
LOAN NUMBER 2472/2473(SF)-COO

PROJECT AGREEMENT
(Avatiu Port Development Project)

between

ASIAN DEVELOPMENT BANK

and

THE COOK ISLANDS PORTS AUTHORITY

DATED 5 MAY 2009

PAL:COO 40287

PROJECT AGREEMENT

PROJECT AGREEMENT dated 5 May 2009 between ASIAN DEVELOPMENT BANK (hereinafter called ADB) and THE COOK ISLANDS PORTS AUTHORITY (hereinafter called CIPA).

WHEREAS

(A) by a Loan Agreement of even date herewith between Her Majesty the Queen in Right of the Government of the Cook Islands (hereinafter called the Borrower) and ADB (hereinafter called the Ordinary Operations Loan Agreement), ADB has agreed to make to the Borrower a loan (hereinafter called the Ordinary Operations Loan) of eight million six hundred and thirty thousand dollars (\$8,630,000) on the terms and conditions set forth in the Ordinary Operations Loan Agreement;

(B) by a Loan Agreement of an even date herewith between the Borrower and ADB (hereinafter called the Special Operations Loan Agreement, and together with the Ordinary Operations Loan Agreement, the Loan Agreements), ADB has agreed to make to the Borrower a loan (hereinafter called the Special Operations Loan, and together with the Ordinary Operations Loan, the Loans) in various currencies equivalent to four million five hundred and twenty four thousand Special Drawing Rights (SDR 4,524,000) on the terms and conditions set forth in the Special Operations Loan Agreement;

(C) ADB has agreed to make the Loans only on the condition that the proceeds of the Loan be made available to CIPA and that CIPA agrees to undertake certain obligations towards ADB as hereinafter in this Project Agreement set forth; and

(D) CIPA, in consideration of ADB entering into the Loan Agreements with the Borrower, has agreed to undertake the obligations hereinafter set forth;

NOW THEREFORE the parties hereto agree as follows:

ARTICLE I

Definitions

Section 1.01. Wherever used in this Project Agreement, unless the context otherwise requires, the several terms defined in the Loan Agreements and in the Loan Regulations (as defined in each of the Loan Agreements) have the respective meanings therein set forth.

ARTICLE II

Particular Covenants

Section 2.01. (a) CIPA shall carry out the Project with due diligence and efficiency, and in conformity with sound administrative, financial, engineering, environmental and port operational practices.

(b) In the carrying out of the Project and operation of the Project facilities, CIPA shall perform all obligations set forth in each of the Loan Agreements to the extent that they are applicable to CIPA and all obligations set forth in the Schedule to this Project Agreement.

Section 2.02. CIPA shall make available, promptly as needed, the funds, facilities, services, equipment, land and other resources which are required, in addition to the proceeds of the Loans, for the carrying out of the Project.

Section 2.03. (a) In the carrying out of the Project, CIPA shall employ competent and qualified consultants and contractors, acceptable to ADB, to an extent and upon terms and conditions satisfactory to ADB.

(b) Except as ADB may otherwise agree, all Works and consulting services to be financed out of the proceeds of the Loans shall be procured in accordance with the provisions of Schedule 4 to the Special Operations Loan Agreement. ADB may refuse to finance a contract where Works or consulting services have not been procured under procedures substantially in accordance with those agreed between the Borrower and ADB or where the terms and conditions of the contract are not satisfactory to ADB.

Section 2.04. CIPA shall carry out the Project in accordance with plans, design standards, specifications, work schedules and construction methods acceptable to ADB. CIPA shall furnish, or cause to be furnished, to ADB, promptly after their preparation, such plans, design standards, specifications and work schedules, and any material modifications subsequently made therein, in such detail as ADB shall reasonably request.

Section 2.05. CIPA shall take out and maintain with responsible insurers, or make other arrangements satisfactory to ADB, for insurance of Project facilities to such extent and against such risks and in such amounts as shall be consistent with sound practice.

Section 2.06. CIPA shall maintain, or cause to be maintained, records and accounts adequate to identify the Project facilities, Works and consulting services and other items of expenditure financed out of the proceeds of the Loans, to disclose the use thereof in the Project, to record the progress of the Project (including the cost thereof) and to reflect, in accordance with consistently maintained sound accounting principles, its operations and financial condition.

Section 2.07. (a) ADB and CIPA shall cooperate fully to ensure that the purposes of the Loans will be accomplished.

(b) CIPA shall promptly inform ADB of any condition which interferes with, or threatens to interfere with, the progress of the Project, the performance of its obligations under this Project Agreement or the Subsidiary Loan Agreement, or the accomplishment of the purposes of the Loans.

(c) ADB and CIPA shall from time to time, at the request of either party, exchange views through their representatives with regard to any matters relating to the Project, CIPA and the Loans.

Section 2.08. (a) CIPA shall furnish to ADB all such reports and information as ADB shall reasonably request concerning (i) the Loans and the expenditure of the proceeds thereof; (ii) the Works and consulting services and other items of expenditure financed out of such proceeds; (iii) the Project; (iv) the administration, operations and financial condition of CIPA; and (v) any other matters relating to the purposes of the Loans.

(b) Without limiting the generality of the foregoing, CIPA shall furnish to ADB quarterly reports on the execution of the Project and on the operation and management of the Project facilities. Such reports shall be submitted in such form and in such detail and within such a period as ADB shall reasonably request, and shall indicate, among other things, progress made and problems encountered during the quarter under review, steps taken or proposed to be taken to remedy these problems, and proposed program of activities and expected progress during the following quarter.

(c) Promptly after physical completion of the Project, but in any event not later than three (3) months thereafter or such later date as ADB may agree for this purpose, CIPA shall prepare and furnish to ADB a report, in such form and in such detail as ADB shall reasonably request, on the execution and initial operation of the Project, including its cost, the performance by CIPA of its obligations under this Project Agreement and the accomplishment of the purposes of the Loans.

Section 2.09. (a) CIPA shall (i) maintain separate accounts for the Project and for its overall operations; (ii) have such accounts and related financial statements (balance sheet, statement of income and expenses, and related statements) audited annually, in accordance with appropriate auditing standards consistently applied, by independent auditors whose qualifications, experience and terms of reference are acceptable to ADB; and (iii) furnish to ADB, promptly after their preparation but in any event not later than 6 months after the close of the fiscal year to which they relate, certified copies of such audited accounts and financial statements and the report of the auditors relating thereto (including the auditors' opinion on the use of the proceeds of the Loans and compliance with the financial covenants of the Loan Agreements as well as on the use of the procedures for imprest account and statement of expenditures, where applicable), all in the English language. CIPA shall furnish to ADB such further information concerning such accounts and financial statements and the audit thereof as ADB shall from time to time reasonably request.

(b) CIPA shall enable ADB, upon ADB's request, to discuss CIPA's financial statements and its financial affairs from time to time with the auditors appointed by CIPA pursuant to Section 2.09(a) hereabove, and shall authorize and require any representative of such auditors to participate in any such discussions requested by ADB, provided that any such discussion shall be conducted only in the presence of an authorized officer of CIPA unless CIPA shall otherwise agree.

Section 2.10. CIPA shall enable ADB's representatives to inspect the Project, Project facilities and Works financed out of the proceeds of the Loans, all other sites, properties and equipment of CIPA and any relevant records and documents.

Section 2.11. (a) CIPA shall, promptly as required, take all action within its powers to maintain its corporate existence, to carry on its operations, and to acquire, maintain and renew all rights, properties, powers, privileges and franchises which are necessary in the carrying out of the Project or in the conduct of its business.

(b) CIPA shall at all times conduct its business in accordance with sound administrative, financial, environmental and port operational practices, and under the supervision of competent and experienced management and personnel.

(c) CIPA shall at all times operate and maintain its plants, equipment and other property, and from time to time, promptly as needed, make all necessary repairs and renewals thereof, all in accordance with sound administrative, financial, engineering, environmental, port management, and maintenance and operational practices.

Section 2.12. Except as ADB may otherwise agree, CIPA shall not sell, lease or otherwise dispose of any of its assets which shall be required for the efficient carrying on of its operations or the disposal of which may prejudice its ability to perform satisfactorily any of its obligations under this Project Agreement.

Section 2.13. Except as ADB may otherwise agree, CIPA shall apply the proceeds of the Loans to the financing of expenditures on the Project in accordance with the provisions of the Loan Agreements and this Project Agreement, and shall ensure that all goods, Works and consulting services financed out of such proceeds are used exclusively in the carrying out of the Project.

Section 2.14. Except as ADB may otherwise agree, CIPA shall duly perform all its obligations under the Subsidiary Loan Agreement, and shall not take, or concur in, any action which would have the effect of assigning, amending, abrogating or waiving any rights or obligations of the parties under the Subsidiary Loan Agreement.

ARTICLE III

Effective Date; Termination

Section 3.01. This Project Agreement shall come into force and effect on the date on which both of the Loan Agreements shall come into force and effect. ADB shall promptly notify CIPA of such date.

Section 3.02. All the provisions of this Project Agreement shall continue in full force and effect notwithstanding any cancellation or suspension under either or both of the Loan Agreements.

ARTICLE IV**Miscellaneous**

Section 4.01. Any notice or request required or permitted to be given or made under this Project Agreement and any agreement between the parties contemplated by this Project Agreement shall be in writing. Such notice or request shall be deemed to have been duly given or made when it shall be delivered by hand or by mail, telegram, cable, telex, facsimile or radiogram to the party to which it is required or permitted to be given or made at its address hereinafter specified, or at such other address as such party shall have designated by notice to the party giving such notice or making such request. The addresses so specified are:

For ADB

Asian Development Bank
P.O. Box 789
0980 Manila, Philippines

Facsimile Numbers:

(632) 636-2444
(679) 331-8074

For CIPA

Nooroa Tou
PO Box 84,
Rarotonga, Cook Islands

Facsimile Number:

(682) 21191

Section 4.02. (a) Any action required or permitted to be taken, and any documents required or permitted to be executed, under this Project Agreement by or on behalf of CIPA may be taken or executed by its CEO or by such other person or persons as he shall so designate in writing notified to ADB.

(b) CIPA shall furnish to ADB sufficient evidence of the authority of each person who will act under paragraph (a) of this Section, together with the authenticated specimen signature of each such person.

Section 4.03. No delay in exercising, or omission to exercise, any right, power or remedy accruing to either party under this Project Agreement upon any default shall impair any such right, power or remedy or be construed to be a waiver thereof or an acquiescence in such default; nor shall the action of such party in respect of any default,

or any acquiescence in any default, affect or impair any right, power or remedy of such party in respect of any other or subsequent default.

IN WITNESS WHEREOF the parties hereto, acting through their representatives thereunto duly authorized, have caused this Project Agreement to be signed in their respective names and to be delivered at the principal office of ADB, as of the day and year first above written.

ASIAN DEVELOPMENT BANK

By _____
HARUHIKO KURODA
President

THE COOK ISLANDS PORTS AUTHORITY

By _____
TEREPAI MAOATE
Authorized Representative

SCHEDULE

Execution of Project and Operation of Project Facilities; Financial Matters

Infrastructure Asset Management

1. CIPA shall ensure that by December 2012, CIPA satisfactorily implements its asset management plans, including but not limited to, providing resources, exclusively for the purpose of asset maintenance, that are adequate for sustaining the investment for its intended purpose and life, and shall verify the same through annual audits.

Community Service Obligations

2. CIPA shall ensure to identify, by June 2009, all services required to be provided by CIPA for community services and for which CIPA is required to levy no charge or a charge below the cost of providing the service. The commercial cost of providing the services shall be met by the Borrower.

Project Management

3. CIPA shall ensure that it is adequately staffed and resourced, including but not limited to the appointment of professionally qualified CFO and PAME. CIPA shall further ensure that the detailed engineering design and construction supervision be undertaken by appropriately experienced personnel, approved by the ADB and having extensive international experience in similar works.

Construction Quality

4. CIPA shall ensure that (i) ADB's no objection to contractors' mobilization for Works construction shall have been obtained; (ii) the Project is built in accordance with the technical design specifications; and (iii) the construction supervision, quality control, and contract management shall have been implemented in accordance with internationally accepted standards.

Financial Performance

5. CIPA shall ensure and take all necessary action to achieve and maintain an operating profit, net of community services obligations cost, of not less than 2 percent to be earned on average net revalued fixed assets in service.

Land Acquisition and Resettlement

6. CIPA shall ensure that (i) all land acquisition and resettlement activities under the Project shall have been implemented in accordance with the applicable laws and regulations of the Borrower, *ADB's Involuntary Resettlement Policy (1995)* and the Project RP; (ii) evidence of compliance with the RP shall have been submitted to ADB for review and approval before any resettlement activities are initiated; and (iii) where applicable, resettlement compensation is paid to the effected people as soon as it can be determined.

Environmental Management, Monitoring and Reporting

7. CIPA shall ensure that (i) the Project facilities shall have been designed, constructed, operated, and maintained in accordance with all applicable laws and regulations of the Borrower, ADB's *Environment Policy* (2002) and the Project IEE; (ii) any adverse environmental impacts arising from the Project shall have been minimized by implementing the mitigation measures prescribed in the EMP; (iii) EMP prepared for the Project shall have been updated during and incorporated in the detailed engineering design; (iv) the environmental mitigation measures specified in the EMP shall have been incorporated into the bidding documents, and Works contract specifications; (v) bidding documents shall have been issued only after NES approval of an environmental assessment report and issuance of Project consent; (vi) in the case of any material changes in the EMP, the PEA report shall have been submitted to ADB for review and clearance prior to issuance of bidding documents; and (vii) proper mitigation action shall have been taken regarding any unanticipated negative environmental impacts and ADB shall have been informed about any such unanticipated negative environmental impacts and mitigation action taken therefor.

8. CIPA shall further ensure that (i) the Works' contractors are monitored closely to ensure compliance with all environmental impact mitigation requirements in the EMP; and (b) a report on a quarterly basis, on the mitigation monitoring and progress is prepared.

Labor Standards

9. CIPA shall ensure that (i) the provisions shall have been stipulated in all Works contracts requiring Project contractors to incorporate minimum workplace occupational safety norms, including the core labor standards as identified by the fundamental International Labor Organization conventions; (ii) the Project contractors, employed under the Works contracts, comply with all applicable labor laws; (iii) the Project contractors shall refrain from employing child labor in any Works related activity; (iv) the Project contractors provide appropriate training, and information materials, for workers on HIV/AIDS prevention by engaging an NGO with established capacity to provide such training; (v) the Project contractors and their workers observe local protocols concerning acceptable behavior toward the local population; (vi) the Project contractors shall pay equal wages to men and women for work of equal value; and (vii) specific clauses, concerning above specified labor standards, shall have been included in bidding documents, and compliance shall be strictly monitored during project implementation.

Governance and Anticorruption

10. CIPA shall ensure that (i) the Project shall have been carried out in accordance with all applicable anti-corruption laws and regulations of the Borrower and ADB's *Anticorruption Policy* (1998, as amended to date); and (ii) a Project website shall have been developed within two months of the Effective Date, to maintain and disclose information about various matters concerning the Project, including the audited Project financial accounts, Project progress reports, and procurement activities.

Accounting, Auditing, and Reporting

11. CIPA shall ensure to make arrangements that are satisfactory to ADB for reporting progress on project implementation. CIPA shall further ensure to submit to ADB quarterly progress reports concerning preconstruction activities and construction of all Works, including physical and financial progress; status of environmental management, institutional development; asset management; financial administration and forward budgeting; institutional capacity building; public communications; and other activities critical to project implementation.

12. Without prejudice to the generality of Section 2.09 (a) of this Agreement, CIPA shall ensure that (i) separate records and accounts are maintained for the Project identifying the Works and services financed from the Loan, expenditures incurred for the Project, and use of counterpart funds; (ii) the Project accounts shall be established and maintained in accordance with internationally accepted accounting standards; (iii) the Project accounts and annual financial statements shall be subject to annual external audit by auditors acceptable to ADB; (iv) the annual audit reports shall include an auditor's opinion on the use of the Loan proceeds and compliance with the financial covenants included in the Loan and Project agreements; (v) A separate opinion shall be provided on the use of the imprest account and SOE procedures; and (vi) the annual audited financial statements, audited project accounts, audit reports, and management letters and other related statements shall be provided to ADB in English, no later than 6 months after the end of each fiscal year for the entire implementation period.

Project Monitoring and Evaluation

13. CIPA shall agree with ADB, within 6 months of Effective Date, a system for monitoring and evaluating the performance of the Project in relation to its expected impact and outcomes as set out in Schedule 1 to the Special Operations Loan Agreement. CIPA shall monitor and evaluate the Project's progress annually throughout construction, and shall prepare and submit to ADB, annual reports within 3 months of the end of each calendar year.

Project Review

14. Semi-annual and midterm reviews of the Project shall be undertaken by ADB, the Borrower and CIPA to consider (i) compliance with the loan covenants; (ii) physical achievements against milestones; (iii) loan disbursements and financial progress; and (iv) Project implementation issues requiring resolution or action. The midterm review shall be undertaken within 15 months of the Loan Effective Date.