
GRANT NUMBER 0256-TON(SF)

GRANT AGREEMENT
(Special Operations)

(Tonga-Fiji Submarine Cable Project)

between

KINGDOM OF TONGA

and

ASIAN DEVELOPMENT BANK

DATED 9 September 2011

TON 44172

**GRANT AGREEMENT
(Special Operations)**

GRANT AGREEMENT dated 9 September 2011 between KINGDOM OF TONGA ("Recipient") and ASIAN DEVELOPMENT BANK ("ADB").

WHEREAS

(A) the Recipient has applied to ADB for a grant for the purposes of the Project described in Schedule 1 to this Grant Agreement;

(B) the Recipient has also applied for a grant from the International Development Association and a grant from the Pacific Regional Infrastructure Facility to finance certain expenditures under the Project jointly with ADB and certain capacity development activities relevant to the Project on a parallel basis;

(C) the Project will be carried out by the Recipient's Ministry of Finance and National Planning and Tonga Cable Limited, and for this purpose the Recipient will make available to Tonga Cable Limited the proceeds of the grant provided for herein, upon terms and conditions satisfactory to ADB; and

(D) ADB has agreed to make a grant to the Recipient from ADB's Special Funds resources upon the terms and conditions set forth herein and in the Project Agreement (as defined below);

NOW THEREFORE the parties agree as follows:

ARTICLE I

Grant Regulations; Definitions

Section 1.01. All the provisions of the Special Operations Grant Regulations of ADB, dated 7 February 2005 ("Grant Regulations"), are hereby made applicable to this Grant Agreement with the same force and effect as if they were fully set forth herein, subject, however, to the following modifications:

(a) Section 2.01 is deleted and the following is substituted therefor:

"Project Agreement" means the Project Agreement of even date herewith between ADB and TCL.

(b) The term "Project Executing Agency" appearing in Section 6.01(a), 8.01(c), 8.01(e), 8.01(i), 9.01(b) and 9.02(b) of the Grant Regulations shall be substituted by the term "TCL".

Section 1.02. Wherever used in this Grant Agreement, the several terms defined in the Grant Regulations have the respective meanings therein set forth unless

modified herein or the context otherwise requires. Additional terms used in this Grant Agreement have the following meanings:

(a) “Environmental Management Plan” or “EMP” means the environmental management plan for the Project, including any update thereto, incorporated in the IEE;

(b) “Environmental Safeguards” means the principles and requirements set forth in Chapter V, Appendix 1, and Appendix 4 (as applicable) of the SPS;

(c) “Fiji Landing Party Agreement” means the landing party agreement between TCL and FINTEL for the provision of space, facilities and services at the Suva cable station in the Republic of Fiji as well as assurances regarding interconnection and backhaul services for the operation of the Project facilities;

(d) “FINTEL” means Fiji International Telecommunications Limited, a company established and existing under the laws of the Republic of Fiji, or any successor thereto;

(e) “Goods” means equipment and materials to be financed out of the proceeds of the Grant, including related services such as transportation, insurance, installation, commissioning, training, and initial maintenance;

(f) “Initial Environmental Examination” or “IEE” means the initial environmental examination for the Project, including any update thereto, prepared and submitted by TCL and cleared by ADB;

(g) “Loan Disbursement Handbook” means ADB’s Loan Disbursement Handbook (2007, as amended from time to time);

(h) “PAM” means the project administration manual for the Project dated 17 May 2011 and agreed between the Recipient, TCL and ADB, as updated from time to time in accordance with the respective administrative procedures of the Recipient, TCL and ADB;

(i) “PRIF Grant” means the grant from the Pacific Regional Infrastructure Facility to the Recipient, administered by World Bank, in the amount of five hundred thousand Dollars (\$500,000) to finance capacity development activities relevant to the Project on a parallel basis;

(j) “PRIF Grant Agreement” means the agreement pursuant to which the PRIF Grant is made;

(k) “Procurement Guidelines” means ADB’s Procurement Guidelines (2010, as amended from time to time);

(l) “Procurement Plan” means the procurement plan for the Project dated 17 May 2011 and agreed between the Recipient, TCL and ADB, as updated from time to time in accordance with the Procurement Guidelines and other arrangements agreed with ADB;

(m) “Project Executing Agency” for the purposes of, and within the meaning of, the Grant Regulations means the Recipient’s Ministry of Finance and National

Planning or any successor thereto acceptable to ADB, which is responsible for the carrying out of the Project;

(n) "Project facilities" means the facilities to be established under the Project;

(o) "Safeguards Monitoring Report" means each report prepared and submitted by the Recipient to ADB that describes progress with, implementation of and compliance with the EMP, including any corrective and preventative actions;

(p) "Safeguard Policy Statement" or "SPS" means ADB's Safeguard Policy Statement (2009);

(q) "Share Purchase Agreement" has the meaning given thereto in Section 3.01 of this Grant Agreement;

(r) "TCC" means Tonga Communications Corporation, a company established and existing under the laws of the Recipient, or any successor thereto;

(s) "TCL" means Tonga Cable Limited, a company established and existing under the laws of the Recipient, or any successor thereto acceptable to ADB;

(t) "WB Grant" means the grant from World Bank to the Recipient in the amount of seventeen million two hundred thousand Dollars (\$17,200,000) to finance expenditures under the Project jointly with ADB and capacity development activities relevant to the Project on a parallel basis;

(u) "WB Grant Agreement" means the agreement pursuant to which the WB Grant is made;

(v) "Works" means construction or civil works to be financed out of the proceeds of the Grant, including related services such as drilling or mapping, and project related services that are provided as part of a single responsibility or turnkey contract; and

(w) "World Bank" means the International Development Association of the World Bank group.

ARTICLE II

The Grant

Section 2.01. ADB agrees to make available to the Recipient from ADB's Special Funds resources an amount of nine million seven hundred thousand Dollars (\$9,700,000).

ARTICLE III

Use of Proceeds of the Grant

Section 3.01. (a) The Recipient shall make the proceeds of the Grant, together with other funds required for the Project, available to TCL under a share purchase agreement upon terms and conditions satisfactory to ADB ("Share Purchase Agreement").

(b) The Recipient shall cause TCL to apply the proceeds of the Grant to the financing of expenditures under the Project in accordance with the provisions of this Grant Agreement and the Project Agreement.

Section 3.02. The proceeds of the Grant shall be allocated and withdrawn in accordance with the provisions of Schedule 2 to this Grant Agreement, as such Schedule may be amended from time to time by agreement between the Recipient and ADB.

Section 3.03. Except as ADB may otherwise agree, the Recipient shall procure, or cause to be procured, the items of expenditure to be financed out of the proceeds of the Grant in accordance with the provisions of Schedule 3 to this Grant Agreement.

Section 3.04. Withdrawals from the Grant Account in respect of Goods and Works shall be made only on account of expenditures relating to Goods and Works which meet such eligibility requirements as shall have been specified by ADB from time to time.

Section 3.05. The Grant Closing Date for the purposes of Section 8.02 of the Grant Regulations shall be 31 December 2016 or such other date as may from time to time be agreed between the Recipient and ADB.

ARTICLE IV

Particular Covenants

Section 4.01. In the carrying out of the Project and operation of the Project facilities, the Recipient shall perform, or cause to be performed, all obligations set forth in Schedule 4 to this Grant Agreement.

Section 4.02. The Recipient shall enable ADB's representatives to inspect the Project, the Goods and Works, and any relevant records and documents.

Section 4.03. The Recipient shall take all actions which shall be necessary on its part to enable TCL to perform its obligations under the Project Agreement, and shall not take or permit any action which would interfere with the performance of such obligations.

Section 4.04. (a) The Recipient shall exercise its rights under the Share Purchase Agreement in such a manner as to protect the interests of the Recipient and ADB and to accomplish the purposes of the Grant.

(b) No rights or obligations under the Share Purchase Agreement shall be assigned, amended, or waived without the prior concurrence of ADB.

ARTICLE V

Suspension

Section 5.01. The following are specified as additional events for suspension of the right of the Recipient to make withdrawals from the Grant Account for the purposes of Section 8.01(k) of the Grant Regulations:

(a) the PRIF Grant or the WB Grant shall have become liable for suspension or cancellation prior to the Grant Closing Date;

(b) the Recipient, TCC or TCL shall have failed to perform any of their respective obligations under the Share Purchase Agreement;

(c) FINTEL or TCL shall have failed to perform any of their respective obligations under the Fiji Landing Party Agreement; and

(d) TCL's broadband network operator license or any provision thereof shall have been repealed, suspended or amended in any manner which, in the reasonable opinion of ADB, may adversely affect the carrying out of the Project or the operation of the Project facilities.

ARTICLE VI

Effectiveness

Section 6.01. The following are specified as additional conditions to the effectiveness of this Grant Agreement for the purposes of Section 9.01(e) of the Grant Regulations:

(a) the PRIF Grant Agreement, the WB Grant Agreement and the Share Purchase Agreement shall have been duly executed and delivered, and all conditions precedent to their effectiveness (other than a condition requiring the effectiveness of this Grant Agreement) shall have been fulfilled or arrangements satisfactory to ADB shall have been made for the fulfillment thereof within a period of time satisfactory to ADB;

(b) TCL shall have entered into the Fiji Landing Party Agreement on terms and conditions satisfactory to ADB;

(c) the Recipient shall have issued an individual license to TCL for wholesale broadband network services, upon terms and conditions satisfactory to ADB;

(d) TCL shall have obtained the land and rights-of-way required for construction of the landing station in Nuku'alofa, Tonga, and installation of the submarine cable system, on terms and conditions satisfactory to ADB; and

(e) TCL shall have certified in writing that all licenses and permits required for the Project in the territory of the Recipient and in the Republic of Fiji have been obtained, or arrangements satisfactory to ADB shall have been made to obtain such licenses and permits within a period of time satisfactory to ADB.

Section 6.02. The following are specified as additional matters, for the purposes of Section 9.02(c) of the Grant Regulations, to be included in the opinion or opinions to be furnished to ADB:

(a) on behalf of the Recipient, TCC and TCL, that the Share Purchase Agreement has been duly authorized or ratified by, and executed and delivered on behalf of the Recipient, TCC and TCL, and is legally binding upon the Recipient, TCC and TCL in accordance with its terms; and

(b) on behalf of FINTEL and TCL, that the Fiji Landing Party Agreement has been duly authorized or ratified by, and executed and delivered on behalf of FINTEL and TCL, and is legally binding upon FINTEL and TCL in accordance with its terms.

Section 6.03. A date 90 days after the date of this Grant Agreement is specified for the effectiveness of the Grant Agreement for the purposes of Section 9.04 of the Grant Regulations.

ARTICLE VII

Miscellaneous

Section 7.01. The Minister of Finance and National Planning of the Recipient is designated as representative of the Recipient for the purposes of Section 11.02 of the Grant Regulations.

Section 7.02. The following addresses are specified for the purposes of Section 11.01 of the Grant Regulations:

For the Recipient

Ministry of Finance and National Planning
Vuna Road
Nuku'alofa
Kingdom of Tonga

Facsimile Number:

(676) 24040.

For ADB

Asian Development Bank
6 ADB Avenue
Mandaluyong City
1550 Metro Manila
Philippines

Facsimile Numbers:

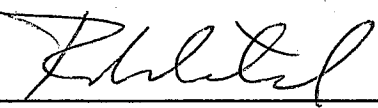
(632) 636-2444
(632) 636-2446.

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

KINGDOM OF TONGA

By 
LORD TU'IVAKANO
Prime Minister

ASIAN DEVELOPMENT BANK

By 
ROBERT WIHTOL
Director General
Pacific Asia Regional Department

SCHEDULE 1**Description of the Project**

1. The objective of the Project is to create broadband internet access for the population of Tonga at an affordable price.
2. The Project comprises (i) the establishment and operation of a submarine cable system linking the Recipient to the Southern Cross Cable Network by means of an approximately 827 kilometer repeatered submarine cable connecting TCL's landing station in the territory of the Recipient (Nuku'alofa) with FINTEL's landing station in the Republic of Fiji (Suva); (ii) construction of the landing station at Sopo, Nuku'alofa; and (iii) project management and implementation support.
3. The Project is expected to be completed by 30 June 2016.

SCHEDULE 2**Allocation and Withdrawal of Grant Proceeds**General

1. The table attached to this Schedule ("Table") sets forth the item of expenditure to be financed out of the proceeds of the Grant.

Percentages of ADB Financing

2. Except as ADB may otherwise agree, the item of expenditure shall be financed out of the proceeds of the Grant on the basis of the percentage set forth in the Table.

Disbursement Procedures

3. Except as ADB may otherwise agree, the Grant proceeds shall be disbursed in accordance with the Loan Disbursement Handbook.

TABLE

ALLOCATION AND WITHDRAWAL OF GRANT PROCEEDS (Tonga-Fiji Submarine Cable Project)			
CATEGORY			ADB FINANCING
Number	Item	Total Amount Allocated for ADB Financing \$	Percentage and Basis for Withdrawal from the Grant Account
1	Equipment	9,700,000	37 percent of total expenditure claimed *

* Exclusive of taxes and duties imposed within the territory of the Recipient.

SCHEDULE 3

Procurement of Goods and Works

General

1. The procurement of Goods and Works shall be subject to and governed by the Procurement Guidelines.
2. All terms used in this Schedule and not otherwise defined in this Grant Agreement have the meanings provided in the Procurement Guidelines.

Procurement of Goods and Works

3. Except as ADB may otherwise agree, Goods and Works shall only be procured on the basis of limited international bidding procedures, subject to, among other things, the detailed arrangements and threshold values set forth in the Procurement Plan. The Recipient may only modify the methods of procurement or threshold values with the prior agreement of ADB, and modifications must be set out in updates to the Procurement Plan.

Condition for Award of Contract

4. TCL shall not award any contract for Works or Goods which involves environmental impacts until TCL has incorporated the relevant provisions from the EMP into the contract.

Industrial or Intellectual Property Rights

5. (a) The Recipient and TCL shall ensure that the Goods and Works procured (including without limitation all computer hardware, software and systems, whether separately procured or incorporated within other goods and services procured) do not violate or infringe any industrial property or intellectual property right or claim of any third party.

(b) The Recipient and TCL shall ensure that all contracts for the procurement of Goods and Works contain appropriate representations, warranties and, if appropriate, indemnities from the contractor or supplier with respect to the matters referred to in subparagraph (a) of this paragraph.

ADB's Review of Procurement Decisions

6. Contracts procured under limited international bidding procedures shall be subject to prior review by ADB, unless otherwise agreed between the Recipient and ADB and set forth in the Procurement Plan.

SCHEDULE 4

Execution of Project and Operation of Project Facilities; Financial Matters

Implementation Arrangements

1. The Recipient and TCL shall ensure that the Project is implemented in accordance with the detailed arrangements set forth in the PAM. Any subsequent change to the PAM shall become effective only after approval of such change by the Recipient, TCL and ADB. In the event of any discrepancy between the PAM and this Grant Agreement, the provisions of this Grant Agreement shall prevail.
2. The Recipient and TCL shall ensure that TCL employs sufficient staff to manage Project implementation for the duration of the Project, with adequate and relevant expertise in the field of project management, financial management, engineering, procurement, and environmental and social safeguards implementation. The Recipient and TCL shall equip staff assigned to the Project with the necessary office space, facilities, equipment, support staff and management information systems for the entire duration of the Project. Until implementation of the corporate governance reforms set out in paragraph 13 of this Schedule 4, the Recipient and TCL shall undertake best efforts to ensure that the same persons will continue to be assigned to the Project for the entire duration of the Project.

Environment

3. The Recipient and TCL shall ensure that the preparation, design, construction, implementation, operation and decommissioning of the Project comply with (a) all applicable laws and regulations of the Recipient relating to environment, health and safety; (b) the Environmental Safeguards; and (c) all measures and requirements set forth in the IEE, the EMP, and any corrective or preventative actions set forth in a Safeguards Monitoring Report.

Resettlement

4. The Recipient and TCL shall ensure that the Project does not result in any involuntary resettlement within the meaning of the Safeguard Policy Statement. In the unforeseen event that the Project does lead to involuntary resettlement, the Recipient and TCL shall take all steps required to ensure that the Project complies with (a) all applicable laws and regulations of the Recipient relating to land acquisition and involuntary resettlement; (b) the resettlement framework for the Project, including any update thereto, prepared and submitted by TCL and cleared by ADB; and (c) the Safeguard Policy Statement.

Indigenous Peoples

5. The Recipient and TCL shall ensure that the Project does not impact indigenous peoples within the meaning of the Safeguard Policy Statement. In the unforeseen event that the Project does impact indigenous peoples, the Recipient and TCL shall take all steps required to ensure that the Project complies with applicable laws and regulations of the Recipient and with the Safeguard Policy Statement.

Safeguards Monitoring and Reporting

6. The Recipient shall do the following or cause TCL to do the following:
- (a) submit quarterly Safeguards Monitoring Reports to ADB and disclose relevant information from such reports to affected persons promptly upon submission;
 - (b) if any unanticipated environmental and/or social risks and impacts arise during construction, implementation or operation of the Project that were not considered in the IEE or the EMP, promptly inform ADB of the occurrence of such risks or impacts, with detailed description of the event and proposed corrective action plan; and
 - (c) report any actual or potential breach of compliance with the measures and requirements set forth in the EMP promptly after becoming aware of the breach.

Counterpart Support

7. The Recipient shall ensure that TCL makes available all counterpart funds required for timely and effective implementation of the Project, including any funds required to make land available for the Project, to mitigate unforeseen environmental and social impacts, and to meet additional costs arising from design changes, price escalation in construction and cable installation costs and/or unforeseen circumstances. The Recipient shall ensure that TCL makes the resources thus required available as and when needed.

Operation and Maintenance

8. TCL shall ensure that the Project facilities are maintained in accordance with applicable standards and best international practices, and allocate and make available, on a timely basis, the funds budgeted for repair and maintenance of the Project facilities.

Governance and Corruption

9. The Recipient and TCL shall (i) comply with ADB's Anticorruption Policy (1998, as amended to date) and acknowledges that ADB reserves the right to investigate directly, or through its agents, any alleged corrupt, fraudulent, collusive or coercive practice relating to the Project; and (ii) cooperate with any such investigation and extend all necessary assistance for satisfactory completion of such investigation.

10. The Recipient and TCL shall ensure that anticorruption provisions acceptable to ADB are included in all bidding documents and contracts, including provisions specifying the right of ADB to audit and examine the records and accounts of the Recipient and TCL and all contractors, suppliers, consultants, and other service providers as they relate to the Project.

11. The Recipient and TCL shall announce the Project and business opportunities associated with the Project as set out in the Procurement Plan on the Recipient's official website. The website shall publish the audited Project accounts, Project progress reports and

at least disclose the following information in relation to Goods and Works procured for the Project: (i) the list of participating bidders, (ii) the name of the winning bidder, (iii) the amount of the contracts awarded, and (iv) the Works, Goods and services procured.

Organizational Matters

12. The Recipient shall ensure that TCL has the operational autonomy required to secure, protect and advance its commercial, financial and administrative interests. The Recipient shall also ensure that throughout Project implementation (i) no material organizational changes (either financial, operational, or structural) to, nor material asset transfers to or from TCL, including change in ownership of the Project facilities, are formally approved or implemented without prior approval of ADB; and (ii) any such changes are carried out in a transparent manner and in accordance with applicable laws and regulations.

TCL Corporate Governance Reforms and Human Resources Development

13. No later than the date at which the submarine cable system becomes operational, the Recipient and TCL (i) shall have completed the steps required to convert TCL into a public enterprise that meets the requirements under the Recipient's Public Enterprises Act 2002, as amended; and (ii) shall ensure that the board and senior management of TCL solely comprise members that have been engaged under a competitive and transparent recruitment process. The Recipient and TCL shall inform ADB of any proposed subsequent changes in the ownership or governance framework applicable to TCL and shall provide ADB with an opportunity to comment on any such proposals. The Recipient and TCL shall take ADB's views into consideration before finalizing and implementing any such proposals.

Debt Service Coverage Ratio

14. From commencement of commercial operations onwards, TCL shall not incur any Debt unless a reasonable forecast of the revenues and expenditures shows that the estimated free cash flows for each fiscal year during the term of the Debt to be incurred shall be at least 1.2 times the estimated debt service requirements in such year on all borrowings including the Debt to be incurred and no event has occurred since the date of the forecast which has, or may reasonably be expected in the future to have, a material adverse effect on the financial condition of future operating results. For the purposes of this provision, the term "Debt" means any indebtedness maturing by its terms more than one year after the date on which it is originally incurred.

Cable Protection Measures

15. Within one month after determination of the precise submarine cable route on the basis of a marine survey, the Recipient shall have (i) declared the area within the Recipient's territorial waters through which the submarine cable will pass, a 'special management area' under the Recipient's Fisheries Management Act, where trawl fishing is prohibited; and (ii) the Recipient shall have adopted any other legislation or regulations required to ensure adequate protection of the submarine cable system in the Recipient's territorial waters.

Sector Reforms and Sector Dialogue

16. No later than 30 September 2012, the Recipient shall have completed the legal and regulatory reforms necessary to incorporate into national law (i) the Recipient's specific commitments regarding telecommunications to the World Trade Organization, including as set out in the *Reference Paper to the GATS Agreement on Basic Telecommunications*; and (ii) international best practices in the field of telecommunications regulation, with a view to creating an enabling telecommunications and information and communication technology environment providing, among other things, for (a) open interconnection access on non-discriminatory terms and with transparent and reasonable, cost-oriented rates; (b) appropriate measures to prevent anti-competitive behavior; (c) transparency in license administration and regulatory decision making; (d) independent appeals mechanisms and dispute resolution processes; (e) efficient administration of scarce resources (such as frequencies and numbers) in an objective, timely, transparent and non-discriminatory manner; and (f) adequate provisions regarding consumer protection.

17. No later than 30 June 2013, the Recipient shall have (a) completed the legal and regulatory reforms necessary to create an enabling environment for secure electronic transactions, ensuring on-line security (protection against cyber-crimes), protection of personal data, protection of intellectual property rights in an on-line environment, and country code top level domain (".to") administration and regulation in Tonga; and (b) adopted a road map and policy framework to address any remaining medium and longer term regulatory needs, such as the possible establishment of an independent regulatory institution for the telecommunications sector.

18. No later than 30 June 2013, the Recipient shall have adopted a detailed road map with corresponding budget allocation to deploy ICT-based public service delivery in education, health, public administration and disaster risk reduction within the existing national development strategy.

19. The Recipient shall keep ADB informed of policy discussions with other multilateral and bilateral agencies relating to the development and regulation of broadband connectivity and broadband access service, and shall provide ADB with an opportunity to comment on any resulting policy proposals. The Recipient shall take ADB's views into consideration before finalizing and implementing any such proposals.

Prohibited List of Investments

20. The Recipient and TCL shall ensure that no proceeds of the Grant are used to finance any activity included in the list of prohibited investment activities provided in Appendix 5 of the Safeguard Policy Statement.