definition of "Force Majeure Events"*.

## **20. MISCELLANEOUS**

### **20.1. <Nodal Agency> Affiliates.**

With respect to any <Nodal Agency> Affiliates that receive Services from <PPP Vendor> for their internal use under this Agreement, <Nodal Agency> will (i) retain responsibility for payment of such Services; (ii) cause such Affiliates to comply with the applicable terms and conditions of this Agreement; and (iii) upon the request of <PPP Vendor> from time to time, obtain written assurances from such Affiliates that such Affiliates will abide by the applicable terms and conditions set out in this Agreement.

### **20.2. Injunctive Relief.**

Each Party will have the right to seek injunctive or other equitable relief to address breaches (or attempted breaches) of the obligations of the other Party under this Agreement only after taking all measures as mentioned in clause 18.



### **20.3. Assignment.**

This Agreement will be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. Neither Party will assign this Agreement or any part hereof or any benefit or interest therein without the prior written consent of the other Party; provided, however, that either Party may assign this Agreement (i) to any of its Affiliates and (ii) to any entity that acquires all or substantially all of the assets of such Party or to successor in a merger or acquisition of such Party. In the event of an assignment of this Agreement pursuant to the previous sentence, the assigning Party will not be released from any of its liabilities or obligations hereunder. In the event of any permitted assignment of this Agreement by either Party, the designated assignee will assume, in writing (in form and substance reasonably satisfactory to the other Party), the rights and obligations of the assigning Party under this Agreement. This Clause 20.3 will not apply to the subcontracting by <PPP Vendor> of any portion of the Services in accordance with Clause 8.10.

### **20.4. Cooperation; Consents.**

Each Party will cooperate with the other Party in good faith in the performance of its respective activities contemplated by this Agreement through, among other things, making available, as reasonably requested by the other Party, such management decisions, information, approvals and acceptances in order that the provision of the Services under this Agreement may be accomplished in a proper, timely and efficient manner. Where agreement, approval, acceptance or consent of either Party is required by any provision of this Agreement, such action will not be unreasonably withheld or delayed.

### **20.5. Compliance with Laws and Regulations.**

- (f) Notwithstanding any other provision of this Agreement to the contrary other than Clause 7.6 [*and 17.1(g)*], each Party will retain responsibility for its compliance with all applicable laws and regulations relating to its respective business and facilities and the provision of services to third parties, including applicable export laws, regulations and orders. In performing their respective obligations under this Agreement, neither Party will be required to undertake any activity that would violate any applicable laws or regulations. Nodal Agency will notify vendor of requirements under applicable laws which pertain to the business of the Nodal Agency and which affect the services to be provided prior to the execution of the contract.
- (g) [*<PPP Vendor> shall maintain processes and procedures relating to the Services in accordance with the written requirements delineated in advance by <Nodal Agency> to meet <Nodal Agency>'s internal control requirements. <Nodal Agency> retains responsibility for compliance with regulatory requirements that pertain to its business. In the event that <Nodal Agency> wishes to make changes to the internal control requirements, they shall be submitted in accordance with the System or*

*Contract Change Control processes (as applicable) set out in Clauses 8.11 and 8.12. <PPP Vendor> will periodically certify to <Nodal Agency> <PPP Vendor>'s compliance with the agreed-upon processes and procedures.]*

## **20.6. Relationship of Parties.**

In connection with this Agreement, each Party is an independent contractor. Except as expressly provided in this Agreement, <PPP Vendor> does not undertake to perform any obligation of <Nodal Agency>, whether regulatory or contractual, or to assume any responsibility for <Nodal Agency>'s business or operations. This Agreement establishes and will only be construed as establishing a contract between unrelated business entities for the provision and purchase of certain services and does not and will not be deemed to create a joint venture, partnership, fiduciary or agency relationship between the Parties for any purpose (except as expressly provided). In no event will <PPP Vendor> be deemed to be acting in a fiduciary capacity for <Nodal Agency>. With respect to its own personnel, each Party is independently responsible for all obligations incumbent upon an employer.

## **20.7. Notice.**

Wherever under this Agreement one Party is required or permitted to give notice to the other Party, such notice will be in writing and will be delivered personally, sent by facsimile transmission, sent by express courier or sent by certified mail (return receipt requested). Any such notice will be deemed given when actually received and will be addressed as follows:

In the case of <Nodal Agency>:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention:

Facsimile Number:

with a copy (which will not constitute effective notice) to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention:

Facsimile Number:

In the case of <PPP Vendor>:

<PPP Vendor>

\_\_\_\_\_  
\_\_\_\_\_

Attention:

Facsimile Number:

with a copy (which will not constitute effective notice) to:

<PPP Vendor>

Attn: [ ]

Either Party may change its address for notices upon giving ten days' written notice of the change to the other Party in the manner provided above.

## **20.8. Severability.**

If any provision of this Agreement or the application of any such provision to any Person or circumstance, will be declared judicially to be invalid, unenforceable or void, such decision will not have the effect of invalidating or voiding the remainder of this Agreement, and it is the intent and agreement of the Parties that this Agreement will be deemed amended by modifying such provision to the extent necessary to render it valid, legal and enforceable while preserving its intent or, if such modification is not possible, by substituting another provision that is legal and enforceable and that achieves the same objective.

## **20.9. No Third-Party Beneficiaries.**

Nothing contained in this Agreement is intended or will be construed to confer upon any Person (other than the Parties hereto and the Indemnitees specifically identified in Clause 15) any rights, benefits or remedies of any kind or character whatsoever. Except as expressly stated in this Agreement, the Parties do not intend that any term of this Agreement shall be enforceable by any third party.

## **20.10. Publicity.**

All advertising, press releases, public announcements and public disclosures by either Party relating to this Agreement which includes (i) the other Party's name, trade names, trademarks, logos, service marks or trade dress (collectively, "Name") or (ii) language from which the connection of such Name may be inferred or implied, will be coordinated with and subject to approval by both Parties prior to release; provided, however, that (i) either Party may indicate to third parties that <PPP Vendor> is providing services to <Nodal Agency> and (ii) <PPP Vendor> may use <Nodal Agency> as a reference.

### **20.11. Amendment.**

This Agreement may not be modified or amended except by a written instrument executed by or on behalf of each of the Parties to this Agreement.

### **20.12. Entire Agreement/Priority.**

This Agreement (including Schedules hereto, each of which is incorporated herein by reference) constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, whether written or oral, between the Parties with respect to the subject matter hereof. *[The letter of intent, dated \_\_\_\_\_, between <PPP Vendor> and <Nodal Agency> is superseded by this Agreement and will be of no further force or effect.]* There are no representations, understandings or agreements relating to this Agreement that are not fully expressed in this Agreement. Each of the Parties acknowledges that it has not relied on any representation, promise, understanding or warranty (other than as fully expressed in this Agreement) in entering into this Agreement. In the event of a conflict or ambiguity between the Agreement and a Schedule, the terms of this Agreement will prevail. In the event of any conflict or ambiguity between Schedules, the terms of the Schedule will prevail with respect to that Schedule only.

### **20.13. Governing Law.**

This Agreement will be governed by and construed in accordance with the laws, other than choice of law rules, of *[India]*.

### **20.14. Rules of Construction.**

The clause headings and the table of contents contained in this Agreement are for reference purposes only and will not affect in any way the meaning or interpretation of this Agreement. As used in this Agreement, unless otherwise provided to the contrary, (a) all references to days, months or quarters will be deemed references to calendar days, months or quarters and (b) any reference to a "Clause" or "Schedule" will be deemed to refer to a clause of this Agreement or a schedule to this Agreement. Unless the context otherwise requires, as used in this Agreement, all terms used in the singular will be deemed to refer to the plural as well, and vice versa. The words "hereof," "herein" and "hereunder" and words of similar import referring to this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. Whenever the words "include," "includes" or "including" are used in this Agreement, they will be deemed to be followed by the words "without limitation." References in this Agreement to *["INR"]* will be deemed a reference to *[Indian National Rupee ]* unless otherwise specified. References to "this Agreement" includes each New Service Request executed and delivered pursuant to this Agreement.

## **20.15. Inconsistencies.**

To the extent that the provisions of this Agreement and of any other schedule hereto are in any respect inconsistent, the provisions of this Agreement will govern and control, provided that with respect to the description of the Services, the schedules hereto will govern and control.

## **20.16. Counterparts.**

This Agreement may be executed in two or more counterparts, each of which will be deemed to be an original, but all of which together will constitute one agreement binding on the Parties, notwithstanding that both Parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, this Agreement has been duly executed by and on behalf of the Parties hereto on the Effective Date.

**<NODAL AGENCY>**

**<PPP VENDOR>**

By:

By:

Name:

Name:

Title:

Title:

## SCHEDULE I: DEFINITIONS

"<PPP Vendor>" will have the meaning specified in the preamble of this Agreement and include all <PPP Vendor> Affiliates and subcontractors of <PPP Vendor> or <PPP Vendor> Affiliates, unless specifically stated or the context indicates otherwise. However, the use of the term "<PPP Vendor>" to refer to Affiliates in separate countries shall not be construed as a requirement for, or evidence of, the presence or establishment of <PPP Vendor> or the Affiliate doing business in a jurisdiction other than where it is domiciled.

"<PPP Vendor> Account Representative" will have the meaning specified in Clause 8.1.

"Affiliate" means any other Person that, directly or indirectly, through one or more intermediaries, is controlled by or under common control with a Party. For the purposes of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of shares, the holding of voting power, by contract or otherwise.

"<PPP Vendor>-Managed Agreements" will have the meaning specified in Clause 6.2(a)

"<PPP Vendor> Service Locations" means those locations from which Services will be provided that are owned, leased or under the control of <PPP Vendor>, its Affiliates, or subcontractors, initially as identified in Schedule 7.1.

"<PPP Vendor> Software" will have the meaning specified in Clause 6.6(a).

"<PPP Vendor> Software Enhancements" will have the meaning specified in Clause 13.3(b).

"<PPP Vendor> Warranty Item" will have the meaning specified in Clause 11.4(e)

"Account Documentation" will have the meaning specified in Clause 8.6(a).

"Adjustable Amounts" will have the meaning specified in Clause 10.5.

*["Adjustment Event" will have the meaning specified in Clause 4.9.]*

"Agreement" will have the meaning specified in the preamble of this Agreement.

"Agreement Term" will have the meaning specified in Clause 2.2.

"Amount at Risk" will have the meaning specified in Schedule 5.1.

"Application Development Services" will have the meaning specified in Clause 4.4(a).

*["Application Services" will have the meaning specified in Schedule \_\_\_\_.]*

*["Assumed Liabilities" will have the meaning specified in Schedule 6.1.]*

"Base Index" will have the meaning specified in Clause 10.5.

"Base Services" will have the meaning specified in Clause 4.2.

"Base Services Commencement Date" will have the meaning specified in Clause 3.1.

*["Base Services Report" will have the meaning specified in Clause 4.9(e).]*

"Benchmarking Adjustment" will have the meaning specified in Clause 5.3(g).

"Benchmarking Condition" will have the meaning specified in Clause 5.3(e).

"Benchmarking Process" will have the meaning specified in Clause 5.3(a).

"Benchmarking Report" will have the meaning specified in Clause 5.3(e).

"Contract Changes" means any changes to this Agreement that are within the scope of the Services. Examples include changes in Service Levels, <Nodal Agency> provided hardware, reporting requirements and applicable laws.

"Claim" will have the meaning specified in Clause 15.4(a).

"<Nodal Agency>" will have the meaning specified in the introduction to this Agreement and include all <Nodal Agency> Affiliates and third parties of <Nodal Agency> or <Nodal Agency> Affiliates, unless specifically stated or the context indicates otherwise.

"<Nodal Agency> Account Representative" will have the meaning specified in Clause 8.2.

"<Nodal Agency> Contractors" will have the meaning specified in Clause 8.9(a).

"<Nodal Agency> Data" means information regarding <Nodal Agency> that is provided by <Nodal Agency> to <PPP Vendor> pursuant to this Agreement or created by <PPP Vendor> under or arising out of data and records of <Nodal Agency> pursuant to this Agreement.

"<Nodal Agency>-Leased Hardware" will have the meaning specified in Clause 6.3.

"<Nodal Agency>-Licensed Software" will have the meaning specified in Clause 6.4.

"<Nodal Agency>-Owned Hardware" will have the meaning specified in Clause 6.3.

"<Nodal Agency>-Owned Software" will have the meaning specified in Clause 6.5.

"<Nodal Agency> Service Location Items" will have the meaning specified in Clause 7.2.

"<Nodal Agency> Service Locations" means those locations from which Services will be provided that are owned, leased or under the control of <Nodal Agency>, as identified in Schedule 7.1.

"<Nodal Agency> Service Responsibilities" will have the meaning specified in Clause 4.12(a).

"Confidential Information" will have the meaning specified in Clause 12.1(a).

"Consents" means consents, waivers, permits, clearances, approvals, rights and other authorisations.

"Covered Opportunity" will have the meaning specified in Clause 4.8(a).

"Critical <PPP Vendor>-Licensed Software" will have the meaning specified in Clause 6.7(a).

*["Critical Application Availability" will have the meaning specified in Schedule 5.1.]*

*["Critical Applications" will have the meaning specified in Schedule 5.1.]*

*["Critical Performance Category" will have the meaning specified in Schedule 5.1.]*

"Current Index" will have the meaning specified in Clause 10.5.

"Demobilisation Costs" means the costs reasonably incurred by <PPP Vendor> in connection with either (i) the redeployment, demobilisation and relocation of the applicable <PPP Vendor> (or subcontractor) personnel who are then primarily dedicated to providing Services to <Nodal Agency> *[and who <PPP Vendor> is unable, using reasonable efforts over a [one]-month period, to redeploy to another <PPP Vendor> account in the same metropolitan area]* or (ii) the termination of the applicable <PPP Vendor> (or subcontractor) personnel (including severance, out-placement or related costs).

*"Developed Application" means [to come].*

"Disaster Recovery Services" will have the meaning specified in Clause 4.5.

*["Discontinuance Notice" will have the meaning specified in Clause 17.2(b).]*

*["Discontinuance Response" will have the meaning specified in Clause 17.2(b).]*

"Dispute" will have the meaning specified in Clause 18.1(a).

*["Downtime" will have the meaning specified in Schedule 5.1.]*

"Effective Date" means [the date of this Agreement].



“Embedded <PPP Vendor> Software” will have the meaning specified in Clause 13.3(a).

“Employees Offered Employment” will have the meaning specified in Schedule 9.1.

“Employment Effective Date” will have the meaning specified in Schedule 9.1.

“Expiry Date” will mean the Expiry Date of the Agreement or any later date in case the parties mutually agree that the Agreement should extend.

“Final Acceptance” will have the meaning specified in Schedule 4.4(c).

“Force Majeure Event” will have the meaning specified in Clause 19.1(b).

“FTE” means a person dedicated to the <Nodal Agency> account or in the case of non-dedicated personnel, such group of persons whose business time expended in providing Services under this Agreement is, in the aggregate, approximately equal to the business time expended by one dedicated person.

“FTE Based Projects” will have the meaning specified in Schedule 4.4.

“Hardware” will mean computers and related equipment, including, as applicable, central processing units, personal computers and other processors, controllers, modems, storage devices, printers, terminals, other peripherals and input and output devices, and other tangible mechanical and electronic equipment intended for the processing, input, output, storage, manipulation and retrieval of information and data.

“Hired Employees” will have the meaning specified in Schedule 9.1.

*[“Identified Resource” will have the meaning specified in Clause 4.9(d).]*

“Indemnatee” will have the meaning specified in Clause 15.4(a).

“Indemnitor” will have the meaning specified in Clause 15.4(a).

“Infringement Claims” will have the meaning specified in Clause 15.3(a).

“Key Management Positions” will have the meaning specified in Clause 8.4(a).

*[“Key Measurement” will have the meaning specified in Schedule 5.1.]*

*[“LAN Server Availability” will have the meaning specified in Schedule 5.1.]*

“Liens” means, with respect to any properties or assets, any mortgage, pledge, claim, charge, hypothecation, assignment, security interest, lien or encumbrance or any preference, priority or

other right or interest granted pursuant to a security agreement or preferential arrangement of any kind or character in respect of such properties or assets.

“Losses” means losses, liabilities, damages, actions, claims, costs and expenses (including reasonable legal fees and disbursements).

“Migration” will have the meaning specified in Clause 3.2.

*[“Monthly Charges” will have the meaning specified in Schedule 5.1.]*

“Name” will have the meaning specified in Clause 20.10.

*[“Network Availability” will have the meaning specified in Schedule 5.1.]*

“New Services” will have the meaning specified in Clause 4.6(a).

“New Service Request” will have the meaning specified in Clause 4.6(b).

“New Service Response” will have the meaning specified in Clause 4.6(c).

“Non-transferrable Contracts” will have the meaning specified in Schedule 6.1.

“Notice” will have the meaning specified in Clause 15.4(a).

“Parties” means <Nodal Agency> and <PPP Vendor>, as signatories to this Agreement.

“Pass-Through Expenses” will have the meaning specified in Clause 10.3(a).

*[“Performance Category Weight” will have the meaning specified in Schedule 5.1.]*

“Person” means any corporate, association, partnership, joint venture, organisation, individual, business or other trust or any other entity or organisation of any kind or character, including a court or other governmental authority.

“Privileged Work Product” will have the meaning specified in Clause 12.3.

“Proprietary Items” will have the meaning specified in Clause 13.4.

“Retained Expenses” will have the meaning specified in Clause 10.4.

*[“Sample Period” will have the meaning specified in Schedule 5.1.]*

*[“Scheduled Uptime” will have the meaning specified in Schedule 5.1.]*

*[“Service Category” will have the meaning specified in Schedule 5.1.]*

“Service Charges” will have the meaning specified in Clause 10.1.

*[“Service Discontinuance” will have the meaning specified in Clause 17.2.]*

*[“Service Level Credit” will have the meaning specified in Schedule 5.1.]*

*[“Service Level Default” will have the meaning specified in Schedule 5.1.]*

“Service Levels” will have the meaning specified in Clause 5.1(a).

“Service Locations” means <PPP Vendor> Service Locations and <Nodal Agency> Service Locations.

“Service Management Steering Committee” will have the meaning specified in Clause 8.3.

“Services” will have the meaning specified in Clause 4.1.

“Stranded Costs” means (i) any unrecouped investments, costs or obligations, or the unrecovered portion of any amortised charges for such investments, costs or obligations, for any hardware, software or third-party service agreements primarily dedicated to providing Services to <Nodal Agency> which have been made, incurred or assumed by <PPP Vendor> in good faith in reasonable expectation of providing Services requested by <Nodal Agency> pursuant to this Agreement (including obligations under unexpired lease, licence or other agreements for hardware, software, third-party services or subcontracts) and (ii) any amount of accrued and unbilled revenue for Services provided under this Agreement. *[Notwithstanding the foregoing, for an item to constitute a “Stranded Cost” for purposes of this Agreement, (i) <PPP Vendor> must have exercised due regard for <Nodal Agency>’s interests, prior to entering any commitment that exposes <Nodal Agency> to such investment, cost or obligation, and (ii) <PPP Vendor> will have used reasonable efforts to redeploy such hardware, software or third-party service for a period of [one] month from the date the obligation to pay the Stranded Cost arose. To the extent such hardware, software or third-party service is not dedicated entirely to providing Services for <Nodal Agency>, only that portion of the investment, cost or obligation that was used to provide Services to <Nodal Agency> will be considered Stranded Cost. To the extent commercially reasonable, <PPP Vendor> will minimise the financial impact on <Nodal Agency> of such investment, cost or obligation. Upon payment of any Stranded Costs, <Nodal Agency> will thereupon be entitled to all rights, setoffs, subrogations and benefits held by <PPP Vendor> under or in connection with such investments and contractual obligations; provided, however, that if [75%] or more of the Stranded Cost is attributable to Services provided to <Nodal Agency>, at <Nodal Agency>’s option, <PPP Vendor> will transfer or assign to <Nodal Agency> that portion of the obligation used to provide Services to <Nodal Agency> and <Nodal Agency> will assume and resolve the obligation itself. The Parties will execute and deliver such documentation and take such other reasonable actions as may be necessary to transfer to <Nodal Agency> such rights, setoffs, subrogations, benefits and obligations.]*

“System Changes” means any changes to the <Nodal Agency> computer environment, equipment, software, personnel or Services that would reasonably be expected to have a material adverse effect on the functionality, performance standards or technical environment of <Nodal Agency>’s systems or increase <Nodal Agency>’s costs for the Services.

“Termination Assistance Period” will have the meaning specified in Clause 17.7.

“Termination Amount” means the applicable amount specified in Schedule 17.1(a).

“Termination Date” means the date on which the parties mutually agree to terminate before the expiry period.

“Termination Management Team” will have the meaning specified in Schedule 17.6.

“Third-Party Benchmark” will have the meaning specified in Clause 5.3(b).

“Transfer Amounts” will have the meaning specified in Schedule 17.1(a).

“Transferred Assets” will have the meaning specified in Schedule 17.1(a).

“Transferred Contracts” will have the meaning specified in Schedule 6.1.

“Transferred Third-Party Equipment Leases” will have the meaning specified in Schedule 6.1.

“Transferred Third-Party Service Agreements” will have the meaning specified in Schedule 6.1.

“Transferred Third-Party Software Licences” will have the meaning specified in Schedule 6.1.

“Solution Development” will have the meaning specified in Clause 3.2.

“Solution Development Plan” will have the meaning specified in Clause 3.3(a).

“Solution Development Services” will have the meaning specified in Clause 3.2.

*[“True-Up Period” will have the meaning specified in Clause 4.9(a).]*

## **Schedule II: Sample Model Tripartite Agreement for Resale of Network Bandwidth**

DRAFT MODEL TRIPARTITE AGREEMENT (amongst ..... ( PURCHASER) .....  
(SUPPLIER ) & ..... (NETWORK SERVICE PROVIDER / SUB CONTRACTOR)  
For providing network services and Internet Bandwidth

### *NOTE*

- a. This agreement is between three parties, Purchaser, Supplier and Network Service Provider for providing network services/ Internet Bandwidth when, the Purchaser/Nodal Agency is using the services of Network Provider under the contract with Supplier/ SI. This agreement is required in such case to abide with TRAI guidelines , which doesn't permit resale of network bandwidth*
- b. This is a draft agreement format; final agreements needs to be signed between Purchaser, Supplier and Network Service Provider*
- c. It is to be ensured by PURCHASER that:*
  - Prior to this agreement Contract agreement between PURCHASER and SUPPLIER has been signed.*
  - The Purchase Order on the same price and work, as quoted by SUPPLIER against the 'Network services, Internet Bandwidth) and Related Services' component of SUPPLIER LOA/CONTRACT has been/is to be signed between PURCHASER and NETWORK SERVICE PROVIDER.*
- d. SLA format for including in the PURCHASER's Purchase Order to NETWORK SERVICE PROVIDER is given at the end of this document.*
- e. This agreement does not endorse any agreement between NETWORK SERVICE PROVIDER and SUPPLIER*
- f. The Responsibility Matrix may be modified depending upon specific works.*

## MODEL TRIPARTITE AGREEMENT

This Agreement is entered on .....day of 20....<year> among .....<name of PURCHASER> constituted by and having its registered office at.....(hereinafter called the "PURCHASER"), of the one part

AND

..... <name of SUPPLIER>, a company incorporated under the Companies Act 1956 and having its corporate office at ..... SELECTED IT IMPLEMENTATION AGENCY (SUPPLIER) FOR .....PROJECT i.e., Party engaged by ..... vide LOI No:..... and detailed order no. ....(herein referred to as the "Contract") for Supply, installation, integration, testing, commissioning and facility management service of System Integration Project covering software, hardware, field survey and networking (Network services, Internet Bandwidth) and Related Services incidental thereto as specified in the Services/ Scope of Work at Section 4 of the said Contract (hereinafter referred to as "**SUPPLIER or** .....(name of SUPPLIER) which expression shall unless excluded by or repugnant to the meaning or context thereof be deemed to include its successors and assigns) of the second Part.

AND

.....<name of NETWORK SERVICE PROVIDER (NSP)> a company incorporated under the Companies Act 1956 and having its corporate office at....., being a TELECOM SERVICE PROVIDER/NETWORK BANDWIDTH SERVICE PROVIDER for the referred ..... PROJECT engaged for Providing ....., Network services, Internet Bandwidth and connectivity incidental thereto as specified in the Services/ Scope of Work in the agreement between ..... (SUPPLIER) and ..... (PURCHASER) (hereinafter referred to as "NETWORK SERVICE PROVIDER (NSP)") which expression shall unless excluded by or repugnant to the meaning or context thereof be deemed to include its successors and assigns) of the third Part. ".....( PURCHASER)", " .....(SUPPLIER)" and ".....NETWORK SERVICE PROVIDER (NSP))" are individually referred as "Party" and collectively as "Parties".

WHEREAS ..... (PURCHASER), the party of the first part has contracted .....(SUPPLIER), the second party, for Turn Key Implementation of .....<Name of Solution> at .....<name of SUPPLIER> (hereinafter referred to as "The Project") vide its Contract No.....

WHEREAS as per the requirements of the project, ..... (PURCHASER) requires these services for successful implementation of the project.

WHEREAS ..... (SUPPLIER), in order to service its obligation under the above mentioned RFP to the full satisfaction of the PURCHASER, had proposed ".....(NETWORK SERVICE PROVIDER (NSP))" as a service provider vide their letter/ offer no dated and now agrees to associate with .....(NETWORK SERVICE PROVIDER (NSP)) for execution of the part of the order, to provide support services as detailed in the purchase Order (SUPPLIER) and/or indicated in .....<section> of this agreement to be the responsibility of ....( NETWORK SERVICE PROVIDER (NSP)), namely, related to required Bandwidth services for the project.

WHEREAS SUPPLIER has done the due diligence with respect to the capabilities, technical or otherwise, of .....( NETWORK SERVICE PROVIDER (NSP)) for providing the required type of

connectivity and services within time frame, quality, security and reliability level as envisaged in the RFP / SRS before recommending their name.

WHEREAS the bid price quoted by ..... (SUPPLIER) for networking (Network services, Internet Bandwidth and connectivity) and Related Services ("Service") at locations as specified in CONTRACT (hereinafter referred to as the "Locations") for the purpose of utilization by the .....( PURCHASER) and their respective subsidiaries and affiliates as specified in the CONTRACT No.....to .....(SUPPLIER) placed by .....( PURCHASER), is passed through to ..... (NETWORK SERVICE PROVIDER (NSP)) in accordance with the bid proposal dated .....submitted to .....( PURCHASER) by .....(SUPPLIER), and the Terms & Conditions and SLA of .....( PURCHASER) with .....( NETWORK SERVICE PROVIDER (NSP)), for carrying out the networking and Related Services.

WHEREAS ..... (NETWORK SERVICE PROVIDER (NSP)) has Category 'A' ISP license having its network spread across India.

The Purchase Order placed vide ...../to be placed by ..... (PURCHASER) to ..... ( NETWORK SERVICE PROVIDER (NSP)) shall form an integral part of this agreement. .... (SUPPLIER), shall be responsible for (i) coordinating /entering into a tripartite agreement with the NSP along with the Purchaser (ii) getting the work executed by the NSP as per the Contract for Bandwidth as well as SLA's (iii) the replacement, if any, of the NSP without changing any penalty/LD criteria. However the new NSP has to meet the qualification criteria. Any breach or failure to fulfil the obligations as mentioned in the Tripartite Agreement which has a material impact on the performance of the Contract shall be treated as a breach of the terms of 'The Contract'.

WHEREAS by virtue of this agreement, the parties..... (SUPPLIER) and ..... (NETWORK SERVICE PROVIDER (NSP)) bind themselves to the terms & conditions that are embedded in the contract between the first two parties.

**Now these presents witness and it is hereby agreed by and between the parties hereto as follows:**

## **1. APPLICATION**

This Agreement details the general terms and conditions for the provision of the Services to be rendered by ..... (NETWORK SERVICE PROVIDER (NSP)) [as per CONTRACT placed vide..../to be placed by PURCHASER] and by .....(SUPPLIER) [as per CONTRACT No. ....with ..... (PURCHASER)]. Upon signing the scope, duration and other services to be so rendered under this Agreement the parties agree to accept and be bound by these terms and conditions.

## **2. PROVISION OF SERVICE**

i. The provision of the Services is subject to these terms and conditions stated in this Agreement. Where ..... (NETWORK SERVICE PROVIDER) shall accept the Order from..... (PURCHASER), ..... (NETWORK SERVICE PROVIDER) shall provide the Services required by..... (PURCHASER), and by ..... (SUPPLIER) on behalf of..... (PURCHASER), within a timeframe, quality, security and reliability level agreed with between ..... (PURCHASER), ..... (NETWORK PROVIDER) and ..... (SUPPLIER). The SUPPLIER shall provide..... (NETWORK PROVIDER) with a complete network diagram of the set-up along with the details of connectivity at the Locations and services will be provisioned to the..... (PURCHASER) accordingly. It is the responsibility of SUPPLIER, to ensure and of ..... (NETWORK SERVICE PROVIDER) to provide proper network monitoring and network management as per SLA like

uptime, proper bandwidth etc. and to submit the SLA performance report of the ..... (NETWORK SERVICE PROVIDER) to the ..... (PURCHASER) on monthly/as and when required basis.

ii. The network links will be provided by.....(NETWORK SERVICE PROVIDER) and the SUPPLIER will monitor and report any problems on behalf of .....(NETWORK SERVICE PROVIDER) to .....(PURCHASER).

iii. Where it is necessary, due to materiel breach by the NETWORK SERVICE PROVIDER, the PURCHASER shall instruct the SUPPLIER to replace the ..... (NETWORK SERVICE PROVIDER) with another NETWORK SERVICE PROVIDER. In case of replacement of NETWORK SERVICE PROVIDER, the SUPPLIER shall terminate forthwith all agreements/contracts other arrangements with such NETWORK PROVIDER and find suitable replacement for such NETWORK PROVIDER to the satisfaction of the ..... (PURCHASER) at no additional charge. The SUPPLIER has to execute the contract as per agreed schedule and SLA and as per contractual provision entered between PURCHASER and SUPPLIER.

iv. .... (SUPPLIER) shall ensure that Requisite Services from .....(NETWORK SERVICE PROVIDER) for project area (town) are available on time when its own system/works that are to be installed/ executed/implemented under PO no. ....with .....(PURCHASER), are ready for testing & commissioning.

v. The .....(NETWORK SERVICE PROVIDER) shall not use the establishments and services installed under this agreement for organizations other than .....( PURCHASER).

### 3. SERVICE TERM

The term of the Services is initially for ..... years (as per CONTRACT) from the date of commencement of service, and if required, thereafter, shall be extended from time to time by written consent of the parties. The Service Commencement Date shall be set forth in accordance with the Purchase Order placed vide...../to be placed by .....( PURCHASER) on ..... (NETWORK SERVICE PROVIDER).

### 4. TERMINATION OF SERVICE

The Termination of this Agreement and Services shall be as per provisions of Termination clause as appearing in main CONTRACT

### 5. RESPONSIBILITIES OF THE PARTIES

Responsibility of .....( PURCHASER)	Responsibility of .....(SUPPLIER)	Responsibility of .....(SUB-CONTRACTOR)
To monitor the project progress against time frame & quality and performance with , quality, security and reliability levels of required services as per agreement with..... (SUPPLIER) and ..... (NETWORK SERVICE PROVIDER).	To arrange through a licensed network service provider, Network services, Internet Bandwidth and connectivity, incidental thereto as specified in the Scope of Work in the agreement between ..... (SUPPLIER) and ..... (PURCHASER).	To provide Network services, Internet Bandwidth and connectivity, incidental thereto as specified in the Scope of Work as per CONTRACT placed by PURCHASER to ..... (SUPPLIER) and ( NETWORK SERVICE PROVIDER). To provide the Services (as per



<p>To disburse the payment to the ..... (NETWORK SERVICE PROVIDER) upon achievement of the SLA on the basis of performance reports/ SLA reports.</p> <p>To provide safe access and conditions to ..... (SUPPLIER) and (NETWORK SERVICE PROVIDER)'s employees or appointed personnel while in the premises</p>	<p>The Suppliers overall liabilities and responsibilities shall in no case be less or more than the liabilities as mentioned in the contract, with respect to 'The Project', executed between the Supplier and the Purchaser. Ensuring Timely execution of the part of the order related to required Bandwidth for the project.</p> <p>To provide ..... ( NETWORK SERVICE PROVIDER) with a complete network diagram of the set-up along with the details of connectivity at the Locations and services provisioned to the..... (PURCHASER)</p> <p>Proper network monitoring and network management as per SLA like uptime, proper bandwidth etc. and submit SLA report to the PURCHASER on monthly/as and when required basis.</p> <p>To monitor and report any problems on behalf of ..... (NETWORK SERVICE PROVIDER).</p> <p>To ensure that the ..... (NETWORK SERVICE PROVIDER) comply with all relevant and applicable provisions of the Contract.</p> <p>To obtain and arrange for the maintenance in full force and effect of all applicable government approvals, consents, licenses, authorizations , declarations, filings, and registrations as may be necessary and advisable for the performance of all of the terms and conditions of this Agreement.</p>	<p>SLA) required by..... (PURCHASER), and by.....(SUPPLIER) on behalf of ..... (PURCHASER), within the timeframe, quality, security and reliability level agreed with between ..... (PURCHASER), ..... (NETWORK SERVICE PROVIDER) and ..... (SUPPLIER). Not to use the establishments and services installed under this agreement for organizations other than ..... (PURCHASER).</p> <p>To raise direct invoices against the works/services performed, as per the terms of the Purchase Order with PURCHASER.</p> <p>To ensure compliance of Indian Telecom regulation &amp; statutory requirements while performing the works/services under this agreement.</p> <p>To obtain and arrange for the maintenance in full force and effect of all government approvals, consents, licenses, authorizations, declarations, filings, and registrations as may be necessary and advisable for the performance of all of the terms and conditions of this Agreement.</p>
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## 6. INVOICE AND PAYMENT

i. ....( NETWORK SERVICE PROVIDER) shall raise direct invoices against the Requisite Services so rendered, as per the terms of the Contract and ..... (PURCHASER) shall directly make the payment to ..... (NETWORK SERVICE PROVIDER) based on the SLA report and confirmation made by ..... (SUPPLIER).

ii. The other terms and conditions shall remain applicable as per .....(PURCHASER's) CONTRACT No..... with ..... (SUPPLIER).

#### **7. DISPUTES WITH REGARDS TO INCORRECT INVOICING**

Disputes with regard to incorrect Invoicing shall be governed by ..... (PURCHASER's) CONTRACT No. ....with..... (SUPPLIER).

#### **8. ACCESS TO PREMISES**

..... ( PURCHASER) shall allow or obtain the required permission to enable ..... (NETWORK SERVICE PROVIDER) employees or authorized personnel, appointed distributors, agents or subcontractors to enter at all times during the normal working hours of ..... (PURCHASER) into the premises where the Services are provided for periodical inspection with seven (7) days prior notice, installing, maintaining, replacing and removing equipment hardware and/or software prior to, during and after the provision of the Services, as well as to inspect the network and/or to the CPE or any other equipment used in or in connection with the Services. The ..... (PURCHASER) shall render all assistance in this regard and shall provide safe access and conditions for ..... (NETWORK SERVICE PROVIDER)'s employees or appointed personnel whilst in the premises. .... (NETWORK SERVICE PROVIDER)'s employees or appointed personnel shall comply with security and confidentiality policies and procedures while on the ..... (PURCHASER)'s premises.

#### **9. NOTICES**

Any party may deliver notices to the other by personal delivery or by postal delivery at - (PURCHASER)

.....

(SUPPLIER)

.....

(NETWORK SERVICE PROVIDER)

.....

Notices shall be deemed delivered on the date of actual receipt.

#### **10. ENTIRE UNDERSTANDING**

This Agreement constitutes the entire understanding of the parties related to the subject matter hereof. The agreement may be amended only in writing when it is signed by ..... (NETWORK SERVICE PROVIDER), .....(SUPPLIER) and .....( PURCHASER).

#### **11. MISCELLANEOUS**

- a. The terms of this Agreement shall not be construed to constitute a partnership, joint venture or employer/employee relationship between the parties. This Agreement along with any other relevant document constitutes the whole of the agreement and understanding between the parties about the subject matter.
- b. In the event of any provision of this Agreement being held or becoming invalid, unenforceable or illegal for any reason, this Agreement shall remain otherwise in full force apart from the said provision which will be deemed deleted. The parties shall however attempt to replace the

deleted provision with a legally valid provision that reflects the same purpose of the deleted provision to the greatest extent possible.

- c. Headings used in this Agreement are for the convenience and ease of reference only, and shall not be relevant to or affect the meaning or interpretation of this Agreement.
- d. No forbearance, relaxation or inaction by any party at any time to require the performance of any provision of this Agreement shall in any way affect, diminish, or prejudice the right of such party to require the performance of that or any other provision of this Agreement or be considered to be a waiver of any right, unless specifically agreed in writing.
- e. Each Party shall obtain and arrange for the maintenance in full force and effect of all government approvals, consents, licenses, authorizations, declarations, filings, and registrations as may be necessary and advisable for the performance of all of the terms and conditions of this Agreement.
- f. The (NETWORK SERVICE PROVIDER) and ..... (SUPPLIER) shall ensure compliance of Indian Telecom regulation & all other statutory requirements while performing the works/ services under this agreement.

## **12. APPLICABLE LAW**

The Agreement shall be governed by and construed in accordance with Indian Law. Subject to arbitration provision stated hereinafter the Courts at Delhi shall have the jurisdiction.

## **13. ARBITRATION**

Any disputes which may arise out of this Agreement, and which cannot be settled in discussions or negotiations between the Parties, shall be referred to the appropriate management or higher authorities of the respective parties to resolve such dispute in good faith. In case no settlement is reached the parties shall refer it to a sole arbitrator appointed and selected by parties. Arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other subsequent modifications or enactments thereof. The venue for Arbitration proceedings shall be ..... . The Arbitration shall be conducted in English Language and the award shall be binding upon all Parties.

## **14. LIMITATION OF LIABILITY**

Limitation & liability with respect to Main Agreement and also this Agreement shall be governed by ..... (PURCHASER's) Contract with ..... (SUPPLIER). For the sake of clarity the parties agree that this Limitation of Liability shall be a part of overall limitation of liability for the entire scope of work under the contract, with respect to 'The Project', executed between the Supplier and the Purchaser. IN WITNESS WHEREOF the parties hereto have executed these presents the day and year first above written.

SIGNED AND DELIVERED BY (on behalf of

**PURCHASER)**

Signature .....

Name & Designation .....

Address .....

.....

in the presence of .....

Signature .....

Name & Designation.....

Address .....

.....

SIGNED AND DELIVERED BY (on behalf of

**SUPPLIER .....)**

Signature .....

Name & Designation .....

Address .....

.....

in the presence of .....

Signature .....

Name & Designation .....

Address .....

.....

SIGNED AND DELIVERED BY (on behalf of

**SUB-CONTRACTOR.....)**

Signature .....

Name & Designation .....

Address .....

.....

in the presence of .....

Signature .....

Name & Designation .....

Address .....

.....