

*PACIFIC REGIONAL CONNECTIVITY PROJECT 2: PALAU - FSM CONNECTIVITY  
PROJECT*

*(World Bank Project Number P130592, Asian Development Bank Grant Number  
D004-FM)*

*Terms of Reference for FSM Technical Advisor of Kosrae's  
Interest in the Ownership and Operations of the East  
Micronesia Cable System*

## **1 Background**

In 2014 the World Bank (WB) approved the Palau - FSM<sup>1</sup> Connectivity Project (P130592)<sup>2</sup> providing FSM with IDA17 grant funding in the amount of \$47.5 million. The Project Development Objective is to reduce the cost and increase the availability of Internet Communication Technology (ICT) services needed to support social and economic development in the Recipient's territory. Major elements of the development program include:

- A national ICT and telecommunications policy (September 2012), providing for market opening and the establishment of an independent sector regulator;
- The adoption of new legislation, the Telecommunications Act of 2014, to give effect to the ICT policy;
- Restructuring the incumbent telecommunications service provider, FSM Telecommunications Corporation (FSMTC);
- International connectivity infrastructure investments in FSM States of Chuuk, Kosrae, and Yap;
- Issuance of licenses for new operators and service providers to enter the market.

The project funding for FSM is allocated to three components:

- Component 1: International Connectivity Infrastructure. The construction of a new undersea fiber optic cable systems for FSM to connect Yap State, Chuuk State, and subject to World Bank approval for additional financing for the project, Kosrae State.
- Component 2: Technical Assistance. Technical assistance, including training, for the ongoing operations and maintenance of the infrastructure, reformation and development of FSMTC, and the establishment and operations of the independent sector regulatory office and ownership and operations for the new connectivity investments.

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<sup>1</sup> Federated States of Micronesia

<sup>2</sup> Co-funded with the Asian Development Bank

- Component 3: Project Management Support. Project management and coordination resources and training, financial management, auditing, monitoring and evaluation and other matters relating to managing the project.

## 2 Project Description

### 2.1 Palau – FSM Connectivity Project

#### 2.1.1 Proposed Infrastructure Investments

The international connectivity infrastructure funded by the World Bank under Component 1 of the project is allocated to (i) a new submarine fiber optic cable supplied by NEC that will link Yap to the South East Asia- United States (SEA-US) cable system to Guam (Yap link scheduled for completion in Q4 2017), a (ii) a new submarine fiber optic cable supplied by NEC that will link Chuuk to the existing Pohnpei Spur which interconnects with the Hannon-Armstrong (HANTRU-1) cable to Guam (Chuuk link scheduled for completion in Q4 2017 or Q1 2018), (iii) FSM’s participation in a regional cable with Kiribati and Nauru which would link Kiribati to Nauru to Kosrae State to the Pohnpei Spur interconnecting to HANTRU-1 to Guam (system completion date subject to supplier’s plan of work to be determined through a competitive bid.)

The three new FSM cable systems for Yap, Chuuk, and Kosrae along with the existing Pohnpei Spur connection to HANTRU-1 are pictured in the figure below.



#### 2.1.2 Overview Of Kosrae Participation in Kosrae – Kiribati – Nauru Connectivity Projects

The Financing Agreement for the Palau-FSM Connectivity Project will be restructured in the near future to include funding for Kosrae’s participation in the regional cable system with Kiribati and Nauru. Concurrently, WB will finance the participation of Kiribati through the proposed Kiribati Connectivity Project, and the Asian Development Bank (ADB) will support Nauru’s participation.

The proposed Kosrae-Kiribati-Nauru cable, designated through a Memorandum of Agreement between the three participating countries as the “East Micronesia Cable” (EMC) system, will be approximately 2,100km in length, with landing sites yet to be identified. Each participating EMC country / state will be connected to the HANTRU-1 cable on to Guam, at locations yet to be identified. A possible configuration of the EMC system is pictured in the figure below.



The Governments have established an intergovernmental joint Project Steering Committee (PSC), tasked with overseeing the development of the strategic investment in the EMC system. Kiribati, Nauru and FSM have each designated a government agency to manage project preparation and to represent the country on the PSC. Designated agencies are:

- Kiribati: Ministry of Information, Communication, Transport and Tourism Development (MICTTD);
- Nauru: Ministry of Telecommunications and Media (MTM); and
- FSM: Department of Transportation, Communication, & Infrastructure (DTCI).

The specific responsibilities relating to Kosrae’s interest in the regional cable system and associated infrastructure will be managed by DTCI under the restructured Palau – FSM Connectivity Project. The specific responsibilities relating to Kiribati and Nauru will be managed by their respective implementing agencies. The PSC is hiring a joint technical project manager who will be responsible for the detailed technical aspects of project design and development through contracting for the cable system.

The PSC’s joint project manager will be expected to finalize the proposed configuration of the EMC system with input from the technical advisory Consultant for each country.

Each country’s ownership interest in the cable system shall be managed by a specialized entity to be designated by each government during project preparation.

### *2.1.3 Implementation Arrangements*

DTCI is responsible for monitoring and overall implementation of FSM's participation in the project. DTCI has hired a full-time Project Coordinator who is responsible for overall implementation of the project. The Project Coordinator is primarily responsible for monitoring and implementation of the project on behalf of DTCI and for ensuring that the project is implemented in accordance with the requirements of the Financing Agreement between FSM and World Bank. The Project Coordinator coordinates the activities of the technical advisor consultancies contracted by DTCI to provide support for project implementation. Consultants hired for the World Bank funded ICT projects report to the Project Coordinator who reports directly to DTCI.

For FSM's interest in the ownership and operations of the EMC system, FSM is planning to establish a state owned enterprise, the Open Access Entity (OAE), in accordance with FSM's 2014 Telecommunications Act. The OAE is statutorily mandated to provide open access to FSM's international cable systems for all domestic telecommunications operators in FSM. DTCI as overall implementing agency will be responsible for the implementation of the Yap, Chuuk, and Kosrae cables until the OAE is established. Once established the OAE will be directly responsible for the construction, management, and operations of the FSM's ownership of the cable links for Yap, Chuuk and Kosrae.

FSM's national telecommunications operator FSM Telecom (FSMTC) owns the Pohnpei Spur and an Indefeasible Right of Use (IRU) on the HANTRU-1 system for transit to Guam. FSM will be responsible for ensuring that the EMC parties are granted access and sufficient capacity on the Pohnpei Spur and HANTRU-1.

## **3 Scope of Services**

FSM is seeking to hire a legal and technical Consultant who will support Kosrae's participation in the EMC system and to provide advice on the arrangements governing access to HANTRU 1 for the fiber optic cable systems for Chuuk and the EMC. The objective of the Services for this assignment is to assist FSM in developing and implementing its proposed new infrastructure investment in a manner consistent with the project conditions and requirements.

In this context, the Consultant will be expected to provide transactional advice to FSM on (i) ownership and operations arrangements for Kosrae's share of the newly constructed portions of the EMC system, (ii) ownership and operations arrangements for the parties transit and capacity usage on the existing Pohnpei Spur and HANTRU-1 to Guam, and (iii) ensuring that the route configuration and supply of the EMC system provide the most efficient and beneficial outcome for Kosrae and FSM.

### *3.1.1 Detailed Task Description*

The scope of work for the Services comprises the following components:

## **1. Ownership and Operations Arrangements for New Infrastructure (EMC System)**

Advise FSM on underlying financial, legal and transactional issues in order to ensure that the proposed investment in broadband connectivity for Kosrae is structured efficiently and in a manner that promotes the long term interests of users of communications services in FSM. This will entail providing transactional advice and assistance associated with FSM Government's participation in the newly constructed portions of the EMC system including ownership and operations arrangements with Kiribati and Nauru.

## **2. Ownership and Operations Arrangements for Existing Infrastructure (Pohnpei Spur/HANTRU-1)**

Advise FSM on underlying financial, legal and transactional issues in order to ensure that the new fiber optic investments for Chuuk and FSM's participation in the EMC system includes the provisioning of capacity and usage on the Pohnpei Spur and HANTRU-1 for Chuuk and the EMC parties in a manner that promotes the long term interests of users of communications services in FSM. This will entail providing transactional advice and assistance associated with provisioning access and capacity to the EMC parties for transit to Guam on the Pohnpei Spur and HANTRU-1 (in coordination with FSMTC, the OAE, FSM national government, and third-parties as required).

## **3. Independent Review of Tender and Negotiations for Provisioning the EMC System**

Provide independent financial, legal and transactional advice to FSM during preparation of the tender documents and negotiation of the supply contract(s) for the newly constructed portions of the EMC system. The tender for the EMC will be lead by the EMC PSC's joint project manager. The Consultant will be responsible for ensuring that the tender and supply of the EMC system is conducted in a manner that promotes the long term interests of users of communication services in FSM.

### *3.1.2 Deliverables and Timing*

Prior to the commencement of the substantive components of the Services, the Consultant shall provide a more fully developed draft work plan, within the parameters of the general work plan set out in **Section 4**, describing activities, personnel, expected timings, milestones, and dependencies. The draft work plan should be revised as necessary taking into account relevant developments and feedback from the Client and provide a final work plan for approval by the Client.

In preparing the draft work plan, the Consultant shall take into account the following deliverables:

- a) Advise and make recommendations to FSM regarding the optimal ownership structure for Kosrae's participation in the EMC system (e.g. as a tenancy in common with Kiribati and Nauru, or as membership in a regional special

- purpose vehicle for the EMC, or as an IRU holder for Kosrae's share in the EMC);
- b) Completion of negotiation and drafting of Construction & Maintenance Agreement and associated documents necessary for EMC system ownership and operations;
  - c) Completion of arrangements between FSM and Kiribati and Nauru for interconnection by the EMC parties on the Pohnpei Spur and HANTRU-1 cable to Guam, which may require a separate set of legal agreements amongst the EMC parties e.g. sub-IRUs on FSM's IRU for capacity on HANTRU-1 to Guam;
  - d) Obtain necessary consents and agreements between FSM and the Pohnpei Spur/HANTRU-1 owners for the EMC parties transit to Guam via the Pohnpei Spur and HANTRU-1.
  - e) Obtain all necessary consents and agreements necessary to secure access and connectivity for Chuuk on HANTRU 1 in a manner consistent with the project conditions and the long term interests of end users.

The Consultant must promptly (1) report to the Client on any information requirements and (2) identify any matters that may affect the completion of each phase of the task in accordance with the approved work plan. Any variations to the work plan must be agreed by the Client and be appropriately documented, and copies shall be provided to the Consultant and the Client.

The Consultant will be responsible for ensuring that all options and recommendations are consistent with FSM law, international obligations if any, and international best practice. The Consultant will be expected to identify any legal issues and to make recommendations for overcoming any issues together with action plans taking into account the Government's timetable for implementation.

The Consultant will be expected to begin work within two weeks of contract signature. The Consultant is expected to complete the deliverables within 12 months, but time of completion is subject to multiple variables beyond the control of either the Client or the Consultant. The Client and the Consultant will cooperate in good faith to keep the assignment on a reasonable timetable in view of these other variables.

Subject to performance review, on written agreement by both Client and Consultant, the Contract shall be subject to extension or expansion in the time of performance and/or the scope of work (and related remuneration and expenses for any expanded scope of work).

### *3.1.3 Administrative Matters*

**Team Leader:** The Consultant is expected to designate a team leader for the assignment. The team leader may designate an alternate when the team leader is otherwise unavailable. The team leader or alternate will be expected to be available to the working group on an as-needed basis throughout the assignment.

Principal Report: The principal counterpart for the Government is the Secretary of DTCI. DTCI's full-time Project Coordinator is designated by the Secretary to directly interface with the Consultant and is responsible for managing the Consultant's contract in accordance with the terms of reference and overall project objectives.

In addition to the Project Coordinator, the Consultant will, as needed, coordinate with:

- (i) The Joint Project Manager leading the EMC Joint Committee's procurement of the EMC system;
- (ii) World Bank staff and consultants working on FSM's ICT connectivity project;
- (iii) FSMTC, especially with regard to arrangements for transit by the EMC parties on FSMTC's existing connectivity assets;
- (iv) Government legal offices as needed with respect to review and approval of legal documents prepared by the Consultant;
- (v) Owners and suppliers of the HANTRU-1 system and any third party creditors as needed to obtain necessary consents and agreements for transit to Guam.

#### *3.1.4 Required Skills of the Consulting Firm*

The firm should have at least 10 years of relevant experience with major international multi-multiparty submarine cable projects and possess telecommunications engineering expertise and legal negotiating experience of complex commercial transactions. The successful firm will be required to demonstrate:

- Detailed technical knowledge of submarine cable system technology and their deployment and management.
- Experience with submarine cable project financing and financial modeling.
- Extensive and demonstrable experience negotiating government ownership arrangements in at least two major multi-party international submarine cable projects and preparing related transactional legal documentation.
- Sound knowledge of the telecommunications industry and its likely trends.
- Demonstrated ability to work successfully with project team members and counterparts, and stakeholders, including governments, regulatory bodies, international funding agencies, investment banks, wholesale customers and local communities is preferable.
- Previous experience with donor funded Republic sector managed infrastructure financing projects would be an advantage.

Knowledge and experience working for government stakeholders in the Pacific region and/or small island developing countries would be an advantage, but is not essential.

#### *3.1.5 Key personnel*

The following key personnel shall be included in the proposal. The firm may include other experts, with the prior written approval of DTCI.

1. Legal advisor, admitted to practice in a recognized jurisdiction and at least 15 years relevant commercial transactional experience, including negotiating ownership, construction, maintenance and operational arrangements on multi-party international cable systems.

2. Finance specialist, with relevant advanced degree qualifications from a recognized university, and at least 15 years of specific relevant experience leading and advising on commercial arrangements and negotiations relevant to this assignment.
3. Telecommunications technical specialist/engineer, with at least 10 years of specific relevant experience in submarine cable system design, construction, operation and maintenance.
4. Team Leader (in the interests of efficiency and cost-effectiveness, this may be subsumed in one of the above roles).

## 4 Consultant's General Work Plan

This describes the Consultant's general work plan for providing the Services.

The Services encompass the three primary substantive components of assignment:

**Component 1:** Transactional advice and assistance on ownership and operations arrangements for FSM's share of the EMC system, including the overall structure, terms and conditions of the construction & maintenance agreement (C&MA) for the cable system.

**Component 2: (a)** Transactional advice for the terms of access, interconnection, and/or ownership and rights of use on HANTRU 1 through issuance of e.g. sub-IRUs to Kiribati and Nauru for their transit on the Pohnpei Spur to HANTRU-1 to Guam. This includes preparation of any ancillary agreements to the C&MA between the EMC parties for capacity and transit on Pohnpei Spur and HANTRU-1, as well as obtaining any third party consents for the EMC parties. **(b)** Transactional advice and support for the terms of access, interconnection, and/or ownership and rights of use on HANTRU 1 for the Chuuk-Pohnpei Cable. This includes support for negotiations, obtaining any consents or permits, preparation all transaction documents to memorialize the transfer of ownership, or IRU or similar agreement between the Open Access Entity and FSMTC, and any third party consents.

**Component 3:** During the tender of the EMC system which shall be led by the EMC steering committee's joint project manager, provide independent advice to FSM for legal, financial and technical review of the tender documents prepared by the EMC joint project manager and independent technical and legal support to FSM during the negotiation of the supply contracts for the delivery of the EMC system which will also be led by the joint project manager.

The deliverables included in the Contractor's terms of reference as set forth in Section 3.1.2 include preparation of a draft work plan at the inception of the assignment "describing activities, personnel, expected timings, milestones and dependencies." This draft will be revised and finalized as necessary to take into account feedback from the Client. The Consultant will prepare this work plan as part of the preparation stage described below based on discussions with and feedback from the Client.

### 4.1.1 Stage 1: Preparation stage



The main objectives of the preparation stage are to intake information through initial meetings with the Client and study of relevant background material and to identify the key steps and subcomponents of the Services. The Consultant's team leader will take primary responsibility for consultations and information gathering and preparation of the inception report. The preparation stage will conclude with an inception report and work plan as **deliverables**. The Consultant will consult with the Government in preparing drafts of these deliverables, and will incorporate any comments and feedback to be delivered in final versions.

#### *4.1.2 Stage 2: Substantive components of the assignment*

The following describes each substantive component of this assignment. The Consultant's detailed work plan prepared during the preparation stage may need to be revised from time to time as the project progresses based on further findings and discussions between the Client and the Consultant and the feedback and actions of the Client's counterparties and other stakeholders. Accordingly, the descriptions below are general in nature and are subject to change as needed.

In addition to the team leader's initial stakeholder consultations, roughly four additional individual meetings by key staff, including attendance at EMC PSC and project team meetings, may be required to complete the three substantive components. In some cases, two or more staff may carry out concurrent visits in order to provide complementary skillsets and experience to the Client during the same visit.

#### **Component 1: investment in submarine cable linking Kiribati, Nauru, and Kosrae to the HANTRU-1 Cable in Pohnpei**

FSM, Kiribati, and Nauru have agreed to co-equally invest in new infrastructure for the EMC system linking Kosrae State, Kiribati and Nauru. Concurrently, FSM contemplates interconnecting the EMC system to the Pohnpei Spur connecting to the HANTRU-1 cable to Guam. The EMC PSC is tasked with overseeing the project. The EMC parties anticipate jointly funding and managing the procurement, installation and maintenance of the proposed submarine cable system. The three governments intend to each form special purpose vehicles for their investments which will enter into a C&MA/joint venture agreement to govern these joint activities.

The Consultant will advise the Client in negotiating the structure and other substantive terms of the C&MA/joint venture arrangements and drafting and finalizing the definitive C&MA/joint venture documents with Kiribati and Nauru. The terms of the arrangement will depend on the overall goals to be achieved and the specific needs of each party. The Consultant will discuss those goals with the Client during the preparation stage of the assignment. Some general topics that will need to be considered in planning for the joint venture/C&MA arrangements include, among other topics: (1) the ownership and governance structure for the EMC system, including for the new and existing infrastructure, (2) how broad or narrow the scope of the ownership and operations arrangements for the EMC system will be, (3) the apportionment of capital expenditures, operating costs, cable capacity, managerial responsibility and other financial risks and rewards between the three parties, and (4) other matters typically addressed in the documentation for cable ownership and operation between parties to a submarine cable consortium.

The **deliverables** for this component of the project will be the definitive documents for the joint venture/C&MA and associated documents between the EMC parties for the supply and operation of the EMC system.

## **Component 2: Terms of Access, Interconnection, and Ownership for Transit from Pohnpei to Guam**

### **a. EMC Parties' Transit from Pohnpei to Guam**

The Consultant will advise FSM on the terms of access, interconnection, and ownership for the EMC parties' transit from the Branching Unit that will connect the new cable from Kosrae to the existing Pohnpei Spur to the HANTRU-1 cable to Guam. The Consultant will ensure that necessary agreements related to transit from Pohnpei to Guam by the EMC parties are completed concurrently and within the context of the ownership structure of the EMC system. This will include as needed consultations and negotiations with the EMC parties, FSMTC, the OAE, and landing parties, as required.

The **deliverables** for this component of the project include preparation of all necessary instruments and documentation (either as part of the C&MA or in associated documents) for access, interconnection, and ownership to the EMC parties for transit to Guam on the Pohnpei Spur and HANTRU-1. This may include e.g. granting of sub-IRUs to Kiribati and Nauru for transit from Pohnpei to Guam. Included in this deliverable is obtaining agreement between the EMC parties on terms of access including capex and opex sharing arrangements for transit from Pohnpei to Guam, and obtaining all necessary consents and agreements from third parties for the EMC parties to transit from Pohnpei to Guam. This deliverable does not include negotiation of onward connectivity from Guam to the global internet or system upgrades, which are subject to negotiation between the state owned enterprises established by each EMC party for the purpose of owning and operating their respective interests in the EMC system.

### **b. Chuuk-Pohnpei Transit to Guam**

Concurrently with Component 2(a), the Consultant will provide support for negotiations, drafting transaction documents and for the Government to obtain all necessary consents and agreements necessary to secure access and connectivity for the Chuuk-Pohnpei cable system on HANTRU from Pohnpei to Guam, including any agreement or consent which may be required or desired from any third parties. This deliverable does not include negotiation of onward connectivity from Guam to the global internet, or system upgrades on HANTRU 1. This deliverable may be met by either obtaining agreement for transit by the Open Access Entity from FSMTC in the form of an IRU or similar property right, or by obtaining agreement from FSMTC and third parties to transfer HANTRU-1 to the Open Access Entity.

## **Component 3: Independent Legal and Technical Advice for the Tender and Negotiation for Provisioning of the EMC System**

The EMC Steering Committee's joint project manager will lead the tender for the supply of the EMC system, including preparation of technical specifications and tender documents, and negotiation of the supply contracts with the suppliers for delivery of the EMC system. The Consultant will provide to FSM independent legal and technical review of the specifications and tender documents prepared by the joint project manager. The Consultant will also provide independent legal advice and support to FSM during negotiation of the supply contracts for the provision of the EMC system.

The **deliverables** for this component of the project will be to review, comment, and provide recommendations for approval by FSM of all documents for the tender and provisioning of the EMC system.