

TERMS OF REFERENCE

CONSULTANCY SERVICES FOR A SINGLE ENTITY REGIONAL CONSULTANT GEOHERMAL ENERGY LEGAL AND TRANSACTION ADVISOR FOR THE EASTERN CARIBBEAN

REGIONAL – ORGANISATION OF EASTERN CARIBBEAN STATES COMMISSION GEOBUILD PROGRAMME

1. BACKGROUND

- 1.01 The common energy sector challenge in most of the countries of the Caribbean is their general inadequacy of energy security - rooted in their over reliance on imported petroleum-based fuels for powering their economies. In addition to being a key source of high energy costs in these countries over the years, the dependence on imported oil renders the economies hostage to price volatility and other vagaries of the international oil market. This undermines economic stability and national efforts for long- term planning. It is also a source of balance of payment challenges, and the associated foreign currency demand causes a drain on the countries' foreign exchange reserves. The challenges are more accentuated in the countries of the Organisation of the Eastern Caribbean States (OECS) which have the smallest markets, and highest preponderance of inefficient^{1/} diesel power generation in the Caribbean.
- 1.02 In view of this situation, the countries of the OECS have prioritized the development of their renewable energy (RE) potential as a key strategy for transitioning their economies away from the over- reliance on imported fossil fuel mainly in the form of diesel-fuel and other petroleum products. They are therefore seeking to develop all their RE resource options, including solar, wind, hydropower, and geothermal energy (GE). In this regard, many have taken important steps in recent years, including, *inter alia*, the approval of national energy policies and the setting of ambitious energy efficiency (EE), RE and carbon emission reduction targets as part of its Nationally Determined Contribution (NDC) commitment, under the Paris Climate Change Accord 2015.
- 1.03 For the six countries of the OECS^{2/}, which have volcanic origins, it is considered that GE holds the greatest prospect (of the RE options available) for transforming their energy matrices by directly displacing large proportions of the diesel fuel-based generation. Further, in addition to being renewable, GE as a source of energy for electricity production provides many advantages, by providing firm capacity (being not variable as wind and solar) for 24 hours per day and seven-days per week year-round. As a result, the respective governments have signaled this RE option as a priority and have commenced the development of GE projects^{3/}, beginning with exploration of their GE potential over the past several years. The main aim of the countries in developing their first GE project is to meet the domestic electricity demand. However, given that the GE potential in each country is multiple times that required to meet their domestic demand countries are increasingly considering fully developing their GE potential beyond that required for their domestic market, to allow them possibly to export energy either through sub- marine cables to neighboring countries or in the form of green hydrogen. In recent years, green hydrogen has been increasingly recognized globally as a potentially key energy carrier for the future to decarbonize the energy sector, to become a fuel for energy intensive industries, and transport. If properly developed

^{1/} Many OECS countries utilize high speed diesel generation technology, which characteristically is most inefficient of the diesel options.

^{2/} Viz: Dominica, Grenada, Montserrat, St. Kitts and Nevis, Saint Lucia, and St Vincent and the Grenadines.

^{3/} The GE Development Project consists of the following phases: (a) Surface Exploration and Conceptualisation; (b) Exploration Test- Drilling (slim-hole drilling), and Concession Tender and Award; (c) Appraisal Drilling and Bankable Feasibility, and Final Investment Decision; (d) Production Drilling and Construction; and (e) Operation.

GE projects can be implemented in a stepwise and scalable manner to meet the immediate and longer-term objectives of the countries.

- 1.04 GE as a technology, however, is new to the Region, and the projects are complex, capital intensive and exhibit high and unique technical risks especially in the exploratory stage. In addition, the small scale of the projects in the context of isolated island states poses special challenges for attracting credible private investors. These challenges coupled with the lack of technical experience in the countries, and the need for appropriate risk capital represent barriers to the timely advancement of GE projects. Against this background, the Caribbean Development Bank (CDB) has developed the **GeoSmart Initiative**, which seeks to mobilize appropriate resources (in the form of grants, contingent grant, and concessional financing) to address many of these challenges and risks at various stages of the GE project cycle.
- 1.05 Under its GeoSmart Initiative, CDB in collaboration with the Inter-American Development Bank (IDB) and the European Union Caribbean Investment Facility (EU-CIF) have established the Sustainable energy Facility (SEF) Programme for the Eastern Caribbean, and the Geothermal Risk Mitigation (GRM) Programme, respectively. Through the IDB/SEF Programme most of the resources for GE development have been mobilized - coming through the IDB (from IDB own resources, as well as from the Clean Technology Fund, the Global Environmental Facility, the Green Climate Fund [GCF], and the Government of Italy). The resources seek to provide technical assistance (TA) for: strengthening institutional capacity, the enabling environment, development of various studies, as well as for investment funding for drilling, and plant installation. Through the EU-CIF/GRM grant resources have been mobilized for TA for capacity strengthening, studies, and for investment grants for early-stage drilling.
- 1.06 In general, the approach promoted by CDB and partners (IDB, EU, etc) under the GeoSmart, is a public private partnership (PPP) approach for developing and delivering the Programme. Here, ideally government would take the lead in the early stage works for de-risking the GE resources supported by various bi-lateral partners and grant funding. Once the resource would have been de-risked to a certain level, the government would then go to the market to identify a suitably qualified and experienced private sector partner, which would enter into a PPP arrangement through a special purpose vehicle – joint venture project company to develop the Programme. In this context, the private partner would be required to have the relevant GE project development experience, and financial capacity to provide the required equity. Also, the private partner would be required to undertake the majority risk in the joint venture company reflected in the majority stake. The relevant upfront input by the government and grant contributions from partners and the development bank would be accounted as the Government's equity contribution to the project.
- 1.07 Although all countries have adopted slightly different approaches to the development of their GE project, in general the PPP approach is being pursued. Given that GE development is new to the countries and also given the known capacity constraint (human and institutional) of governments of the Region, it has been recognised that significant capacity support would need to be provided for the governments in order for them to effectively play their roles as partners in the PPP arrangement – ensuring that the projects are developed in a sustainable manner and where risks and costs for the country are minimized. For this reason, under CDB's GeoSmart Initiative through the CDB/IDB SEF and the EU-CIF GRM programmes, a significant portion of resources is targeted for TA support to governments, and various other key stakeholders, directly or through other key regional partners.
- 1.08 The OECS Commission (OECSC) is one such key regional partner, which has been seeking to support the countries in advancing their energy transition to greater use of RE and in particular GE development, based on mandates from its Council of Ministers of Environment Sustainability (COMES) who also typically have responsibility for energy matters. Also, in the context of the implementation of Caribbean Sustainable Energy Roadmap and Strategy (C-SERMS) under the CARICOM Energy Policy, the OECSC has been identified as the *geothermal energy development thematic hub* - which is one of five

thematic hubs^{4/} for promoting various RE options relevant to the Caribbean. The aim of these thematic hubs is to establish strong technical capabilities and experience over time around the RE options: solar, wind, hydropower, bioenergy, and geothermal energy, thereby addressing overtime, the perennial capacity gaps. It is intended that over time these hubs will emerge as centers of excellence based on implementation of best practices in the context of Caribbean SIDS.

1.09 In seeking to fulfill its role as the thematic hub for geothermal development, the OECSC developed a programme called GEOBUILD through which it intends to provide a range of regional level capacity building interventions to support effective implementation of GE projects. *Inter alia*, these include training of various persons in geoscience (and other technical areas) and GE project development, supporting critical studies, providing expert advice to government on environmental and social risks, legal and contractual matters, and other technical areas. Against this background, the OECSC has applied to CDB for TA funding available under GeoSmart, to provide the relevant capacity strengthening, and awareness building interventions in the countries through regional approaches. In this regard, the OECSC is pursuing five regional level consultancies in the areas of:

- (a) Public Information and Awareness.
- (b) Regional GE Capacity Advisory.
- (c) GE Legal and Transactional Advisor.
- (d) GE Environmental and Social Advisor.
- (e) GE Resource and Engineering Advisor.
- (f) Economic Advisor.

1.10 The area of GE legal and transactional advisory is critical one for governments in pursuing PPP approach, as this is relevant to their establishing appropriate frameworks and also having the requisite capacity to develop and negotiate the various contracts and pursue the transactions in a manner, which ensure that risks are properly allocated and minimised. Further, it is deemed critical that even as advisory support is provided to the government ministries and agencies, that these also build their own internal skills to fulfil these roles going forward. This objective of building internal capacities of institution is also integral to the GEOBUILD programme of the OECSC.

1.11 The OECSC is therefore desirous of addressing the needs of the government stakeholders to secure appropriate expert legal and transactional advice on their participation in GE projects as part of the PPP approach, and in assuring that appropriate regulatory framework is in place to support the GE development. In this regard the OECSC intends to engage the services of a suitably qualified firm as a GE Legal and Transaction Advisor – referred to as the Regional GE Legal and Transaction Advisor (LTA) to fulfil aforementioned double objectives of: (a) strengthening technical/legal/transaction advisory capacity of government agencies; and (b) supporting the strengthening of the legal and regulatory framework for the development of GE project.

1.12 As instructed by OECSC, LTA will collaborate and share information with other consultants advising the relevant government agencies and regulatory bodies.

1.13 The LTA must confirm that it has no conflict of interest with any of the GE project developers in Dominica, Grenada, St. Kitts and Nevis, Saint Lucia, and St Vincent and the Grenadines, their respective Project Companies, affiliates, or other entities involved in the Project.

^{4/} Barbados - Solar hub; Jamaica – wind power hub; Suriname/Guyana-hydropower hub; Belize- bio-energy hub; OECSC-geothermal energy hub.

1.14 In general, the LTA will work remotely, however, periodic travel to the targeted countries and OECS headquarters in Saint Lucia, and the project sites may be required by relevant OECS-Consultant's experts/representatives to complete the tasks under this Terms of Reference (TOR).

2. OBJECTIVE OF THE ASSIGNMENT

2.01 The overall objective of the Consultancy is to provide capacity strengthening and general back-stopping support in the form of legal and transactional advisory services, and advisory services for strengthening of the legal and regulatory framework for GE development, to governments pursuing GE development in the Eastern Caribbean.

3. SCOPE OF SERVICES

3.01 The Consultant will provide: (a) legal advisory services review concession agreements, memoranda, and power purchase agreements (where relevant); (b) advisory on strengthening the legal and regulatory frameworks for GE development in the countries – with key regulations and ordinances identified and addressed; and (c) advisory on the GE transaction to ensure that project risks are actively managed and that developments proceed as cost-effectively as possible.

3.02 To this end, the LTA will provide advice and guidance to relevant government ministries and agencies and government owned electric utilities (where deemed feasible) in relation to key agreements and contracts, including but not limited to: concession agreements, geothermal development agreements, memoranda of understanding, shareholders' agreement, power purchase agreements, etc. Where there are existing agreements, the LTA will provide guidance in managing such agreements to minimise risks and optimise opportunities, and where feasible, recommend amendments as deemed feasible. Where these agreements have not yet been established or are up for review, the LTA will provide guidance to the relevant government entities on their participation in a manner which minimises risks and maximises the opportunities, while always reflecting an approach where the private partner undertakes majority of the risks commensurate with their equity stake in the PPP project company.

3.03 The LTA will also review the legal and regulatory framework for each country to identify gaps as related to relevant laws and regulations for supporting the safe and sustainable GE development. Then develop or support the development of the relevant ordinances and rules and make recommendations to attorneys-general offices and other agencies for actions.

3.04 The LTA will also provide guidance to governments to ensure that the relevant risks are identified and are properly/fairly allocated in the context of the PPP approach, the business case is developed in a manner with lowest PPA price and other reward for government appropriately included. Specifically, the consultant will develop a thorough understanding of the business case and the associated financial model, including the relevant assumptions in relation to the inputs and outputs. Also, the LTA will provide an economic analysis which will demonstrate an understanding of market demand.

4. KEY TASKS

4.01 The LTA will:

- (a) Review existing agreements where these are in place:
 - (i) Review the concession agreement, geothermal agreement MOU, and shareholders' agreement established between governments and private project developer for risks, opportunities, and identify any issues that could be inimical to governments

over the long-term, and which may be addressed in the re-drafted aforementioned agreements as part of the negotiation process.

- (ii) Consider any preliminary risk assessment already conducted in seeking to reflect the allocation of risks in the various provisions of the concession or GE agreements. Some risks to be considered include, but not limited to, technical risk, market risk, counterparty risk, completion risk, risk from conflicting roles, operation risk, price, and tariff risk, social/gender risk, legal risks, regulatory risk, environmental risks, force majeure risks.
- (b) Develop or guide the development of relevant new agreements/ revised agreements
- (i) Provide guidance in the development of the concession agreement, geothermal agreement MOU, and shareholders' agreement to be established between governments and private project developer. In the process also identify all relevant risks and opportunities; and identify any issues that could be inimical to governments over the long-term, and which may be addressed in the new or re-drafted aforementioned agreements as part of the negotiation process. In this regard, the LTA should seek to address any issues or obligations in current agreements, which may be inimical to the government's cost-effective, efficient, and sustainable development of its GE resources. Also, the Consultant will, seek to ensure that relevant risks are appropriately addressed and allocated in the context of any re-drafted agreements.
 - (ii) Conduct risk assessments on behalf of government which reflect the allocation of risks in the various provisions of the concession or GE agreements. Some risks to be considered include, but not limited to, technical risk, market risk, counterparty risk, completion risk, risk from conflicting roles, operation risk, price, and tariff risk, social/gender risk, legal risks, regulatory risk, environmental risks, force majeure risks. Some of these analyses will be done in complementary manner between the legal and the GE transaction experts.
 - (iii) Assist the governments in the negotiations of the agreements with the private developer. In addition to in-person-representation, this may involve:
 - (aa) helping to prepare a suitable negotiation team;
 - (bb) planning negotiation strategy and the processes for reaching agreement;
 - (cc) advising on proposed changes to the agreed form of agreements;
 - (dd) providing legal opinion on various aspects/provisions of agreements and implications of same; and
 - (ee) providing legal opinion on regulatory issues.
 - (iv) Take into consideration, the following aspects among others, in developing the relevant agreements:
 - (aa) current laws and regulations, and opportunities and obligations therein;
 - (bb) resource ownership and protection;
 - (cc) exclusivity;
 - (dd) current regulatory framework as well as plans;
 - (ee) the strategy and requirement for procuring exploration and development activities;

- (ff) the capital structure of the exploration and development company (SPV) and the government's participation in the SPV;
- (gg) the responsibilities of and the remuneration of the developer and government; and
- (hh) the treatment of grant and concessional loans funding for exploration and plant development.

(c) Provide Transaction Advice and guidance

- (i) Determine appropriate project structure in the context of PPP with risk appropriately allocated. In determining the appropriate structure of the Project, the Consultant will consider the financing instruments available to governments and respective JVCs, for the various stages of the project.
- (ii) Support government, where necessary in the selection of private developer/partner in the context of the PPP. In this regard, help to establish criteria for selection, as well as support government with relevant due diligence efforts.
- (iii) Review the financial and technical capacity of the developer who will partner with the government as part of the special purpose vehicle that will own and operate the project, to properly manage the geothermal project and operate a geothermal power plant.
- (iv) Conduct transactional reviews of the relevant contracts (including concession agreement, shareholders' agreements, PPA, drilling contracts, engineering procurement and construction contracts) to understand the key risks that impact the business proposal and the financial model. Some of these reviews may be done in complementary manner with other specialist, e.g., drilling engineer/consultant supporting government.
- (v) Where relevant, develop a thorough understanding of the business case and the associated financial model, including the relevant assumptions in relation to the inputs and outputs.
- (vi) Provide an economic analysis, which will demonstrate an understanding of market demand. Where utility is government owned, LTA may be required to analyse and opine on the utility's ability to meet the obligations under proposed or an existing PPA.
- (vii) Develop an appropriate risk matrix for the project based on the information/requirements/obligations reflected in the relevant agreements and draft agreements; and also based on the technical characteristics of the Project. All relevant risks should be identified, ranked, and prioritised for the Government, utility, private developer, etc. This will be guided by the risk allocation established and using best practice approach in a SIDS context, protecting the interests of governments, and optimising the benefits, while seeking to ensure that the approach allows for lowest cost of energy delivered from the GE project.

- (viii) Make recommendations for reallocation of risks, where deemed necessary based on industry best practice or good practice, for a GE project being pursued as a PPP.
- (ix) Conduct an audit of the financial model (where this has already been developed) and provide a comprehensive review and assessment of the same; as well as the GE project business proposal/case. This should identify any gaps in either the business case or the financial model and make assessment of the reasonableness of the outputs (making relevant comparison with standard industry practice). In this regard the consultant will:
 - (aa) identify assumptions that may not be consistent, parameters that must be further investigated, or characteristics of the proposed project that may be unacceptable to the government/utility and ratepayer or for potential financier. The consultant will review:
 - (1) investment costs (capital expenditures – Capex) and schedule;
 - (2) operating assumptions and expenditures (OpEx) schedules;
 - (3) demand and revenue projections, including the PPA terms, rate, term, take or pay clauses, and other accounting assumptions, including but not limited to depreciation methods and schedules, working capital, and taxes; and
 - (4) the main financial assumptions, including but not limited to the discount rate, debt to equity structure, and financing plan (interest rates, amortization schedules, loans, and equity terms).
 - (bb) identify and rank various risks;
 - (cc) where SPV is already established, comment on the ownership structure, the risks and level reward for government, and make relevant recommendations; and
 - (dd) where deemed necessary, conduct a sensitivity analysis on the variables that have the greatest impact on the financial feasibility of the Project to quantify potential risks and identify mechanisms for mitigating those risks.
- (d) Provide review and analysis of the legal and regulatory frameworks in the countries
 - (i) Identify legal and regulatory issues and gaps which affect or could potentially affect the Project.
 - (ii) Providing legal opinion on existing regulatory issues.
 - (iii) Propose any legislative, administrative, or regulatory changes that need to be made.

(e) Other Tasks

(i) Capacity strengthening and awareness building support to:

(aa) provide training and awareness presentation sessions to staff of various government agencies, OECSC; in collaboration with OECSC, capacity needs assessment and training interventions (in form of workshops and webinars) will be developed by LTA to enhance the skills of the staff of various government ministries and agencies.

(bb) prepare and make presentations on GE projects in collaboration with OECSC staff or on behalf of various government ministries and agencies; and

(cc) provide input and support for the development of communication materials.

5. DELIVERABLES and SCHEDULE^{5/}

5.01 The Consultant will provide the following deliverables:

Deliverables:	When:
1. Brief Inception report	One Week after assignment.
2. Review and Analysis Report – covering analysis of the various agreements identified which will include but not limited to concession agreements, shareholders’ agreements, power purchase agreement, EPC, and other relevant information.	Four weeks after the commencement of the assignment.
3. Review and Analysis Report – covering analysis of the various aspects of legislative and regulatory frameworks relevant to GE development, and relevant recommendations – for improvements by development partners.	Eight weeks after the commencement of the assignment.
4. Report on assistance provided in the guidance and development of relevant new relevant agreements/ revised agreements.	As requested/scheduled.
5. Negotiation Briefs – for the negotiating team which will include: (a) the review of the business case; (b) review and audit of the financial model, including relevant sensitivity analyses; (c) risk/reward matrix;	As requested/scheduled.

^{5/} Not consecutive days

Deliverables:	When:
(d) the identification of key assumptions and comments on reasonableness of assumptions, project structure, financing structure, inputs, outputs, and level of returns; (e) recommendations for reallocation of risks; (f) identification of any gaps in the business case; and (g) other relevant analyses, comments, and recommendations linked to the key tasks, which are necessary to allow countries to make determination on bankability of the Project.	
6. Training sessions to OECS Staff (face-to-face, and virtually).	As requested/scheduled.
7. Case study and documentation of specific issues identified by OECS.	As requested/scheduled

6. DURATION

6.01 The assignment will be for a period of thirty (30) months in the context of framework agreement with relevant call down task orders.

7. REPORTING REQUIREMENTS/SUPERVISION

7.01 The Consultant will report to Project Coordinator, Project Management Unit, Sustainable Energy Programme of the OEECS, and designated government representatives; and as instructed by OECS, will liaise with other regional consultants, which are also supporting the government's effort in GE development.

7.02 In executing the various tasks and activities, LTA will work in close liaison with the Ministries responsible for energy, water finance, public infrastructure, environment, agriculture, planning, urban development, transport, justice and legal affairs, and the Office of the Attorney General (OAG) in the countries.

8. QUALIFICATIONS, SKILLS AND EXPERIENCE:

The LTA must be a firm with experience and a strong track record in international project advisory works in the field of GE, with proven experience in legal advisory services review concession agreements, memoranda, and power purchase agreements (where relevant); advisory on strengthening the legal and regulatory frameworks for GE development in the countries – with key regulations and ordinances identified and addressed; and advisory on the GE transaction to ensure that project risks are actively managed and that developments proceed as cost-effectively as possible. Associations may be in the form of Joint Venture or Sub-Consultancy. For Joint Venture a letter of Intent signed by each Firm must be submitted. For Joint Venture the Lead Firm should be identified as well as the authorized representative. The LTA must present a team of experts with extensive experience [at least seven (7) years] in planning, designing, managing legal advisory and transaction services, programmes and projects in geothermal energy. The key experts also need to have at least seven (7) years professional experience in assignments of this nature and corresponding academic training. Practical experience in legal and transaction advisory services in geothermal energy is necessary. Working experience in the Caribbean, Small Island Developing States (SIDS), or developing countries is also an advantage. Specific qualifications and experience should include:

1. At least seven (7) years' experience in geothermal energy legal and transaction advisory for the stages of the GE project cycle including pre-feasibility, exploration, field development, negotiating, contracting, drilling and plant construction stages.
2. At least three successfully completed GE legal and transaction advisory projects within the past ten (10) years with at least one in a developing country context, preferably in a SIDS.
3. Experience in developing a GE legal and transaction advisory project, financed with the participation of a development bank – with requirements for gender equality, social inclusion, stakeholder-engagements, and social safeguard standards.
4. Fluency in English (oral and written).

The LTA should submit evidence of previous performance, detailing at least three similar projects completed in the past ten (10) years, including level of effort and their specific roles in the projects. Curriculum Vitae (CVs) for key experts shall highlight project experience relevant to this consultancy.

The Consulting team should include at least three (3) key experts. Key experts, however, will not be evaluated at the shortlisting stage.

Key Expert 1: Legal Expert

8.01 The Legal Expert must be a qualified attorney at law – with recognised legal academic qualification and practicing certificate. A minimum of ten years' experience in:

- (a) geothermal exploration, and/or exploitation contracts negotiations;
- (b) transaction advice and/or negotiation of power supply contracts/power purchase agreements, and GE concession agreements;

- (c) legal, social, environmental, and financial structuring of complex infrastructure projects including geothermal projects through PPPs; and
- (d) drafting GE concession agreements preferably in developing countries and SIDS context.

Key Expert 2: GE Legislative and Regulatory Expert

8.02 The GE Legislative and Regulatory Expert must be a qualified attorney at law – with recognised legal academic qualification and practicing certificate. A minimum of ten years’ experience in:

- (a) geothermal exploration, and/or exploitation contracts negotiations;
- (b) transaction advice and/or negotiation of power supply contracts/power purchase agreements, and GE concession agreements;
- (c) legal, social, environmental, and financial structuring of complex infrastructure projects including geothermal projects through PPPs;
- (d) drafting GE concession agreements preferably in the context of developing countries and SIDS; and
- (e) legislative review and drafting and regulation development.

Key Expert 3: Transaction Expert

8.03 The Transaction Expert should possess the following qualifications and experience:

- (a) A post-graduate level degree (Masters or Ph.D.) in Finance, Economics, Energy Economics, Business Administration, or related fields.
- (b) Undergraduate degree in engineering or applied science, or certification in any relevant area of GE project development.
- (c) Minimum of 10 years of experience in financial analysis/management/review/modelling, or financial engineering of complex infrastructure projects.
- (d) Experience in the economics of geothermal power generation systems, at least five years of specific experience in PPP structuring and implementation and financial structuring of complex infrastructure projects including through PPPs.
- (e) Experience in the review of projects involving IPP energy contracts, PPAs, energy regulation and laws, including PPP in the Caribbean, energy systems and infrastructure planning would be an asset.
- (f) Highly relevant and proven sector experience may in cases be considered in lieu of a postgraduate degree.
- (g) Fluency in English (oral and written) is a prerequisite for this assignment.

Other Experts

8.04 As deemed necessary to support key experts and suitably qualified and experienced.