

## ANNEX "A"

### A. Water and Wastewater Rates

- 1. Please confirm that the Financial Proposal Amount for the Water Tariff will also be considered as that of the Wastewater Tariff.**

Yes, the Wastewater Tariff will equal the Water Tariff for the first 5 years, subject to rebasing every 5 years onwards. See Section 2.2(b)(ii)(x) of IPSP – Volume 2.

- 2. We note that the Water Rate shall be subject to the approval of the NWRB. To expedite the rate-fixing process, may BCDA secure, through an agreement with the NWRB, that NWRB allow BCDA (or one of BCDA's subsidiaries possessing the necessary power under the law) to exercise the rate-fixing power for Water Rates within the NCC?**

No, NWRB will retain its power to fix water rates for the Project.

- 3. Please confirm that the adjustments to the Wastewater Rate on each CPI Adjustment Date are indeed automatic and are not contingent on BCDA approvals during the Project period?**

CPI adjustment is automatic and no prior approval from NWRB is required, however, the calculations are required to be submitted to NWRB for review. BCDA understands that the purpose of this review is to ensure the accuracy of the computation of the CPI adjustment. The letter from NWRB dated 31 August 2018 addressing this point is attached as Appendix A to this bid bulletin.

Section 17.1(b) of the JVA shall be revised to clarify the same as follows:

"The Water Rate and the Wastewater Rate shall be subject to the approval of the relevant Regulatory Authority. The Parties acknowledge and confirm that that rates to be charged by the JV to its Customers shall at all times comply with and shall be as approved by said Regulatory Authority. *For the avoidance of doubt, the percentage adjustments in Sections 17.3(a) and 17.5(a) shall not require affirmative approval of NWRB or BCDA (as applicable); however, the adjustments and its calculations shall be submitted for review.*"

Section 17.3(a) of the JVA shall be revised as follows:

"Effective on each CPI Adjustment, there will be an automatic percentage adjustment in the Water Rate equal to two thirds (2/3) of the percentage change in the Consumer Price Index between the month immediately preceding the current Charging Year and the month immediately preceding the start of the following Charging Year. The JV shall (and the JV Partner shall procure that the JV shall) submit to the NWRB such adjustment and its calculations no later than 10 days prior to the start of such Charging Year."

**4. We note that Schedule 8 (Wastewater Rebasing Formula) is specific to Wastewater rebasing. Please clarify if there is a similar schedule for the Water rebasing formula?**

The Water Rebasing Adjustment is described in Section 17 of the JVA, and in the letters dated 11 July and 22 August 2018 of BCDA to NWRB describing the rebasing methodology for NCC, which are attached as Appendices B and C to this bid bulletin. NWRB expressed its “no objection” to the said rebasing methodology per its letter dated 31 August 2018, which is attached as Appendix A to this bid bulletin.

**5. Please confirm that the 12% discount rate is applied to the unlevered JV level cash flow on a pre-tax basis.**

Yes, the 12% discount rate in Schedule 8 (*Wastewater Rebasing Formula*) of the JVA is applied to unlevered JV-level cash flow on a pre-corporate income tax basis.

**6. Please clarify if the Water Rate cap of PhP25/cu.m. is for all types of customers or will BCDA prescribe a rate for each type of customer (i.e., residential, commercial, industrial, etc.)?**

The Water Rate cap of PhP25/cu.m. is the weighted average rate for all customers. The PSP may adjust the rates by type of customer in accordance with NWRB guidelines, as long as the weighted average is retained. Any over/under-payment due to projections in customer type and population will be adjusted in the next rebasing period.

**7. Please clarify the definition of CPI in the JVA.**

The definition of “Consumer Price Index” will be revised as follows:

“Consumer Price Index means, for any ~~month~~period, the Monthly Consumer Price Index for All Income Households in the Philippines for all items for that ~~month~~period published by the Philippine Statistics Authority Office or such successor index as the Parties may agree.”

**8. Please clarify the definition of JV Initiated Adjustment Date in the JVA.**

The definition of JV Initiated Adjustment Date will be revised in the JVA to reflect 5-year rebasing.

**9. Please confirm that the Water Rate and Wastewater Rate are exclusive of VAT and other taxes.**

Yes, the Water Rate and Wastewater Rate are exclusive of VAT, if any.

**B. CAPITAL FUNDING / STRUCTURE**

**1. Can the capital structure of the JVC be revised to allow for the creation of different classes of shares, which may account for the amounts contributed by the JV Partner to the Project in excess of the JV Partner contribution in lieu of additional paid-in capital?**

Such alternate arrangements may be discussed between the parties under the JVA. The JVA will be clarified that different classes of shares (and JV Partner's payments in forms other than APIC) may be issued so long as there is no modification of BCDA's voting rights or its 10% ownership (economic and legal) interest in the JV throughout the Project Period. For the avoidance of doubt, the creation of any separate classes of shares will be a Reserved Matter for the Board.

As noted in Section 3.1(b), different series of common shares may be created solely for the purpose of distinguishing the shares of BCDA and the JV Partner in the Articles of Agreement and the By-Laws. Both series of shares will have voting and economic rights as set forth in the JVA.

**2. Can debt be incurred by the JVC?**


The JVA will be modified to allow the JVC to incur unsecured debt of up to 70% of the JV Partner's capital requirements. Please note however that the assets of the JVC cannot be used as security over the said debt. For the avoidance of doubt, any incurrence of debt by the JVC is a Reserved Matter for the Board.

As already provided in the JVA, the JV Partner may choose to assign its dividend and termination payment rights to the Lenders as collateral.

**3. Is there a difference between the "Terminal Value" definition in Schedule 8 of the JVA (Net book value of the Project assets at Year 30) and the "Investment Value" in Section 23.2 of the JVA?**

The reference "TV" in Schedule 8 (*Wastewater Rebasing Formula*) will be replaced with "IV<sub>30</sub>", which will then be defined as: "IV<sub>30</sub> = Investment Value at Year 30."

**4. Will fair market value be used as basis for the determination of the Investment Value?**

No, the Investment Value is based on the total book value of the shareholders' equity of or interests in (as applicable) the JV based on (a) the JV's latest audited financial statements, minus (b) the total book value of the BCDA Contribution based on the JV's latest audited financial statements, plus (c) (if not already included in such determination) the net amount of insurance proceeds actually retained by the JV after application in accordance with Section 19.2 of the JVA. 

**5. Can the earnings by the JVC be used to finance capital expenditures, operating expenses, any expansion, and certain other costs and expenses without requiring additional capital infusions from the JV Partner?**

The JVA will be revised to allow replacement capital expenditures and remedial works, in addition to operating expenses and other currently allowable uses, to be funded through retained earnings. The JVA will also be modified to clarify the treatment of certain costs and expenses as operating expense (and not JV Partner funded capex).

**C. BCDA AS THE REGULATORY AUTHORITY FOR WASTEWATER SERVICES**

**1. What is the legal basis for BCDA's power to fix wastewater rate?**

Under current regulations, there is no regulatory authority over sewerage services. While Republic Act ("R.A.") No. 9400 states that the governing body of the CSEZ has no regulatory authority over public utilities, which authority pertains to the regulatory agencies created by law for the purpose, there is no regulatory agency specifically mandated by law to regulate sewerage services. In the absence of such regulatory agency, the BCDA may determine the performance requirements and rates for such services pursuant to its jurisdiction over the CSEZ in accordance with Section 5(m) of R.A. No. 7227 and Section 3 of Proclamation No. 163.

**2. Given that BCDA will be the regulator for Wastewater Services, does the BCDA have guidelines on this matter?**

Currently, the BCDA does not have specific guidelines for the regulation of Wastewater Services for NCC. The parameters are provided in Section 17.5(b)(iii) and (iv) of the JVA.

**D. FORCE MAJEURE / MATERIAL ADVERSE GOVERNMENT ACTION**

**1. Can extraordinary inflation be considered as an Event of Force Majeure?**

The JVA will be revised to allow extraordinary inflation (as determined by Bangko Sentral ng Pilipinas) as a possible trigger for Event of Force Majeure.

**2. Does the JVA provide for a mechanism that allows the JV Partner to be compensated in the event that Water or Wastewater Rates are not approved by the Regulatory Authority within a certain period?**

The initial Water Rate, which is based on the winning bid, does not require regulatory approval. Likewise, annual adjustments for CPI also do not require prior regulatory approval, but is subject to review of computation by NWRB.

Only JV-initiated adjustments every five (5) years are subject to prior approval by NWRB. In case of delays in NWRB's tariff adjustment decisions, under recovery of expenditures may be considered in succeeding JV-Initiated adjustments.

**3. Does the JVA allow the JV Partner to be compensated through cash payment?**

Relief for MAGA should follow the process indicated in the JVA, which does not include direct payments from the BCDA.

**4. Can the MAGA threshold of 5% be removed?**

No. The longer-dated capital is less impacted by recent MAGA and therefore, only a significant portion (defined as 5%) of such would trigger MAGA.

**E. DESIGN AND CONSTRUCTION**

**1. Given that the approval of the PED and DED is dependent upon the time prescribed by the Independent Consultant, is there a limit as to the period of approval by the Independent Consultant?**

Section 14.2(b) of the JVA will be modified to provide for a fifteen (15) day period for the Independent Consultant's approval.

**2. Is there a period for BCDA to provide its consent in the event that a replacement contractor is engaged?**

There shall be no defined period for BCDA to provide its consent in the event that a replacement contractor is engaged. Sections 14.5(f) and 15.2(e) of the JVA will be modified to clarify this point.

**3. Are the plans provided under DWG-LG-01 and DWG-LG-02 the final land grade plans for NCC?**

Yes, to date these are the final land grade plans for NCC.

**4. Is the BCDA pursuing utility corridors at the NGAC and throughout the NCC?**

That is still the current plan as per the Master Development Plan provided to the PSPs. Please note that the civil work costs for these utility corridors will be borne by BCDA.

**5. Can the bidders be provided with the (i) technical design of the Existing Facility to enable integration of design into the water network, and (ii) copies of the pump test results?**

(i) Technical specifications of the Existing Facility (which will be revised to include the deep well, submersible pump, and the packaged Sewage Treatment Plant) will be provided to the bidders. In addition, please note that there will be temporary arrangements for the water and wastewater networks within NGAC, to be done by MTD Alloy for the initial period. The design of these networks will also be provided to the bidders.

(ii) The existing well is meant to provide a backup arrangement, not replacement, for the well required for the DU – although its availability relaxes the time requirement for this additional well to 30 September 2019 (see response to question J.7 below on the revised liquidated damages clause).

**6. How big is the lot allocated for the ongoing drilling of Manila Water?**

The dimension of the ongoing drilling is 10m x 15m.

**7. Where can the Winning PSP drill within the NCC? Are there restricted areas?**

Subject to securing the relevant NWRB permits, the Winning PSP may drill anywhere in the NCC. To date, BCDA has applied for a permit from NWRB to drill in 9 other locations within NCC, and they can be passed on to the Winning PSP once approved. The coordinates of these locations can be provided in a separate bid bulletin.

**8. Is the land development/site development/road network of the 2,000 hectares going to be finished immediately or by phase? If by phase, can we get the phasing schedule with map?**

The developments will be done by phases as indicated in the Master Development Plan, which has already been provided to bidders.

**F. REPRESENTATIONS AND WARRANTIES**

**1. Is the approval of the President of the Philippines required in compliance with Section 21.1(c) of the JVA?**

No, the President's approval is already contained in the endorsement from the Governance Commission for GOCCs.

**2. Does the warranty against corruption in Section 21.3 of the JVA only cover a final determination by a court?**

No, the warranty against corruption includes those that are under investigation or that which has not been finally determined by a court of competent

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jurisdiction. However, the JVA will be revised to allow an exception for those that have been disclosed in writing to BCDA.

- 3. *Is the compliance with Performance Standards limited to entities that the JV Partner actually controls and not extend to parties that the JV Partner contracts with?***

No, it is the JV Partner's responsibility to engage with reliable parties.

- 4. *Are the representations and warranties of BCDA continuing?***

The representations and warranties of BCDA are made at the time of execution of the JVA.

## **G. BIDDING PROCEDURE**

- 1. *Is there a compensation regime should the bidding process be invalidated?***

There is no separate compensation regime. The validity of the bidding process is covered by BCDA's representations and warranties on its authorization to enter into the JVA, and perform its obligations thereunder. BCDA also specifically represents that it has full power and authority to grant the Project Rights and Land Rights. Additionally, the JVA will be revised to specify that BCDA's misrepresentation will be a BCDA Event of Termination, subject to materiality.

- 2. *Please clarify whether the USD735,000.00 in Section 15.3 of the IPSP: Volume 2 – Competitive Selection Documents forms part of the JV Partner's Initial Contribution, and consequently, the Investment Value to be considered in the event of the termination under the JVA?***

The USD735,000.00 in Section 15.3 of the IPSP: Volume 2 – Competitive Selection Documents does not form part of the JV Partner's Initial Contribution or the Investment Value. Such amount forms part of the cost of the Competitive Selection Process that will be reimbursed by the Winning PSP (see definition of "Project Cost" in the IPSP).

## **H. PROPOSAL SECURITY**

- 1. *Can the proposal security be in the form of an irrevocable standby letter of credit?***

The BCDA JV Guidelines provides that the Proposal Security shall be in the form of a bank manager's check or cashier's check. The Proposal Security can be provided through multiple checks.

- 2. *Will the Proposal Security of the Winning PSP be refunded or is it automatically converted as part of the Performance Security?***

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The Proposal Security should be returned to the Winning PSP unless the Performance Security will be in the same form as the Proposal Security, in which case, the Winning PSP will just deliver the balance of the Performance Security.

## **I. SEA Games Facilities**

### **1. SEA Games Facilities Deadline**

The SEA Games Facilities Deadline under the JVA will be revised to 30 September 2019.

### **2. How many units are there in the government housing facility and Athletes Village?**

There are five hundred (500) units in the government housing facility, and five hundred (500) units in Athletes Village, with an estimate of two (2) people per unit.

### **3. How many restrooms are there in the Stadium? Aquatic Center? Warm up Facility?**

The number of restrooms for the Stadium, Aquatic Center, and Warm up Facility have yet to be determined. Please note that the capacity of the stadium is twenty thousand (20,000) and the aquatic center is two thousand (2,000), which discounts the staff working at these events.

### **4. Will a complete SCADA as described under Section 4.8 of the MPSS be required for the SEA Games Water and Wastewater Infrastructure?**

SCADA for the SEA Games infrastructure will not be required at the time of the SEA Games but will be incorporated later as the SCADA system is developed. SCADA integration is covered in the PED and DED and whilst we will remove that requirement for the SEA Games PED/DED submissions it should be retrospectively included in the next PED submission after the SEA Games so it does not get left out of the overall system.

### **5. Will the Project require the use of renewable energy?**

The MPSS will be revised to remove the requirement relating to the use of renewable energy.

### **6. The MPSS provides that the JVC shall lease space in an administration building within NCC to be identified by BCDA. Can particulars be provided for this space?**



Additional space for such office requirements may be leased from BCDA as necessary. The administrative office is expected to be located within the NGAC area.

**7. Please clarify the liquidated damages under Section 7.3 of the MPSS.**

The liquidated damages for wastewater will be removed if the 1.5MLD STP is procured and installed under the NGAC Joint Venture Agreement.

The liquidated damages for water will be revised as follows:

“If the JV fails to (i) install connecting pipes, storage tank(s) and treatment for water extracted from the existing deep well provided by BCDA, and distribution pumps by 30 April 2019; and (ii) commission an additional guaranteed continuous potable water supply of not less than 2,000 m<sup>3</sup>/day by 30 September 2019 the BCDA may claim, by way of payment of liquidated damages, lump sum amounts of PhP 10 million and PhP 90 million, respectively.”

**8. When will permanent power supply be available? Is there an indicative price already?**

Permanent power will be provided through the grid at the prevailing rate.

**J. FILINVEST**

**1. Will the Winning PSP be responsible for the water distribution and sewerage network within its 288 hectare property?**

The Winning PSP will be responsible for providing water and wastewater for Filinvest.

**2. Is Filinvest going to purchase water in bulk for their area or per establishment/structure?**

Filinvest will purchase on a per establishment/structure level.

**3. Is Filinvest required a certain percentage of built up area per phase? If yes, can we get the details?**

There is no specific requirement on a percentage of built up area per phase.

**K. MISCELLANEOUS**

**1. Does the JVA allow for reimbursement in case the takeover of the Existing Facility is invalidated by the Commission on Audit (“COA”)?**

Given that the Existing Facility is owned by a private entity, there is no disposal of government asset and is not within the jurisdiction of the COA.

- 2. Will the failure of a BCDA Director to appear for three (3) consecutive meetings, when the matter to be resolved during such meetings is a Reserved Matter, constitute a Deadlock?**

Yes, the JVA will be revised to address this.

- 3. Will the failure of a BCDA Director to attend three (3) consecutive meetings of the Board with the same agenda constitute a BCDA Event of Termination?**

No, the absence of a BCDA Director for three (3) consecutive meetings of the Board with the same agenda does not constitute a BCDA Event of Termination.

- 4. What is the cure period for a JV Partner Event of Termination for a material breach of any of its obligations, representations or warranties under Section 22.2(m) of the JVA?**

As provided in the JVA, the JV Partner may remedy any material breach of any of its obligations, representations or warranties within forty-five (45) days from notice given by BCDA.

- 5. Please clarify in Section 22.5 of the JVA: (a) Section 23.2 of the JVA (on dissolution and liquidation) does not apply if the BCDA chooses to purchase the Shares in the JV upon termination of the JVA, and (b) the reference to "Sections 23.10" is a reference to "Section 23.1".**

These are typos. Only "Section 23.1" (and not the entire "Article 23") of the JVA applies in case BCDA purchases the Shares of the JV Partner in the JV. The reference to "Sections 23.10" in Section 22.5 should be a reference to "Section 23.1". The JVA will be corrected to reflect these changes.

- 6. Can the Independent Consultant be appointed jointly by BCDA and the JV Partner?**

No, the Independent Consultant will be appointed either by BCDA or by the JV (at the option of BCDA), and not by the JV Partner.

- 7. Can the solidary liability of the Consortium Member having the highest equity interest be removed?**

Note that the BCDA JV Guidelines require the Consortium Agreement to include an agreement of all members to be jointly and severally liable for the obligations of the Consortium under the award/contract.

The Performance Security only covers a small portion of the monetary obligations of the JV Partner under the JVA. The Sponsor Support Agreement

is intended to guarantee the performance of the SPC's obligations under the JVA, given that the SPC is a newly-incorporated entity. It is not unusual in PPP transactions to require a sponsor guarantee for the SPC. BCDA should have the right to look to the sponsor, as the direct majority shareholder of the JV Partner (or the SPC), to ensure compliance with the JVA.

As for the entity assuming joint and several liability with the SPC under the Sponsor Support Agreement, BCDA expects that the Consortium Members will develop their own liability discharge mechanism within the Consortium to allocate the responsibilities / risks.

**8. Please clarify the share transfer restrictions under Article 8 of the JVA; can this be limited to transfers during a specified period rather than for the entire Project Period, or can it be limited to those that trigger a Change of Control, or can a Change of Control be consummated without BCDA's prior consent?**

No. The share transfer restrictions under Section 8.1 and 8.3 of the JVA apply during the entire Project Period.

The JV Partner may transfer its interest in the JV with the prior written consent of BCDA, consistent with the requirement under the BCDA JV Guidelines. Note that the transfer restrictions that apply to the Consortium members are "above" the JV Partner level. The Consortium members will be prohibited from effecting transfers that trigger (i) a Change of Control, or (ii) a failure to maintain the Eligibility Requirements.

**9. Will the BCDA guarantee that the JVC will receive investment incentives?**

There are currently no new incentives applied for the NCC other than those already available within the Clark Special Economic Zone. BCDA is continually working to differentiate its properties, and will work within its mandate to push for additional incentives for locators to move into NCC.

The ability of the JVC to obtain the incentives from PEZA as Ecozone Utilities Enterprise will depend on compliance with PEZA requirements. The Eligible PSPs are expected to undertake their own independent evaluation of the applicable incentives regime.

**10. Is NCC an economic zone?**

Yes, NCC is within the Clark Special Economic Zone.

**11. Can a waiver of sovereign immunity of BCDA be included in the JVA?**

BCDA charter expressly provides for BCDA's right to sue and be sued.

**12. Can the period to submit the audited report under Section 15.3 (d) of the JVA be changed from ninety (90) days after the beginning of every**

***Fiscal Year to one hundred five (105) days after the beginning of every Fiscal Year to coincide with the deadline for filing the audited financial statements with the Bureau of Internal Revenue and the Securities and Exchange Commission?***

No. BCDA should have an opportunity to review and examine the audited report prior to the filing of the audited financial statements with the relevant government agency.

***13. Can BCDA be considered in breach under the JVA if it claims under the Performance Security but is subsequently found (through the dispute resolution process in Article 24 of the JVA) to be not entitled to such claim?***

No.

***14. Can the period for a prolonged Event of Force Majeure under Section 20.2 of the JVA be extended from one hundred eighty (180) days to two hundred seventy (270) days?***

No, two hundred seventy (270) days is too long given the nature of the services of the JV.

***15. Will the form of the legal opinion under Section 2.3(a)(iii) of the JVA be provided?***

Yes, it will be provided in the revised draft JVA.

***16. Can the BCDA audit the JV Partner's books and records?***

Section 27.2(b) of JVA will be deleted to remove this right of BCDA.

***17. What is the scope of the Interim Water Agreement?***

The Provisionally-Eligible PSPs / Eligible PSPs will be provided with the scope of the Interim Water Agreement through a separate bid bulletin.

***18. Does BCDA have full ownership or right to develop the 2,000- hectare land for the NCC?***

Yes, the entire 2000 hectares is within the metes and bounds of Clark Special Economic Zone, the ownership and utilization of which was transferred to BCDA pursuant to Proclamation No. 163 dated April 3, 1993.

***19. Please clarify whether there are indigenous peoples in the Service Area or if the Service Area conflicts with an ancestral domain or claims the land of the indigenous peoples.***

No Certificates of Ancestral Domain Title (CADT) or Certificates of Ancestral Land Title (CALT) have been issued within the Service Area.

**20. Notification to the Philippine Competition Commission (“PCC”)**

Notification to the PCC is required to be filed within thirty (30) days from the execution of the definitive agreement, *i.e.* the JVA. BCDA will commence discussions with the PCC prior to the award of tender to expedite the process.