

# **ANNEX 5**

## **EXPLANATORY NOTES FOR PRECEDENT COOPERATION AGREEMENT TO UNDERTAKE CSR-SUPPORTED COMMUNITY DEVELOPMENT (Long Version)**

## **Introduction**

These notes explain briefly how to use the long version of the precedent Cooperation Agreement (the Agreement) to undertake community development.

The Agreement is designed as a practical knowledge tool to facilitate the effective implementation of agreed plans for CSR-supported development work in Indonesian communities.

It is intended primarily for use as the basis for preparing a legally-binding contract between:

- a company or an Indonesian state-owned enterprise; and
- a registered not-for-profit community-based or civil society organisation with expertise in community development,

that propose to work together on implementing agreed plans for CSR-supported community development.

By making the precedent document available, TNP2K encourages companies and state-owned enterprises to work together with civil society organisations in undertaking community development that is well targeted and likely to achieve a sustainable reduction in poverty in Indonesian communities.

However, it could also be useful for:

- a philanthropic organisation that contributes funding for community development from sources other than CSR; and
- organisations involved in disaster relief within Indonesia that need to quickly document the agreed terms on which they will jointly contribute to implementing agreed plans for social assistance in disaster-affected communities.

## **Important note on seeking legal advice**

Each party should seek its own legal advice before signing any legally-binding contract based on the precedent Agreement to ensure that its legal rights and interests are properly protected.

Further, the parties should ensure that signing a contract based on the precedent Agreement does not in any way contravene the prevailing laws and regulations. For instance, the funding for community development must not be derived from any illegal activities or money laundering or contravene any other regulations that specifically apply to the parties due to their status and/or business activities.

## **Legal disclaimer**

Please note that the important legal disclaimer on the reverse of the cover of the report to which this document is annexed applies to the long and short versions of the precedent Cooperation Agreement and these explanatory notes.

## **Contents of the precedent Cooperation Agreement**

The Agreement contains suggested ways of providing for the rights and obligations of each of the parties and the process they will follow in forming a working partnership to implement community development initiatives.

Although it tries to strike a fair balance between the parties where their interests may be different, the parties should always consider carefully whether the provisions set out in the Agreement are fair and appropriate for their own particular needs and circumstances. The Agreement should not be used as a rigid precedent. It should be used as a guide and should always be amended as necessary to reflect your actual circumstances.

Note that the Agreement refers to Party A and Party B throughout but you should feel free to replace these with a reference to the actual parties' names or use the terms "company" and "civil society organisation" if you wish to do so.

The following paragraphs are designed to help you understand the purpose of each of the provisions in the precedent document and to prompt you to consider if the provision is suitable for your needs, or needs to be changed or deleted.

Please remember that you may need to draft and insert new provisions to cover issues that are not included in the precedent Agreement but that need to be covered to meet the needs of the parties and their particular circumstances.

The following numbers refer to the numbered articles and sections in the precedent Agreement.

## **1. PARTIES AND BACKGROUND**

### **Is each party a legal entity?**

The parties must be legal entities if they wish to use the precedent Agreement to form a legally-binding contract.

If a community group is not a registered legal entity, it could still use the precedent Agreement as a source of ideas and language for a less formal, non-legally-binding document that sets out the intentions of the group and a company to work together on community development work with the support of CSR funding.

### **Do any CSR laws apply?**

The background should refer to any Indonesian legislation that applies to CSR activities and spending by the company so it is clear what legal obligations the company needs to meet. If no CSR laws apply, delete the references to legislation.

### **Definitions and interpretation**

Check that the existing definitions make sense for your needs. Add new definitions for any new terms that you will use a lot in your document to make it easier to read.

The interpretation section explains that headings (although they help the reader) are of no legal importance when interpreting the document and that certain words will be legally interpreted as including other words.

## **2. AGREEMENT TO WORK TOGETHER**

### **Parties to work together to implement agreed plans for community development**

Sections 2.1 and 2.2 deal with the fundamental agreement of the parties to work together on the terms of the Agreement. Schedule one should set out a detailed description of the agreed community development initiative or community action plan, including a copy of the relevant logical framework

analysis or other planning and analysis tool. All relevant planning documents should be attached to the signed agreement.

If the initiative does not involve a community action plan, replace the references to a community action plan (CAP) with references to the relevant initiative.

### **Term of the Agreement**

Insert in section 2.3 the dates on which you intend the Agreement to start and finish.

### **Performance reviews**

Agree on the details of a performance review from the start, including the aspects of performance that will be assessed and the expectations of the company as to the standards of work to be met by civil society organisation staff. Set these out in writing as a guide for the civil society organisation. This guide can be inserted as schedule two.

### **Do you intend to be legally bound by the Agreement?**

If you are using the precedent Agreement as the basis for a less formal, non-legally-binding agreement, section 2.5 should be deleted.

## **3. ROLE OF THE COMPANY (“Party A”)**

### **To provide CSR funds**

In accordance with an agreed budget and payments schedule, the company agrees to pay the CSR funding required for the activities into a special bank account set up by the civil society organisation to receive these funds. The parties should prepare the initial agreed schedule and include it as schedule three to the Agreement prior to signing. Note that it may be amended from time to time to reflect changed circumstances but only if both parties agree to the amendment.

### **To provide support for the civil society organisation’s capacity-building activities**

It is important that the civil society organisation brings competent professional community development skills and up-to-date knowledge to the CSR partnership. It is also important that the organisation has strong managerial and administrative capabilities. Strengthening these aspects of a civil society organisation working in the community is itself a form of sustainable community development because the benefits should flow into the community and through to future development work by the organisation.

The Agreement recognises the difficulties civil society organisations can experience in obtaining funding for their staff to attend training courses, conferences and other capacity-building activities. It contemplates the idea that the company may provide additional funding as required to enable the organisation to build its capabilities in ways that will benefit their work together. The company may also decide to offer mentoring, business coaching and training in reporting and keeping financial accounts, as appropriate, as well as to provide relevant template documents. All of these should improve the standard of the civil society organisation’s work and the effectiveness of the company’s investment under the Cooperation Agreement. The types of support agreed from the start can be inserted in schedule four.

### **To transfer skills and experience**

Although the Agreement contemplates that the civil society organisation will take on the role of project manager for the parties' activities (see article 4 below), the company agrees, in sections 3.4 and 3.5, to contribute the full benefit of its technical and business knowledge, skills and experience to the planning work and to transfer skills where possible, particularly where these will enable the community to maintain the assets created by the parties. Add further detail to this section to describe the actual technical assistance that the company will provide.

### **To provide in-kind expenditure**

Section 3.6 allows the company to provide in-kind assistance to the parties' work together instead of providing cash payments.

### **Security plan**

Where the community location is affected by conflict, the company will take responsibility for working with the civil society organisation on appropriate security arrangements to ensure that employees and **contractors remain safe during the planning work.**

To work to prevent or resolve community disputes

The company will be primarily responsible for preventing or resolving actual or potential disputes within the community. The civil society organisation agrees to provide assistance if required.

## **4. ROLE OF THE CIVIL SOCIETY ORGANISATION ("Party B")**

### **To act as project manager**

The civil society organisation, applying professional standards to its work, will act as project manager. Schedule five sets out suggested professional community development tools that could be applied.

### **Records, accounts and approvals**

Article 4 sets out the responsibilities of the civil society organisation for: preparing and managing records and accounts; reporting on progress; managing budgets, schedules and payments to third parties; managing planning tools; and obtaining approvals and required assets.

The total amount of CSR funding to be allocated to work under the Agreement should be inserted in section 4.6(d). The initial agreed budget and payments schedule should be inserted in schedule three.

The civil society organisation will need to set up a special purpose bank account to receive CSR funding paid by the company. The purpose of this account is to ensure that the company's CSR funds do not become mixed with the organisation's general funds or with funding from another source. This helps bring transparency and accountability to the organisation's financial management.

The parties should include funding in the budget to cover the civil society organisation's indirect costs and administrative overheads. This component of the budget may be referred to as a management fee. The amount to be allocated for this purpose is a matter for negotiation and should reflect a realistic assessment of the actual indirect costs the organisation will incur in operating at a professional standard while undertaking its obligations under the Agreement.

## **5. GOOD GOVERNANCE AND DECISION MAKING**

### **Decision-making process**

Design a process for making decisions that encourages trust to grow as your work together progresses. The process should allow effective and timely decision making in a transparent and accountable manner.

Section 5.1 sets out a suggested process under which the parties' representatives at various levels could meet at different intervals to make and review decisions. The suggested process involves the following elements:

- ❖ Those people involved in day-to-day planning meet together at least twice a week;
- ❖ Those same people meet together with their respective immediate supervisors at least once each week; and
- ❖ All those from the weekly meetings meet together with their appropriate higher level managers and any other relevant stakeholders at least once a month.

Section 5.1 suggests that, as is customary in Indonesia, decisions are made by consensus rather than by each party having a vote that carries a percentage value.

It is important for good governance that all decisions are documented and that minutes are circulated for comment, reviewed, amended as necessary and signed when correct.

Section 5.1 builds in flexibility in how meetings are held. This should be changed if necessary to reflect the parties' preferences.

### **Commitment to ethical conduct**

Section 5.2 contains a commitment to ethical practices and states the importance of training and monitoring staff for ethical conduct.

### **Conflicts of interest**

If either party becomes affected by a conflict of interest, it must work to remove or resolve that conflict as soon as possible so that neither party's reputation is damaged and their work together is not adversely affected by the conflict.

### **Compliance with laws**

The parties should commit to abide by relevant laws. Where the company or the civil society organisation has international connections, these laws could include laws of foreign jurisdictions that deal with matters such as corrupt conduct, privacy or the protection of children. This issue needs to be explored during negotiations so both parties are clear as to what laws apply to their work together.

## **6. THE IMPLEMENTATION PROCESS**

### **Standard of work**

Article 6 commits the parties to using professional community development principles and practices in their work and working towards evidence-based community development that reduces the incidence of poverty in the community in an equitable and sustainable way.

## **Communications and public awareness process**

Section 6.2 requires the establishment of a robust communications and public awareness raising process for the community development work and gives the civil society organisation the responsibility for arranging and carrying out public communications, provided the company has first approved them.

## **Monitoring and evaluation**

Given the importance of being able to measure the effectiveness of your work together, section 6.3 deals with building monitoring and evaluation into your plans. This section could be expanded to give more detail if required.

## **Government**

Section 6.4 deals with the issue of understanding relevant governmental development plans and priorities for the community so you can ensure your work complements and supplements rather than replaces government community development initiatives.

Consider drawing on all the resources that government ministries and agencies may have to offer that could assist your work. In particular, take advantage of the information and guidance available from the National Team for the Acceleration of Poverty Reduction (TNP2K) and the relevant regional poverty reduction coordination team to ensure that your initiatives will be well targeted to achieve a sustainable reduction in poverty in the relevant community.

Consider if you should enter into a technical cooperation agreement with a government agency under which the agency commits to cooperating with your work. Many legal regulations relate to government funding and budgeting processes and some of these could apply in this context so obtain legal advice on such matters before signing any agreement with a government agency.

If there is a CSR forum comprising local government and companies (and sometimes civil society organisations) actively coordinating CSR activities in the area, you may benefit from working with it, particularly to identify gaps in development needs and potential for synergies with other CSR-funded initiatives and government development programmes.

Working with the CSR forum could also help you identify lessons learnt from previous community development activities in the area and prevent you from repeating mistakes.

## **7. CONTRACTORS AND SUPPLIERS**

In article 7 the civil society organisation is given responsibility for procuring contractors and suppliers and contracting directly with them. The organisation commits to using good procurement practices that also comply with the company's tender requirements under its procurement policies or under the law. For example, state-owned enterprises are subject to regulations that specify the tender requirements to be followed.

To the extent possible, the civil society organisation agrees to give preference to local community contractors and suppliers.

Provision is made for the company to approve procurement decisions made by the civil society organisation where the value of the contract is above a certain value. The parties need to agree on and insert this threshold contract value in section 7(f).

## **8. INSURANCE**

The civil society organisation will be responsible for obtaining any agreed insurance policies. If the company does not require the organisation to do this, article 8 can be deleted.

## **9. EVENTS BEYOND A PARTY'S CONTROL**

A party will not be in breach of the Agreement if it cannot perform its obligations due to events beyond its control. This exemption from breach does not apply to any failure by the company to pay the agreed CSR funding.

Article 9 allows one party to terminate the Agreement if the other party is unable to perform its obligations for longer than three months (or some other agreed period) due to events beyond the affected party's control.

The unaffected party is not, however, obliged to terminate the Agreement. It could continue to wait longer than the agreed period for the other party to resume performance.

The parties should consider whether three months is appropriate or if some other period would better suit their circumstances.

## **10. REPRESENTATIONS**

Each party should have made inquiries to check the reputation and capabilities of the other well before they get to the stage of negotiating an agreement. Article 10 provides formal representations from each party as to their legal nature, their legal capacity to contract and ability to carry out their obligations under the Agreement without giving rise to any conflict of interest or breach of regulations or ethical principles.

## **11. DISPUTE RESOLUTION**

### **Dispute resolution procedure**

If a dispute arises between the parties that cannot be settled by senior management, article 11 provides for the dispute to be referred to mediation by a respected independent person. If mediation fails, the parties agree to refer the dispute to be settled by a court in the relevant jurisdiction.

Right to approach a court for urgent relief unaffected

The above procedure does not stop a party approaching a court for urgent relief at any time.



## **12. TERMINATION**

### **Termination for breach**

Article 12 sets out a number of reasons why the Agreement could terminate. They are, in brief:

- ❖ breach of contractual obligations;
- ❖ conduct likely to damage the parties' work;
- ❖ insolvency;
- ❖ corrupt conduct; or
- ❖ the company has reasonable grounds to believe, as the result of a performance review, that the civil society organisation does not have the capabilities required to carry out its obligations.

### **Other remedies unaffected**

A party terminating the Agreement for breach under article 12 does not lose any other remedies it may have under Indonesian law.

### **Consequences of termination**

Section 12.4 sets out the consequences of termination, including the need for the parties to settle outstanding business between them and with third party suppliers and contractors and close down their work. The company will fund reasonable closing down costs incurred by the civil society organisation.

The civil society organisation must give the company a final report and acquittal of expenditure and deal properly with records and accounts as agreed with the company. The section allows the organisation to retain copies of documents needed for internal governance purposes and documents that would enable it to retain the benefit of professional learning.

Unused CSR funds must be returned to the company unless the company agrees that the organisation may apply them for another purpose.

Waiver of article 1266 of the Indonesian Civil Code

The parties agree to waive their legal right to ask a court to approve the termination of the Agreement.

## **13. CONFIDENTIALITY**

### **Confidential information**

Section 13.1 is an acknowledgement by both parties that they may exchange confidential information. For example, the civil society organisation may learn confidential information about the company's business and financial affairs.

### **Confidential information to be kept secret**

Each party agrees to keep any confidential information provided to it secret and not to use it for its own benefit or to the detriment of the other. There are exceptions given, including the right of the organisation to disclose confidential information on a confidential basis to any civil society network it belongs to where the disclosure is required to enable it to perform its obligations under the Agreement.

### **Confidential obligations to survive termination**

It is important to understand that section 13.3 means that confidentiality obligations will survive termination of the Agreement for an indefinite period.

## **14. INTELLECTUAL PROPERTY RIGHTS**

### **No transfer of pre-existing Intellectual Property Rights**

Intellectual Property Rights is a defined term.

Section 14.1 provides that pre-existing Intellectual Property Rights of either party are not transferred to the other party when the parties enter into the Agreement. Those pre-existing rights remain with the party that owns them.

### **Ownership of Intellectual Property Rights developed under the Cooperation Agreement**

However, Intellectual Property Rights that are developed by either party in performance of its duties under the Agreement will become the joint property of both parties. Accordingly, the party that creates the rights (for example, by preparing copyright material or creating a trademark or an industrial design or patentable device) must immediately disclose information about them to the other party. If you do not want to adopt this regime, amend this provision to insert your agreed regime for ownership of intellectual property created during the parties' work together under the Agreement.

### **Obligations to survive termination**

The obligations to disclose jointly-owned Intellectual Property Rights survive termination of the Agreement for an indefinite period.

## **15. OTHER ASSETS**

Article 15 provides that, if and when the Agreement terminates, assets other than intellectual property will be transferred to the community with which the parties have been working, unless the company and civil society organisation agree that the organisation could make better use of those assets.

## **16. GENERAL PROVISIONS**

### **Notices**

Section 16.1 sets out how each party should communicate with the other and contains address details.

### **Relationship of the parties**

Section 16.2 makes it clear that the parties are not forming a legal partnership or a relationship of employment or agency by working together on the terms of the Agreement.

It is important that employees of each party do not represent to anyone that they are authorised to represent the other party or bind it contractually.

### **Assignment**

Neither party is allowed to assign its rights under the Agreement unless the other party first agrees to that assignment.

**Variation**

No change can be made to the Agreement unless both parties agree in writing to make the change.

**Waiver**

Any waiver by a party of a right under the Agreement has no effect unless it is evidenced in writing.

**Entire agreement**

Section 16.6 provides that the Agreement represents the whole agreement between the parties with respect to its subject matter. If the parties wish to preserve the effect of earlier related documents they have signed, they should mention them specifically in this section 16.6.

**Severance**

If any provision of the Agreement is void, illegal or not enforceable, it can be deleted and the remaining provisions of the Agreement will remain in effect.

**Languages**

If the Agreement is prepared in English and in Bahasa Indonesia, the English version can be signed first and take effect before the Bahasa Indonesia version is signed. However, if there is any inconsistency between the versions, the meaning of the section of the Agreement written in Bahasa Indonesia will prevail.

**Counterparts**

To assist with the practicalities of signing, the parties may sign identical copies of the Agreement. If they do, the copies together will constitute one legal document.

**Governing law**

The laws of Indonesia govern the Agreement.

**SIGNING THE AGREEMENT**

Each party should formally authorise in writing, in accordance with its internal governance procedures, the person who is entitled to sign the Agreement on behalf of that party.