



Association for the Improvement  
of American Infrastructure

# Water Toolkit

## Sample Contract Terms

<b>Project</b>	Provide description of the new or to be newly renovated facility and all associated design, construction, financing, operations, and maintenance related to that facility.
<b>Service Agreement Parties</b>	The sponsor agency and the private contractor.
<b>Term</b>	Defined length of the agreement with all possible renewal options.
<b>Design and Construction Work</b>	<p>Work to be done by the Contractor, including: (1) apply for, obtain and maintain governmental approvals in accordance with the service contract; (2) comply with all reporting obligations; (3) prepare and excavate the project site; (4) remove and dispose of any demolition or construction debris and any unused excavated soil; (5) design and construct the facility; (6) conduct commissioning and startup operations; and (7) conduct all tests.</p> <p>The Contractor should have full responsibility for quality assurance and quality control plan and implementation for the design and construction work, and exclusive responsibility for all construction means, methods, techniques, sequences, and procedures necessary for the correct, prompt, and orderly completion of the design and construction work. Sponsor Agency may seek to proactively review Contractor's adherence to their quality assurance and quality control plan.</p>
<b>Design/Construction Price (DBOM or Owner Financing)</b>	The price the project's lender or bond holders will pay the Contractor for the design and construction work. The sponsor agency has no obligation to pay the Contractor any fees until the project is deemed operational.
<b>Unit Cost of Waster Provided (DBFOM)</b>	The price the project public owner will pay the Contractor per unit of water supplied.
<b>Contractor Design Requirements</b>	The elements of the design phase that the Contractor will have the sole responsibility and liability. The sponsor agency will have the right to review and comment on all design documents prepared by the Contractor in order to confirm compliance and consistency with any Service Agreement specified design requirements.
<b>Project Inspection and Audit</b>	The sponsor agency and all governmental bodies having jurisdiction, may with reasonable notice conduct on-site observations and inspections, and civil structural, mechanical, electrical, chemical, or other tests deemed necessary to ascertain whether work complies with the agreement and applicable law.



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# Water Toolkit

## Sample Contract Terms

### Permitting and Governmental Approvals

The Contractor will obtain and maintain all governmental approvals required for the construction and operation of the facility other than those to be obtained by sponsor agency itself. The sponsor agency should provide reasonable assistance to the Contractor in obtaining and maintaining such approvals throughout the term of the agreement. The Contractor will generally assume the risk of obtaining and maintaining all such governmental approvals.

### Pilot Testing

The Contractor will be responsible for performing all pilot testing if required by any governmental body or otherwise to assure the efficacy of the treatment process and shall bear the risk with respect thereto.

### Compliance with Applicable Law

The Contractor shall comply with all applicable laws in designing, constructing, commissioning, starting up, testing, and operating the project.

### Manufacturers' Warranties

The Contractor will obtain from manufacturers such warranties and guarantees as are normally provided or as may be specified in the agreement with respect to all structures, improvements, fixtures, machinery, equipment and materials to be incorporated into the project.

### Project Acceptance

The Contractor shall obtain all required governmental approvals, achieve mechanical completion, conduct and document required commissioning actions, perform the acceptance test and achieve the acceptance conditions within a specified number of days following the agreement date for the project to be accepted by the sponsor agency (the "Acceptance Date"). After the acceptance Date, the facility is deemed operational.

### Delay Liquidated Damages

In the event that acceptance of the project by the sponsor agency occurs after the scheduled Acceptance Date, the Contractor shall pay the sponsor agency daily delay liquidated damages for each day of unexcused delay, typically capped at a stated percentage of the fixed design/construction price.

### Early Completion Bonus

(Optional; generally depended on transactional savings available) In the event that acceptance occurs prior to the scheduled acceptance date, the sponsor agency shall pay to the Contractor an incentive payment for each day of early completion, up to a specified maximum amount.

### Operation and Management

Upon acceptance of the project, the Contractor shall operate and manage the project as defined in the agreement.



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### O&M Manuals and Record Drawings

The Contractor will develop draft operations and maintenance manuals for the project prior to completion. The Contractor shall revise the manuals for any modifications made during commissioning and acceptance testing, which shall be approved by sponsor agency prior to final completion. Manuals shall conform to specified criteria for hard copy and electronic files. The Contractor will deliver an up to date redlined construction plan set for all project facilities as a condition to acceptance testing. The Contractor will complete final record As-Built drawings for all project facilities as a condition of final completion.

### Staffing and Personnel

The Contractor will staff the project with qualified personnel who meet all applicable licensing and certification requirements of the State and any other Service Agreement staffing provisions.

### Safety and Security

The Contractor will be responsible to maintain safety at a level consistent with all Federal, State and local safety and health rules and regulations.

The Contractor will be responsible for the security and protection of the project and the project site consistent with industry standards.

### Water or Wastewater Ownership

The Contractor will be the owner of the project facilities. Unless otherwise explicitly provided for in the Service Agreement, the Contractor will not treat water or wastewater other than that water wastewater indicated within the agreement and will not use the facility for any purpose other than the purposes of the agreement.

### Performance Guarantees

The Service Agreement may establish key service performance guarantees. Typically, some key areas of performance guarantees are treatment (Product Water Quality or Meeting Discharge Permit Standards), water quantity delivered (Product Water Delivery Guarantee), production or treatment efficiency, and limits to any hydraulic transients in the water conveyance system. In addition, the Contractor may guarantee maximum electrical usage and electrical demand during facility operations.

### Product Water Guarantee

The Contractor will operate the facility in compliance with the requirements of all current regulatory standards and any Service Agreement specific enhanced water quality requirements. The Contractor will pay liquidated damages for any unexcused failure to comply with water treatment standards.

### Product Water Delivery or Wastewater Treatment Guarantee

The Facility is expected to be a meet the service conditions defined in the Service Agreement and, therefore, there may be limited or no downtime allowances for maintenance activities. If the Contractor fails to meet the water delivery or treatment performance guarantee, the Contractor shall pay liquidated damages to the sponsor agency as outlined in the Service Agreement.



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of American Infrastructure

# Water Toolkit

## Sample Contract Terms

### Production Efficiency Guarantee

The Contractor will operate the facility to achieve a specified production efficiency over the course of each contract year. The Contractor will pay the sponsor agency liquidated damages for any unexcused failure to comply with the production efficiency guaranty.

### Hydraulic Transients

(Only applicable for water production facilities that pump into the sponsor agency's transmission system)

The Contractor will operate the project to prevent any sudden, significant pressure spikes in the sponsor agency's water distribution system.

### Contractor Disposal of Treatment Wastewater

The Contractor will be responsible for disposing of all wastewaters resulting from the treatment with appropriate treatment systems provided and operated by the Contractor and disposal shall follow all applicable regulatory requirements.

### Environmental Requirements

In performing the operation services the Contractor shall comply with all environmental requirements imposed by applicable law and the agreement. The Contractor shall pay all fines and penalties arising from any Contractor's failure to comply with environmental requirements.

### Contractor Disposal of Residuals

The Contractor will be responsible for the disposal of all semi-solid or solid materials resulting from the treatment or produced by the project during the term of the agreement.

### Operating Protocol

The Contractor shall initially provide and annually update, subject to the sponsor agency's approval, an operating protocol setting forth all practices, procedures and protocols, which are necessary or useful in coordinating the activities of the parties. The Contractor shall be responsible to operate the project as a functional component of the sponsor agency's water supply and distribution system or wastewater treatment system.

### Water or Wastewater Testing

The Contractor will conduct all tests on related wastewaters and raw and product water in accordance with the Service Agreement standards and at State-certified laboratories consistent with all applicable regulatory requirements.

### Metering

The Contractor will maintain in good working order, and repair and replace when necessary, devices capable of: (i) metering the daily total volume of water or wastewater; (ii) metering the daily total volume of water provided to the sponsor agency; (iii) metering or weighing the daily total amount of facility by-products for disposal; and (iv) any other metering or weighing requirement imposed by applicable law or the Service Agreement.



Association for the Improvement  
of American Infrastructure

# Water Toolkit

## Sample Contract Terms

### Ordinary Maintenance, Repair and Replacements

The Contractor shall: (i) perform all normal and routine and ordinary maintenance of the machinery, equipment structures, improvements and all other property constituting the facility; (ii) keep the facility in good working order, condition and repair, in a neat and orderly condition; and (iii) maintain the aesthetic quality of the facility as originally constructed.

### Major Maintenance, Repair and Replacements

The Contractor shall be responsible to perform all major maintenance, repair and replacement of the machinery, equipment, structures, improvements and all other property constituting the project during the term of the agreement.

### Capital Maintenance Fund

There shall be a reserve created and maintained by the Contractor, adequate to support the Contractor's cost of making all major equipment renewals and replacements to the project, in accordance with the major equipment repair and replacement plan and the exit test transfer conditions established in the Service Agreement, with funds added to the reserve fund each month pursuant to the amount included in the operating charge for the major equipment renewal and replacement reserve fee. The major equipment repair and replacement plan should contain a detailed annual listing and schedule of maintenance, repair and replacement activities anticipated to be undertaken during the term of the agreement. No other additional compensation for major equipment renewals and replacements will be made available by the sponsor agency to the Contractor.

### Required Condition of Facility Structures and Facility Equipment Upon Return to the Sponsor agency:

The facility structures shall be returned to the sponsor agency in good condition, working order and repair, subject to ordinary wear and tear. If a project asset reaches the end of its useful life, or becomes obsolete during the term of the agreement, the Contractor shall be responsible for its renewal or replacement consistent with good industry practice. The facility equipment (including all manufactured equipment, property or assets constituting part of the facility) shall be returned to the sponsor agency in a condition and state of repair so that, in the aggregate, the weighted average useful life at the end of the term is equal to or greater than a specified number of years in compliance with the exit test procedures and/or transfer condition requirements contained in the agreement.

### Computerized Maintenance Management System

The Contractor will maintain, upgrade, repair and replace, as appropriate throughout the term, a computerized maintenance management system (the "CMMS") that is capable of providing: (i) a record of repair and replacement of the project on a detailed, item-by-item basis; (ii) scheduling, carrying out, monitoring and controlling predictive, preventative and corrective maintenance programs; (iii) monitoring routine operations within the project; (iv) issuing work orders and purchase orders; (v) maintaining a spare parts inventory; (vi) issuing exception, equipment status and repair priority reports, producing equipment history reports; and producing equipment repair cost reports. The contractor shall be responsible to convey the data contained in the CMMS in a useable format to the sponsor agency at the end of the term.

### Loss, Damage or Destruction to the Facility

The Contractor will use care and diligence, and take all appropriate precautions, to protect the facility from loss, damage or destruction. In the event of loss, damage or destruction to the facility, the sponsor agency will provide all funds necessary to pay the costs of repairing, replacing and restoring the facility, except costs resulting from Contractor breach or negligence and not covered by insurance. All insurance proceeds and recoveries from third parties resulting from damage to or the loss or destruction of the facility will be for the benefit of the sponsor agency.

### Capital Modifications

A capital modification is any material change to the structures and equipment comprising the project. The sponsor agency will have the right, in its sole discretion, to approve, reject or modify all capital modifications.

### Calculation of Service Fee

The service fee paid for either the commodity delivered or based upon availability will typically be comprised of several components, which equitably compensate the Contractor for debt repayment and the operating services. These components may include: (i) a capital charge (for debt and equity); (ii) fixed O&M charge; (iii) variable O&M; and (iv) an electricity charge.

### Operating Charges

A fixed component (covering labor, chemicals and other operating, maintenance, repair, replacement and management costs, and allowances for overhead, risk, contingency and profit), linked to an inflation index. A variable component (including electricity savings, excess electricity demand and incentive payments elements).

### Reimbursable Costs Charge

These items include:

- Any real property - related charges or taxes required to be paid
- Any other reimbursable or “pass-through” elements.

### Billing and Payment of Service Fee

The service fee typically is paid in monthly installments, and any estimate amounts shall be reconciled through an annual settlement statement.

### Security for Performance

The Security provisions of a Service Agreement should be carefully weighed by the Sponsor Agency and its advisors to be suitable for their project. Frequently, a letter of credit is providing as a component of the security provide by the Contractor. The Contractor will provide security for the performance of its obligations through an irrevocable direct pay Letter of Credit in the amount of [\$x,xxx,xxx] to remain in effect until [XX] days after the termination date of the Service agreement. The stated amount of the Letter of Credit and the Sponsor agency’s estimate of damages for purposes of its drawing rights under the Letter of Credit shall in no way limit the amount of damages to which the Sponsor agency may be entitled for any material breach or Contractor event of default or a material breach or event of default by the Contract.

### Contractor Default

Each of the following will constitute an “Event of Default” by the Contractor upon which the sponsor agency may terminate the agreement:

- Failure to achieve acceptance by the applicable date set forth in the contract.
- Failure to achieve final completion by the applicable date set forth in the contract.
- Failure to obtain and maintain any required security Instrument; and
- (If applicable) The failure of the Contractor to provide credit enhancement about the guarantor’s credit standing.

Each of the following, after notice and an opportunity to cure, will constitute an “Event of Default” upon which the sponsor agency may terminate the contract:

- False or inaccurate representation or warranty of the Contractor or guarantor.
- Failure or refusal to pay any amount required to be paid to the sponsor agency within the number of days allowed in the contract following the due date.
- Failure or refusal to perform any material obligation under the agreement (unless excused by an uncontrollable circumstance).
- Failure to take immediate appropriate action in the event of a public health or safety emergency
- Insolvency of the Contractor or guarantor; and
- The failure of the guarantor to perform any obligation under the guaranty.

### Sponsor Agency Default

Each of the following, after notice and an opportunity to cure, will constitute an “Event of Default” by the sponsor agency upon which the Contractor may terminate the contract:

- Failure or refusal to pay an amount required to be paid to the Contractor within several days set within the contract following the due date.
- Failure to perform any other material obligation under the agreement (unless excused by an Uncontrollable Circumstance).
- The filing by the sponsor agency of a petition seeking relief under the Bankruptcy Code.

### Non-Binding Mediation

Either party may request non-binding mediation of any dispute arising under the Service Agreement. The non-requesting party may decline the request in its sole discretion.

### Service Fee Offsets

In lieu of requiring a letter of credit, the sponsor agency shall have the right to set off against the service fee any amount determined by the sponsor agency to be due from the Contractor on account of any failure to meet a performance guarantees, comply with a maintenance obligation, or comply with any other material term of the service contract.



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# Water Toolkit

## Sample Contract Terms

### Termination for Convenience

As the Project is owned by the Contractor and financed by commercial parties there may be prohibitions on termination for Convenience. If such a term exists, it will involve repayment of debt and equity and other breakage costs. An example of which follows:

(A) The Sponsor agency shall have the option to purchase the Project at any time following the date that is [XX] years following the Commercial Operation Date.

(B) Project Purchase Price. If the Sponsor agency exercises its Project purchase option under this Section, the Sponsor agency shall pay to the Contractor a Project purchase price equal to the aggregate amount, without duplication, of:

- (1) the aggregate principal amount of bonds and debt outstanding, together with accrued interest thereon and any applicable bond redemption premium, and any other bond and debt breakage, prepayment or other termination costs.
- (2) any operating service provider breakage costs; and
- (3) the net present value calculated using an agreed upon discount rate, of the equity return amount for each of the remaining years from the year in which the Project purchase occurs through final term.

### Termination Upon the Occurrence of an Uncontrollable Circumstance

In the event an uncontrollable circumstance causes a total constructive loss of the facility, or in the event an uncontrollable circumstance causes an extraordinary increase in costs, the sponsor agency may elect to exercise its right to terminate for convenience and will not be required to pay any specified termination fee to the Contractor.

### Limitation of Liability During Development and Construction Periods

The Contractor's aggregate liability for damages resulting from the performance or non-performance of the design and construction work because of a claim or suit initiated by the sponsor agency shall not exceed an amount Service Agreement's development period security amount.

### Limitation of Liability During Operation Periods

The Contractor's aggregate liability for damages resulting from the performance or non-performance of the operating services because of a claim or suit initiated by the sponsor agency shall not exceed an amount as specified in the Service Agreement.

### No Consequential or Punitive Damages

Neither party shall be liable to the other for any consequential, punitive, special, incidental or similar damages under the Service Agreement.



### Forum for Dispute Resolution

All legal proceedings related to the service contract, the project or to any rights between the parties arising therefrom shall be solely and exclusively initiated and maintained in State or Federal courts located in [Insert appropriate City and State].

### Required Insurance

Sponsor Agency needs to carefully evaluate the Project and its overall risks and consult with a risk management advisor to craft an adequate insurance program for the project. Some basis insurance considerations are as follows.

At all times during the term of the Service Agreement, the Contractor shall obtain and maintain required insurance which will include:

- All risk builders' insurance
- Property insurance at the full replacement cost of the project
- Commercial general liability insurance in the minimum amount of [fill in amount]
- Business Continuity Insurance
- Other standard and legally required insurance coverages

### Uncontrollable Circumstances

Neither party to the service agreement will be liable to the other for any loss, damage, delay, default or failure to perform any obligation to the extent it is caused by circumstances beyond the control of the non-performing party due to uncontrollable circumstances. The non-performing party shall diligently attempt to remove such cause and notify the other party of the extent and anticipated duration.

Uncontrollable circumstances include:

- Changes in Law
- Force majeure events
- Differing site conditions (if considered in Service Agreement)
- Other acts, events or circumstances beyond the reasonable control of the affected party

### Indemnification by the Contractor

The Contractor will indemnify, defend and hold harmless the sponsor agency from, and pay the full amount of, any loss-and-expense arising from: (i) any failure by the Contractor to perform its obligations under the service contract; or (ii) the negligence or willful misconduct of the Contractor or any of its employees or subcontractors consistent with the indemnity provisions of the Service Agreement.

### Ownership of the Project

The Contractor will own the project assets and the project site.