

**DRAFT STANDARD**  
**CONCESSION AGREEMENT**  
**FOR**  
**BUILD-TRANSFER-OPERATE (BIO) PROJECTS**  
**-ROAD PROJECTS-**

**DRAFT STANDARD CONCESSION  
AGREEMENT FOR BTO PROJECTS<sup>1)2)</sup>**  
**-ROAD PROJECTS-**

March 2010

**Public and Private Infrastructure Investment  
Management Center  
Korea Development Institute**

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- 1) New provisions may be inserted into this Standard Concession Agreement or provisions irrelevant to the relevant project may be deleted from this Form, depending upon the nature of the project, unless such addition or deletion contravenes the purposes of this Form.
- 2) Please note that this Standard Concession Agreement Form has been revised and supplemented by reflecting the Standard Request Form for Proposals of BTO Projects (Public Notices No. 2009-15, 2009-120, 2009-162, and 2009-192 by the Ministry of Strategy and Finance) for 2009, as well as the aforesaid forms for 2007 and 2008 successively, based on the "Study on the Draft Standard Concession Agreement Form for BTO Projects (Dec. 2006)," which was published by the Public and Private Infrastructure Investment Management Center of the Korea Development Institute, and that this Form will be revised and supplemented continuously afterwards through consultation with related ministries and agencies to keep up with changes in the conditions and circumstances of PPP Projects, revisions to the Standard Request for Proposals of BTO Projects, and other relevant factors.

## PREFACE

Since the enactment of the Promotion of Private Capital into Social Overhead Capital Investment Act in 1994, which was superseded later by the Act on Public-Private Partnerships in Infrastructure currently in force, many infrastructure facilities in various sectors, such as roads, ports, harbors, railroads, and sewage treatment plants, have been built and operated through public-private partnership (PPP) projects in the Build-Transfer-Operate(BTO) type of arrangement. A BTO project is a project implemented over a long period of time in accordance with a concession agreement, concluded by and between the competent authority and a person who intends to carry out the PPP project on terms and conditions for the implementation of the project, subsequently to a public notice of inviting the submission of project proposals and the evaluation of such proposals for the selection of potential concessionaires. Since many interested parties, such as shareholders, creditor financial institutions, insurance companies, and users, are involved in a PPP project in addition to the competent authority and the concessionaire, it is very important to consider the allocation of risks among them, and such considerations shall be stipulated fully in the relevant concession agreement. Therefore, the importance of a concession agreement cannot be overemphasized.

Although negotiations for the conclusion of a concession agreement have been carried out by various entities, including the Ministry of Construction and Transportation, the Ministry of Maritime Affairs and Fisheries, local governments, and the Public and Private Infrastructure Investment Management Center, standards or guidelines for concession agreements have not been established yet, which has brought about inconsistent and defective stipulations in concession agreements, as well as inefficient and prolonged negotiations. Due to the lack of such standards or guidelines, disputes between parties to negotiation have recurred frequently in connection with identical or similar stipulations of concession agreements whenever negotiations are conducted by negotiating entities for each project, and

ambiguous or inadequate stipulations of some concession agreements have created potential causes of disputes due to insufficient research and study on stipulations of concession agreements and the lack of sufficient experience of implementing projects. Furthermore, sometimes it has been pointed out that lopsided stipulations more favorable to competent authorities made it difficult for not only domestic investors but also foreign investors to participate in projects, while it is undeniable, on the contrary, that stipulations of some concession agreements have been unreasonably unfavorable to competent authorities.

In an effort to resolve such problems, we, the Public and Private Infrastructure Investment Management Center rendering assistance in PPP projects, established and published a standard concession agreement in December 2006 through the "Study on the Draft Standard Concession Agreement for BTO Projects (Dec. 2006)" for toll road projects, based on the results of research and analyses on the stipulations of concession agreements implemented until then and data of the United Kingdom, Japan, and the World Bank, and other data from overseas sources. Since then, The "Draft Standard Concession Agreement for BTO Projects for 2007" was published by making supplements for some issues raised in applying the standard concession agreement mentioned above in the course of negotiations for the actual conclusion of concession agreements and by reflecting the amended 2007 Basic Plan for PPPs. In 2008, the "Draft Standard Concession Agreement for BTO Projects for 2008" was published by adding the stipulations of Article 42-2 and making supplements to Article 49 in order to clearly stipulate the method of accounting for an increase or a decrease in corporate tax, if any, in accordance with the amendment to the Corporate Tax Act. Then, the "Draft Standard Concession Agreement for BTO Projects for 2009" was published by reflecting the revised Basic Plan for PPPs (Public Notice No. 2009-14 by the Ministry of Strategy and Finance), as amended in March 2009 and some issues raised in the course of executing projects. The Draft Standard Concession Agreement for BTO Projects is amended and presented again to reflect amendments to the

revised Basic Plan for PPPs (Public Notice No. 2009-162 by the Ministry of Strategy and Finance), publicly notified on October 6, 2009 by the Ministry of Strategy and Finance, and the revised Basic Plan for PPPs (Public Notice No. 2009-192 by the Ministry of Strategy and Finance), publicly notified on December 17, 2009 by the Ministry of Strategy and Finance. The amended Draft Standard Concession Agreement for BTO Projects contains amended stipulations regarding the ratio of distribution of surplus earnings from ancillary and supplementary projects, minimum revenue guarantee, the recovery of surplus revenue, financial subsidies for sharing investment risk and the recovery of such financial subsidies, the sharing of profit from refinancing, etc.

We wish and expect that this "Draft Standard Concession Agreement for BTO Projects" can contribute in some measure to speedy and efficient negotiations, the minimization of potential disputes, and the development of PPP projects by helping participants in PPP projects make decisions on investment. Moreover, we commit ourselves to supplement and improve this "Draft Standard Concession Agreement Form for BTO Projects" continuously afterwards to keep up with changes in conditions of PPP projects, in Korea and overseas.

March 2010

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# CONCESSION AGREEMENT ON THE PUBLIC-PRIVATE PARTNERSHIP PROJECT FOR ( ) ROAD

## PREAMBLE

Whereas, the Minister of OO (hereinafter referred to as the "competent authority") and a Concessionaire desire to contribute to OO by implementing a BTO project for the construction and operation of the facilities of OO (hereinafter referred to as the "BTO project") in a creative and efficient manner;

Whereas, the competent authority had formulated, and made public notice of, the "request for proposals for the "public-private partnership project for the facilities of OO (hereinafter referred to as "request for proposals") on (Date) in order to invite the private sector to participate in the design, construction, maintenance, management, and operation of the facilities of OO and to raising funds for the implementation of the project pursuant to the Act on Public-Private Partnerships in Infrastructure (hereinafter referred to as the "PPP Act"), the Enforcement Decree of the said Act, and the Basic Plan for Public-Private Partnership Projects<sup>3)</sup>, and the competent authority had selected (tentatively-called) OO Co, Ltd. (hereinafter referred to as the "Concessionaire") as the (preferred) potential Concessionaire for this project, and has decided to execute this Concession Agreement through negotiations with the Concessionaire;<sup>4)</sup>

Whereas, the competent authority, the Concessionaire, and planned investors<sup>5)</sup> profoundly realize the public nature of this project and

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3) If the project hereunder is an unsolicited project, "request for proposals" referred to hereinafter shall be construed as "request for alternative proposals."

4) It is advisable to state the developments in the promotion of the project in general in the Preamble, including the day on which the project was proposed.

5) Planned investors are obligors under this Concession Agreement, based on their status as parties who sign this Agreement, and their rights and obligations under this Agreement are transferred to the Concessionaire (the project corporation) when the project corporation is incorporated.

commit themselves to apply their best endeavors to implement the project successfully with regard to the implementation of this project in consideration of mutual trust between parties;

Now, Therefore, the parties hereto agree as follows:

## CHAPTER I GENERAL PROVISIONS

### Article 1 (Purpose of Agreement and Project Overview)

- (1) The purpose of this Agreement is to stipulate matters necessary for the implementation of this project between the competent authority and the Concessionaire in accordance with the PPP Act, the Enforcement Decree of the said Act, the relevant Request for Proposals, and the Basic Plan for PPP Projects.
- (2) The scope of this project, and the scope and scale of the facilities under this project are as set out in Table 00 (Overview of the Project) attached hereto.<sup>6)</sup>

### Article 2 (Implementation Method of Project)

- (1) This project shall be implemented as a BTO project in the form of an arrangement under subparagraph 1 of Article 4 of the PPP Act.
- (2) Projects for the facilities of 00 shall be implemented as ancillary (or supplementary) projects in order to raise the efficiency in the use and functions of the facilities under this project and minimize the competent authority's financial burden.

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6) If the overview of the project is brief, it may be placed in the main text without necessarily preparing a separate attachment.

(3) The funds that the Concessionaire invests for the construction of the facilities under this project shall be recovered with [user fees that the Concessionaire collects from users of the facility] and net income generated from ancillary (or supplementary) projects in accordance with the provisions of this Agreement, while [costs incurred in the operation, maintenance, and management of the facilities] shall be covered with the operating cost determined in accordance with the provisions of this Agreement.

### Article 3 (Definitions)

Unless otherwise stipulated in this Agreement, the terminology used in this Agreement shall be defined as follows:<sup>7)</sup>

1. Month: refers to a period beginning on a particular day of a calendar month and ending on the corresponding day of the relevant month: Provided, That if there is no corresponding day in the relevant month, it shall be deemed that the period ends on the last day of the relevant month. The determination of a month shall be based on the standard time used in the Republic of Korea;
2. Construction period: refers to the duration beginning on the conclusion date of this Agreement and ending on the day immediately before the effective date of the right to manage and operate;
3. Construction Technology Management Act: means the Construction Technology Management Act (Act No. 00 ) of the Republic of Korea;
4. Construction subsidy: refers to a subsidy granted by the competent authority for this project in accordance with Article 53 (Construction

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<sup>7)</sup> Depending upon the nature of the project, unnecessary terminology may be deleted, and more terminology may be added, if necessary.

Subsides);

5. Interest during construction: refers to interest expenses specified in this Agreement, which are expected to be incurred until completion of the project in regard to the funds borrowed by the Concessionaire in order to appropriate the funds for costs incurred in connection with the construction of the facilities under this project;
6. Insignificant project: refers to a project recognized by the competent authority pursuant to the proviso to Article 14 (4) of the PPP Act and Article 48 (Insignificant Projects) hereof;
7. Affiliated company: refers to a person defined in subparagraph 3 of Article 2 of the Monopoly Regulation and Fair Trade Act as a company affiliated to the Concessionaire or a shareholder of the Concessionaire or a person defined in Article 1-3 of the Act on External Audit of Stock Companies: Provided, That if the person is not a corporation incorporated in the Republic of Korea, this refers to a foreign related party under Article 2 (1) 9 of the Adjustment of International Taxes Act;
8. Project supervisor: refers to a responsible supervisor designated pursuant to Article 28 (Specialized Supervision Company) of the Construction Technology Management Act in order to have the person perform the responsible supervision under Article 27 (Responsible Supervision of Construction Projects, etc.) of the said Act (or a person who performs the responsible supervision as a construction manager under Article 22-2 of the said Act or subparagraph 6 of Article 2 of the Framework Act on the Construction Industry)<sup>8)</sup>, including its

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8) Depending upon the nature of the relevant project, the competent authority may select a construction manager (CM), who has been entrusted, with the management of construction projects pursuant to subparagraph 6 of Article 2 of the Framework Act on the Construction Industry or Article 22-2 of the Construction Technology Management Act and who are capable of performing responsible supervision, as a project supervisor.

successor;

9. Construction period: refers to the period beginning on the commencement date of construction works for the facilities under this project and ending on the day immediately before the date for filing an application for final confirmation of the completion of the entire facilities under this project under the PPP Act;
10. Construction cost: refers to the construction cost stipulated in this Agreement as set out in Table 0 (Total Project Cost) attached hereto;
11. Commencement date of construction works: refers to the commencement date of construction works on the commencement report submitted to the competent authority pursuant to Article 21 (Commencement of Construction Works);
12. Related authority: refers to the Central Government, a local government, or any other public agency that grants authorization or permission, imposes taxes and public charges in relation to this project, and conducts an act that has a legal effect on the Concessionaire's performance through administrative procedures or administrative regulations;
13. Right to manage and operate: refers to the right under Article 26 of the PPP Act for the Concessionaire to use the facilities under this project for profit without consideration during the period stipulated by the concession agreement after completion of the facilities under this project is confirmed, maintain and manage the facilities and collect fees from users of the facilities;
14. Effective period of the right to manage and operate: refers to the period during which the Concessionaire has a right to maintain, manage, and operate the facilities under this project pursuant to Article 26 of the PPP Act;

15. Traffic volume: refers to the total number of vehicles that travel on the road to be built under this project;
16. Traffic impact assessment: refers to the traffic impact assessment demanded pursuant to the Act on Assessment of Impacts of Works on Environment, Traffic, Disasters, etc. [Act No. 00 ] of the Republic of Korea;
17. State Contract Act<sup>9)</sup>: refers to the Act on Contracts to which the State is a Party [Act No. 00 ] of the Republic of Korea;
18. Present value of expected profit: refers to the present value of the net future cash flow indicated in Table 0 (Cash Flow Chart for Determination of User Fees) attached to this Agreement;
19. Basic design: refers to planning and design works through which the best plan for the scale, layout, and form of facilities, construction methods, the approximate period of construction work, the approximate cost of construction shall be selected and presented in the form of design documents by taking into consideration the results of the preliminary feasibility test, and the feasibility test, and the Basic Plan and conducting surveys, analyses, comparisons, and reviews, including design works for obtaining authorization and permission for various projects, which shall also include the preparation of technical data necessary for detail design service for design standards and terms and conditions in accordance with Article 38-9 of the Enforcement Decree of the Construction Technology Management Act and the Detailed Guidelines for Performance of Basic Design, etc. (Public Notice No. 2006-286 by the Ministry of Construction and Transportation).<sup>10)</sup>

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9) If the competent authority is a local government, the Act on Contracts to which a Local Government is a Party may be applied instead.

10) Article 38-9 (2) of the Enforcement Decree of the Framework Act on the Construction Industry:

20. Basic financial model: refers to a financial model prepared in order to determine terms and conditions for the implementation of the project when the concession agreement is executed;
21. Base interest rate: refers to a rate calculated by averaging the rates of return on the circulation of unsecured corporate bonds assessed to AA- or a higher credit rating and maturing in three years, based on final quoted prices publicly notified by the Korea Financial Investment Association during one month immediately before the time of determination (referring to the beginning date of the period to which the reference interest rate is applicable): Provided, That figures to the nearest three decimal places shall be rounded up. If no rates of return are not publicly notified on the circulation of unsecured corporate bonds assessed to AA- or a higher credit rating and maturing in three years, the rates of return on the circulation of unsecured corporate bonds assessed to the next lower credit rating and maturing in three years shall be applied as substitutes, while if no rates of return are not publicly notified on the circulation of unsecured corporate bonds maturing in three years, the rates of return on the circulation of corporate bonds maturing in a period nearest to three years, among corporate bonds maturing in not less than three years, shall be applied as substitutes. If a rate of return on the circulation of corporate bonds can not be ascertained using any of the methods stipulated above, due to a sudden change in the financial market, the rates of return on treasury bonds maturing in five years shall be applied as the reference interest rates, while if even a rate of return on treasury bonds maturing in five years are not available, the rate of

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The guidelines for the contents of the basic design, the design period, the management of design works, and design documents shall be determined by the Minister of Construction and Transportation.



return shall be determined in accordance with the procedure stipulated in Chapter XII (Dispute Resolution) in this Agreement;

22. Standard financial model: refers to the financial model prepared by reflecting the historical cash flow until the date for filing the application for approval for refinancing and the estimated cash flow, in which the estimated future prices are reflected, in the basic financial model;
23. Reference user fee: refers to the reference user fee specified for each type of vehicle in Table 0 (Reference User Fee for Each Type of Vehicle) attached hereto;
24. Security right: refers to a mortgage, a lien, a pledge right, a security right to property transferred for security, or a right with practically similar effects;
25. Agent bank (or agent institution): refers to a financial institution (or an institution) designated by creditor financial institutions as an agent bank (or an agent institution);
26. Cultural heritage: refers to cultural heritage under Article 2 of the Cultural Heritage Protection Act (Act No. 00 ) of the Republic of Korea;
27. Escalation cost: refers to the price fluctuation cost on Table 00 (Financial Model) attached hereto, which shall be determined by reflecting the expected price fluctuation cost during a period beginning on (Date), which shall be the base date of the determination of total project cost, and ending on the scheduled date of completion: Provided, that the price fluctuation cost for the determination of initial user fees refers to the price fluctuation cost determined by reflecting the price fluctuation rate actually realized until actual completion;
28. PPP Act: means the Act on Public-Private Partnerships in

- Infrastructure (Act No. 00 ) of the Republic of Korea;
29. Enforcement Decree of the PPP Act: means the Enforcement Decree (Presidential Decree No. 00 ) of the Act on Public-Private Partnerships in Infrastructure of the Republic of Korea;
30. Basic Plan for PPP Projects: means the Basic Plan for Public-Private Partnership Projects publicly notified pursuant to Article 7 (Establishment of Basic Plan for Public-Private Partnership Projects) of the PPP Act;
- 30-2. Archaeological survey and excavation: refers to the official excavation conducted when the existence of relics has been ascertained through a survey and trial excavation and it is possible to clearly demarcate the area to be excavated in accordance with the Guidelines for Archaeological Survey and Excavation (Archaeological Survey and Excavation Division, No. 1852, Jul. 1, 2008);
31. Acts and subordinate statutes: means all Acts, Enforcement Decrees, and Enforcement Rules of the Government of the Republic of Korea;
32. Acts, subordinate statutes, and other regulations: include Acts and subordinate statutes and public notices, guidelines, directives, and other policies of the Government;
33. Revenue of user fees eligible for guarantee: refers to an amount determined by reflecting changes of consumer price index in 00 % of the revenue of user fees for a specific operating year, as stipulated in Table 0 (Estimated User Fees Received);
34. Subsidy: refers to any of subsidies under Article 53 of the PPP Act, which shall be paid by the competent authority to the Concessionaire as a non-repayable grant in accordance with Acts, subordinate statutes, regulations, or this Agreement ;
35. Main project road: refers to the road to be built through the main project, which shall be 00 m long in total, comprised of tunnels and

bridges, in the section from [ ] to [ ] specified in the request for proposals, and includes architectural facilities, such as tollgate offices and road management offices built in relation to the main project, landscaping works, electrical facilities, tunnel facilities, and other facilities supplementary to the road;

36. Main project: refers to the PPP project for the construction and operation of the facilities under this project, specified in Article 1 (Purpose of Agreement and Project Overview) of this Agreement and the relevant implementation plan;

37. Main project site: refers to the area of land necessary for the construction, management, and operation of the facilities under this project, specified in this Agreement and the relevant implementation plan. the area of land referred to here includes land, public waters, waterways, surface, ground, and underground;

38. Revenue from this project: refers to the revenue of user fees accruing from the main project, the revenue from ancillary projects, and other revenue;

39. Main facilities: refer to the facilities of 00, implemented in the form of an arrangement under subparagraph 1 of Article 4 of the PPP Act (hereinafter referred to as the "main facilities"), including facilities ancillary to such facilities;

40. This Agreement: refers to this Concession Agreement;

41. Supplementary project: refers to a project for the facility of 00 under 21 of the PPP Act, which shall be a profit-making project that can contribute to the utilization of the main facilities and the performance of functions of such projects in normal conditions and reduce the competent authority's financial support;

42. Supplementary facilities: refer to the facilities used for supplementary projects;

43. Ancillary project: means a project for the operation, leasing, etc. of ancillary facilities;
44. Revenue from ancillary projects: means revenue that the Concessionaire earns through projects for ancillary facilities;
45. Ancillary facility: refers to a facility of 00 that is integrated into the main facilities, the utility of which will be exhausted simultaneously with the main facilities, and the ownership of which shall vest in the competent authority simultaneously upon completion of the project;
46. Quarter: refers to a period between January 1 and March 31, between April 1 and June 30, between July 1 and September 30, or October 1 and December 31 each year;
47. Force majeure event: refers to an event specified in Article 62, for which neither of parties to the Agreement is liable, which creates a circumstance or a cause (or a combination of circumstances or causes) that neither of parties to the Agreement can reasonably foresee and renders either party unable to perform obligations under this Agreement or adversely affects either party's performance of obligations. The burden of proving a force majeure event is on the party who asserts a force majeure, and a force majeure event means a direct and significant situation that a party is unable to overcome in spite of the party's reasonable efforts or preventive measures;
48. Comparative financial model: refers to a financial model prepared by reflecting a refinancing plan in the pre-refinancing model;
49. Project plan: refers to the project plan that the Concessionaire submits to the competent authority on (Date) in relation to this project, including revisions and modifications thereto;
50. Project period: refers to the period beginning on the conclusion date of this Agreement and ending on the end of the effective period of

- the right to manage and operate main facilities under this Agreement;
51. Rate of return on the project: refers to the actual rate of return before taxes under Article 49 (Rate of Return on Project) of this Agreement;
52. Concessionaire: refers to a person (referring to OO Co., Ltd.; the trade name may be changed) who is a party to this Agreement and who is designated by the competent authority as the Concessionaire of this project pursuant to the PPP Act, the Enforcement Decree of the said Act, the relevant request for proposals, and this Agreement, including its legitimate universal or specified successors;
53. Project year: refers to a period between January 1 and December 31 each year during the project period: Provided, That the project year for the year in which the project commences shall be between the conclusion date of the Agreement and December 31 of the year, while the project year for the year in which the project ends shall be between January 1 of the year and the date on which operation actually ends;
54. Performance bond: refers to cash, a guarantee insurance policy, a bank's letter of payment guarantee that the Concessionaire pays or submits to the competent authority to guarantee the performance of this Agreement, promote timely construction of main facilities, and prevent the Concessionaire from abandoning the project in the course of construction works;
55. User fees: The term refers to user fees under the PPP Act, which shall be collected in accordance with this Agreement from vehicles travelling through the main project road;
56. Revenue of user fees: refers to gross revenue of user fees collected by the Concessionaire;
57. Designs: include basic designs, detail designs, and all working drawings accompanied therewith;

58. Design supervision: refers to the control of planning, surveying, or design works of a construction project for assuring quality and safety in such works in accordance with the guidelines for the design of construction projects and the guidelines for the execution of construction projects under Article 22 of the Construction Technology Management Act and subparagraphs of Article 39-2 of the Enforcement Decree of the said Act;
59. Consumer price index: refers to the consumer price index, publicly notified through the Monthly Statistical Bulletin published by the Bank of Korea, for urban areas for the month in which the relevant point of time is included. If the consumer price index for all urban areas is no longer publicly notified in the current manner, the index shall be replaced with another index on which parties to the Agreement agree;
60. Changes in consumer price index: refer to changes in the consumer price index calculated by setting the consumer price index on (Date) at 100 and comparing the consumer price index at the time when the competent authority shall actually pay an amount in accordance with this Agreement with the former consumer price index, and such changes shall be applied when constant prices specified in this Agreement are converted into current prices;
61. Construction company: refers to a person responsible for the execution of construction works for the facilities under this project, including persons responsible for the execution of construction works under a contract for construction works for the facilities under this project;
- 61-2. Trial excavation and survey: refers to the primary search and survey conducted in a project site in accordance with the Guidelines for Archaeological Survey and Excavation (Archaeological Survey and

Excavation Division, No. 1852, Jul. 1, 2008) established by the Cultural Heritage Administration, if relics are scattered over an extensive area or if it is not certain whether relics exist;

62. Request for proposals: refers to the request for proposals for the 00 Road Project under the Public Notice No. 00 (Date) by the Ministry of [ ];

63. Implementation plan: refers to the implementation plan approved by the competent authority for this project pursuant to Article 15 of the PPP Act;

64. Detail design: refers to planning and design works, design documents, specifications, design statements, calculation sheets for structures and hydrography, etc. prepared for construction, maintenance, and management in accordance with the Article 38-11 of the Enforcement Decree of the Construction Technology Management Act and the Detailed Guidelines for the Implementation of Basic Design, etc. (Public Notice No. 2006-286 by the Ministry of Construction and Transportation) through which the best plan for the scale, layout, and form of facilities, construction methods, the construction period, the construction cost, and maintenance and management shall be selected, based on the results of basic design, through detailed surveys, analyses, comparisons, and reviews;<sup>11)</sup>

65. Business day: refers to a day on which financial institution in the Republic of Korea is open for business, except Saturdays, Sundays, and official holidays;

66. Commencement date of operation: refers to the date on which

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11) Paragraph (2) of Article 38-11 (Detail Design) of the Enforcement Decree of the Construction Technology Management Act: The guidelines for the details of detail design, design period, design management, and the preparation of details of detail design shall be determined by the Minister of Construction and Transportation.

operation commences by the exercise of the right to manage and operate;

67. Period of operation: refers to the period from the commencement date of operation to the end of the effective period of the right to manage and operate;

68. Operating year: refers to the period of operation from January 1 to December 31 each year: Provided, That the first operating year shall be between the commencement date of operation and December 31 of the year, while the last operating year shall be between January 1 of the year in which the project period ends and the last day of the project period;

69. Dangerous substance: refers to a substance that is inflammable, ignitable, or of a nature defined in Article 2 of the Safety Control of Dangerous Substances Act and that is likely to cause significant damage or disturbance to this project, irrespective of its quantity specified in the same Act;<sup>12)</sup>

70. Maintenance and management: refers to regular inspection and maintenance, repairing of damaged parts to ensure the facilities fully perform their functions in their original state and activities necessary for the amelioration, repairing, and reinforcement of facilities, required as time passes, which are conducted for the propose of maintaining the facilities under this project and promoting the convenience and safety of users of the facilities;

71. Authorization, permission, or such: refers to the permission, consent, authorization, approval, acceptance, or any similar action made by the Government, the competent authority, or any other related agency or any person who provides utilities, as required for this

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12) The Safety Control of Dangerous Substances Act defines substances inflammable, ignitable, or otherwise hazardous in a certain (specified) quantity as dangerous substances.



project;

72. Day or date: means a period of uninterrupted 24 hours that begin at 0:00 a.m. and end at 0:00 a.m. of the following day;

73. Person: refers to an individual, a company, a joint-venture company, a legal entity, a joint investment company, an association, a trust, an unincorporated organization, or a governmental agency;

74. Refinancing: refers to activities conducted by the Concessionaire to maximize investors' expected return in comparison with the return at the time of the latest loan agreement by changing the structure of the capital of the project corporation, investors' shares of equity, and terms and conditions for borrowing loans: Provided, That an increase in the investors' expected return through a change in investors under the Agreement, a change in capital structure, or a change in terms and conditions of financing at the time or before the initial financial agreement is concluded shall be regarded as refinancing;<sup>13)</sup>

75. Borrowing a loan: means the Concessionaire's activities of borrowing a loan from a financial institution or any other person for the funds necessary for this project;

76. Loan agreement: refers to a loan agreement or any similar agreement concluded by the Concessionaire in order to raise borrowed capital for the total private investment cost under this Agreement as necessary for the construction of facilities under this project, and borrowed capital includes the funds that investors in the Concessionaire provides to the Concessionaire in the form of a loan;

77. Capital: refers to an amount that investors pay to the Concessionaire as investment during the project period in accordance with this Agreement;

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13) If the Basic Plan for PPP Projects is amended, the agreement shall be modified accordingly before concluding an agreement.

78. Financial model: refers to a computer-programmed model presented in Table 00 (Financial model), which is prepared in accordance with the Corporate Accounting Standards of the Republic of Korea;<sup>14)</sup>
79. Utilities: The term refers to electricity, telecommunications service, gas, water supply, oil, and other utilities provided to facilities under this project;
80. Access road: refers to the [ ]-lane road linked to the main project road in the section between [ ] and [ ];
81. Taxes and public charges: mean taxes and public dues, such as the acquisition tax, registration tax, and value-added tax imposed on this project with respect to the implementation, completion, registration and transfer of ownership, and various charges imposed pursuant to an Act, a subordinate statute, or a municipal ordinance;
82. Completion: refers to the completion of construction of facilities under this project in accordance with provisions of this Agreement and the implementation plan;
83. Scheduled date of completion: refers to the scheduled date of completion specified in the work progress plan in the implementation plan, which shall be adjusted by reflecting a change in the construction period, if the construction period under this Agreement is changed (extended or shortened);
84. Date of completion: refers to the date on which the competent authority confirms the completion of the project by issuing a certificate of confirmation of completion to the Concessionaire in accordance with Article 39 (Confirmation of Completion and Registration of Right to Manage and Operate) of this Agreement;
85. Authorization for use prior to completion: refers to the

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14) The model shall be prepared by the Financial Services Commission pursuant to the Act on External Audit of Stock Companies.

authorization that the Concessionaire obtains from the competent authority for the use of facilities under this project prior to completion in accordance with Article 22 (5) of the PPP Act;

86. Certificate of confirmation of completion: refers to a certificate that the competent authority issues pursuant to Article 39 (Confirmation of Completion and Registration of Right to Manage and Operate) to certify the completion of facilities under this project;
87. Obstacle: refers to a physical object that hinders or delays the implementation of construction works for facilities under this project, including facilities under water, on the ground, and underground;
88. Creditor financial institution, etc.: refers to domestic and foreign financial institutions that solely or jointly provide funds when the Concessionaire raises borrowed capital necessary for the implementation of this project, including persons other than pension funds and public funds or financial institutions under the PPP Act;
89. Total private project cost: refers to the project cost borne by the Concessionaire, excluding financial subsidies such as construction subsidies under this Agreement, out of the total project cost determined pursuant to Article 22 (1) of the Enforcement Decree of the PPP Act, further details of which are as set out in Table 0 (Total Project Cost) attached hereto;
90. Total private investment cost: means the aggregate of the total private project cost, price fluctuations, and interest during construction;
91. Total project cost: refers to the total project cost necessary for the construction of facilities under this project, which shall be determined in accordance with Article 22 of the Enforcement Decree of the PPP Act, and further details thereof are as set out in Table 0

(Total Project Cost);

92. Initial user fee: means the user fee applicable from the commencement date of operation onward pursuant to this Agreement;
93. Estimated revenue of user fees: refers to an amount calculated by reflecting changes in consumer price index in the revenue of user fees for a specific operating year, as specified in Table 00 (Estimated Revenue of User Fees);
94. Investor: refers to a party who makes investment in the Concessionaire, including its legitimate universal or specified successors under Article 74 (Changes in Shares of Investment);
95. Planned investor: refers to a person who is prearranged before the Concessionaire is incorporated, to become an investor after the incorporation of the Concessionaire in accordance with this Agreement;
96. Date of termination: refers to the date on which a notice of early termination of this Agreement becomes effective or the date on which the competent authority's notice of ratifying buyout becomes effective;
97. Parties to the Agreement: refer to the competent authority and the Concessionaire (including planned investors until before a corporation is incorporated in accordance with this Agreement);
98. Recoverable user fee revenue: refers to an amount calculated by reflecting 00 % of the revenue of user fees specified for a specific operating year in Table 00 (Estimated User Fee Revenue), with changes in consumer price index.<sup>15)</sup>

#### **Article 4 (Interpretation of Agreement)**

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<sup>15)</sup> In cases of a general BTO project to which the sharing of investment risk is not applicable, the provisions above is unnecessary and therefore shall be deleted.

Except as otherwise required in the context, this Agreement shall be interpreted in accordance with the following paragraphs:

- (1) A reference to any contract or agreement in this Agreement includes modifications and amendments to such a contract or agreement: A reference to any Act, subordinate statute, or regulation in this Agreement means an Act, subordinate statute, or regulation in force on the conclusion date of this Agreement, including amendments thereto and substitutes with Acts, subordinate statutes, and other regulations.
- (2) A reference to any person or thing in the singular form in this Agreement shall be interpreted as including a reference to such persons or things in plural form and vice versa;
- (3) The heading of each article in this Agreement is inserted only as a matter of convenience, and thus does not constitute part of this Agreement nor serve as a ground for interpretation.
- (4) "Include(s)" or "including" in this Agreement shall be interpreted as "including, but not limited to."
- (5) "etc." includes "including but not limited to," "similar," and "related matters."
- (6) A reference to an Article, paragraph, subparagraph, table, or appendix in this Agreement means an Article, paragraph, subparagraph, table, or appendix in this Agreement, except as otherwise expressly stipulated;
- (7) A reference to a party to the Agreement, a construction company, a supervisor, a creditor financial institution, or any other party to this Agreement includes its successor or transferee.
- (8) A reference to the competent authority in this Agreement includes a person to whom the competent authority delegates or entrusts its

authority, if the competent authority delegates or entrusts its authority to its subordinate administrative agency or a third party;

- (9) Except as otherwise stipulated, a period of time in this Agreement shall be calculated in accordance with the provisions of Articles 155 through 161 of the Civil Act.

## **Article 5 (Order of Priority of Documents)**

- (1) Except as otherwise indicated in this Agreement, this Agreement and other documents referred to in this Agreement shall take precedence over all communications of intent and agreements made between parties to the Agreement before this Agreement is executed.
- (2) Where any vagueness or inconsistency arises in interpreting documents comprising this Agreement, the parties to the Agreement shall solve such vagueness or inconsistency in the following order of priority:
1. The PPP Act;
  2. The Enforcement Decree of the PPP Act;
  3. The relevant request for proposals;
  4. The Basic Plan for PPP Projects.

## **CHAPTER II BASIC AGREEMENT**

### **Article 6 (Designation of Concessionaire)**

- (1) The competent authority shall designate (tentatively called) OO Co., as the Concessionaire of this project in accordance with the PPP Act, the Enforcement Decree of the said Act, the relevant request for

proposals, this Agreement, and the Basic Plan for PPP Projects.

- (2) The person designated as the Concessionaire pursuant to paragraph (1) shall incorporate a project corporation before filing an application for the approval of the implementation plan under Article 18 and shall submit a report thereon to the competent authority. Except as otherwise stipulated in this Agreement, the project corporation shall be incorporated in accordance with the plan submitted for the incorporation of the corporation at the stage of evaluation for the selection of potential Concessionaires of this project: Provided, That if it is difficult for an investor to participate in the project in fact due to its default in payments or other event or if it is inevitable for implementing the project effectively, the Concessionaire may revise the plan submitted for the incorporation of the corporation, subject to prior approval thereof from the competent authority.
- (3) If the person designated as the Concessionaire fails to incorporate the project corporation in accordance with paragraph (2), the designation of the Concessionaire shall become ineffective.

## **Article 7 (Concessionaire's Rights)**

- (1) The competent authority shall create and grant the qualification, authority, and rights for conducting the following activities to the Concessionaire:
  1. The design and construction of facilities under this project under this Agreement and the implementation plan;
  2. The use of state-owned or public property within this project site without consideration from the date on which the implementation plan is publicly notified to the end of the effective period of the right to

manage and operate facilities under this project:<sup>16)</sup> Provided, That the Concessionaire shall not use such property for any purpose other than purposes clearly stipulated in this Agreement, unless it obtains approval from the competent authority as being in the public interest or on any other ground;

3. The free use of facilities under this project for profit under this Agreement and by exercising the right to manage and operate;

4. The maintenance, management, and operation of facilities under this project and the imposition or collection of user fees for facilities under this project under this Agreement and by exercising the right to manage and operate.

(2) Unless the Concessionaire breaches this Agreement or this Agreement or any relevant Act or subordinate statute otherwise so provides, the competent authority shall not revoke, cancel, deprive of, or alter the qualification, authority, or rights of the Concessionaire under paragraph (1) during the period of this project.

## **Article 8 (Concessionaire's Obligations)**

(1) The Concessionaire shall comply with all Acts, subordinate statutes, and regulations related to this project, take responsibility to perform this Agreement in good faith, and shall endeavor faithfully to successfully carry out the construction, maintenance, management, and operation of facilities under this project.

(2) The Concessionaire shall be responsible for the design, construction, maintenance, management, and operation of facilities

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<sup>16)</sup> The Concessionaire may be permitted to use state-owned or public property without consideration in accordance with the PPP Act and this Agreement, but it is not compulsory to grant such a right of free use, and thus it is possible to conclude a separate agreement on the lease of administrative property for consideration.



under this project under this Agreement and the performance of this Agreement and shall take risks stipulated in this Agreement.

- (3) Except as otherwise stipulated in this Agreement, the Concessionaire shall replace the letter of intent or the letter of conditional confirmation of loans issued by a creditor financial institution and submitted along with the project plan, with a loan agreement by the time when an application for approval of the implementation plan is filed and submit it to the competent authority.
- (4) In principle, the Concessionaire shall perform this project at its own risk and expense in accordance with this Agreement, except as otherwise stipulated in this Agreement.

#### **Article 9 (Vesting of Ownership)**

- (1) The ownership of facilities under this project shall vest in the competent authority immediately upon completion of such facilities.
- (2) If this Agreement terminates earlier, this project is bought out upon receiving a request for buyout, or this Agreement expires at the end of the effective period, all rights and authority of the Concessionaire and its facility-assets (including equipment and intellectual property) shall be disposed of in accordance with Chapter X (Discharge of Agreement) of this Agreement.

#### **Article 10 (Effective Period of Right to Manage and Operate)**

- (1) Unless otherwise stipulated in this Agreement, the effective period of the right to manage and operate facilities under this project shall be 00 years.
- (2) When facilities under this project are completed, the competent

authority shall grant the Concessionaire the right to manage and operate under Article 26 of the PPP Act, and the Concessionaire may use the facilities under this project without consideration and collect user fees from users during the effective period of the right to manage and operate.

#### **Article 11 (Performance of Agreement in Good Faith)**

- (1) The parties to the Agreement shall exercise their rights under this Agreement and perform their obligations in good faith.
- (2) The Concessionaire shall comply with all Acts, subordinate statutes, and regulations related to this Agreement, whereas the competent authority shall fully cooperate with the Concessionaire so that the Concessionaire can carry out this project smoothly.

### **CHAPTER III DETERMINATION AND AMENDMENT OF TOTAL PROJECT COST**

#### **Article 12 (Total Project Cost and Total Private Project Cost)**

The total project cost shall be KRW [ ] at constant price as at (Date) as set out in Table 00 (Total Project Cost) and the total private project cost shall be KRW [ ], excluding construction subsidies of KRW [ ] from the total project cost. The total project cost shall not be variable, except as otherwise stipulated in this Agreement.

#### **Article 13 (Amendment of Total Project Cost)**

- (1) If deemed necessary to adjust the total project cost fixed in this Agreement because any of the following events has occurred, the total project cost may be amended by a mutual agreement between the parties;
  1. If there is a change in construction cost, significantly higher or lower than price fluctuation rates during the construction period;
  2. If the total project cost increases or decreases due to the competent authority's fault or a force majeure event;
  3. If the total project cost increases or decreases due to the enactment or amendment of an Act or subordinate statute, or specifications that may directly affect construction cost, the design standards established by the Government, or design rules or guidelines (including design standards of the Korea Highway Corporation);
  4. If the total project cost is increased or decreased with the competent authority's authorization in response to an environmental or traffic impact assessment, a request by an authorizing or permitting authority, consultation with a local government, or any civil petition;
  5. If the total project cost is increased or decreased in response to the competent authority's demand.
- (2) If there is a difference in supervision cost because the supervision cost under the actual supervision agreement between the Concessionaire and the supervisor is lower than the supervision cost fixed at the time when the Agreement is concluded, the total project cost shall be amended to the amount calculated by deducting the difference from the total project cost under this Agreement.
- (3) The total project cost shall be amended in accordance with the statement of calculation in the approved implementation plan.
- (4) If Article 62 (Force Majeure Events and Countermeasures therefor) of

this Agreement applies or applies *mutatis mutandis* due to an occurrence of an event under any subparagraph of paragraph (1), the portion to be borne by the Concessionaire shall be excluded from the portion changed in the total project cost.

- (5) Except as otherwise stipulated in this Agreement, if the Concessionaire intends to amend the total project cost pursuant to any subparagraph of paragraph (1), it shall submit materials supporting the calculation to the competent authority or a person to whom the competent authority delegates its authority for approval after obtaining confirmation thereof from a specialized institution in accordance with the PPP Act, the State Contract Act, the Construction Technology Management Act, and other relevant Acts, subordinate statutes, and regulations: Provided, That the Concessionaire shall obtain confirmation from the supervisor when it intends to amend any construction cost out of the total project cost.
- (6) If the total project cost is amended in accordance with paragraph (1), the parties to the Agreement may request the adjustment of construction subsidies specified in Table 0 (Time Schedule for Payment of Construction Subsidies), and the competent authority shall pay construction subsidies as adjusted: Provided, That if it is concluded by the parties to the Agreement as a result of a review that it is possible to eliminate the cause at issue by an adjustment of user fees or an adjustment of the effective period of the right to manage and operate, the parties may adjust user fees or the effective period of the right to manage and operate by an agreement. In such cases, if the parties fail to reach an agreement on an amendment of the total project cost, the dispute shall be settled in accordance with the procedure for the dispute resolution in Chapter 00.

## CHAPTER IV RAISING AND INJECTION OF FUNDS

### Article 14 (Financing by Concessionaire)

Except as otherwise stipulated in this Agreement, the funds necessary for implementing this project shall be procured under the Concessionaire's responsibility, and all expenses incurred in relation to the Concessionaire's financing after this Agreement is concluded shall be borne by the Concessionaire.

### Article 15 (Raising and Injection of Equity Capital)

- (1) The Concessionaire shall raise its equity capital for not less than 00 % of the total private investment cost.<sup>17)</sup>
- (2) The Concessionaire shall file an application for approval of the implementation plan in accordance with the financing plan stipulated in this Agreement and shall require investors (planned investors) to invest in accordance with the financing plan on the application for approval of the implementation plan so approved by the competent authority.
- (3) The time schedule for the injection of equity capital in which the planned work progress rate of construction works shall be reflected at the time when this Agreement is concluded is as set out in Table 00 (Time Schedule for Injection of Agreed Investment).<sup>18)</sup>

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17) The Basic Plan for PPP Projects provides that the investors' equity capital ratio shall be maintained at 20% minimum during the construction period in order to maintain the stability of the construction of facilities, but it is possible to lower the minimum equity capital ratio to the level of 15%, if financial investors' share of investment is not less than 50%.

18) It may vary according to the actual work progress rate.

- (4) The Concessionaire shall pay equity capital on time in accordance with the time schedule for injection under paragraph (2) during the construction period and shall make equity capital not less than 00 % of the total private investment cost at the time of completion.
- (5) The Concessionaire shall maintain the equity capital ratio at 00 % minimum during the period of operation.<sup>19)</sup>

## **Article 16 (Raising and Injection of Borrowed Capital)**

- (1) The Concessionaire shall file an application for approval of the implementation plan in accordance with the financing plan stipulated in this Agreement.
- (2) The Concessionaire shall raise capital borrowed from creditor financial institutions and shall inject the capital in accordance with Table 00 (Time Schedule for Injection of Agreed Investment).
- (3) When the Concessionaire intends to grant an open-end mortgage or any other security right to a creditor financial institution on the right to manage and operate this project, it shall obtain approval therefor from the competent authority.
- (4) When the Concessionaire intends to grant an open-end mortgage in accordance with paragraph (3), it shall submit to the competent authority all documents about the security agreement, including the loan agreement and the open-end mortgage agreement for the implementation of this project, and the competent authority shall approve the grant of the open-end mortgage only when it concludes that the grant of the open-end mortgage does not breach this Agreement as a result of its review thereon.

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<sup>19)</sup> The Basic Plan for PPP Projects requires to maintain it at the level of 10% minimum.

- (5) In concluding a loan agreement with a creditor financial institution, etc. the Concessionaire shall include a condition that the creditor financial institution, etc. shall consult with the competent authority in advance when it intends to exercise its open-end mortgage on the ground of non-performance of obligations under the loan agreement.

## **CHAPTER V PROVISIONS ON DESIGN AND CONSTRUCTION**

### **Article 17 (Design, Authorization, Permission, etc.)**

- (1) The Concessionaire shall perform detail design works for facilities under this project in accordance with the relevant request for proposals (including inquiries and answers), the project plan, this Agreement, and relevant Acts, subordinate statutes, and regulations and shall submit the detail design when it files an application for approval for the implementation plan: Provided, That the project plan is applicable only where it is agreed to apply the project plan as a supplement in performing detail design works when this Agreement is executed.
- (2) If authorization, permission, or consultation is required in performing detail design works under paragraph (1), the Concessionaire shall consult with the competent authority thereon and shall be liable to carry out works at its own expense.

### **Article 18 (Approval of Implementation Plan)**

- (1) The Concessionaire shall file an application with the competent

authority for approval of the implementation plan under Article 16 of the Enforcement Decree of the PPP Act within 00 days<sup>20)</sup> from the conclusion date of this Agreement: Provided, That the competent authority may extend the period only once by not more than 00 days,<sup>21)</sup> if it is considered inevitable.

- (2) Upon receiving an application for approval of the implementation plan under paragraph (1), the competent authority shall examine whether this Agreement and the effects of other agreements between the competent authority and the Concessionaire are reflected therein and then notify the Concessionaire in writing of whether it approves the implementation plan within 00 months from the filing date of the application for approval of the implementation plan under paragraph (1) in accordance with the PPP Act and the Enforcement Decree of the said Act, unless there is any exceptional circumstance.
- (3) If the competent authority finds as a result of its review on the application for approval of the implementation plan that the effects of the agreements between the competent authority and the Concessionaire are not reflected therein, it may demand the Concessionaire to modify the application,<sup>22)</sup> and the Concessionaire shall be liable to modify the application at its own expense and shall file an application for approval of the implementation plan again within 00 days from the date on which it is demanded to make a

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20) Article 13 of the PPP Act and Article 15 of the Enforcement Decree of the said Act provides that the period shall not exceed one year, unless otherwise specified by the competent authority, and thus an appropriate period shall be presented in each request for proposals according the nature of the project in accordance with such provisions.

21) Article 13 of the PPP Act provides that the period may be extended by not more than one year.

22) Article 16 of the Enforcement Decree of the PPP Act specifies detailed items that shall be included in an application for approval for a Detailed Engineering and Design Plan for Implementation (DEDPI), and thus the competent authority shall review whether "the provisions of the Concession Agreement" reflect in the "specifications for construction works, documents about the ground for the calculation of construction cost and the financing plan, other relevant documents, etc."



modification.

- (4) If the Concessionaire violates any provision of paragraphs (1) through (3) by its own fault, the competent authority may revoke the designation of the Concessionaire and shall not be liable for the funds already raised by the Concessionaire or costs already injected by the Concessionaire.
- (5) Even where the competent authority approves a Detailed Engineering and Design Plan for Implementation (DEDPI) pursuant to paragraph (2), the liability for the implementation of the implementation plan shall reside in the Concessionaire and shall not be transferred to the competent authority.

## **Article 19 (Construction Cost)**

The construction cost shall be KRW [ ] at constant price as at (Date) as set out in Table 0 (Total Project Cost).

## **Article 20 (Construction Period)**

- (1) The construction period for the facilities under this project shall be 00 days from the commencement date of construction works.
- (2) If it is necessary to extend or reduce the construction period due to an event under either subparagraph (1) or (3) of Article 13 (Amendment of Total Project Cost), the construction period under paragraph (1) shall be extended or reduced accordingly by a reasonable period.
- (3) If the Concessionaire requests to extend the time to commence construction works or the construction period on the ground of the competent authority's fault, a force majeure event, or any other

cause recognized by the competent authority and the competent authority accepts such request, the time to commence construction works or the construction period under paragraph (1) may be adjusted.

## **Article 21 (Commencement of Construction Works)**

- (1) The Concessionaire shall complete works related to various applications for authorization and permission in relation to construction works on time so as to avoid any problem in construction works for facilities under this project.
- (2) Except as otherwise stipulated in this Agreement, the Concessionaire shall commence construction works within 00 days after it obtains approval of the implementation plan, notify the competent authority thereof, and carry out construction works for facilities under this project in accordance with the approved implementation plan and the work progress plan stipulated in the implementation plan.
- (3) The Concessionaire shall submit to the competent authority a report on commencement of works, which shall be confirmed by the project supervisor, within 00 days from the commencement date of construction works.
- (4) If the Concessionaire fails to commence construction works for facilities under this project under the implementation plan and this Agreement without a justifiable cause even after the lapse of 00 months from the commencement date of construction works, the competent authority may terminate this Agreement and revoke the designation of the Concessionaire pursuant to the PPP Act.

## **Article 22 (Work Progress Management)**

- (1) The Concessionaire shall establish a work progress plan in accordance with this Agreement and the implementation plan and shall manage work progress, including the management of progress rates and progress payments.
- (2) The Concessionaire shall report to the competent authority or a person to whom the competent authority delegates its authority on the current status of the implementation of construction works in relation to the work progress management under paragraph (1), which shall be confirmed by the project supervisor, each month and each quarter.
- (3) The Concessionaire shall prepare scheduled work progress charts for the process of all works and the work progress for the following year with regard to construction works for facilities under this project by the end of (Month) each year, which shall be confirmed by the project supervisor, and shall submit the charts to the competent authority or a person to whom the competent authority delegates its authority.
- (4) If the actual accumulated work progress rate is lower than 90%<sup>23)</sup> of the planned work progress rate, based on the work progress plan stipulated in the implementation plan for each quarter from the commencement date of construction works, the Concessionaire shall establish a scheme for recovering the poor work progress, which shall be confirmed by the project supervisor, submit it to the competent authority, and endeavor to make work progress normal.
- (5) If it is inevitable to adjust the work progress plan stipulated in the implementation plan, the work progress shall be adjusted with

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23) In general, the rate for an existing concession agreement is 85% or 90%, but these Draft Standards set the rate at 90% because it is more desirable to require the Concessionaire to perform work progress management in a stricter manner by narrowing the gap between the actual work progress rate and the planned work progress rate as much as possible.

approval from the competent authority.

### **Article 23 (Contracts on Design and Construction Works)**

- (1) The Concessionaire shall execute a contract for the performance of design or construction works with an investor, who was qualified for the performance of design or construction works at the stage of evaluation for the selection of potential Concessionaires, or a designer or construction company, who submitted a letter of confirmation of participation in this project, and shall submit to the competent authority a report on the results of such a contract and evidencing materials immediately upon conclusion of such a contract.
- (2) If the Concessionaire intends to change a construction company who concluded or, is to conclude, a contract pursuant to paragraph (1), it may replace the construction company with a person who meets or excels the requirements for the qualification for construction companies, presented in the relevant request for proposals<sup>24)</sup> and the project plan, subject to prior approval from the competent authority.<sup>25)</sup>

### **Article 24 (Compliance with Relevant Acts, Subordinate Statutes, etc.)**

- (1) The Concessionaire shall ensure that each construction company who executes a contract shall comply with relevant Acts, subordinate statutes, and regulations.

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24) In cases of an unsolicited project, it shall be replaced with the request for alternate proposals.

25) Where a contract is concluded with any person who was not qualified at the stage of evaluation, whether to approve shall be decided carefully, considering that it may distort the meaning of evaluation.

- (2) If a construction company subcontracts design or construction works, the Concessionaire shall ensure that the subcontractor shall comply with relevant Acts, subordinate statutes, and regulations.
- (3) If the project supervisor finds that a construction company or a subcontractor is not competent to conduct construction works of facilities under this project, it may demand the Concessionaire to take necessary measures in accordance with relevant Acts, subordinate statutes, and regulations, and the Concessionaire shall accept the demand in compliance with relevant Acts, subordinate statutes, and regulations.

#### **Article 25 (Liabilities Arising from Contracts and Subcontracts)**

- (1) If the payment of wages under a contract or a subcontract is in arrears, the Concessionaire may make the payment for the subcontract directly in accordance with relevant Acts, subordinate statutes, and regulations and shall stipulate the condition in contracts for construction works.
- (2) If any obligation owed to a construction company is not performed in relation to a contract or a subcontract for the performance of this project, including the payment of wages in arrears under paragraph (1), the competent authority shall issue an order to the Concessionaire to take corrective measures, which the Concessionaire shall take accordingly.
- (3) The Concessionaire shall not be discharged from its duties, obligations, or liabilities under this Agreement on the ground that its obligations are performed by a designer, a construction company, or a subcontractor.
- (4) The competent authority shall not be liable to a designer, a

construction company, or a subcontractor thereof in regard to a contract or a subcontract for design or construction works and shall not be bound by such a contract or subcontract: Provided, That the foregoing shall not apply if a related contract is assigned to the competent authority upon termination of this Agreement.

## **Article 26 (Hazardous Substances and Obstacles)**

- (1) The Concessionaire shall conduct an inspection on various hazardous substances and obstacles on the ground and under ground, which are likely to threaten functions and safety of facilities under this project and which are likely to affect directly to the performance of construction works, determine whether to relocate such substances and obstacles, methods of construction works, etc, and reflect relevant matters in the implementation plan.
- (2) If any hazardous substance or obstacle, which was not foreseen when the implementation plan was approved, although the Concessionaire had fully performed its duty of due care, is discovered in the site for this project, the Concessionaire shall notify the competent authority of such discovery immediately and shall take measures necessary for safety.
- (3) The Concessionaire shall remove or neutralize any hazardous substance discovered in the site for this project, relocate obstacles, and take other measures in accordance with relevant Acts, subordinate statutes, and regulations.
- (4) Costs incurred in the disposal under paragraph (3) shall be borne by the Concessionaire: Provided, That Article 62 (Force Majeure Events and Countermeasures therefor) shall apply *mutatis mutandis* to costs incurred for the disposal of any hazardous substance or obstacle not discovered by the Concessionaire's due inspection, but discovered later.

## Article 27 (Cultural Heritage)<sup>26)</sup>

- (1) The Concessionaire shall conduct a surface inspection for cultural heritage in accordance with Acts, subordinate statutes, and regulations related to cultural heritage, notify the competent authority and related agencies of results thereof, and reflect the results in the implementation plan.
- (2) If the Concessionaire discovers any cultural heritage in the site for this project, it shall deal with the heritage in accordance with Cultural Heritage Protection Act and other relevant Acts, subordinate statutes, and regulations.
- (3) Costs incurred in the trial excavation and survey for cultural heritage shall be borne by the Concessionaire, while costs incurred in the archaeological excavation and survey shall be paid by the Concessionaire first and then the competent authority shall settle the costs to reflect the costs in the total project cost: Provided, That if costs incurred for an archaeological excavation and survey that could have been reflected in the total project cost if the Concessionaire conducted an ordinary and reasonable survey, including the inspection of the map of the distribution of cultural relics, shall be settled by applying paragraph (1) of Article 62 (Force Majeure Events and Countermeasures therefor) *mutatis mutandis*.
- (4) As to the adjustment of the construction period for an archaeological excavation and survey for cultural heritage, paragraph (1) of Article 62 (Force Majeure Events and Countermeasures therefor)

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<sup>26)</sup> Provisions hereafter may be applicable if costs of trial excavation and survey have been reflected in the total project cost. If costs of trial excavation and survey have not been reflected in the total project cost, it may be necessary to modify the Agreement by reflecting such costs.

shall apply *mutatis mutandis*.

## Article 28 (Performance Bonds)

- (1) In order to guarantee the performance of the project under this Agreement, the Concessionaire shall deposit the performance bonds equivalent to ten percent of the total project cost in cash to the competent authority, or submit to the competent authority a letter of guarantee equivalent to the guarantee deposit for the performance of this project, as provided for in Article 37 (2) of the Enforcement Decree of the State Contract Act, within 00 days from the date on which the Concessionaire is designated:<sup>27)</sup> Provided, That the competent authority may extend the deadline for the payment or submission by not more than 00 days, if there is an exceptional circumstance.
- (2) If the letter of guarantee under paragraph (1) or a performance bond insurance policy has been submitted in the name of the representative investor or the proposed corporation, a modified letter of guarantee or insurance shall be submitted immediately upon incorporation of the corporation with the beneficiary of the letter of guarantee or insurance policy changed to the corporation.
- (3) If this Agreement terminates earlier or facilities under this project are bought out due to the competent authority's fault or a force majeure event or when a certificate of confirmation of completion is issued with respect to facilities under this project,

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<sup>27)</sup> This clause provides that a guarantee deposit or a letter of guarantee equivalent to the guarantee deposit shall be presented, and thus the competent authority shall review whether an issuing institution is authorized to issue performance bonds pursuant to relevant Acts and whether the letter of guarantee submitted is valid as a letter of guarantee for payment to determine whether it accepts the letter of guarantee submitted by the Concessionaire as a letter of guarantee equivalent to the performance bond.



the competent authority shall return the cash deposited or the performance bond insurance policy or the letter of guarantee submitted in accordance with paragraph (1) to the Concessionaire.

- (4) If the competent authority terminates this Agreement earlier due to the Concessionaire's fault, the performance bonds shall belong to the competent authority, while if the Concessionaire has submitted a performance bond insurance policy (or a letter of guarantee), the competent authority may file a claim for the payment of insurance proceeds (or guaranteed amount) in accordance with relevant terms and conditions.
- (5) If there is an increase in the amount that shall be covered by the performance bonds under paragraph (1), the Concessionaire shall deposit an additional performance bond corresponding to the increased amount to the competent authority, or submit another letter of guarantee or an insurance policy as a replacement of the letter of guarantee or insurance policy already submitted, in the manner stipulated in paragraph (1) within 15 days from the date on which the amount is increased.

## **Article 29 (Liquidated Damages)**

- (1) If the Concessionaire completes this project after the scheduled date of completion of facilities under this project stipulated in this Agreement and the implementation plan (or the deadline extended in accordance with this Agreement), without a justifiable cause, the Concessionaire shall compensate the competent authority for liquidated damages for the period from the day immediately after the scheduled date of completion (or the scheduled date of completion in which the extended period is reflected if the construction period under this Agreement has been extended) to the actual completion date

of facilities under this project in accordance with Article 74 of the Enforcement Decree of the State Contract Act.<sup>28)</sup> In such cases, the contract amount under the said Act shall be deemed the total project cost<sup>29)</sup>.

- (2) If the competent authority finds that the Concessionaire fails to complete facilities under this project and is unable to perform this project, it may terminate this Agreement, revoke the designation of the Concessionaire, or take other necessary measures provided for in the PPP Act and the Enforcement Decree of the said Act. In such cases, the performance bonds shall accrue to the competent authority, while if the Concessionaire has submitted a performance bond insurance policy (or a letter of guarantee), the competent authority may file a claim for the payment of insurance proceeds (or guaranteed amount) in accordance with relevant terms and conditions.

## Article 30 (Purchase of Insurance)

- (1) The Concessionaire shall directly purchase insurance policies in accordance with Table 0 (List of Insurance) or require construction companies and others to purchase such insurance policies,<sup>30)</sup> and shall ensure to keep such insurance policies effective during the

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28) If the competent authority is the head of a local government, Article 74 of the Enforcement Decree of the State Contract Act and Article 75 of the Enforcement Rule of the said Act may be changed to Article 90 of the Enforcement Decree of the Act on Contracts to which a Local Government is a Party and Article 75 of the Enforcement Rule of the said Act respectively.

29) If compensation cost is borne by the competent authority, it refers to the total project cost exclusive of compensation cost.

30) With respect to the coverage of insurance, the insured amount, the insured, the time to insure, the insurance term, the accounting for insurance premium, the determination of insurance premium rate, the spending of insurance proceeds, etc., the competent authority shall comply with Article 53 (2) of the Enforcement Decree of the State Contract Act and the Guidelines for Execution of Affairs of Insurance against Loss on Construction Works (Accounting Rule 2200. 04-155, Dec. 26, 2003).

project period.

- (2) The Concessionaire shall submit insurance contracts and a list thereof to the competent authority and shall notify the competent authority of a change in terms and conditions of such insurance contract in writing immediately whenever there is a change.
- (3) If the Concessionaire receives insurance proceeds for an insured incident, it shall submit a statement of the receipt of the insurance proceeds to the competent authority, use the insurance proceeds first for curing damage caused by the insured incident, and shall notify the competent authority of the details of spending.
- (4) The Concessionaire shall be fully liable for costs that shall be borne by it because it fails to perform the obligation to carry insurance policies under this Agreement.

### **Article 31 (Supervision by Competent Authority)**

- (1) In order to prevent poor performance, implement the project smoothly, or operate the project in normal conditions, the competent authority may supervise the performance of the Concessionaire and issue orders as may be necessary for supervision in relation to this project within the extent of not interfering with the Concessionaire's free management activities.
- (2) The Concessionaire shall explain the current status of construction of facilities under this project, quality control, etc. to the competent authority at least once a month (within 00 days).
- (3) In order to ascertain that facilities under this project are built in accordance with this Agreement and the implementation plan during the construction period, the Concessionaire shall inspect facilities under this project at a specified time and shall report the findings

thereof to the competent authority within 00 days from the inspection date.

- (4) The Concessionaire shall obtain approval from the competent authority with respect to the method, scope, and time of inspection before conducting the inspection under paragraph (3).
- (5) If the competent authority finds in the course of the inspection under paragraph (3) that facilities under this project are not built in accordance with this Agreement or the implementation plan, the competent authority may demand the Concessionaire to take corrective measures, and the Concessionaire shall be liable to take corrective measures at its own expense.
- (6) Costs incurred in relation to the competent authority's supervision, out of costs incurred under paragraphs (1) through (5), shall be borne by the competent authority, while costs incurred in the Concessionaire's inspection and corrective measures shall be borne by the Concessionaire: Provided, That if it is necessary to supervise the Concessionaire's performance further than ordinary due to the Concessionaire's fault specified in Article 61 (Competent Authority's Faults and Countermeasures therefor) and the competent authority retains an expert (or a specialized institution) to have assistance through entrustment or otherwise, all costs incurred therefrom shall be borne by the Concessionaire.

## **Article 32 (Progress Inspection)**

The Concessionaire shall require a construction company to undertake the project supervisor's progress inspection on the construction company's progress of construction works, and the project supervisor shall notify the competent authority and the Concessionaire of findings thereof within 00 days

after completion of the progress performance.

### **Article 33 (Settlement of Civil Petitions)**

- (1) Civil petitions raised in relation to this project shall be classified as follows:
  1. Civil petitions on the project: Civil petitions raised in relation to the purchase of, or the compensation for, the site for this project or an obstacle or civil petitions raised in response to a violation of a right or an interest of a third party, excluding civil petitions under subparagraph 2:
  2. Civil petitions on construction or operation: Civil petitions raised directly in connection of construction works or operation of this project, such as noise, bad odor, vibration, dust, traffic hazard, or any other impact on the surrounding environment.
- (2) The competent authority shall take responsibility for the settlement of civil petitions on the project.
- (3) If a civil petition on the project, which is raised in connection with the implementation of this project and to which the competent authority's regulations on compensation are not applicable, impedes the implementation of this project, the competent authority and the Concessionaire shall discuss a scheme for the settlement of the civil petition, and if it is agreed as a result of the discussion to settle the civil petition by amending the total project cost, the competent authority shall reflect costs actually spent by the Concessionaire for the settlement of the civil petition additionally in the total project cost.
- (4) The Concessionaire shall be liable to settle civil petitions on construction works and operation at its own expense. The

Concessionaire shall prepare measures for the prevention of civil petitions on construction works and operation and shall report them to the competent authority.

- (5) The Concessionaire shall bear costs and compensation required for the settlement of civil petitions raised against the Concessionaire's activities conducted in violation of an Act, a subordinate statute, or a regulation related to the implementation of this project or the authorization, permission, or approval of a related agency.

#### **Article 34 (Environmental and Safety Management)**

- (1) The Concessionaire shall establish measures for the matters specified in this Agreement and relevant Acts, subordinate statutes, and regulations and measures for the environmental management, safety management, and emergency relief specified in the implementation plan and this Agreement and carry out such measures in good faith.
- (2) The Concessionaire shall require a construction company to establish a safety control organization for safe construction to perform the works specified in the Occupational Safety and Health Act, the Construction Technology Management Act, and the Special Act on the Safety Control of Public Structures and to undergo safety control-related instruction, supervision, and inspection from the project supervisor.
- (3) If the competent authority demands the Concessionaire to conduct a safety inspection pursuant to this Agreement or any relevant Act, subordinate statute, or regulation during construction works, the Concessionaire shall conduct the inspection and shall report the findings thereof to the competent authority: Provided, That if the Concessionaire fails to conduct such an inspection without a justifiable cause, the competent authority itself shall conduct the

inspection, but costs incurred therein shall be borne by the Concessionaire.

### **Article 35 (Responsible Supervision of Construction Works)**

- (1) The competent authority shall select a qualified business entity as the project supervisor pursuant to the Construction Technology Management Act and other relevant Acts, subordinate statutes, and regulations, and the Concessionaire shall conclude a contract on the responsible supervision of construction works with the project supervisor selected by the competent authority. In that case, the bidding price of the supervisor selected by the competent authority shall be the contract amount.
- (2) The Concessionaire shall allow the project supervisor to perform responsible supervision under this Agreement and Construction Technology Management Act and other relevant Acts, subordinate statutes, and regulations with regard to construction works for facilities under this project, and the competent authority shall oversee the project supervisor's performance of supervision.
- (3) The project supervisor shall prepare a business plan for all works related to supervision, including the system for the performance of supervision and inspections on construction works, before commencing the responsible supervision of construction works, submit the plan to the Concessionaire and the competent authority respectively, whereas the Concessionaire shall obtain approval thereof from the competent authority, and the project supervisor shall report the current status of supervision to the competent authority and the Concessionaire in accordance with the Construction Technology Management Act and subordinate statutes in the course of performing its supervision.
- (4) The project supervisor shall conduct the inspections under Article

31 (Oversight by Competent Authority), the progress inspections under Article 32 (Progress Inspection), the preliminary completion inspection under Article 38 (Preliminary Completion Inspection, etc.), and the completion inspection under Article 39 (Confirmation of Completion and Registration of Right to Manage and Operate), prepare inspection reports thereon, and submit them to the competent authority for confirmation.

- (5) The Concessionaire shall ensure that construction companies and their subcontractors comply with the provisions of this Agreement regarding responsible supervision.
- (6) If the construction period stipulated in this Agreement is extended due to the Concessionaire's fault, additional costs of supervision for the extension of the responsible supervision period shall be determined by prior consultation with the competent authority, but such additional costs shall be borne by the Concessionaire without increasing the total project cost: Provided, That if the construction period stipulated in this Agreement is extended due to the competent authority's fault or a force majeure event, additional costs of supervision for the extension of the responsible supervision period shall be borne in accordance with the principle of risk sharing under Chapter 00 (Provisions regarding Risk Sharing).

### **Article 36 (Ancillary Projects)**

- (1) The scale and scope of facilities of 00, which shall be implemented as facilities ancillary to facilities under this project, are as set out in Table 00 (Ancillary Facilities).
- (2) The ancillary facilities under paragraph (1) shall be built in accordance with the implementation plan, and the works necessary for the authorization and permission for the installation of facilities



shall be carried out at the initiative of the Concessionaire.

- (3) The project costs, including the construction cost of the ancillary facilities under paragraph (1), shall be included in the total project cost.
- (4) Ancillary projects shall be implemented under the Concessionaire's responsibility and at its own expense.

### **Article 37 (Supplementary Projects)**

- (1) The overview of the project for the facilities of 00 implemented as supplementary projects and the scale and scope of such projects are as set out in Table 00 (Supplementary Projects).
- (2) The project cost, including the construction cost of facilities of the supplementary projects under paragraph (1) shall not be included in the total project cost under Article 12.
- (3) Supplementary projects shall be implemented in compliance with the PPP Act, the Enforcement Decree of the said Act, the Basic Plan for PPP Projects, this Agreement, and other relevant Acts, subordinate statutes, and regulations.
- (4) Supplementary projects shall be implemented under the Concessionaire's responsibility and at its own expense.

### **Article 38 (Preliminary Completion Inspection, etc.)**

- (1) The Concessionaire shall submit to the competent authority a preliminary completion report on infrastructure facilities, which shall be prepared by the project supervisor, by not later than 00 days before completion of facilities under this project and shall

undergo the preliminary completion inspection.

- (2) If any defective part is discovered in the course of the preliminary completion inspection, the competent authority shall notify the Concessionaire of details thereof in writing within 00 days, and the Concessionaire shall cure the defective part within 00 days from the date of notice and shall file an application for confirmation of completion of this project.
- (3) The Concessionaire shall prepare all facilities necessary for the management and operation of facilities under this project before filing an application for confirmation of the completion of this project.

### **Article 39 (Confirmation of Completion and Registration of Right to Manage and Operate Facilities)**

- (1) The Concessionaire shall submit to the competent authority a report on completion of construction works along with the statement of completion of construction works for facilities under this project, which shall be confirmed by the project supervisor, after completion of facilities under this project and shall file an application for confirmation of completion of this project.
- (2) In order to prepare the completion report under paragraph (1), the Concessionaire shall be liable to conduct a completion inspection on facilities under this project for itself at its own expense. In that case, the Concessionaire shall notify the competent authority of the time schedule of the completion inspection, and the competent authority may attend at the completion inspection.
- (3) Upon receiving the completion report under paragraph (1), the competent authority shall conduct the completion inspection within 00

days in accordance with the PPP Act after receiving the application and shall issue a certificate of confirmation of completion of facilities under this project to the Concessionaire, if it finds during the inspection that this Agreement is not breached and facilities under this project can be used and operated in normal conditions.

- (4) In conducting the completion inspection under paragraph (3), the competent authority shall conduct a test operation (performance test) of facilities under this project, and the Concessionaire shall cooperate with the competent authority in the inspection, attending at the inspection, giving explanations at the site, and providing data.
- (5) In order to commence the maintenance, management, and operation of facilities under this project, the Concessionaire shall consult with the competent authority before obtaining the certificate of confirmation of the completion to finalize matters regarding the registration of the right to manage and operate, the commencement date of operation following the creation of the right to manage and operate, and other necessary matters.
- (6) If the competent authority concludes from the completion inspection that there is any discrepancy between the actual construction and this Agreement or design documents submitted for the approval of the implementation plan, the competent authority shall return the report on the completion of construction works via the project supervisor and may demand the Concessionaire to correct such a discrepancy in writing 00 days from the date of return, clarifying defects in detail.
- (7) Upon receiving the demand under paragraph (6), the Concessionaire shall be liable to correct defects at its own expense and shall file another application for confirmation of completion quickly.

- (8) Upon confirmation of completion, the competent authority shall grant the Concessionaire the right to manage and operate under Article 26 of the PPP Act.

#### **Article 40 (Early Completion)**

- (1) If facilities under this project are completed before the scheduled date of completion under the Agreement ("early completion"), free use during the period from the date of completion to the scheduled date of completion shall not be permitted.
- (2) If the project is completed earlier, the competent authority may advance the beginning of the effective period of the right to manage and operate (in this case, the end of the effective period of the right to manage and operate shall be also advanced by the number of days by which the beginning of the effective period of the right to manage and operate is advanced) or may entrust the Concessionaire with the operation of facilities under this project during the period from the date of early completion to the scheduled date of completion.<sup>31)</sup>

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31) i) If the beginning of the effective period of the right to manage and operation is advanced:

Where there is no demand risk in the nature of the project (such as an environmental project), where it is expected that the substantial repairing cost and operating cost during the free use period under the Agreement will increase due to earlier operation, where the project is completed merely a few months earlier than the initially scheduled date of completion and thus the impact on demand or other factors are insignificant even if the right to manage and operate is granted on the date of early completion, or where there is a similar ground;

ii) If the operation is entrusted:

If the project is completed significantly earlier than the scheduled date of completion under the Agreement, the earlier completion is likely to cause a significant difference in the initially estimated traffic demand, and thus it is impossible to change the effective period of the right to manage and operate, the competent authority may entrust the Concessionaire with the operation of facilities under this project during the period from

## Article 41 (Authorization for Use Prior to Completion and Partial Completion)

- (1) If the competent authority finds it necessary to operate main facilities before issuing a certificate of confirmation of the completion of facilities under this project pursuant to Article 39 (Confirmation of Completion and Registration of Right to Manage and Operate) of this Agreement, it may authorize to use the facilities.
- (2) If the Concessionaire intends to be authorized to use facilities prior to completion, it shall file an application for authorization for the use prior to completion with the competent authority in accordance with the procedure for the confirmation of completion under Article 39 (Confirmation of Completion and Registration of Right to Manage and Operate) of this Agreement.
- (3) The period during which the operation is authorized for the use prior to completion shall not be included in the effective period of the right to manage and operate, and in this case the revenue and costs shall be settled by a mutual agreement of the parties to the Agreement.

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the date of early completion to the scheduled date of completion, and in this case only the operating cost for the period from the date of early completion to the scheduled date of completion shall be paid to the Concessionaire in principle, while partial sharing of operating revenue (for example, 50:50) and other benefits may be permitted only if the substantial repairing cost or operating cost is expected to increase during the free use period under the Agreement due to early completion or there is any other reasonable ground: Provided, That if the competent authority entrusts the operation of a project that commenced in 2010 during the period of early completion in order to encourage earlier completion in accordance with the Basic Plan for PPP Projects, amended in 2009 (Public Notice No. 2009-192 by the Ministry of Strategy and Finance), incentives may be granted to the Concessionaire within the limit of 1/2 of the reduced period, so that the Concessionaire can operate facilities under its responsibility.

- (4) The competent authority may permit to operate facilities partially completed, among facilities under this project (partial completion), to which paragraph (3) shall apply *mutatis mutandis*.

## CHAPTER VI PROVISIONS ON MAINTENANCE, MANAGEMENT, OPERATION

### Article 42 (Operating Cost)

- (1) The total operating cost of this project shall be KRW [ ] at constant price as at (Date), and the details of the operating cost of each sector for each year are as set out in Table 00 (Operating Cost).
- (2) If the operating cost significantly increases or decreases due to any of the following events, either party to the Agreement may request the adjustment of user fees, the effective period of the right to manage and operate, or subsidies:
1. Where an Act, subordinate statute, or regulation related to the maintenance, repairing, operation, and management of facilities under this project is amended or the Government's policy is changed;<sup>32)</sup>
  2. Where an increase or a decrease is caused by a change in the total project cost under paragraph (1) of Article 13 (Amendment of Total Project Cost) or the compliance with a demand from the competent authority;
  3. Where the operating cost increases due to any other event recognized by the competent authority or an occurrence of a force majeure event.<sup>33)</sup>

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<sup>32)</sup> It shall be adjusted within the extent of the portion borne by the competent authority under Article 62 (3) of this Agreement.

- (3) If the Concessionaire intends to change the operating cost specified in Table 0 (Operating Cost) on the ground of an occurrence of any event specified in paragraph (2), it shall submit an application to the competent authority for approval. The competent authority shall examine whether the operating cost can be reduced as a consequence of the amendment to an Act, subordinate statute, or regulation when it approves the application.
- (4) If the Concessionaire reduces the operating cost through efficient management, the competent authority shall not demand the Concessionaire to lower user fees, reduce the effective period of the right to manage and operate, or pay back the reduced amount of the operating cost on that ground.

#### **Article 42-2 (Accounting for Costs in Compliance with Amendment of Corporate Tax Act)**

If corporate tax rate increases or decreases as a result of an amendment to the Corporate Tax Act during the project period, either party to the Agreement may demand to adjust user fees, the effective period of the right to manage and operate, or subsidies for the increase or decrease.

#### **Article 43 (Contracts on Maintenance, Management, and Operation)**

- (1) The Concessionaire shall fulfill the duty of care as a good fiduciary to maintain and manage functions of facilities under this project.
- (2) The Concessionaire shall comply with the Special Act on the Safety

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33) It shall be adjusted within the extent of the portion borne by the competent authority under Article 62 (3) of this Agreement.

Control of Public Structures in managing facilities under this project and follow the regulations applicable to the maintenance and management of expressways of the Korea Highway Corporation (including ancillary traffic facilities, and such as the Korea Highway Corporation's regulations on the maintenance and management and manuals for maintenance and repair), except as provided for in the said Act, in the maintenance and management of such facilities,<sup>34)</sup> while the competent authority may order the Concessionaire to take corrective measures, if it finds that the Concessionaire fails to meet a standard, and costs incurred in taking such measures shall be borne by the Concessionaire. If the competent authority considers it necessary to request the Concessionaire to conduct a close safety inspection or carry out works for emergency maintenance and repair, the Concessionaire shall conduct the close safety inspection or carry out works for emergency maintenance and repair and report the results thereof to the competent authority, and the costs incurred in such works shall be borne by the Concessionaire.

- (3) The Concessionaire shall conclude a contract for the delegation or entrustment of the maintenance, management, and operation of facilities under this project with the investor, who was qualified for the performance of direct operation at the stage of evaluation for the selection of potential Concessionaires, or a specialized operating company<sup>35)</sup>, who submitted a letter of confirmation of participation in this project at the stage, (hereinafter referred to as the "operator") and shall submit to the competent authority a

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34) Output specifications demanded by the competent authority may be additionally specified in the request for proposals or alternate proposals.

35) The clause is applicable only where the Concessionaire entrusts a third party with operation, and the specialized operator herein refers to a person who meets the qualification for the operator under the request for proposals, while the clause shall be applicable to a road project for which the request for proposals specifically provides for the qualification for the operator since it is difficult for any Concessionaire other than the Korea Highway Corporation to seek for a specialized operator.



report on the results of the contract on delegation or entrustment and evidencing materials immediately upon conclusion of such a contract.

- (4) If the Concessionaire intends to replace the person with whom it concluded, or is to conclude, a contract on delegation or entrustment in accordance with paragraph (1) with another person, it may replace the person only with a person whose qualification is not lower than the qualification specified in the request for proposals and the project plan after obtaining approval therefor from the competent authority: Provided, That if it intends to replace the investor under paragraph (1), with whom it concluded (or is to conclude) a contract on delegation or entrustment, it shall also comply with the provisions of this Agreement regarding changes of investors and shares of investment.
- (5) The Concessionaire shall ensure that the delegatee or trustee under paragraph (1) shall comply with relevant Acts, subordinate statutes, and regulations as well as this Agreement and shall require the delegatee or trustee to purchase and maintain insurance policies in preparation against force majeure events.
- (6) The Concessionaire shall not be discharged from its obligations or liabilities as the Concessionaire under this Agreement on the ground that a delegatee or trustee shall perform the maintenance, management, and operation of facilities under this project.

#### **Article 44 (Submission of Operation Performance Report)**

- (1) The Concessionaire shall submit data about traffic volume and revenue of toll fees of the previous year to the competent authority by not later than February 28 each year.

- (2) If it is necessary to verify traffic volume and revenue of toll fees, the competent authority may request a specialized institution selected by an agreement between the parties to the Agreement to inspect and verify them, and the Concessionaire shall cooperate in such an inspection.

#### **Article 45 (Plan for Maintenance, Management, and Operation)**

- (1) The Concessionaire shall establish a reasonable plan for the maintenance, management, and operation of facilities under this project in accordance with this Agreement and shall submit it to the competent authority for approval by not later than 00 days<sup>36)</sup> before commencing the operation with the right to manage and operate the facilities.
- (2) The Concessionaire shall prepare a plan for the maintenance, management, and operation for each business year in accordance with the plan under paragraph (1) by not later than 30 days before the beginning of the business year and shall obtain confirmation thereof from the competent authority.
- (3) The plan prepared in accordance with paragraph (2) may be revised only by an agreement between the competent authority and the Concessionaire if any relevant Act, subordinate statute, or regulation is amended during the effective period of the right to manage and operate or any other reasonable ground exists.

#### **Article 46 (Maintenance, Management, and Operation of Ancillary Facilities)**

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<sup>36)</sup> It is advisable to establish the plan before 30 to 60 days before the beginning of the effective period of the right to manage and operate, if possible, to obtain approval thereof.

- (1) The Concessionaire shall be liable to maintain, manage, and operate ancillary facilities at its own expense in accordance with this Agreement.
- (2) The Concessionaire shall make it possible to count the operating revenue from ancillary facilities accurately in maintaining, managing, and operating ancillary facilities.
- (3) The Concessionaire shall report the results of operation, including costs of managing and operating ancillary facilities for each month, the details of revenue, and evidencing materials, to the competent authority on or before the 00 th day of the following month, and the competent authority shall confirm the actual net operating income from ancillary facilities, when it concludes that the Concessionaire's report on the results of operation is accurate.
- (4) The competent authority may, if necessary, inspect and verify whether the results of operation, which was reported by the Concessionaire in accordance with paragraph (3), is accurate and the Concessionaire shall cooperate in such inspection and verification.
- (5) If the competent authority finds in the course of the inspection and verification under paragraph (4) that the results of operation, which was reported by the Concessionaire, is not accurate, it shall conduct a reinspection to correct the actual net operating income from ancillary facilities.
- (6) If the actual net operating income from ancillary facilities during the effective period of the right to manage and operate falls short of the estimated net operating income in Table 00 (Net Operating Income from Ancillary Facilities), the Concessionaire shall take the responsibility therefor.
- (7) If the net operating income from ancillary facilities during the

effective period of the right to manage and operate exceeds the estimated net operating income in Table 00 (Net Operating Income from Ancillary Facilities), the surplus income shall be distributed to the competent authority and the Concessionaire at a specified rate (00:00):<sup>37)</sup> Provided, That if the revenue of road occupancy and usage charges under the Road Act accrues, the revenue shall accrue to the Central Government.

#### **Article 47 (Maintenance, Management, and Operation of Supplementary Facilities)**

- (1) The Concessionaire shall maintain, manage, and operate supplementary facilities under its responsibility and at its own expense in accordance with this Agreement.
- (2) As to the maintenance, management, and operation of supplementary facilities, Article 46 (Maintenance, Management, and Operation of Ancillary Facilities) shall apply *mutatis mutandis*.
- (3) If the actual net operating income from supplementary facilities during the effective period of the right to manage and operate falls short of the estimated net operating income in Table 00 (Net Operating Income from Supplementary Facilities), the Concessionaire shall take the responsibility therefor.
- (4) If the net operating income from supplementary facilities during the effective period of the right to manage and operate exceeds the estimated net operating income in the Table 00 (Net Operating Income from Supplementary Facilities), the surplus income shall be

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<sup>37)</sup> The distribution ratio of the surplus income from ancillary projects shall be determined through negotiations, taking into consideration the amount of income from projects ancillary to similar projects, the competent authority's role, etc.

distributed to the competent authority and the Concessionaire at a specified rate (00:00).<sup>38)</sup>

## Article 48 (Insignificant Projects)

- (1) The Concessionaire may implement insignificant projects approved by the competent authority after the conclusion of this Agreement in accordance with the proviso to Article 14 (4) of the PPP Act within the extent the does not threaten the maintenance, management, and operation of facilities under this project.
- (2) In order to implement insignificant projects under paragraph (1), the Concessionaire shall establish a plan regarding the scope of the projects, costs required, expected revenue, the method of implementing the projects, etc. to obtain prior approval from the competent authority.
- (3) Where the Concessionaire implements an insignificant project under paragraph (1), matters regarding the implementation of such project and the distribution of revenue shall be determined following consultation with the competent authority.<sup>39)</sup>

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38) The distribution ratio of the surplus income from supplementary projects shall be determined through negotiations, taking into consideration the amount of income from projects supplementary to similar projects, the competent authority's role, etc.

39) If there is minimum revenue guarantee, the provisions may be substituted by the following provisions:

"The competent authority shall permit the Concessionaire to implement an insignificant project, but subtract revenue therefrom from the minimum revenue guarantee during the period in which minimum revenue is guaranteed, while the method of disposing of revenue during the period in which minimum revenue is not guaranteed shall be determined, following consultation with the competent authority."

## CHAPTER VII RATE OF RETURN ON PROJECT AND USER FEES

### Article 49 (Rate of Return on Project)

The rate of return on this project shall be the real rate of return of 0% before taxes (0% after taxes) and shall not be changed until the expiration of this Agreement: Provided, That the foregoing shall not apply where the real rate of return before taxes is changed due to an adjustment under Article 42-2 (Accounting for Costs in Compliance with Amendment of Corporate Tax Act).

### Article 50 (Determination and Adjustment of User Fees)

- (1) The initial user fees for this project shall be determined as set out in Table 00 (Standard User Fees for each Type of Vehicle) but may be adjusted by consultation between the parties to the Agreement.
- (2) In order to determine initial user fees, the Concessionaire shall submit the following documents to the competent authority by not later than 00 days before the commencement date of operation:
  1. The method of using facilities under this project and the actual initial user fees applicable from the commencement date of operation onward;
  2. Basic data on the calculation of user fees;
  3. The method of collecting user fees;
  4. Full or partial exemption from user fees, surcharge rates, and the eligibility for such exemption or surcharge;
  5. The level of user fees for similar facilities, etc.;
  6. Other matters necessary for user fees.

- (3) In principle, user fees for each year, excluding initial user fees, shall be adjusted only once a year as at (Date) each year, and the Concessionaire shall calculate the user fees applicable each business year within the fluctuations in consumer price index, shall submit the calculation to the competent authority by the end of (Month) each year, and shall determine the final user fees following consultation with the competent authority.
- (4) User fees may be adjusted additionally if additional costs or losses are incurred due to a force majeure event, the competent authority's fault, or any other cause specified in this Agreement and the parties to the Agreement agree to settle the portion borne for the competent authority by adjusting the user fees.<sup>40)</sup> In such cases, if the parties to the Agreement fail to reach an agreement on the appropriate adjustment of user fees, the parties may request a specialized institution designated by an agreement between the parties to evaluate the reasonableness of the adjustment of the level of user fees, and the parties shall be bound by the results of such a requested evaluation.

## Article 51 (Collection of User Fees)

- (1) The Concessionaire shall have an exclusive right to collect user fees from users who use facilities under this project during the effective period of the right to manage and operate in accordance with this Agreement.
- (2) When the Concessionaire collects user fees from vehicles eligible

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40) In the event of a minimum revenue guarantee, the following clause may be added:

"If the actual revenue of user fees during the immediately preceding year falls short of the guaranteed revenue of user fees and it is agreed to compensate for the deficiency fully or partially by adjusting user fees."

for the exemption from user fees under Article 15 of the Toll Road Act, it shall apply the exemption rates under Article 8 of the Enforcement Decree of the said Act and Article 5 of the Enforcement Rule of the said Act.

- (3) The Concessionaire may request the competent authority to render assistance as may be necessary in establishing measures against unlawful use of facilities under this project, such as the use without paying user fees.
- (4) The Concessionaire may charge additional user fees to users who do not pay appropriate user fees in addition to the original user fees, as provided for in the Toll Road Act. The competent authority shall render administrative assistance necessary for such measures.

## **Article 52 (Settlement of User Fees)**

- (1) If the main project road is connected to a toll road such as an expressway, the competent authority may request the Concessionaire to establish and operate the traffic control system and the method of collecting user fees of the main project equivalent to those for the linked road, and the Concessionaire shall comply with such request. In addition, the Concessionaire shall also cooperate actively with the competent authority when the competent authority requires it to harmonize the user fee system with the system for other roads, and user fees shall be determined by an agreement between the parties to the Agreement.
- (2) If the system for collecting user fees for the main project road is consolidated with the system for a linked road section, the Concessionaire shall conclude a separate agreement with the Korea Highway Corporation or the operator of the linked road, whoever the operator of the road is, to determine the methods of the collection and settlement of user fees.



## CHAPTER VIII PROVISION REGARDING SUPPORT BY COMPETENT AUTHORITY

### Article 53 (Financial Aid)

- (1) The construction subsidy that the competent authority shall pay to the Concessionaire for part of the total project cost when this Agreement is concluded shall be KRW [ ] at constant price as at (Date), and the time schedule for the payment of construction subsidies are as set out in Table 0 (Time Schedule for Payment of Construction Subsidies).
- (2) The competent authority shall pay the construction subsidies under paragraph (1) on a quarterly basis in accordance with the time schedule specified in Table 0 (Time Schedule for Payment of Construction Subsidies), but shall pay the subsidies at the accumulated actual construction completion rate<sup>41)</sup> (the ratio of the accumulated actual construction completion to the planned accumulated construction completion rate) within 90 days<sup>42)</sup> from the date on which the Concessionaire files a payment application. The amount to which fluctuations in the consumer price index is applied from (Month/Year) to the end of the quarter immediately before the quarter for which a construction subsidy is payable shall be paid when the subsidy becomes due: Provided, That if the actual construction completion rate exceeds the relevant planned construction completion rate, the competent authority may pay construction subsidies for the

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41) It is necessary to clearly define the concept of accumulation.

42) The period varies in existing agreements, such as 60 days and 90 days, but an appropriate period may be specified, taking the competent authority's budget and other factors into consideration.

excess construction completion within budgetary limits for the pertinent year.

- (3) If the competent authority postpones the payment of a scheduled construction subsidy on the ground that the accumulated construction completion under paragraph (2) fails to reach the planned accumulated construction completion, it shall pay the postponed construction subsidy when it is confirmed that the delayed construction completion has been restored as planned.<sup>43)</sup>
- (4) If the competent authority fails to pay the construction subsidy for a quarter within the deadline for payment after receiving an application for payment of the construction subsidy in accordance with paragraph (2), the competent authority shall pay the past-due interest additionally which is calculated at the base interest rate for the period from the day immediately after the deadline for payment to the date of actual payment.
- (5) Notwithstanding paragraph (2), if the Concessionaire fails to perform the measures for restoring delayed construction completion, as submitted in accordance with paragraph (4) of Article 22 (Work Progress Management), due to its fault, the competent authority may postpone the payment of the full amount of construction subsidies payable for the current quarter (the amount payable for the previous quarter + the amount payable for the current quarter), irrespective of the performed construction completion rate.
- (6) Fluctuations in the consumer price index during the period in which the payment of construction subsidies have been postponed shall not be reflected in the payment of such construction subsidies postponed in accordance with paragraph (3) or (5).

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43) A condition "when the construction subsidy for the quarter following the quarter during which it is confirmed that delayed work progress has been restored as planned is paid" may be added, depending upon the status of the management of the competent authority's budget.

## Article 54 (Administrative Assistance)

- (1) The competent authority shall carry out administrative procedures (including consultation on traffic impact assessment and environmental impact assessment) necessary for the determination of planned urban facilities for facilities under this project and deliberation on the technology for detail design, while the Concessionaire shall carry out works for authorization and permission related to construction works for facilities under this project,<sup>44)</sup> and the competent authority shall cooperate with the Concessionaire, whenever necessary.
- (2) The Concessionaire shall not be discharged from its obligations, irrespective of results of the competent authority's administrative assistance in authorization and permission under paragraph (1).

## Article 55 (Provision of Land for Project Site)

- (1) The competent authority and the Concessionaire shall make an agreement in advance on the plan for securing the land for the construction of facilities under this project, the time schedule of compensation therefor, and the time schedule for the conveyance of the land.
- (2) The competent authority shall provide the Concessionaire with the land for this project as necessary for the Concessionaire's

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44) It provides for the Concessionaire's obligations regarding authorization and permission not constructively granted under the PPP Act. In the case of constructively granted authorization and permission, the Concessionaire is not required to obtain authorization and permission separately since such authorization and permission is deemed to be granted through the competent authority's prior consultation with heads of related administrative agencies on the approval of the implementation plan (see Article 17 of the PPP Act).

construction and operation of facilities under this project immediately upon completion of relevant procedures for the section for which compensation is not required and immediately upon completion of the compensation procedure for the section for which compensation is required. In providing the land for this project, the competent authority shall allow the Concessionaire to exercise the right to occupy and use the land, the right to use the land without consideration, and other rights recognized necessary for the Concessionaire to carry out this project under this Agreement during the project period without incurring any burden of tax, public charge, or security right.

- (3) When the Concessionaire acquires and exercise the right to occupy and use the land, the right to use the land without consideration, and other rights recognized necessary for the Concessionaire to carry out this project under this Agreement, it shall conduct a legal due diligence in advance to find whether there is any legal or factual burden or constraint and shall notify the competent authority in writing of legal or factual defects discovered as a result of the due diligence without delay.
- (4) The Concessionaire shall endeavor to prevent [ ]<sup>45)</sup> from being adversely affected by the implementation of this project.
- (5) The Concessionaire shall identify taxes and public charges<sup>46)</sup> expected to be imposed upon it to reflect them in the total project cost when this Agreement is concluded, and taxes and public charges identified subsequently shall be borne by the Concessionaire: Provided, That the foregoing shall not apply if there is any other

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45) Public interest projects adversely affected by the implementation of the project shall be listed.

46) For example, if it is not allowed to occupy and use public water surface without consideration, the charge for the occupancy and use of public water surface shall be also reflected in the total project cost.

reasonable ground to believe that the Concessionaire is unable to identify a tax or public charge to reflect it in the total project cost in case there is no Act, subordinate statute, or regulation applicable to a tax or public charge when this Agreement is executed, or in case it is impossible to calculate the amount of a tax or public charge in accordance with an Act, subordinate statute, or regulation applicable to the tax or public charge.

- (6) The competent authority shall not dispose of the land for this project or create any other right or interest therein during the project period without the agreement with the Concessionaire, and the competent authority shall make agreement with the Concessionaire in advance when it intends to use part of the land for this project for public purposes.
- (7) The Concessionaire shall not use the land for this project for any purpose other than the purposes specified in this Agreement: Provided, That the foregoing shall not apply if the Concessionaire obtains approval from the competent authority for any public interest.
- (8) If the competent authority fails to provide the Concessionaire with the land in accordance with the provisions of this Agreement for this project, the construction period shall be extended by the delayed period.

## **Article 56 (Compensation)**

- (1) The Concessionaire shall entrust the competent authority with the implementation of works for the expropriation or use of the land and other property for this project (including land, chattels, fishery rights, and other rights), the compensation for losses, and measures for relocation of residents.<sup>47)</sup>

- (2) The competent authority shall carry out works entrusted by the Concessionaire in accordance with paragraph (1) under its responsibility at its own expense.

#### **Article 57 (Timely Completion of Government-Subsidized Facilities)<sup>48)</sup>**

- (1) The competent authority shall complete the facilities timely specified in Table 00 (Construction Works for Government-Subsidized Facilities) at its own expense so as to prevent any problem in the Concessionaire's implementation of this project.
- (2) If it is impossible to operate facilities under this project in normal conditions due to defects in the facilities under paragraph (1) and the Concessionaire sustains losses on user fees, the competent authority may compensate the Concessionaire for the revenue of user fees for estimated demand for the subsidized facilities under the Agreement or adjust user fees or the effective period of the right to manage and operate instead of such compensation: Provided, That the foregoing shall not apply if the actual traffic volume exceeds the estimated traffic volume under the Agreement despite the failure to complete subsidized facilities on time.

#### **Article 58 (Financial Support for Sharing Investment Risk and Recovery of Subsidies)<sup>49)</sup>**

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47) This paragraph reflects general practice in road projects, and an agreement may be executed with a condition that works for compensation shall be carried out by the Concessionaire at the Concessionaire's expense.

48) This Article shall apply only to relevant projects.

49) This Article shall be applied only where the requirements specified in the Basic Plan for PPP Acts (if a solicited project in which the ownership of facilities shall vest in the Government has great public interests) are satisfied and thus the competent authority determines to share investment risk.

- (1) The subsidy for sharing investment risk allocated to this project is as set out in Table 00 (Subsidy for Sharing Investment Risk).
- (2) Pursuant to the PPP Act, the Enforcement Decree of the said Act, and the Basic Plan for PPP Projects, if the actual operating revenue for each operating year, exclusive of the value-added tax, fails to reach the subsidy for sharing investment risk allocated to this project, the competent authority shall pay the deficiency to the Concessionaire in the manners stipulated in paragraphs (4) through (6): Provided, That no subsidy shall be granted for the deficiency in an operating year (the difference between the allocated investment risk and the actual operating revenue) if the actual operating revenue is less than 50% of the allocated investment risk for the pertinent operating year.
- (3) If the actual operating revenue for an operating year, exclusive of the value-added tax, exceeds the subsidy for sharing investment risk allocated to this project, the competent authority shall recover the excess in the manners stipulated in paragraphs (4) through (6) within the limit of the subsidies already granted for sharing investment risk
- (4) In order to make a decision on the financial support and the recovery of subsidies under paragraphs (2) and (3), the Concessionaire shall submit to the competent authority data about the current status of settled operating revenue within [ ] months from the opening date of the annual shareholders' meeting in which the financial statements for the pertinent business year shall be finally confirmed.
- (5) The competent authority shall review relevant data within [ ] days from the date on which the Concessionaire submits such data in accordance with paragraph (4) and determine financial support or the

amount of subsidies to be recovered.

- (6) When the competent authority determines a subsidy pursuant to paragraph (5), it shall pay the subsidy within [ ] days from the date on which the subsidy is determined, while the Concessionaire shall pay the amount to be recovered within [ ] days from the date on which the recovery is determined, if the amount of subsidy to be recovered is determined pursuant to paragraph (5).
- (7) If the competent authority or the Concessionaire fails to pay a subsidy or an amount of subsidy to be recovered by December 31 of the year during which the deadline for payment under paragraph (6) becomes due, the competent authority or the Concessionaire shall pay past-due interest additionally which is calculated at the base interest rate in addition to the amount of subsidy or the amount of subsidy to be recovered for the period from the day immediately after December 31 of the year to the day on which the amount is fully paid.
- (8) Where a subsidy is granted pursuant to paragraph (2), no monetary support shall be provided additionally, even if the burden of corporate tax is imposed on the Concessionaire in relation to the subsidy.

## **Article 58-2 (Collection of Surplus Revenue of User Fees)<sup>50)</sup>**

- (1) If the actual revenue of user fees in each operating year, exclusive of the value-added tax, during the period of [ ] years from the commencement date of operation (or the scheduled date of completion, if completed earlier) exceeds the standard of revenue of user fees, the Concessionaire shall pay the excess to the competent authority

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<sup>50)</sup> It is advisable to apply this Article only where the competent authority shares investment risk.



or, instead, may dispose of such excess in any of the following ways; if the parties to the Agreement agree:

1. To appropriate the excess for the amount that the competent authority shall pay to the Concessionaire in accordance with this Agreement and that becomes due;
  2. To lower user fees if it is necessary to maintain or lower the level of user fees to an appropriate level or to reduce the effective period of the right to manage and operate.
- (2) As to the recovery of the surplus revenue of user fees, Article 58 (4) through (7) shall apply *mutatis mutandis*.

### **Article 58-3 (Management of Demand Risk)**

If there is a difference between the demand actually generated from the use of the main facilities and the estimated demand for the main facilities specified in this Agreement, the liability therefor and risks therein shall be taken by the Concessionaire, except as otherwise stipulated in this Agreement.

## **CHAPTER IX PROVISIONS REGARDING RISK SHARING**

### **Article 59 (Principles for Risk Distribution)**

- (1) A party shall be liable for the risk that has arisen or is likely to arise in connection with this project as a consequence of its fault.
- (2) Risks arising as a consequence of a force majeure event shall be primarily covered by related insurance, but each party's share in the portion not covered by insurance shall be determined in accordance with this Agreement.

- (3) Each party's share of risks according to the nature of each event in accordance with paragraph (2) shall be dependent upon whose act, authority, or control has brought about the relevant event.

#### **Article 60 (Concessionaire's Faults and Countermeasures therefor)**

- (1) In interpreting this Agreement, the following events shall be deemed the Concessionaire's fault, which shall not be limited to the following events:
1. Where the Concessionaire seriously violates an Act, a subordinate statute, or this Agreement or violates the competent authority's disposition or order under Article 46 (Countermeasures against Violation of Acts, Subordinate Statutes, etc.) of the PPP Act;
  2. Where it is concluded that continuing the project does not contribute to the public interest due to seriously poor performance of works for facilities under this project;
  3. Where the Concessionaire is declared bankrupt by a court's final and conclusive judgment;
  4. Where it is resolved at the Concessionaire's shareholders' meeting to dissolve or liquidate the Concessionaire (excluding a merger);
  5. Where it is found impossible to continue this project because the funds necessary for this project (equity capital and borrowed capital) has not been raised and injected due to any cause other than the competent authority's fault or a force majeure event;
  6. Where it is found impossible to continue this project because the Concessionaire fails to commence construction works without a justifiable cause within the deadline specified at the time of approval of the implementation plan or delays or evades the

implementation of the project after it commences construction works  
.;51)

7. Where the Concessionaire fails to file an application for approval of the implementation plan within the period specified in paragraph (1) of Article 18 (Approval of Implementation Plan);
  8. Where it is found impossible to continue this project because the Concessionaire delays the commencement of the maintenance, management, and operation of facilities under this project under this Agreement without a justifiable cause for not less than 00 months or evades the maintenance, management, and operation for not less than 00 months during the effective period of the right to manage or operate.
- (2) It shall not be allowed to change the total project cost on the ground of an additional cost or losses on revenue incurred to the Concessionaire as a consequence of an occurrence of any event specified in paragraph (1).

#### **Article 61 (Competent Authority's Faults and Countermeasures therefor)**

- (1) In interpreting this Agreement, the following events shall be deemed the competent authority's faults, which shall not be limited to the following events:
1. Where the competent authority confiscates facilities under this project or the right to implement this project without the Concessionaire's fault or a force majeure event. The confiscation or the revocation of designation of the Concessionaire under paragraph

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51) Delay or non-performance of a specified contract that a third party concluded with the Concessionaire, which is necessary and important for the implementation of the concession agreement, may be included in the Concessionaire's faults, if appropriate.

- (1) 1 or 2 of Article 47 (Dispositions for Public Interest) of the PPP Act shall be included herein;
2. Where the commencement or implementation of construction works is delayed due to the competent authority's delay in providing land for the project, carrying out works for compensation, or removing obstacles;<sup>52)</sup>
3. Where the competent authority fails to perform or breaches its explicit obligation provided for in this Agreement or any relevant Act or subordinate statute without a justifiable cause, such as a delay in an administrative action, including its obligation to consult on authorization and permission related to the approval of the implementation plan of this project or a modification thereto.
- (2) If any event under paragraph (1) occurs, the competent authority shall postpone the commencement of construction works or extend the construction period by the period necessary for cure and recovery from such an event during the construction period, reimburse the Concessionaire for the costs actually incurred, and compensate the Concessionaire for losses incurred during the effective period of the right to manage and operate.

## **Article 62 (Force Majeure Events and Countermeasures therefor)**

- (1) In interpreting this Agreement during this project period, the following events shall be deemed non-political force majeure events and events regarded as equivalent to such events (hereinafter referred to as "non-political force majeure events"), among force majeure events:

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<sup>52)</sup> This clause shall be applicable only where the competent authority owes such obligations under the Agreement.

1. A disaster caused by an earthquake, a flood, a tidal wave, a fire, a volcanic eruption, a landslide, a typhoon, an aircraft collision, or any similar event;
  2. A nationwide, society-wide, or industry-wide strike;
  3. Where a sudden change in the country credit rating, interest rate, or exchange rate, a similar sudden change in economic environment, or a rapid change in the environment for this project makes it impossible to execute a loan agreement or adversely and seriously affects the Concessionaire's profitability of this project;
  4. Where an amendment to the PPP Act, the Enforcement Decree of the said Act, the Basic Plan for PPP Projects, or a change in the policy on public-private partnership for infrastructure has a direct, serious, and unfavorable impact on the Concessionaire: Provided, That the competent authority shall be liable for losses incurred as a consequence of collecting user fees less than the user fees stipulated in this Agreement due to a demand or policy of the Government;
  5. Other events not specified as force majeure events under in paragraph (2) and events regarded as equivalent to such events but similar to those under subparagraphs 1 through 3.
- (2) In interpreting this Agreement, the following events shall be deemed political force majeure events and events deemed equivalent to such events (hereinafter referred to as "political force majeure events"), among force majeure events:
1. A war, a civil war, an enemy invasion, or any other similar event;
  2. Contamination of the project site by nuclear waste, a chemical, or radioactivity;
  3. A riot, terrorism, or any other similar event;
  4. Control of money exchange or overseas money transfer, or any other similar event.

- (3) If Countermeasures against a force majeure event that occurs during the project period shall be taken in accordance with the following guidelines:
1. If the commencement of construction works is hindered or suspended, the commencement of construction works shall be postponed by the period required for curing damage by the relevant event, or the construction period shall be extended, and the beginning of the effective period of the right to manage and operate shall be postponed;
  2. If the total project cost increases or an operating loss is incurred, the following countermeasures shall be taken:
    - (a) With respect to the portion of increase in the total project cost or operating loss (referring to an aggregate of costs of restoration and losses on revenue of user fees) not covered by insurance due to a non-political force majeure event, 80% of costs actually incurred shall be borne by the competent authority;
    - (b) With respect to the portion of increase in the total project cost or operating loss (referring to an aggregate of costs incurred in restoration and losses on revenue of user fees) not covered by insurance due to a political force majeure event, 90% of costs actually incurred shall be borne by the competent authority;
    - (c) The insurance under subparagraph (a) or (b) above shall be based on insurance proceeds receivable when the obligation to carry insurance policies specified in this Agreement is performed.
- (4) The payment of the portion to be borne by the competent authority in taking countermeasures against a force majeure event may be substituted with the adjustment of user fees or the effective period

of the right to manage and operate, following consultation between the parties to the Agreement.

- (5) If the deadline for the payment of the Concessionaire's loan or interest becomes due while the project is being delayed due to the competent authority's fault or a force majeure event, the competent authority shall cooperate with the Concessionaire as may be necessary for the Concessionaire to borrow a loan from the Government or any other short-term loan in order to perform an obligation under a loan agreement.
- (6) If a force majeure event occurs, the parties to the Agreement shall discuss damage therefrom immediately, make reasonable efforts to minimize and cure such damage, and seek for an effective scheme for the smooth management and operation of facilities under this project.

### **Article 63 (Claims and Objections Arising from Force Majeure Events)**

- (1) If a force majeure event occurs, a party to the Agreement shall make a written claim for the force majeure event (hereinafter referred to as "claim for a force majeure event") to the other party as promptly as possible, clearly stating the occurrence of the force majeure event and the details of the claim therefor.
- (2) Upon receiving a claim for a force majeure event, a party to the Agreement may make a written objection within 30 days from the date on which the claim is served. In such cases, the party to the Agreement shall reach an agreement on the claim for the occurrence of the force majeure event within 0 days from the day on which the objection is served on the other party, but the objection shall be settled in accordance with Chapter 0 (Dispute Resolution), if the parties fail to reach an agreement within the period.

- (3) If there is no objection raised within the period specified in paragraph (2), a claim for a force majeure event under paragraph (1) shall be deemed finally confirmed.

## CHAPTER X DISCHARGE OF AGREEMENT

### Article 64 (Discharge of Agreement upon Expiration)

- (1) This Agreement shall expire at the lapse of the effective period of the right to manage and operate, unless the Agreement terminates earlier, and the Concessionaire's right to manage and operate shall lapse in that case.
- (2) When this Agreement expires at the lapse of the effective period of the right to manage and operate, the Concessionaire shall perform as follows:
1. One year before the end of the effective period of the right to manage and operate,<sup>53)</sup> the Concessionaire shall conduct an inspection on facilities under this project jointly with the competent authority or a person designated by the competent authority<sup>54)</sup> and then transfer all facilities of the project, which are subject matter of the right to manage and operate, including the operation equipment for facilities under this project and various materials related to such equipment, to the competent authority free of charge at the lapse of the effective period of the right to manage and operate;

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53) The paragraph may be revised to require for the Concessionaire to conduct inspections twice in an interval of six months, such as "once one year and again six months in advance of."

54) In this case, the competent authority and the Concessionaire may agree to delegate the joint inspection to a third party and accept the results thereof.



2. If it is found, from the inspection under subparagraph 1, to repair or fix any facility in order to keep normal functions of facilities under this project, the Concessionaire shall repair or fix such a facility at its own expense before the lapse of the effective period of the right to manage and operate;
  3. The scope of facilities and equipment that the Concessionaire shall transfer to the competent authority for the maintenance, management, and operation in accordance with subparagraph 1 is as set out in Table 00 (Transfer of Right to Manage and Operate).<sup>55)56)</sup>
- (3) In order to ensure that the competent authority can maintain, manage, and operate the facilities under this project, which are transferred in accordance with paragraph (2), in normal conditions, the Concessionaire shall explain to the competent authority matters necessary for the maintenance, management, and operation of facilities under this project, provide materials regarding the guidelines for the maintenance, management, and operation that the Concessionaire has used, and cooperate with the competent authority, whenever necessary.

## **Article 65 (Discharge of Agreement upon Early Termination)**

- (1) Termination by the competent authority: If the Concessionaire commits a fault specified in Article 60 (Concessionaire's Faults and

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55) The clause may be revised to such a clause as "at the lapse of the effective period of the right to manage and operate, the Concessionaire shall return facilities under this project (including, but not limited to, operation equipment initially purchased during the effective period of the right to manage and operate, and furniture, equipment, computers, software, and vehicles purchased during the same period) as follows."

56) On the other hand, conditions and procedures for returning facilities under this project at the lapse of the effective period of the right to manage and operate may be included in the implementation plan.

Countermeasures therefor), the competent authority may terminate this Agreement by giving written notice to the Concessionaire in accordance with this Article, revoke the designation of the Concessionaire, cancel the right to manage and operate, or take any other necessary measure.

(2) Termination by the Concessionaire: The Concessionaire may terminate this Agreement by giving written notice to the competent authority in accordance with this Article if any of the following events occurs:

1. Where an event under paragraph (1) 1 of Article 61 (Competent Authority's Faults and Countermeasures therefor) occurs;
2. Where an event under paragraph (1) 2 or 3 of Article 61 (Competent Authority's Faults and Countermeasures therefor) occurs, which causes the delay or suspension of construction works or operation of facilities under this project for not less than six months;<sup>57)</sup>
3. Where the competent authority fails to take necessary measures without a justifiable cause even after it receives a written notice from the Concessionaire, requesting to adjust the effective period of the right to manage and operate in accordance with this Agreement, and thus the Concessionaire dispatches a written notice demanding to correct such failure, but the competent authority fails to correct such failure within 120 days from the date on which it receives the notice.

(3) Termination due to any other cause: Either party to the Agreement may terminate this Agreement by giving written notice to the other party in accordance with this Article if any of the following events occurs:

1. Where a force majeure event specified in Article 62 (Force Majeure

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<sup>57)</sup> The period is specified as six months that is also applicable to the causes of a buyout claim under Article 39 of the Enforcement Decree of the PPP Act.

Events and Countermeasures therefor) has occurred but the parties to the Agreement fails to reach an agreement within 00 days from the commencement date of negotiations therefor;

2. Where the progress of construction works in a certain area or the management and operation of this project have been delayed for not less than one year or either party to the Agreement fails to perform any of its essential obligations for not less than one year<sup>58)</sup> because preventive or neutralizing measures were taken for archeological works in relation to cultural heritage or a detection of a dangerous substance, and construction works for the whole area except the area in which such an event occurred have been completed, but the event has not been eliminated;
3. Where the Concessionaire fails to conclude a loan agreement within 00 months from the date the Concessionaire was designated or a loan agreement expires (or terminates) before the deadline under the agreement but the Concessionaire fails to find a person who will provide the funds instead within six months: Provided, That if such an event occurs due to the competent authority's fault, the Concessionaire may notify the competent authority of termination, while if such an event occurs due to the Concessionaire's fault, the competent authority may notify the Concessionaire of termination, but if such an event occurs due to a cause for which either party to the Agreement is not liable, either party of the Agreement may notify the other party of termination.
- (4) In order for either party to the Agreement to terminate this Agreement in accordance with this Article, it must first be concluded impossible, in fact, to continue this project although the party has made best effort to solve the problem, and the burden of proving it

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<sup>58)</sup> The period may vary depending on the characteristic of each project.

shall be borne by the party who intends to terminate this Agreement.

- (5) If any of events that constitute causes of termination of the Agreement under this Article occurs, the party to the Agreement, who has a right to terminate this Agreement in accordance with this Article, (hereinafter referred to as the "terminating party") shall demand the other party in writing to eliminate the event within a specified period of not more than 90 days (hereinafter referred to as "curing period") or discuss measures for eliminating such an event, stating the occurrence of an event that constitutes a cause of termination along with relevant data. If the event is not eliminated or the parties fail to reach an agreement for elimination, the terminating party may notify the other party of termination in writing, and termination becomes effective when the notice of termination is served: Provided, That the terminating party shall defer the notice of termination while the procedure for the change of the Concessionaire is in progress in accordance with Article 72 (Change of Concessionaire).
- (6) Apart from the right granted to the Concessionaire to terminate this Agreement, if the Concessionaire files a buyout claim with the competent authority in accordance with Article 59 (Right to Demand Buyout) of the PPP Act, this Agreement shall be deemed terminated on the day when the competent authority's notice of acceptance of the buyout claim is served on the Concessionaire.

## **Article 66 (Effects of Termination of Agreement)**

- (1) If this Agreement is terminated pursuant to Article 65 (Discharge of Agreement upon Early Termination), the ownership of facilities under this project (completed portion, if terminated during the construction period) shall vest in the competent authority

immediately upon termination, the Concessionaire's rights, authority shall lapse, and its right to manage and operate shall be cancelled.

- (2) If the competent authority agrees to accept the assignment of a contract to which the Concessionaire is a party, the Concessionaire shall take all measures necessary for the transfer within a short period as much as possible.
- (3) The competent authority shall acquire and take over assets owned by the Concessionaire, including all equipment, structures, facilities, fixtures, mobile equipment, computer hardware and software, all chattels, and spare parts in stock, and all rights and assets that the Concessionaire holds or uses in connection with facilities under this project without needing to the price therefor to the Concessionaire.<sup>59)</sup>
- (4) If this Agreement is terminated, the Concessionaire shall furnish the competent authority with a plan for maintenance, management, and operation along with all documents, records related to this Project, and construction drawings,
- (5) If this Agreement is terminated, the Concessionaire shall conduct due diligence and an inspection on facilities under this project jointly with a person designated by the competent authority, take appropriate measures therefor, and then transfer the facilities under this project to the competent authority.

## **Article 67 (Determination of Compensation on Termination)**

- (1) The parties to the Agreement shall determine the compensation on

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<sup>59)</sup> If it is intended to exclude certain equipment and other property from those subject to transfer without consideration, such equipment and property shall be specified in the Agreement.

termination by an agreement within 30 days from the effective date of termination in accordance with Table 0 (Compensation on Termination): Provided, That if there is any subsidy that the competent authority is entitled to recover pursuant to Article 58 (3) but has not recovered, the amount recovered shall be subtracted from compensation on termination.<sup>60)</sup>

- (2) If parties fail to reach an agreement in accordance with paragraph (1), the parties shall designate a specialized institution by an agreement to have it determine the compensation on termination.
- (3) The specialized institution selected pursuant to paragraph (2) shall determine the compensation on termination within 00 days from the date on which it is selected in accordance with paragraph (4) and notify the parties to the Agreement of the results thereof in writing.
- (4) If compensation on termination is determined by a specialized institution, expenses incurred therein shall be fully borne by the party whose fault has caused termination, while such expenses shall be equally borne by the parties to the Agreement if termination has been caused by a force majeure event.
- (5) An objection raised with regard to the amount determined by a specialized institution for compensation on termination shall be settled in accordance with the procedure under Chapter XII (Dispute Resolution).
- (6) The compensation on termination, which the competent authority shall pay to the Concessionaire in accordance with this Agreement, shall be adjusted as follows:
  1. If the Concessionaire has received insurance proceeds for facilities under this project in connection with termination of this Agreement,

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<sup>60)</sup> The proviso shall be applicable only where the competent authority shares investment risk.

but possesses all or some insurance proceeds without appropriating them to the restoration of facilities under this project, the amount equivalent to such insurance proceeds shall be deducted. The amount shall be based on proceeds claimable on such occasion the Concessionaire has performed its obligation to carry insurance policies;

2. If the competent authority assumes obligations that the Concessionaire owes to creditor financial institutions upon termination of this Agreement with indemnification in accordance with relevant Acts, subordinate statutes, and regulations, or designate a third party as the replacement for the Concessionaire to have the third party assume such obligations with indemnification, the amount of obligations that the competent authority or the third party assumes with indemnification shall be deducted: Provided, That the competent authority shall consult with creditor financial institutions in advance when it intends to designate a third party as the Concessionaire.

## **Article 68 (Methods of Paying Compensation on Termination)**

- (1) The competent authority shall pay the compensation to the Concessionaire on termination, as calculated in accordance with Article 67 (Determination of Compensation on Termination) of this Agreement: Provided, That if there is any principal or interest payable as at the date of termination for the loans that the Concessionaire has borrowed in accordance with loan agreements, the competent authority may pay the principal or interest directly to legitimate creditors under the loan agreements. If the competent authority fails to pay compensation on termination within 30 days

from the date of termination, it shall pay interest calculated at the base interest rate additionally for the compensation payable on termination for a period from the day immediately after the lapse of 00 days from the date of termination to the date of actual payment.<sup>61)</sup>

- (2) In cases under paragraph (1), the competent authority may offset the amount that it shall collect from the Concessionaire under this Act against the amount that the competent authority shall pay to the Concessionaire in addition to the right to offset under any relevant Act or subordinate statute or the right to offset to which it is entitled otherwise after notifying the Concessionaire of its intention to offset .

## Article 69 (Buyout)

- (1) Pursuant to Article 59 of the PPP Act and Article 39 of the Enforcement Decree of the said Act, if any of the following events<sup>62)</sup> occurs, the Concessionaire may request the competent authority to buy the Concessionaire out of this project in accordance with the procedure under Article 40 of the Enforcement Decree of the said Act:
1. Where construction works have been suspended for not less than six months or the total project cost increases by not less than 50 percent, due to a natural disaster, war, or any force majeure event;
  2. Where the operation of facilities has been suspended for not less

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61) Generally, compensation on termination is paid within 30 days from the date of termination, but it is necessary to make the period longer enough to reflect conditions of the budget of each local government, or the competent authority, or the period necessary for determining compensation on termination, etc.

62) The events specified herein are those specified in Article 39 of the Enforcement Decree of the PPP Act, excluding the event under subparagraph 4 of the said Article of the said Enforcement Decree.



than six months or the cost of repairing or reconstruction of facilities exceeds 50 percent of the original total project cost, due to a natural disaster, war, or any force majeure event;

3. Where the State or local government stipulated in the concession agreement has not performed its obligation without a justifiable cause for not less than one year from the date on which it was notified of the occurrence of the relevant event or the construction works or operation of facilities have been delayed or suspended for not less than six months because the State or local government stipulated in the concession agreement has not performed its obligations without a justifiable cause.

(2) The buyout price for the Concessionaire's claim for buyout (hereinafter referred to as "buyout price") shall be determined in accordance with the guidelines for the determination of compensation for termination due to a force majeure event or the competent authority's fault, whichever is relevant.

## **Article 70 (Fiduciary Duty of Care upon Expiration, Termination, or Buyout)**

Notwithstanding the expiration of the effective period of the right to manage and operate, the termination of the Agreement, or the claim for buyout under this Agreement, the Concessionaire shall fulfill its obligations under the Agreement or its duties as a good fiduciary for facilities under this project and shall cooperate fully for amicable transfer.

## **CHAPTER XI DISPOSAL OF RIGHTS AND REFINANCING**

### **Article 71 (Transfer and Provision of Security)**

- (1) Except as otherwise provided for in the PPP Act or this Agreement, the Concessionaire shall not assign or delegate its rights or obligations under this Agreement without the competent authority's prior approval.
- (2) If it is necessary to raise funds in connection with the implementation of this project, the Concessionaire may transfer or assign to a creditor financial institution this Agreement, the right to manage and operate, the rights and obligations under a contract for design or construction works, chattels, revenue, a bank account, an intellectual property, or any right or asset or may offer such assets or rights as security: Provided, That offering rights under this Agreement or the right to manage and operate as security shall be subject to the competent authority's prior approval.

### **Article 72 (Change of Concessionaire)**

If the competent authority terminates this Agreement on the ground of the Concessionaire's fault or revokes the designation of the Concessionaire pursuant to Article 47 of the PPP Act, it may execute this project directly or designate another Concessionaire to have the other Concessionaire continue the project.

### **Article 73 (Change of Share of Equity)**

- (1) The composition of investors of OO Co., Ltd. (including planned investors), who is the Concessionaire, and their shares of equity are as set out in Table 0 (Investors of OO Co., Ltd. and their Shares of Equity).
- (2) If an investor whose share of equity is at least five percent of the total share of equity (including planned investors' shares of equity hereinafter; including an individual enterprise who participates in joint investment and whose share of equity is less than five percent, where enterprises affiliated with one and the same business group jointly invest and the scale of their joint investment is not less than five percent of full shares of equity) intends to have its share of equity changed,<sup>63)</sup> the Concessionaire shall obtain prior approval therefor from the competent authority: Provided, That shares of equity are changed as a consequence of a merger of investors, the Concessionaire shall notify the competent authority thereof in writing within ten days from the effective date of the merger.
- (3) If an investor whose share of equity is less than five percent of the total share of equity has its share of equity changed, the Concessionaire shall notify the competent authority of the details of the change in writing within ten days from the date on which the change occurs.
- (4) Notwithstanding paragraphs (2) and (3), the Concessionaire shall not change shares of equity at the time of the designation of the Concessionaire until completion of the project: Provided, That it may change shares of equity with the competent authority's prior

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63) If there is an investor to whom evaluation points were given separately according to the evaluated factors regarding the composition of investors when the project plan was evaluated and a person whose share of equity is less than five percent intends to have its share of equity changed, it is also advisable, where appropriate, to require to obtain approval therefor to prevent the results of the evaluation from being distorted.

approval, if it is difficult, in fact, for an investor to make its investment due to its default in payments or any other exceptional cause occurs.<sup>64)</sup><sup>65)</sup>

#### **Article 74 (Refinancing Procedure)<sup>66)</sup>**

- (1) If the Concessionaire intends to refinance after the conclusion of this Agreement, the Concessionaire shall notify the competent authority in advance of the plan related to refinancing, report the progress of refinancing to the competent authority, and consult thereon with the competent authority from time to time.
- (2) The Concessionaire shall engage in refinancing for fair market price and reasonable terms and conditions through competition as fair as possible, shall maintain the equity capital ratio stipulated in this Agreement when it changes the capital structure during the construction period, and shall maintain the Concessionaire's equity capital ratio at not less than ten percent of the balance of the right to manage and operate on the audit report as at the time of refinancing when it changes the capital structure during the period of operation.
- (3) The Concessionaire shall obtain approval from the competent

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64) The competent authority shall determine carefully whether to approve it after reviewing the competent authority's policies, the qualification for the Concessionaire under the relevant request for proposals or alternate proposals, the criteria for evaluation, investors' capability of performing the existing project plan. On the other hand, it is advisable for the competent authority to notify the Concessionaire of the rough time schedule for the review on whether the approval will be given at the time when the Concessionaire files an application for the approval for the change (for example, until when an answer will be given on whether the approval will be given) to promote the predictability and stability of the project.

65) On the other hand, an application for the change of an investor shall be filed in the form with which titles of all investors or the intention of all investors can be verified, not the title of the main creditor or the title of the tentatively named corporation.

66) If the Basic Plan for PPP Projects is amended, the Agreement shall be adjusted accordingly.

authority for the final terms and conditions of refinancing and shall submit to the competent authority data necessary for the judgement on benefits from refinancing.

- (4) The competent authority and the Concessionaire shall amend the concession agreement within a reasonable period by reflecting the terms and conditions changed due to refinancing for the implementation of the project.
- (5) The competent authority may authorize the Public and Private Infrastructure Investment Management Center, or any other relevant specialized institution, to vicariously carry out the consultation with the Concessionaire in relation to refinancing.

#### **Article 75 (Sharing of Profit from Refinancing)**

- (1) If refinancing is successfully done, the competent authority and the Concessionaire shall share profit from refinancing, and the shares of profits between the parties to the Agreement shall be 50:50:<sup>67)</sup> Provided, That if the expected rate of return, which is expected from refinancing, is lower than the expected rate of return under the concession agreement, there is no financial support from the Government during the period of operation, and the level of user fees is not more than 1.2 times as much as the level for government-financed projects (based on current price at the time of refinancing), profit from refinancing shall be not shared.<sup>68)</sup>

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67) The clause reflects the Basic Plan for PPP Projects, which provides that the profit sharing ratio between the competent authority and the Concessionaire shall be basically 50:50, and thus a sharing ratio different from the ratio stated above may be set by an agreement between the parties to the Agreement.

68) The proviso above shall be applicable only where a financing agreement is concluded after the amendment of the Basic Plan for PPP Projects (Oct. 6, 2009) and where the project shall commence by not later than 2010.

- (2) The profit from refinancing under paragraph (1) shall be measured based on the increase in the investors' expected rate of return as determined with the 'comparative financial model,' in comparison with the investors' expected rate of return as determined with the 'pre-refinancing model.'
- (3) The competent authority may use its profit from refinancing by lowering user fees<sup>69)</sup> or by any other method.
- (4) Except as otherwise stipulated in this Agreement, the profit from refinancing shall be disposed of in accordance with the detailed guidelines for refinancing and terms and conditions provided for in the Basic Plan for PPP Projects and the relevant request for proposals.

## CHAPTER XII DISPUTE RESOLUTION

### Article 76 (Dispute Resolution)

- (1) The parties to the Agreement shall resolve any dispute arising in connection with this Agreement by a mutual consultation in good faith.
- (2) If the parties fail to resolve a dispute in accordance with paragraph (1), such a dispute shall be resolved in accordance with the procedure under Article 78 (Arbitration) of this Agreement.

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69) The Basic Plan for PPP Projects provides "the competent authority shall use the Government's share of the profit from refinancing first for lowering user fees: Provided, That if the competent authority concludes that it is not appropriate to use the profit for lowering user fees, it may use the profit for reducing minimum revenue guarantee, reducing the free use period, or improving terms and conditions for the implementation of the relevant PPP project, taking the characteristic of each project into consideration."

- (3) If the parties to the Agreement agree not to resolve a dispute by arbitration, the consent jurisdiction over such a dispute under this Agreement shall be the OO Court.
- (4) If either party has an objection with regard to an amount payable to the other party, the party raising the objection shall pay first the amount to which it has no objection.
- (5) In addition to the amount payable first under paragraph (4), an amount calculated by applying the base interest rate to the amount payable for a period from the date on which the amount payable becomes due to the day immediately before the date of actual payment shall be paid additionally.

#### **Article 77 (Arbitration)**

- (1) The parties to the Agreement may agree to resolve all disputes arising from or in connection with this Agreement by arbitration of the Korean Commercial Arbitration Board in accordance with the Arbitration Act and the Arbitration Rules.
- (2) The language used in arbitration shall be Korean language, and the formation of the arbitration panel, the appointment of arbitrators, and arbitration procedures shall be governed by Acts, subordinate statutes, and regulations of the Republic of Korea regarding commercial arbitration.
- (3) The parties shall be finally and conclusively bound by an arbitration award without resorting to any special means for appeal. The parties hereby relinquish a right to appeal and a right to claim repayment in whatsoever form to a court or any other judicial authority having jurisdiction and waive their rights to do so.

## CHAPTER XIII MISCELLANEOUS PROVISIONS

### Article 78 (Amendment of Agreement)

- (1) This Agreement may be amended or supplemented only by a written addendum signed by the parties to the Agreement (or with the parties' names written and their seals affixed thereon).
- (2) Notwithstanding paragraph (1), if figures related to the items that shall be finally fixed after the conclusion of this Agreement in accordance with this Agreement are finally fixed and confirmed by the parties to the Agreement, this Agreement shall be deemed amended with the agreed numbers without necessarily concluding a separate agreement on the amendment.
- (3) If either party to the Agreement considers it necessary to amend this Agreement due to a change in circumstances after the conclusion of this Agreement, it may propose the other party to amend this Agreement, and in such cases the parties to the Agreement shall discuss whether to amend this Agreement in good faith.
- (4) In determining whether to amend the Agreement and terms and conditions to be amended, the parties to the Agreement shall consider whether the purposes of the PPP Act can be achieved irrespective of changes in circumstances after the conclusion of this Agreement, whether the Concessionaire can ensure profitability through the project under this Agreement, and whether the principle of risk sharing between the parties to the Agreement can be maintained as stipulated in this Agreement.
- (5) If the PPP Act, the Enforcement Decree of the said Act, or any Act,



subordinate statute, or system related to public-private partnership in infrastructure is amended and thus it is necessary to reflect the amendment to operate this project smoothly or improve profitability, this Agreement may be adjusted and amended by consultation.

**Article 79 (Beneficiaries of Agreement)**

This Agreement shall be enforceable against the parties to the Agreement, their successors, and permitted transferees or assignees. No provision of this Agreement shall be interpreted to grant a right to, or impose an obligation upon, any person other than the parties to the Agreement, their successors, and permitted transferees or assignees.

**Article 80 (Competent Authority's Obligation to Comply with Agreement)**

The competent authority hereby agree that it shall not assert immunity on the ground of an act of sovereignty from a lawsuit, an execution, a provisional disposition, or any other legal proceedings against the competent authority itself or its assets or revenue with regard to its obligation under this Agreement and shall not rescind the agreement.

**Article 81 (Partial Invalidation)**

The illegality, annulment, or unenforceability of a provision under any Act of a specific jurisdiction shall affect only the effectiveness, legality, possibility of enforcement in the jurisdiction within the scope of the provision and shall not affect the legality, effectiveness, or the enforceability of the provision under an Act of any other jurisdiction, this Agreement, or any other regulation.

## **Article 82 (Exclusion of Implied Terms and Conditions)**

This Agreement explicitly excludes any assurance implied in an Act or custom, any condition or guarantee, any other agreement between the parties to the Agreement, and any statement not included in a written legal agreement concluded by and binding the parties to the Agreement. The parties to the Agreement hereby acknowledge and confirm that the conclusion of this Agreement is not based on any assurance, term, guarantee, agreement, or statement excluded herefrom.

## **Article 83 (Duty of Confidentiality)**

- (1) Each party to the Agreement shall keep all terms and conditions of this Agreement and information acquired in the course of the performance of this Agreement for the period during which the Agreement remains effective and for five years after the termination or expiration of this Agreement and shall not furnish any other person with such information without the other party's consent.
- (2) The restriction under paragraph (1) shall not be applicable to the following cases:
  1. Disclosure of information that becomes publicly known any time at the present or in the future;
  2. Information of which either party to the Agreement has already known without acquiring it directly or indirectly from the other party to the Agreement (as proved with a written record on the date of disclosure);
  3. Disclosure of information that shall be disclosed in accordance with an Act;
  4. Disclosure of information in an arbitration, a trial, or

administrative proceedings;

5. Disclosure of information to the disclosing party's legal advisor, insurance company, or financial institution.

(3) Either party to the Agreement may disclose information to any of the following persons for good intentions:

1. The Concessionaire's affiliated company;
2. An outside designer, construction company, advisor, or consultant acting for the party to the Agreement;
3. A financial institution or its consultant from whom the party to the Agreement borrows a loan in connection with this Agreement;
4. The insurer in an insurance certificate or an insurance offer mentioned in this Agreement;
5. An executive, an employee, an agent, or a subcontractor of the party to the Agreement;
6. Any other related agency that the competent authority acknowledges as one involved in this project.

(4) The disclosure under paragraph (3) shall be limited to the extent necessary for either party to the Agreement to perform and comply with this Agreement or any other contract under this Agreement and to protect or exercise a right under this Agreement.

## **Article 84 (Notice)**

(1) A notice or document under this Agreement shall be served at any of the following addresses or the address designated by each party to the Agreement:

1. Notice to the competent authority:

Address:

Addressee:

Tel. No.: Fax. No.:

2. Notice to the Concessionaire:

Address: Addressee:

Tel. No.: Fax. No.:

(2) When either party to the Agreement changes its address in paragraph (1), it shall notify the other party to the Agreement of the changed address within five days from the date of change, and such a notice shall become effective when it is delivered to the other party to the Agreement.

(3) "When it is delivered" means that a notice by mail is regarded as served when it is served at the relevant address directly, while a notice by facsimile is regarded as served when transmission is confirmed: Provided, That if the date on which a notice is served is not a business day, the notice shall be regarded as served on the business day immediately following the date of service.

### **Article 85 (Language)**

(1) All communications between the competent authority and the Concessionaire shall be made in Korean language.

(2) This Agreement shall be prepared in Korean version, and the Korean version shall take precedence over a version in any language other than Korean, if such a version is also prepared.

### **Article 86 (Governing Law)**

This Agreement shall be governed by, and interpreted in accordance with, Acts of the Republic of Korea.

## Article 87 (Effect of Agreement)

- (1) When the project corporation under Article 6 is incorporated, the corporation shall succeed to the rights and obligations of the Concessionaire under this Agreement as they are.
- (2) This Agreement shall become effective immediately upon conclusion and shall remain valid until termination or expiration.
- (3) The parties to this Agreement have prepared 00 sets of this Agreement and written their names and affixed their names respectively and each party keeps one set of the Agreement.

(Date)

[Minister of Construction  
and Transportation]

000 (signature)

[Planned Investor]

Representative of 00 Co.

000 (signature)

[Planned Investor]

Representative of 00 Co.<sup>70)</sup>

000 (signature)

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70) It is necessary to prevent the Concession Agreement from becoming meaningless and unenforceable by requiring planned investors to jointly sign the Agreement to remind them that they owe the obligation to comply with the Agreement by signing the Agreement until the project corporation is incorporated and clarify who shall be liable if any planned investor breaches the Agreement or denies the effect of the Agreement after the concession agreement is executed, considering the fact that the corporation that shall implement the project actually has not been incorporated yet at the time when the Agreement is executed.