
GRANT NUMBER 0265-TON (SF)

GRANT AGREEMENT
(Externally Financed)

(Nuku'alofa Urban Development Sector Project)

between

KINGDOM OF TONGA

and

ASIAN DEVELOPMENT BANK

DATED 11 January 2012

TON 42394

**GRANT AGREEMENT
(Externally Financed)**

GRANT AGREEMENT dated 11 January 2012 between KINGDOM OF TONGA (the "Recipient") and ASIAN DEVELOPMENT BANK ("ADB").

WHEREAS

(A) the Recipient has applied to ADB for a grant ("Grant") financed by the Government of Australia, represented by the Australian Agency for International Development ("AusAID"), in an amount equal to six million one hundred thousand Australian dollars and equivalent to approximately six million four hundred forty thousand Dollars (\$6,440,000) for the purposes of the Project described in Schedule 1 to the ADB Grant Agreement (such expression as defined in Recital B below);

(B) the Recipient has also applied to ADB for a grant for the purposes of the Project and by a grant agreement dated of even date herewith ADB has agreed to provide to the Recipient from its Special Funds resources a grant in an amount equivalent to approximately six million sixty thousand Dollars (\$6,060,000) ("ADB Grant") for the purposes of the Project ("ADB Grant Agreement");

(C) the Project will be carried out by the Project Executing Agency, with the assistance of the Implementing Agency and for this purpose the Recipient will make available to the Project Executing Agency the proceeds of the Grant provided for herein upon terms and conditions satisfactory to ADB; and

(D) ADB has agreed to administer the Grant from the Government of Australia to the Recipient upon the terms and conditions hereinafter set forth;

NOW THEREFORE the parties agree as follows:

ARTICLE I

Grant Regulations; Definitions

Section 1.01. All provisions of the Externally Financed Grant Regulations of ADB, dated 8 April 2009 (the "Grant Regulations"), are hereby made applicable to this Grant Agreement with the same force and effect as if they were fully set forth herein.

Section 1.02. Wherever used in this Grant Agreement, the several terms defined in the Grant Regulations and ADB Grant Agreement have the respective meanings therein set forth unless modified herein or the context otherwise requires. Additional terms used in this Grant Agreement have the following meanings:

(a) “Consulting Guidelines” means ADB’s Guidelines on the Use of Consultants by Asian Development Bank and Its Borrowers (2010, as amended from time to time);

(b) “Consulting Services” means the services to be financed out of the proceeds of the Grant as described in Paragraph 2 of Schedule 1 to the ADB Grant Agreement;

(c) “equipment maintenance schedule” means the plan, guidelines, policies, schedules and checklists for the operation and maintenance at the Tapuhia landfill operated by WAL, developed under the AusAID Program, and appended to the PAM;

(d) “Goods” means equipment and materials to be financed out of the proceeds of the Grant, including related services such as transportation, insurance, installation, commissioning, training, and initial maintenance, but excluding Consulting Services;

(e) “Loan Disbursement Handbook” means ADB’s Loan Disbursement Handbook (2007, as amended from time to time);

(f) “PAM” means the project administration manual for the Project initially dated 8 September 2011 and agreed between the Recipient and ADB, as updated from time to time in accordance with the respective administrative procedures of the Recipient and ADB;

(g) “Procurement Guidelines” means ADB’s Procurement Guidelines (2010, as amended from time to time);

(h) “Procurement Plan” means the procurement plan for the Project dated 23 June 2011 and agreed between the Recipient and ADB, as updated from time to time in accordance with Procurement Guidelines, Consulting Guidelines, and other arrangements agreed with ADB;

(i) “Project Executing Agency” means MOFNP which is responsible for carrying out the Project or any successor thereto acceptable to ADB; and

(j) “Works” means construction or civil works to be financed out of the proceeds of the Grant, including services such as drilling or mapping, and project related services that are provided as part of a single responsibility or turnkey contract, but excluding Consulting Services.

ARTICLE II

The Grant

Section 2.01. ADB agrees to make the Grant from the Government of Australia available to the Recipient on terms and conditions set forth in this Agreement in the amount of six million four hundred forty thousand Dollars (\$6,440,000).

ARTICLE III

Use of Proceeds of the Grant

Section 3.01. The Recipient shall make the proceeds of the Grant available to the Project Executing Agency upon terms and conditions satisfactory to ADB and shall cause the Project Executing Agency to apply such proceeds to the financing of expenditures on the Project in accordance with the provisions of this Grant Agreement.

Section 3.02. The Goods, Works and Consulting Services and other items of expenditure to be financed out of the proceeds of the Grant and the allocation of amounts of the Grant among different categories of such Goods, Works and Consulting Services and other items of expenditure shall be in accordance with the provisions of Schedule 1 to this Grant Agreement, as such Schedule may be amended from time to time by agreement between the Recipient and ADB.

Section 3.03. Except as ADB may otherwise agree, all Goods, Works and Consulting Services to be financed out of the proceeds of the Grant shall be procured in accordance with the provisions of Schedule 2 to this Grant Agreement.

Section 3.04. Except as ADB may otherwise agree, the Recipient shall cause all items of expenditure financed out of the proceeds of the Grant to be used exclusively in the carrying out of the Project.

Section 3.05. Withdrawals from the Grant Account in respect of Goods, Works and Consulting Services shall be made only on account of expenditures relating to:

- (a) Goods which are produced in and supplied from and Works and Consulting Services which are supplied from such member countries of ADB as shall have been specified by ADB from time to time as eligible sources for procurement, and
- (b) Goods, Works and Consulting Services which meet such other eligibility requirements as shall have been specified by ADB from time to time.

Section 3.06. The Grant Closing Date for the purposes of Section 8.02 of the Grant Regulations shall be 31 December 2017 or such other date as may from time to time be agreed between the Recipient and ADB.

ARTICLE IV

Particular Covenants

Section 4.01. In the carrying out of the Project and operation of the Project facilities, the Recipient shall perform, or cause to be performed, all obligations set forth in Schedule 4 to the ADB Grant Agreement.

Section 4.02. The Recipient shall enable ADB's representatives to inspect the Project, the Goods and Works, and any relevant records and documents.

Section 4.03. (a) The Recipient shall (i) maintain, or cause to be maintained, separate accounts for the Project; (ii) have such accounts and related financial statements audited annually, in accordance with appropriate auditing standards consistently applied, by independent auditors whose qualifications, experience and terms of reference are acceptable to ADB; (iii) furnish to ADB, as soon as available but in any event not later than 6 months after the end of each related fiscal year, certified copies of such audited accounts and financial statements and the report of the auditors relating thereto (including the auditors' opinion on the use of the Grant proceeds and compliance with the financial covenants of this Grant Agreement as well as on the use of the procedures for imprest account and statement of expenditure), all in the English language; and (iv) furnish to ADB such other information concerning such accounts and financial statements and the audit thereof as ADB shall from time to time reasonably request.

(b) The Recipient shall enable ADB, upon ADB's request, to discuss the Recipient's financial statements for the Project and its financial affairs related to the Project from time to time with the auditors appointed by the Recipient pursuant to Section 4.02(a) hereinabove, and shall authorize and require any representative of such auditors to participate in any such discussions requested by ADB, provided that any such discussion shall be conducted only in the presence of an authorized officer of the Recipient unless the Recipient shall otherwise agree.

Section 4.04. The Recipient shall take all actions which shall be necessary on its part to enable the Project Executing Agency to perform its obligations under the Project Agreement, and shall not take or permit any action which would interfere with the performance of such obligations.

Section 4.05. Notwithstanding any other provision of this Grant Agreement, ADB is neither obligated to make any disbursement from the Grant Account, except to the extent that ADB has received the Government of Australia Grant funds, nor is it acting as a representative of the Government of Australia. As the Grant will be made available in installments over several years, the applicable exchange rate for the conversion of the Grant from Australian dollars to Dollars shall be reasonably determined by ADB on the dates ADB receives each such installment. The Dollar amounts made available to the Recipient will be adjusted, if necessary, depending on the actual exchange rates used for the Grant funds. ADB assumes no liability for any exchange rate fluctuations during ADB's administration of the Grant.

ARTICLE V

Suspension and Cancellation

Section 5.01. The following are specified as additional events for suspension of the right of the Recipient to make withdrawals from the Grant Account for the purposes of Section 8.01(k) of the Grant Regulations or cancellation of the Grant pursuant to Section 8.02 of the Grant Regulations: the grant financed under the ADB Grant Agreement shall have become liable for suspension or cancellation.

ARTICLE VI

Effectiveness

Section 6.01. The following is specified as an additional condition to the effectiveness of this Grant Agreement for the purposes of Section 9.01(e) of the Grant Regulations: the ADB Grant Agreement shall have been duly executed and delivered, and all conditions precedent to its effectiveness (other than a condition requiring the effectiveness of this Grant Agreement) shall have been fulfilled or arrangements satisfactory to ADB shall have been made for the fulfillment thereof within a period of time satisfactory to ADB.

Section 6.02. A date ninety (90) days after the date of this Grant Agreement is specified for the effectiveness of the Grant Agreement for the purposes of Section 9.04 of the Grant Regulations.

ARTICLE VII

Miscellaneous

Section 7.01. The Secretary of the Ministry of Finance and National Planning of the Recipient is designated as representative of the Recipient for the purposes of Section 11.02 of the Grant Regulations.

Section 7.02. The following addresses are specified for the purposes of Section 11.01 of the Grant Regulations:

For the Recipient

Secretary
Ministry of Finance and National Planning
Treasury Building
Vuna Road, Nuku'alofa
Kingdom of Tonga

Facsimile Number:

+ (676) 24040

For ADB

Asian Development Bank
6 ADB Avenue
Mandaluyong City
1550 Metro Manila
Philippines

Facsimile Numbers:

(632) 636-2444
(632) 636-2446.

IN WITNESS WHEREOF the parties hereto, acting through their representatives thereunto duly authorized, have caused this Grant Agreement to be signed in their respective names and to be delivered at the principal office of ADB, as of the day and year first above written.

KINGDOM OF TONGA

By



SUNIA MANU FILI

Minister for Finance and
National Planning

ASIAN DEVELOPMENT BANK

By



HARUHIKO KURODA

President

SCHEDULE 1

Allocation and Withdrawal of Grant Proceeds

General

1. The table attached to this Schedule sets forth the Categories of items of expenditure to be financed out of the proceeds of the Grant and the allocation of the Grant proceeds to each such Category ("Table"). (Reference to "Category" in this Schedule is to a Category or Subcategory of the Table.)

Percentages of Grant Financing

2. Except as ADB may otherwise agree, the items of the Categories listed in the Table shall be financed out of the proceeds of the Grant on the basis of the percentages set forth in the Table.

Reallocation

3. Notwithstanding the allocation of Grant proceeds and the withdrawal percentages set forth in the Table,

(a) if the amount of the Grant allocated to any Category appears to be insufficient to finance all agreed expenditures in that Category, ADB may, by notice to the Recipient, (i) reallocate to such Category, to the extent required to meet the estimated shortfall, amounts of the Grant which have been allocated to another Category but, in the opinion of ADB, are not needed to meet other expenditures, and (ii) if such reallocation cannot fully meet the estimated shortfall, reduce the withdrawal percentage applicable to such expenditures in order that further withdrawals under such Category may continue until all expenditures thereunder shall have been made; and

(b) if the amount of the Grant allocated to any Category appears to exceed all agreed expenditures in that Category, ADB may, by notice to the Recipient, reallocate such excess amount to any other Category.

Disbursement Procedures

4. Except as ADB may otherwise agree, the Grant proceeds shall be disbursed in accordance with the Loan Disbursement Handbook.

Direct Payment

5. For Consulting Services, Works, and equipment, a direct payment procedure shall be used in accordance with the Loan Disbursement Handbook and detailed arrangements agreed upon between the Recipient and ADB.

Imprest Account and Statement of Expenditures

6. (a) Except as ADB may otherwise agree, the Recipient shall establish immediately after the Effective Date, an imprest account at the National Reserve Bank of

Tonga. The imprest account shall be established, managed, replenished and liquidated in accordance with the Loan Disbursement Handbook, and detailed arrangements agreed upon between the Recipient and ADB. The imprest account shall only be used for the purposes of the Project. The currency of the imprest account shall be the Dollar. The ceiling for the imprest account shall not exceed the lower of (i) the estimated expenditure to be financed from the imprest account for 6 months of Project implementation, or (ii) the equivalent of 10% of the Grant amount.

(b) The statement of expenditures procedure may be used for reimbursement of eligible expenditures, and to liquidate advances provided into the imprest account, in accordance with the Loan Disbursement Handbook and detailed arrangements agreed upon between the Grant and ADB. Any individual payment to be reimbursed or liquidated under the statement of expenditures procedure shall not exceed the equivalent of \$100,000.

Condition for Withdrawals from Grant Account

7. Notwithstanding any other provision of this Grant Agreement, no withdrawals shall be made from the Grant Account in respect of civil wWorks, equipment and materials, and/or land acquisition, until the firm supplying the Project Implementation Consultants shall have been engaged.

8. Notwithstanding any other provision of this Grant Agreement, no withdrawals shall be made from the Grant Account in respect of the Water Supply Subproject until TWB shall have commenced a program for replacement of faulty water meters with use of existing stocks of functioning meters, satisfactory to ADB.

9. Notwithstanding any other provision of this Grant Agreement, no withdrawals shall be made from the Grant Account in respect of the Solid Waste Subproject until (i) a new chief executive officer shall have been selected and appointed to WAL pursuant to a transparent selection procedure, satisfactory to ADB; and (ii) WAL shall have recommenced the equipment maintenance schedule developed pursuant to the AusAID Program.

TABLE

ALLOCATION AND WITHDRAWAL OF GRANT PROCEEDS (Nuku'alofa Urban Development Sector Project)				
CATEGORY				GOVERNMENT OF AUSTRALIA FINANCING
Number	Item	Total Amount Allocated for Government of Australia Financing (\$)		Percentage and Basis for Withdrawal from the Grant Account
		Category	Subcategory	
1	Civil Works ¹	1,489		
1A	Water Supply Subproject ^{1, 2}		962	51.5% of total expenditure claimed*
1B	Solid Waste Subproject ^{1, 3}		208	51.5% of total expenditure claimed*
1C	Municipal Subprojects		319	51.5% of total expenditure claimed*
2	Equipment and Materials ¹	2,009		51.5% of total expenditure claimed*
3	Land Acquisition ¹	122		51.5% of total expenditure claimed*
4	Consulting Services	1,363		51.5% of total expenditure claimed*
5	Unallocated ⁴	1,457		
	Total	6,440		

* Exclusive of taxes and duties.

¹ A Withdrawals from the Grant Account in respect of Categories 1, 2, and 3 are subject to the condition set forth in Schedule 1, paragraph 7 of the Grant Agreement (Externally Financed).

² Withdrawals from the Grant Account in respect of Category 1(a) are subject to the condition set forth in Schedule 1, paragraph 8 of the Grant Agreement (Externally Financed).

³ Withdrawals from the Grant Account in respect of Category 1(b) are subject to the condition set forth in Schedule 1, paragraph 9 of the Grant Agreement (Externally Financed).

⁴ This amount also includes ADB's administration fee, audit cost, bank charges and provision for foreign exchange fluctuations (if any), to the extent that these items are not covered by the interest and investment income earned on this grant, or any additional grant contribution by the Government of Australia.

SCHEDULE 2

Provisions on Procurement and Consulting Services

General

1. The procurement of Goods, Works and Consulting Services to be financed out of the Grant shall be subject to and governed by the Procurement Guidelines, and the Consulting Guidelines, respectively.
2. All terms used and not otherwise defined in this Grant Agreement have the meanings provided in the Procurement Guidelines and/or the Consulting Guidelines, as applicable.

Procurement of Goods and Works

3. Except as ADB may otherwise agree, Goods and Works shall only be procured on the basis of the methods of procurement set forth below:

- (a) International Competitive Bidding;
- (b) National Competitive Bidding; and
- (c) Local Shopping.

4. The methods of procurement are subject to, among other things, the detailed arrangements and threshold values set forth in the Procurement Plan. The Recipient may only modify the methods of procurement or threshold values with the prior agreement of ADB, and modifications must be set out in updates to the Procurement Plan.

National Competitive Bidding

5. The Recipient and ADB shall ensure that, prior to the commencement of any procurement activity under national competitive bidding, the Recipient's national competitive bidding procedures are consistent with the Procurement Guidelines. Any modifications or clarifications to such procedures agreed between the Recipient and ADB shall be set out in the Procurement Plan. Any subsequent change to the agreed modifications and clarifications shall become effective only after approval of such change by the Recipient and ADB.

Advance Action

6. Prior to the date of this Grant Agreement, ADB approved advance action for Consulting Services under the Project up to, but not including, contract signing, in respect of Consulting Services to be financed under this Grant Agreement. Notwithstanding approval of such advance action, the Recipient shall ensure that Consulting Services are carried out in accordance with the provisions of this Grant Agreement.

Selection of Consulting Services

7. Except as ADB may otherwise agree, and except as set forth in the Procurement Plan, the Recipient shall apply quality- and cost-based selection for selecting and engaging Consulting Services. The Recipient has requested ADB to carry out selection of the Project Implementation Consultants on its behalf. The Consultants shall be selected in accordance with the detailed arrangements set out in the PAM.

Industrial or Intellectual Property Rights

8. (a) The Recipient shall ensure that all Goods and Works procured (including without limitation all computer hardware, software and systems, whether separately procured or incorporated within other goods and services procured) do not violate or infringe any industrial property or intellectual property right or claim of any third party.

(b) The Recipient shall ensure that all contracts for the procurement of Goods and Works contain appropriate representations, warranties and, if appropriate, indemnities from the contractor or supplier with respect to the matters referred to in subparagraph (a) of this paragraph.

9. The Recipient shall ensure that all Grant- financed contracts with consultants contain appropriate representations, warranties and, if appropriate, indemnities from the consultants to ensure that the Consulting Services provided do not violate or infringe any industrial property or intellectual property right or claim of any third party.

ADB's Review of Procurement Decisions

10. Contracts procured under international competitive bidding and national competitive bidding procedures and contracts for Consulting Services shall be subject to prior review by ADB, unless otherwise agreed between the Recipient and ADB and set forth in the Procurement Plan.

Conditions for Award of Contract

11. The Recipient shall not award, and shall not permit the Project Executing Agency or Implementing Agency to award, any contracts financed under the Project for Output 6 of the Project, unless and until the bill entitled "National Spatial Planning and Management Act" pending in the legislature as of September 2011 shall have been enacted by the legislature of the Recipient and shall have entered into force in accordance with the proclamation of the King of Tonga.

12. The Recipient shall not award and shall not permit the Project Executing Agency to award any Works contract under the Water Supply Subproject, the Solid Waste Subproject or any Candidate Subproject which involves environmental impacts until:

- (a) MOECC has granted the final approval of the relevant IEE updated for the relevant Facility Site; and

- (b) the Recipient has incorporated the relevant provisions from the EMP into the Works contract.

13. The Recipient shall not award and shall not permit the Project Executing Agency to award any Works contract involving involuntary resettlement impacts under the Water Supply Subproject, until the Recipient has prepared and submitted to ADB the final RP based on the relevant detailed design, and obtained ADB's clearance of such RP. The Recipient shall not award and shall not permit the Project Executing Agency to award any Works contract involving involuntary resettlement impacts under the remaining Outputs of the Project, if pursuant to the RF an RP is required to be prepared therefor, until the Recipient has prepared and submitted to ADB the final RP based on the relevant detailed design and obtained ADB's clearance of such RP.

14. The Recipient shall not award, and shall ensure that the Project Executing Agency shall not award, any Works contract which involves impacts on indigenous peoples; provided however that in the event that Works in respect of any Facility Site are later determined to potentially involve any impacts on indigenous peoples, as determined under the Safeguard Policy Statement, no Works contract shall be awarded until the Recipient has prepared and submitted to ADB a final IPP and obtained ADB's clearance of such IPP.

Commencement of Works Contracts

15. The Recipient shall ensure that, subsequent to award of any Works contract under the Project for the Solid Waste Subproject, no construction activities shall be undertaken, and no land shall be handed over to the contractor, unless and until the proposed sites for community waste bins in the concerned peri-urban villages have been approved by ADB.