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)

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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). I**t 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 2-A 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 duly-registered with the Securities and Exchange Commission (SEC) and a corporation in good standing for at least two (2) years in accordance with the laws of the Philippines; 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 last two (2) years of operations, and;

(b) Bank Certifications on bank balance for the latest Audited Financial Statements.

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).**

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, as ***operating fund*** to cover among others, expenses itemized under Section 4.2 including but not limited to the following: drilling expenses, studies and research for regulatory compliance, the related exploration costs necessary/required to come up with a DMPF, the cost of skilled manpower and equipment for site development and actual mining operation, and other expenses related to commercial production such as, but not limited to, 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. In connection to the above-stated operating fund, PMDC shall submit to the **FSP**, from time to time, a **Budget Utilization Schedule which shall** be approved by a Management Committee (ManCom) composed of five (5) members, three (3) from PMDC and two (2) from the FSP to be appointed by the Parties and the corresponding amount and purpose thereof within one (1) month from the effective date of the *Agreement*. On or before the stated budget utilization date, the FSP shall unconditionally provide and make available to PMDC in the manner as it may direct, sufficient funds to cover any budget utilization request, that may be submitted at any time and from time to time.

Any amendment to the aforementioned budgetary utilization schedule shall likewise be subject to the approval by the ManCom. It is hereby further understood that the operating fund or any portion thereof shall remain and continue, for all legal intents and purposes, to form part of the corporate funds of the FSP but nevertheless exclusively earmarked and allocated as herein intended or contemplated.

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 **ONE HUNDRED MILLION PESOS (PhP100,000,000.00),** 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.

5.4. 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.

5.5. **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.

5.6. **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.

5.7. **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.

5.8. **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
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: *Provided, however,* 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 bidder's bond shall be based on the commitment fee offered by the bidder. The bidder's 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	Ten percent (10%)

Commercial Bank	
2. Irrevocable letter of credit issued by a Universal or Commercial Bank: *Provided, however,* 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. DISCLOSURE

Anent to the final cancellation of the Joint Operating Agreement (JOA) between PMDC and Pacific Nickel Philippines, Inc. (PNPI), the Law Firm of See and Herrera sent a demand letter dated 28 May 2021 to PMDC claiming that PMDC has no power and authority, basis either legal and factual to unilaterally cancel the JOA. PMDC in its Reply dated June 17, 2021, clarified that Article 1191 of the Civil Code did not prohibit the parties from entering into an agreement whereby a violation of the terms of the contract would result to its cancellation. The JOA with PNPI contains provisions allowing both parties to unilaterally cancel the agreement if any of the terms stated therein are violated or not fulfilled. In the case of the Dinagat Parcel 2A Project, it is undeniable that the following breaches committed by PNPI are substantial as they defeat the very purpose why the JOA was entered into in the first place. As regards the issue on arbitration, PMDC had already pointed out that there is no dispute or disagreement arising out of or relating to the validity, interpretations, enforceability or performance of the JOA, the reason why the JOA was cancelled is PNPI's blatant refusal to comply with the terms and conditions of the contract. Other than that, there is no existing controversy arising out of this agreement other than the substantial breaches it committed under the JOA for the PNPI's claim to resort to arbitration.

14. 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:*______________________________