

**TERMS OF REFERENCE FOR THE PLANNING STAGE TRANSACTION LEGAL ADVISER
(MH-DIDA-164175-CS-CQS / CONSULTING FIRM –INTERNATIONAL LEGAL
ADVISER) – DIGITAL RMI PROJECT**

TERMS OF REFERENCE AND SCOPE OF SERVICES

Background

- 1 The Government of the Republic of the Marshall Islands (the Government) is undertaking an investment program supported by the World Bank under the proposed Digital RMI Project to strengthen its ICT sector, including potential investment in telecommunications infrastructure, digital government, new IT platforms and applications, cybersecurity and enhanced resilience, and expansion and improvement of access to outer islands.
 - 1.1 The Government is considering structural reforms of its telecommunications sector to promote private sector led investments in new climate resilient infrastructure and improved services, which may include restructuring of existing assets, loan obligations and essential services currently provided by the Marshall Islands National Telecommunications Authority (NTA) a largely Government owned entity (approximately 80%) with a minority dispersed private sector ownership (approximately 20%).
 - 1.2 Under a previous ICT Technical Assistance Project (P132119) the Government analysed options to strengthen the legal, regulatory and institutional environment to provide a foundation for improved access and affordability of telecommunications services. Work on the key deliverables under the Project was completed in February 2019, which included a recommended option of introducing a private provider of telecommunication services into the Marshall Islands.
 - 1.3 The private provider option proposed that essential telecommunication infrastructure assets should be transferred from NTA into a new special purpose vehicle ("SPV"), owned and operated by any retail providers that entered the market on an open access and cost recovery basis, with the remaining retail focused assets of NTA (largely customer related) being privatised. This option was identified as having the highest likelihood of triggering substantial new private sector-led investment, expanding coverage and supporting the introduction of better services and lower pricing. It would also significantly reduce financial exposure of the Government.
 - 1.4 Under the private provider option, core national telecommunications assets (capacity on the HANTRU-1 cable system and associated facilities, existing fibre, towers, ducts and access) and any new domestic fibre would be moved to the SPV managed by a private sector operator(s) under a Public Private Partnership (PPP) arrangement. A license will also be issued to the private partner setting out quality, coverage, service availability and price obligations for retail services, including specifications for expanded coverage on the outer islands. A period of exclusivity may be contemplated, depending on the level of risk and amount of private investment contributed under the transaction.
 - 1.5 The private provider option provides the RMI with the best opportunity for the most impactful change and the Government has prioritized the use of IDA 19 resources to support the changes necessary in the sector.
 - 1.6 The Government has identified two distinct phases to the structural reforms:
 - (a) *The Planning Stage:* A pre-implementation stage work programme (provisionally covering the period from May 2020 through to November 2020)

which is intended to progress some distinct area of work that will support the Government decision to proceed to implementation, enable the implementation stage to proceed efficiently, and support and prepare the NTA for matters it will need to address in ensuring readiness for the implementation stage.

- (b) *The Implementation Stage*: The work programme that supports and delivers the structural reforms (provisionally covering the period from December 2020 to November 2022), which seeks, negotiates and agrees on the terms with one or more private investors into the RMI's telecommunication sector, restructures NTA's assets and debts; confirms what new investment will be delivered by private investment and what will require public investment; identifies ongoing non-economic services (including remote community services) and how those should be funded and operated; and prepares relevant legal and regulatory reforms to support the Digital RMI Project.

- 2 The Government has recently issued a Planning Stage TORs for a corporate restructuring firm ("Transactional Adviser") to advise it on the commercial, financial and transactional aspects related to the restructuring. The Government is now seeking an international transactional legal firm to support the work of the corporate restructuring firm.

Objectives of this Assignment

- 3 These terms of reference (TOR) relate to the international transactional legal firm being sought to assist the Planning Stage work of the Transactional Adviser by providing the relevant legal advice and legal transactional support (the Consultant).
 - 3.1 The role is to provide legal advice and legal transactional support to the tasks that the Transactional Adviser will undertake and such other relevant telecommunication sector restructuring related work that the Government might require during the course of the Planning Stage. The tasks of the Transactional Adviser are set out in the Transactional Adviser terms of reference which are available on request from DIDA at filipeseheti@gmail.com and by copying georgia.whelan@chapmantripp.com.
 - 3.2 The Consultant is expected to work closely with the Government Governance Adviser, Mr. Frank McLaughlin (who is an experienced transactional and sector reform lawyer), and the Transactional Adviser (who is being procured concurrently with the procurement of the international transactional law firm).

Scope of Services

- 4 The actual tasks involved in the scope of services will be determined on an as-needed basis by the Government Governance Adviser in consultation with the Transactional Adviser. The tasks are likely to include:
 - (a) Legal advice, legal documentation and potentially negotiation support relating to the buyout for the minority shareholders in NTA.
 - (b) Legal advice on the legal structure of the Open Access SPV and potentially draft term sheets for the relevant legal framework documents (for example articles of association, shareholders agreement etc), the legal residual rights the Government should have in order to address public policy objectives/residual risk issues (for example call rights if certain threshold events occur), and advice on the instrument/s that protect those rights (for example rights contained in legislation and/or contractual or "golden share" rights).

- (c) Legal advice and description and sequencing of legal steps to give effect to the sector restructuring including the timing of the minority buyout, establishment of the Open Access SPV, transfer of NTA assets and restructuring of NTA debt, sale of residual NTA assets/business to the private investor, transfer of employees, assignment/novation of core contracts, wind up of NTA, including identifying necessary or desirable legal approvals and legal documentation (e.g. board and/or shareholder resolutions, certificates, indemnities, non-disclosure agreements, assets and share sale agreements), the core terms for such approvals or documentation, and the parties to the approvals or documentation etc.
- (d) Legal advice on any legislative and regulatory frameworks which are necessary to implement the structural reforms in particular the possibility of reforms to Title 40 (Telecommunications), Title 52 (SOE) and Title 36 (Foreign Investment) as well as advice on the appropriate regulatory framework to support the use of digital services including privacy, cybersecurity and cyber safety, and laws that facilitate electronic transacting both private sector and public sector.
- (e) Legal advice on the bid process for one or more private investors including:
 - (i) advising on, and drafting a term sheet for a proposed set of PPP terms that the Government may wish to negotiate with one or more bidders during the Implementation stage;
 - (ii) assisting with the legal aspects (including legal accuracy) of drafting a vendor's due diligence report;
 - (iii) assisting the Transactional Adviser in the preparation of a virtual due diligence room, including advice on confidentiality and access levels, and drafting (for example, in the form of a table) the key warranties and indemnities that potential investors might reasonably seek to secure from the Government and/or NTA, and how the available information in the DD room helps inform those decisions (for example warranty that all material contracts have been disclosed would have listed against it a description of all the material contracts disclosed in DD and any other material contracts known to NTA/Government but for which no documentation has been identified); and
 - (iv) assisting with the legal aspects (including legal accuracy) of drafting an information memorandum for potential bidders.

Elements of the structural reforms such as the process for procuring and contracting a private investor will have to follow the Government and World Bank procurement rules and processes. The Consultant's legal services will also need to be informed by these requirements.

- (f) Legal advice on the post bid monitoring and enforcement regime to ensure that the Government rights and market participants' obligations can be effectively managed and enforced, including the types of arrangements that might work effectively in the context of the Government, and identifying key architecture for such arrangements and key terms (for example if a primarily led contract model, the options for monitoring the contract and the types of individuals or agencies that can undertake this, expert determination options etc);

- 4.2 For further detail on the tasks, please refer to the Transactional Adviser terms of reference, available on request from DIDA (see above paragraph 3.1).
- 4.3 The Consultant is not expected to be an expert on the local laws of the RMI. RMI local law legal advice will be separately procured by the Government, during the course of the Consultant's assignment. The Consultant will be expected to work with the Attorney General's Office and the RMI local law adviser to ensure that the RMI local law adviser gets instructions that appropriately reflect the transactional context and facts, and that the RMI local law adviser's advice is appropriately factored into the above.

Timing and Administrative Arrangements

- 5 The Consultant will be expected to commence work within one week of contract signature.
- 5.1 The Consultant will report to, and receive instructions from, the Governance Adviser and Government as required. The Governance Adviser will work closely with the Transactional Adviser to determine the appropriate instructions.
- 5.2 The Consultant shall immediately advise the Government of any direct or indirect financial interest or other enduring professional relationship which might reasonably be seen to affect the impartiality of his or her advice to the Government under this assignment.
- 5.3 This assignment is expected to require approximately 140 non-consecutive days of work. Included in these days of work are an expected total of 4 one person, one-week visits to the Marshall Islands.
- 5.4 The work will be done on a time basis. The Consultant and the Governance Adviser will agree in writing (for example by exchange of emails), prior to particular work being undertaken:
- (a) the scope of the work to be undertaken by the Consultant and the form of the Consultant's outputs that are to be provided;
 - (b) an estimate of the likely cost to be incurred by the Consultant in respect of that work; and
 - (c) the timing for the delivery or performance of the Consultant's agreed Services.
- 5.5 The end date for this assignment shall be February 2021, unless extended by mutual agreement and subject to satisfactory performance.
- 5.6 Given the current level of global uncertainty regarding travel and safety, the travel commitments and any tasks requiring a domestic presence in the Marshall Islands referenced in these TOR will be treated as flexible. Where needed, the Consultant and Client will agree in good faith the most appropriate arrangement to give effect to the Services outlined in the TOR. For example, an alternative arrangement may include increased use of video-conferencing services.
- 5.7 The successful firm will be eligible for downstream work relating to the Implementation Stage, subject to satisfactory performance, availability of funding and satisfying any relevant criteria.

Profile and Experience

6 The selected Consultant is expected to be a law firm or association of law firms. For shortlisting, the selected Consultant must have:

- (a) Legal transactional experience in sector and corporate restructuring, privatizations, and PPPs, including experience acting either for Governments seeking private investment into newly liberalized sectors or acting for private investment in this context;
- (b) Experience regarding the operation of telecommunication providers and services including advising one or more of telecommunication operators, Government, regulators or other market participants on matters relating to telecommunications services; and
- (c) Experience in the development of telecommunication related regulation and law reform including experience acting for one or more of Government, regulators, market participants or other relevant parties in relation to the development of telecommunication policy and/or drafting, or submitting on the drafts, of regulation/legislation.

6.2 Upon shortlisting, the shortlisted Consultant shall include the following key personnel in the technical proposal. The Consultant's key personnel shall all be legally qualified with relevant qualifications from a recognized institution. One member of the team may demonstrate experience relating to more than one of the positions described below. Evaluation will be based on how the key personnel in aggregate satisfy the requirements.

- (a) **Corporate restructuring/transactions:** At least 15 years' experience related to mergers and acquisitions corporate transactional work including experience with sale bidding processes, due diligence, sale documentation drafting and negotiations; corporate approvals, minority buyouts, assignment/novations of contracts and other matters related to the transactional work contemplated by the TORS.

Experience in relation to one or more of the following is desirable:

- (i) cross-border corporate transactional work;
- (ii) transactions in small island developing states.

- (b) **Privatisation reforms:** Relevant experience on acting for Government and/or governmental agencies or private investors in relation to the introduction of private investment including experience related to privatisations, the drafting and negotiation of PPAs and appropriate risk allocation models.

Experience in relation to one or more of the following is desirable:

- (i) PPP experience in the telecommunications sector;
- (ii) advising on, negotiating or drafting performance standards (e.g. service standards, price path, maintenance and future capex etc.);
- (iii) advising on, negotiation or drafting effective monitoring and enforcement models of the performance standards requirements; and

(iv) privatisation reforms in small island developing states;

- (c) **Telecommunications related regulation and reform:** at least 10 years relevant experience advising one or more of telecommunication operators, Government, regulators or other market participants on matters relating to telecommunications services and regulation of such services.

Experience in relation to one or more of the following is desirable:

- (i) Advising on, negotiation or drafting of telecommunications performance service standards.
- (ii) The development of telecommunication policy and/or drafting, or submitting on the drafts, of telecommunication related regulation/legislation;
- (iii) Experience advising on regulatory frameworks relating to one or more of privacy, cybersecurity, harmful digital communications, and electronic transacting frameworks.

6.3 The ability for one member of the team to provide advice on United States law is also desirable.

6.4 One of the key personnel shall be designated the Team Leader and will be responsible for coordinating and ensuring the delivery of this assignment.