

TERMS OF REFERENCE
FOR THE SELECTION OF A FINANCIAL PARTNER/SERVICE PROVIDER
FOR THE
PMDC NICKEL-CHROMITE PROJECT
PARCEL 2A LOCATED IN THE MUNICIPALITIES OF
LIBJO, CAGDIANAO, AND BASILISA, DINAGAT ISLANDS
SURIGAO MINERAL RESERVATION AREA (SMRA)

1. THE CONTRACT AREA

The subject tenement is a nickel-chromite project, otherwise designated as Parcel 2A of Lot II, situated in the Municipalities of Libjo, Cagdianao and Basilisa, Province of Dinagat Island within the **SURIGAO MINERAL RESERVATION AREA (SMRA)**. It contains an area of three thousand six hundred (3,600) hectares.

The **SMRA** [*subdivided into Parcel-1 (Lot III) and Parcels 2A and 2B (Lot II)*]. is managed, administered and operated by PMDC by virtue of the **Memorandum of Agreement (MOA)** executed on April 27, 2005 between the DENR and NRMDC [*now known as Philippine Mining Development Corporation (PMDC)*] for the purpose of exploration, development and utilization of minerals found therein, by PMDC itself or in partnership with interested parties/investors.

Consistent with its mandate under the said **MOA** of April 27, 2005, PMDC desires to undertake **by itself**, the development, exploration and/or mining operations of the said **Parcel 2A Nickel-Chromite Project (the "Project")** located in the Municipalities of Libjo, Cagdianao and Basilisa, Province of Dinagat Island, with an area of three thousand six hundred (3,600) hectares, as per the **Location Map** with **Technical Description** hereto attached as **Annex "A"**.

2. QUALIFICATIONS OF THE PROSPECTIVE FINANCIER/SERVICE PROVIDER (FSP)

- 2.1. The prospective FSP should be a corporation duly organized and existing under the laws of the Philippines for at least two (2) years; at least sixty percent (60%) of the outstanding capital stocks of which, is owned by citizens of the Philippines.

It should be sufficiently capitalized and financially capable to fund in full the financial requirements of the Project. As proof thereof, the prospective FSP shall submit certified true copies of the following:

- (a) Audited Financial Statements (AFS) for the preceding year of current business operations;
- (b) Interim Financial Statement for the current year, if the AFS for the immediately preceding fiscal year is not yet available; and
- (c) Bank Certifications establishing the bank balance accounts as indicated in Audited and/or Interim Financial Statement.

- 2.2. The prospective FSP must have an authorized capital stock of at least **ONE HUNDRED MILLION PESOS (PhP100,000,000.00)**, and a minimum paid-up capital of **TWENTY FIVE MILLION PESOS (PhP25,000,000.00)**.

- 2.3. The prospective FSP shall comply with all the legal, financial and technical requirements/ documents mentioned in the eligibility and qualification requirements checklist in existing laws and regulations.
- 2.4. The prospective FSP must submit proof, acceptable to PMDC, of a credit facility approved/granted by a reputable Philippine banking or financial institution or an existing and available bank deposit intended for the project in an amount not less than **ONE HUNDRED FIFTY MILLION PESOS (PhP150,000,000.00)**
- 2.5. PMDC may require the prospective FSP to submit such additional documents to show its legal, financial and technical capabilities to perform its obligations to PMDC in connection with the Project.

3. RESPONSIBILITIES OF PMDC

- 3.1 PMDC shall undertake by itself in coordination with the service provider / financial partner the exploration, development, and/or mining operations of the said Parcel 2A Nickel Chromite Project ("Project). Unless otherwise provided, PMDC being the operator shall directly manage and implement the Community Relations and Tenements Regulatory Compliance in the implementation of project operation.
- 3.2 PMDC shall within sixty (60) days from the date of signing of the contract, start actual exploration work in accordance with its Exploration Work Program (ExWP), Environmental Work Program (EnWP), timetable, and committed budget. It shall also include a maximum one (1) year development period (i.e. construction of facilities, etc.) in preparation to actual mining operations.
- 3.3. Within the exploration period, PMDC shall decide to pursue mining operation based on the feasibility studies. PMDC shall obtain all documents, i.e., business permits and community's and/or Indigenous Peoples' consent, if needed. PMDC shall facilitate the application for Environmental Compliance Certificate, and the filing of the Declaration of Mine Project Feasibility (DMPF) with the MGB Regional Office No. XIII;
- 3.4. The mining operations of PMDC shall be covered by a mining plan prepared in coordination with the FSP and to be regularly updated for submission to appropriate regulatory or supervising Government Agency, whenever required.
- 3.5. PMDC shall provide MGB Regional Office No. XIII, within fifteen days (15) after the end of each quarter a verified report of the volume and grade of the monthly mineral ore production covering said quarter, as well as all reports or documents that may be required by other government entities.

4. RESPONSIBILITIES OF THE FINANCIER/SERVICE PROVIDER (FSP)

- 4.1. The FSP shall timely provide to PMDC the amount required or necessary to cover and defray in full all the cost and expenses of exploration, development and operation of the Project/Contract Area. The parties herein may enter into future agreements to delineate specific work activities in the various stages of the mining operations.

- 4.2. The FSP shall be responsible for the provision of all the financial and skilled manpower resources, machineries, equipment, tools, apparatus, electric power, materials, supplies, etc., needed and required by PMDC to explore, to complete the mine feasibility studies, develop necessary mining facilities and infrastructures, to mine, extract and commercially utilize the Mining Tenement and the Contract Area
- 4.3. The FSP shall initially make available to PMDC, upon demand, an amount of not less than PhP100,000,000.00, to cover among others, expenses itemized under Section 4.2 including but not limited to the following: Community Development Program (CDP) to start during the exploration stage, Social Development and Management Program (SDMP), Environmental Protection and Enhancement Program (EPEP), Final Mine Rehabilitation and Decommissioning Plan, Safety and Health Program as well as other programs required under the mining law.
- 4.4. PMDC shall submit an Annual Budget Utilization Schedule indicating the corresponding amount and the purpose thereof at least thirty (30) calendar days prior to the utilization date in the implementation of Section 4.3. On or before the stated utilization date, the FSP shall credit or transfer the amount so requested, in free and immediately available funds, to a deposit account to be designated by PMDC.
- 4.5. In the event the PhP100 Million to be initially made available to PMDC as above stipulated, should at any time during the term of this Agreement, fall below the level of P50 Million, the FSP agrees, commits and undertakes to replenish the same by infusing or adding an amount sufficient to maintain the fund available to PMDC of not less than PhP50Million.
- 4.6. Simultaneous with the execution of the covering **Project Financing / Service Provider Agreement** (the "Agreement"), the FSP shall remit to PMDC in free and immediately available funds, an amount of not less than **FORTY MILLION PESOS (PhP40,000,000.00)**, by way of **Commitment Fee**. The Commitment Fee shall be non-refundable or non-deductible from the PMDC share in the gross revenue as provided in this Agreement.
- 4.7. Total and full compliance with all Mining Laws and Regulations pertaining to protection and enhancement of the environment. Immediately during the exploration period, the FSP shall commence the preparation of Environmental Impact Assessment Report for ECC Application.

5. FISCAL REGIME

- 5.1. **General Principle**—The fiscal regime of the Agreement shall be governed by the principle according to which the Government, through the PMDC, expects a reasonable return in economic value for the utilization of non-renewable mineral resources under its national sovereignty and patrimony. On the other hand, the FSP may expect a reasonable return on its investment with special consideration and account to be taken for the high risk of exploration, the intensive capital requirements, the terms and conditions prevailing elsewhere in the industry and any special efficiency to be gained by its expected good performance during the entire duration of the mining/quarrying operations.

- 5.2. **Sharing of the Parties.** PMDC and the FSP shall share in the **gross income** of all minerals produced in the Contract Area, at the ratio of:
- **80%** for the: financial partner/investor; and
 - **20%** for PMDC.

For this purpose, the term “*gross income*” shall mean gross selling price of mineral products, less: excise tax (4%), royalty tax for mineral reservation (5%) and soil depletion tax (1%) imposed by Dinagat Province.

- 5.3. **Pricing of Ores/Minerals Sales**—The FSP shall strive to sell the Principal Ore/Mineral, its byproducts, and Associated Ores/Minerals, if any, at the highest market price prevailing in the locality. The FSP shall also pay the lowest achievable marketing commissions and related fees, and shall negotiate for more advantageous terms and conditions subject to the right to enter into long-term sales or marketing contracts or foreign exchange and commodity hedging contracts, which the parties acknowledge to be acceptable notwithstanding that the future sale price of the minerals/ores and byproducts may from time to time be lower or higher than the previously agreed sale price, or the terms and conditions of sales are less favorable, than that available elsewhere. Competing offers for large scale and long-term contracts shall also be procured. The FSP shall seek to strike a balance between long-term sales or marketing contracts or foreign exchange and commodity hedging contracts comparable to policies followed by independent producers in the international mining industry.

In the determination of the price, the parties shall take into consideration as **reference price** the price of the minerals/ores as posted in the London Metal Exchange Website (<http://www.lme.co.uk>), in the China FerroAlloy Market Website (<http://www.FerroAlloyNet.com>), and/or in the Asian Metal Exchange Website (<http://www.asianmetal.com>), as well as the prevailing price in the locality and/or the data provided by the MGB. For long-term sales or marketing contracts or foreign exchange and commodity hedging contracts, due consideration shall be taken of the trend in the price of the ore/mineral in the international market.

The FSP shall likewise seek a balanced distribution among its buyers. Insofar as sales to the FSP's affiliate/s are concerned, the FSP shall disclose, in writing, its relationship with the buyer/affiliate, and the price offered shall be at arm's length standard.

- 5.4. **Distribution of Shares** - The sales proceeds shall be collected and accounted for by the FSP. After deducting from the gross income, the taxes mentioned in the preceding Section 5.2, the FSP shall cause the distribution of the respective shares of the parties from the gross income at the ratio agreed upon, on the date of such receipt of the sales proceeds. Prior to such distribution, the FSP shall keep the PMDC share separate from its own funds and shall hold the same in trust for PMDC with the obligation to remit or pay the same to PMDC without delay, as agreed upon.
- 5.5. **Tax on Income/Share**—The PMDC and the FSP shall each be responsible for the payment of the corresponding taxes, whether national or local, on their own respective share in the income or revenues under this Agreement. To ensure the accuracy and

correctness in the reporting and recording by the PMDC of the financial aspects of this Agreement, the FSP shall make available and/or provide all such financial and accounting records and documents as may be requested by the PMDC and/or the Commission on Audit (COA), the statutory external auditor of the PMDC.

- 5.6. **Associated Ores/Minerals**—If ores/minerals other than the Principal Ore/Mineral are discovered in commercial quantities in the Contract Area, the value thereof shall be included in computing the share due to the PMDC. Likewise, if, after assay, a significant quantity of Associated Ores/Minerals are found in the Principal Ore/Mineral sold, the value thereof shall also be included in the sale and consequently in computing the share due to the PMDC.
- 5.7. **Interests on Unpaid Commitment Fee, PMDC Share, Etc.**—In case the FSP fails to promptly and fully pay on their due dates the commitment fee, or the share due to PMDC under this Agreement, the FSP hereby agrees and binds itself to pay PMDC a penalty on pro-rata per day basis an interest based on the Philippine Dealing System Treasury Fixing (PDSTF) rate plus ten (10%) percent, computed from date of default until the said amount is fully paid. It is clearly understood and agreed by the FSP that the imposition and collection by PMDC of interest is without prejudice to the exercise by the PMDC of its rights, remedies and prerogatives provided under this Agreement, as well as those provided for under applicable laws, such as, but not limited to, the rescission or cancellation of this Agreement based on such default or breach of contract by the FSP.

6. SELECTION CRITERIA

- 6.1. The bidder who submits the highest bid offer on the Commitment Fee referred to in Section 4.6. shall be selected as the financier/service provider for the Project.
- 6.2. The bidder shall not bid below the amount of Commitment Fee stipulated under Section 4.6.
- 6.3. To break the tie in case of two (2) or more similar bid offers, the prospective partners involved shall submit a new offer higher than the previous bid proposal.

7. BIDDER'S BOND

All bids submitted by eligible parties must be accompanied by a bid security, callable on demand and valid for a period of *one hundred twenty (120)* calendar days reckoned from the date of bid opening. The Bid Security may be in any of the following forms:

Form of Security	Commitment Fee
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1. Cash, cashier's / manager's check, bank draft / guarantee confirmed by a Universal or Commercial Bank	Two percent (2%)
2. Irrevocable letter of credit issued by a Universal or Commercial Bank: <i>Provided, however,</i> That it shall be confirmed or authenticated by a Universal or Commercial Bank, if issued by a foreign bank.	Two percent (2%)
3. Surety bond callable upon demand issued by a surety or insurance company duly certified by the Insurance Commission as authorized to issue such security.	Five percent (5%)

The computation of the bidders bond shall be based on the commitment fee offered by the bidder. The bidders bond shall be forfeited in favor of PMDC if the contractor refuses to enter into contract for the project with PMDC.

8. PERFORMANCE BOND

The Agreement shall at all times comply with all the requirements of the Philippine Laws, Rules and Regulations and consistent with the objectives of both parties. To guarantee the faithful performance by the winning financial partner/investor of its obligations under the Agreement prepared in accordance with the TOR and the other bidding documents, it shall post, prior to the signing of the Agreement, a Performance Security, in any of the following forms:

During the exploration work period, the performance bond shall be based on the budget for the two (2) year Exploration Work Program of approximately Fifteen Million Pesos (15,000,000.00). The performance bond could be in any of the following terms:

Form of Security	Two-Year ExWP
1. Cash, cashier's / manager's check, bank draft / guarantee confirmed by a Universal or Commercial Bank	Ten percent (10%)
2. Irrevocable letter of credit issued by a Universal or Commercial Bank: <i>Provided, however,</i> That it shall be confirmed or authenticated by a Universal or Commercial Bank, if issued by a foreign bank.	Ten percent (10%)
3. Surety bond callable upon demand issued by a surety or insurance company duly certified by the Insurance Commission as authorized to issue such security.	Thirty percent (30%)

9. DURATION OF THE AGREEMENT

The duration of the Agreement shall be **ten (10) years**, unless PMDC and the prospective partner have renegotiated for an earlier cancellation or extension of the term or shall enter into a new agreement, under such terms and conditions mutually acceptable to the parties.

10. NON – ENFORCEABILITY OF THE AGREEMENT

The Agreement shall be deemed to be of no further force and effect: (a) upon being superseded by any kind of agreement, defining the terms and conditions of the relationships of the parties; (b) non-renewal or cancellation of the Agreement; or (c) non-compliance by the winning bidder with any of its obligations provided in the Agreement. In case of non-compliance, the winning bidder shall have a period of thirty (30) calendar days from receipt of a written notice of non-compliance from PMDC, to cure or remedy such non-compliance; otherwise the Agreement shall be deemed *ipso facto* cancelled or terminated.

11. FORCE MAJEURE

- a) "**Force Majeure**" means acts or circumstances beyond the reasonable control of the party to the Agreement, including war, insurrection, civil disturbances, blockade, sabotage, embargo, strike and other labor conflict, riot, epidemic, earthquake, storm, flood, or other adverse weather conditions, explosion, fire, act of God or public enemy, acts or restraint of any other government or governmental or semi-governmental authority and any cause (whether or not hereinbefore described) over which the affected party has no reasonable control and which is of such a nature as to delay, curtail or prevent timely action by the party affected.
- b) Notwithstanding any other provisions of the Agreement, any failure or delay on the part of any party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to *Force Majeure* and the time for a party to enjoy the rights and carry out the obligations hereby affected shall be extended for a period equal to the period thus involved.

12. ARBITRATION

Any dispute or controversy between the parties hereto arising under this Agreement shall be settled by arbitration in accordance with the Rules of Procedures Governing Construction Arbitration promulgated by the Construction Industry Arbitration Commission ("**CIAC**") as provided by the Construction Industry Arbitration Law of the Philippines (Executive Order No. 1008). The Arbitral Tribunal shall be composed of three (3) arbitrators, with each party nominating one (1) arbitrator from CIAC's list of arbitrators and the two (2) arbitrators nominated by the parties will nominate the third member, who shall act as the Chairman, from the common nominees of the parties. No party to this Agreement shall file any case or institute any legal action without first going to Arbitration with the CIAC.

13. OTHER PROVISIONS

- a) The Project Financing/Service Provider Agreement or any interest therein cannot be assigned or transferred, in whole or in part, by the winning bidder, without the prior written approval of PMDC. Any such assignment or transfer made in violation of this provision shall be deemed void and ineffective.

- b) The winning bidder agrees to abide by the terms and conditions of this TOR and commits to enter into a contract embodying the said terms and conditions within thirty (30) days.

IT IS HEREBY CERTIFIED THAT I HAVE READ AND UNDERSTOOD THE ABOVE TERMS AND CONDITIONS:

Signature above printed name
(Authorized Signatory of Bidder)

Date: _____