



## **Meghalaya State Warehousing Corporation**

**Development of the Warehousing Facility at Mawkhanu, New Shillong,  
under Design, Built, Finance, Operate and Transfer (DBFOT) on PPP  
mode.**

### **DRAFT CONCESSION AGREEMENT**

## Contents

PART – I.....	7
PRELIMINARY .....	7
CONCESSION AGREEMENT .....	8
BETWEEN .....	8
AND 8 .....	
WHEREAS .....	8
ARTICLE 1 - DEFINITIONS AND INTERPRETATION.....	10
1.2 Interpretation .....	10
1.3 Measurements and arithmetic conventions.....	12
1.4 Priority of agreements, clauses and schedules .....	12
Part II The Concession .....	13
ARTICLE 2 - SCOPE OF THE PROJECT .....	14
2.1 Scope of the Project .....	14
ARTICLE 3 - GRANT OF CONCESSION .....	15
3.1 The Concession .....	15
3.2 Substitution of the Authority .....	16
3.3 Extension of Concession Period .....	16
ARTICLE 4 - CONDITIONS PRECEDENT .....	17
4.1 Conditions Precedent .....	17
4.2 Commencement of Concession Period .....	18
4.3 Deemed Termination upon delay .....	18
ARTICLE 5 - OBLIGATIONS OF THE CONCESSIONAIRE .....	19
5.1 Obligations of the Concessionaire.....	19
5.2 Obligations relating to Change in Ownership .....	21
5.3 Employment of trained personnel .....	22
5.4 Branding of the Site .....	22
5.5 Facilities for differently abled and elderly persons .....	22
5.6 Personnel engaged by the Concessionaire .....	23
5.7 Risks and Responsibility for the Project.....	23
5.8 Obligations relating to security clearance.....	23
5.9 Obligations relating to taxes .....	23
5.10 Accidents .....	23
5.11 Obligations relating to noise control.....	24
5.12 Obligations relating to management of the Concessionaire .....	24
5.13 Intellectual Property Permits .....	24
5.14 Water and Electricity.....	24
5.15 Obligations relating to procurement of goods and services .....	24
5.16 Obligations relating to medical aid.....	24
ARTICLE 6 - OBLIGATIONS OF THE AUTHORITY .....	26
6.1 Obligations of the Authority .....	26
6.2 Obligations relating to refinancing.....	27
ARTICLE 7 - REPRESENTATIONS AND WARRANTIES .....	28
7.1 Representations and warranties of the Concessionaire.....	28
7.2 Representations and warranties of the Authority .....	29
7.3 Disclosure.....	30
ARTICLE 8 - DISCLAIMER .....	31
8.1 Disclaimer .....	31
Part III Development and Operations.....	32
ARTICLE 9 - PERFORMANCE SECURITY.....	33
9.1 Performance Security.....	33
9.2 Appropriation of Performance Security .....	33
9.3 Release of Performance Security.....	33
9.4 References to Performance Security .....	33

ARTICLE 10 - SITE & RIGHT OF WAY.....	34
10.1 The Site.....	34
10.2 License, Access and Right of Way .....	34
10.3 Site to be free from Encumbrances.....	35
10.4 Protection of Site from encroachments .....	35
10.5 Special/temporary right of way .....	35
10.6 Access to the Authority, Authority Representative and Independent Engineer.....	35
10.7 Geological and archaeological finds .....	35
10.8 Acceptance of Site for Project Development .....	36
ARTICLE 11 - UTILITIES, ASSOCIATED ROADS AND TREES.....	37
11.1 Existing utilities and roads.....	37
11.2 Shifting of obstructing utilities .....	37
11.3 Utilities required for Project .....	37
11.4 Felling of trees .....	37
ARTICLE 12 - DESIGN AND CONSTRUCTION OF [THE PROJECT] .....	38
12.1 Construction of the Project.....	38
12.2 Obligations prior to commencement of construction.....	38
12.3 Non-Obstruction - on Highway or of Traffic .....	38
12.4 Drawings.....	38
12.5 Architectural Design .....	40
12.6 Construction of the New Facility .....	40
12.7 Extension of Time.....	41
12.8 Sub-licensing of the Project .....	41
12.9 Rights of sub-licensees after Termination of Concession Agreement .....	42
12.10 Compliance with Applicable Laws.....	42
12.11 Advertisement on the Site.....	42
12.12 Incomplete Construction .....	43
ARTICLE 13 – MONITORING OF CONSTRUCTION .....	44
13.1 Inspection .....	44
13.2 Tests .....	44
13.3 Suspension of unsafe Construction Works.....	44
ARTICLE 14 - COMPLETION CERTIFICATE.....	46
14.1 Completion Certificate .....	46
14.2 Completion Certificate not a cessation of liability.....	46
14.3 Safety certification prior to Final COD .....	46
ARTICLE 15 - ENTRY INTO COMMERCIAL SERVICE .....	47
15.1 Commercial Operation Date (COD).....	47
15.2 Damages for delay.....	47
ARTICLE 16 - CHANGE OF SCOPE.....	48
16.1 Change of Scope.....	48
16.2 Procedure for Change of Scope .....	48
16.3 Restrictions on certain works .....	48
16.4 Power of the Authority to undertake works.....	49
ARTICLE 17 - OPERATION AND MAINTENANCE .....	50
17.1 O&M obligation of the Concessionaire.....	50
17.2 Maintenance and Service Requirements.....	52
17.3 Maintenance Manual .....	52
17.4 Maintenance Programme.....	52
17.5 Damages for breach of maintenance obligations.....	53
ARTICLE 18 - SAFETY REQUIREMENTS.....	55
18.1 Safety Requirements .....	55
ARTICLE 19 - MONITORING OF OPERATION AND MAINTENANCE .....	56
19.1 Quarterly status reports .....	56
19.2 Inspection .....	56
19.3 Tests .....	56
19.4 Remedial measures.....	56
19.5 Reports of unusual occurrence .....	56

ARTICLE 20 - SECURITY .....	58
20.1 Security.....	58
ARTICLE 21 - INDEPENDENT ENGINEER .....	59
21.1 Appointment of Independent Engineer.....	59
21.2 Duties and functions.....	59
21.3 Remuneration.....	59
21.4 Termination of appointment.....	59
21.5 Authorised signatories .....	59
21.6 Dispute resolution .....	60
21.7 Interim arrangement.....	60
Part IV Financial Covenants.....	61
ARTICLE 22 - FINANCIAL CLOSE.....	62
22.1 Financial Close .....	62
22.2 Termination due to failure to achieve Financial Close.....	62
ARTICLE 23 - CONCESSION FEE .....	63
23.1 Concession Fee.....	63
23.2 MSWC's right to set-off.....	64
ARTICLE 24 - USER FEE.....	66
24.1 Collection of Fee by the Concessionaire.....	66
24.2 Revision of Fee.....	66
24.3 Monthly Fee Statement.....	66
ARTICLE 25 - ESCROW ACCOUNT.....	66
25.1 Escrow Account.....	67
25.2 Deposits into Escrow Account.....	67
25.3 Withdrawals during Concession Period.....	67
25.4 Withdrawals upon Termination.....	68
ARTICLE 26 - INSURANCE.....	69
26.1 Insurance during Concession Period .....	69
26.2 Notice to the Authority .....	69
26.3 Evidence of Insurance Cover.....	69
26.4 Remedy for failure to insure.....	69
26.5 Waiver of subrogation .....	69
26.6 Concessionaire's waiver.....	69
26.7 Application of insurance proceeds .....	70
26.8 Insurance Cover .....	70
26.9 Compliance with conditions of insurance policies .....	70
ARTICLE 27 - ACCOUNTS AND AUDIT.....	71
27.2 Appointment of Auditors .....	71
27.3 Certification of claims by Statutory Auditors.....	71
27.4 Set-off.....	72
27.5 Dispute Resolution.....	72
Part V: Force Majeure and Termination.....	73
ARTICLE 28 - FORCE MAJEURE .....	74
28.2 A Force Majeure Event.....	74
28.3 Duty to report Force majeure Events.....	74
28.4 Effect of Force Majeure Event on the Concession.....	75
28.5 Allocation of costs arising out of Force Majeure .....	75
28.6 Termination Notice for Force Majeure Event.....	75
28.7 Termination Payment for Force Majeure Event.....	76
28.8 Dispute Resolution.....	76
28.9 Excuse from performance of obligations.....	76
ARTICLE 29 - COMPENSATION FOR BREACH OF AGREEMENT .....	77
29.1 Compensation for default by the Concessionaire.....	77
29.2 Compensation for default by the Authority .....	77
29.3 Compensation to be in addition .....	77
29.4 Mitigation of costs and damage.....	77
ARTICLE 30 - SUSPENSION OF CONCESSIONAIRE'S RIGHTS.....	78

30.1	Suspension upon Concessionaire Default .....	78
30.2	Authority to act on behalf of Concessionaire .....	78
30.3	Revocation of Suspension .....	78
30.4	Substitution of Concessionaire .....	78
30.5	Termination .....	79
ARTICLE 31 - TERMINATION.....		80
31.1	Termination for Concessionaire Default .....	80
31.2	Termination for Authority Default .....	82
31.3	Termination Payment.....	82
31.4	Other rights and obligations of the Authority.....	83
31.5	Survival of rights .....	84
31.6	Certain limitations on Termination Payment.....	84
31.8	Limitation of Liability .....	84
31.9	Mutual Foreclosure .....	84
ARTICLE 32 – DIVESTMENT OF RIGHTS AND INTEREST .....		86
32.1	Divestment Requirements .....	86
32.2	Inspection and cure .....	86
32.3	Cooperation and assistance on transfer of Project .....	87
32.4	Vesting Certificate .....	87
32.5	Divestment costs etc.....	87
ARTICLE 33 – DEFECTS LIABILITY AFTER TERMINATION .....		89
33.1	Liability for defects after Termination.....	89
33.2	Retention of Escrow Account.....	89
Part VI Other Provisions.....		90
ARTICLE 34 - ASSIGNMENT AND CHARGES.....		91
34.1	Restrictions on assignment and charges .....	91
34.2	Permitted assignment and charges.....	91
34.3	Substitution Agreement .....	91
ARTICLE 35 - LIABILITY AND INDEMNITY.....		93
35.1	Indemnity by the Concessionaire .....	93
35.2	Indemnity by the Concessionaire .....	93
35.3	Notice and contest of claims .....	94
35.4	Defence of claims.....	94
35.5	No consequential claims.....	95
35.6	Survival on Termination .....	95
ARTICLE 36 - RIGHTS AND TITLE OVER THE SITE.....		96
36.1	Licensee rights.....	96
36.2	Access rights of the Authority and others.....	96
36.3	Property taxes.....	96
36.4	Restriction on sub-licensing .....	96
36.5	.....	96
ARTICLE 37 - DISPUTE RESOLUTION .....		97
37.1	Dispute resolution .....	97
ARTICLE 38 - DISCLOSURE.....		98
38.1	Disclosure of Specified Documents.....	98
38.2	Disclosure of Documents relating to safety.....	98
38.3	Withholding disclosure of Protected Documents.....	98
ARTICLE 39 - REDRESSAL OF PUBLIC GRIEVANCES .....		99
39.1	Complaints Register .....	99
39.2	Redressal of complaints .....	99
ARTICLE 40 - MISCELLANEOUS.....		100
40.1	Governing law and jurisdiction .....	100
40.2	Waiver of immunity .....	100
40.3	Depreciation and Interest.....	100
40.4	Delayed payments.....	100
40.5	Waiver .....	100
40.6	Liability for review of Documents and Drawings.....	101

40.7	Exclusion of implied warranties etc .....	101
40.8	Survival .....	101
40.9	Entire Agreement .....	101
40.10	Severability .....	102
40.11	No partnership.....	102
40.12	Third parties .....	102
40.13	Successors and assigns .....	102
40.14	Notices.....	102
40.15	Supplementary Agreement.....	103
40.16	Language .....	103
40.17	Counterparts.....	103
	ARTICLE 41 - DEFINITIONS .....	104
	SCHEDULES.....	116
	SCHEDULE – A - SITE OF THE PROJECT .....	117
	SCHEDULE – B – DEVELOPMENT OF THE WAREHOUSE FACILITY.....	119
	SCHEDULE – C – SERVICES.....	124
	SCHEDULE – D – SPECIFICATIONS AND STANDARDS.....	125
	SCHEDULE – E – APPLICABLE PERMITS .....	126
	SCHEDULE – F – PERFORMANCE SECURITY .....	127
	SCHEDULE – G – DRAWINGS .....	129
	SCHEDULE – H – TESTS .....	130
	SCHEDULE – I – PROJECT COMPLETION SCHEDULE.....	132
	SCHEDULE – J – MAINTENANCE MANUAL, SERVICE MAINTENANCE REQUIREMENTS.....	133
	SCHEDULE – K – SAFETY REQUIREMENTS .....	138
	SCHEDULE – L - SELECTION OF INDEPENDENT ENGINEER .....	141
	SCHEDULE – M- TERMS OF REFERENCE FOR INDEPENDENT ENGINEER .....	142
	SCHEDULE-N - ESCROW AGREEMENT.....	147
	SCHEDULE-O - PANEL OF CHARTERED ACCOUNTANTS .....	158
	SCHEDULE-P - VESTING CERTIFICATE .....	159
	SCHEDULE-Q - SUBSTITUTION AGREEMENT.....	160

**PART – I**  
**PRELIMINARY**

## CONCESSION AGREEMENT

THIS AGREEMENT is entered into on this the \*\*\*\*\*day of\*\*\*\*\*, 20\*\*\*\*

### BETWEEN

- 1 **THE MEGHALAYA STATE WAREHOUSING CORPORATION**, was established after being bifurcated from Assam State Warehousing Corporation in the year 1973, under the Warehousing Corporation Act, 1962 enacted by the Parliament and having its offices at Lower Lachumiere, Shillong - 793 001, East Khasi Hills District, Meghalaya, represented by [ ] (hereinafter referred to as the “**Authority**” or “**MSWC**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors, and assigns) of One Part.

### AND

- 2 \*\*\*\*\* a company incorporated under the provisions of the Companies Act, 2013 with CIN\*\*\*\*\* and having its registered office at \*\*\*\*\* (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Other Part.

The **Authority** and the **Concessionaire** shall collectively be referred to as “**Parties**” and individually be referred to as “**Party**” as the case may be.

### WHEREAS:

- A. The Authority intends to develop a Warehouse Facility over 1 (one) acre of land at Mawkhanu, New Shillong under Design, Build, Finance, Operate and Transfer (“DBFOT”) on PPP mode in accordance with the terms and conditions set forth in this Agreement.
- B. The Authority had accordingly invited proposals by its Request for Proposal dated [ ] (the “Request for Proposal” or “RFP”) for selection of bidder to Design, Build, Finance, Operate, Maintain and Transfer the Project at the identified location on a PPP basis.
- C. After evaluation of the bids received, the Authority had accepted the bid of the {successful bidder/Consortium} comprising [ ] and [ ] (collectively the “Consortium”) with [ ] as its lead member (the “Lead Member”) and issued the Letter of Award No. [ ] dated [ ] (hereinafter called the “**LOA**”) to the {selected bidder/Consortium} requiring, *inter alia*, the execution of this Concession Agreement within 30 (Thirty) days of the date of issue thereof.
- 3 The selected bidder/ Consortium has since promoted and incorporated the Concessionaire as a company under the Companies Act 2013 with CIN\*\*\*\*\* and has requested the Authority to accept the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the {selected bidder/Consortium under the LOA}, including the obligation to enter into this Concession Agreement pursuant to the LOA for executing the Project.
- 4 By its letter dated [ ] the Concessionaire has also joined in the said request of the selected bidder/Consortium to the Authority to accept it as the entity which shall undertake and perform the



obligations and exercise the rights of the selected bidder/Consortium including the obligation to enter into this Concession Agreement pursuant to the LOA. The Concessionaire has further represented to the effect that it has been promoted by the selected bidder/Consortium, only for the purposes hereof.

- 5 The Authority has agreed to the said request of the selected bidder/Consortium and the Concessionaire and has accordingly agreed to enter into this Concession Agreement with the Concessionaire for implementation of the Project on DBFOT basis, subject to and on the terms and conditions set forth hereinafter.
- 6 If at any time during the Term, the Authority/ MSWC is converted into a 'Company' under the provisions of the Companies Act 2013, the provisions of this Agreement shall apply *mutatis-mutandis* to the Parties and/or the Authority/ MSWC, wherever they are applicable upon them collectively and individually.

**NOW, THEREFORE**, in consideration of the foregoing and the respective covenants and agreements set forth in this Concession Agreement, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

## ARTICLE 1 - DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 41) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

### 1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;
- (c) references to a **“person”** and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include successors and assigns;
- (d) the table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (e) the words **“include”** and **“including”** are to be construed without limitation and shall be deemed to be followed by **“without limitation”** or **“but not limited to”** whether or not they are followed by such phrases;
- (f) references to **“construction”** or **“building”** include, unless the context otherwise requires, investigation, design, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and **“construct”** or **“build”** shall be construed accordingly;
- (g) references to **“development”** include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, up-gradation and other activities incidental thereto, and **“develop”** shall be construed accordingly;
- (h) references to **“development period”** is 1 year from Appointed Date for augmentation and development of the Project.
- (i) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (j) any reference to day shall mean a reference to a calendar day;
- (k) references to a **“business day”** shall be construed as a reference to a day (other than a Sunday) on which banks in **the State** are generally open for business;
- (l) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;

- (m) any reference to any period commencing “**from**” a specified day or date and “**till**” or “**until**” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
  - (n) the words importing singular shall include plural and vice versa.
  - (o) references to any gender shall include the other and the neutral gender;
  - (p) “**Lakh**” means a hundred thousand (100,000) and “**Crore**” means ten million (10,000,000);
  - (q) “**indebtedness**” shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
  - (r) references to the “**winding-up**”, “**dissolution**”, “**insolvency**” or “**reorganization**” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganization, dissolution, arrangement, protection or relief of debtors;
  - (s) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, license or document of any description shall be construed as reference to that agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause shall not operate so as to increase liabilities or obligations of Authority hereunder or pursuant hereto in any manner whatsoever;
  - (t) any agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effective only if it is in writing under the hand of a duly authorized representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;
  - (u) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
  - (v) references to Recitals, Articles, Clauses, Sub-clauses or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses and Schedules of or to this Agreement, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a Paragraph of this Agreement or of the Schedule in which such reference appears;
  - (w) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on *per diem* basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “**Damages**”); and
  - (x) time shall be of the essence in the performance of the Parties’ respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence;
- 1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Concessionaire to the Authority and/or the Independent Engineer shall be provided free of cost and in three copies, and if the Authority and/or the Independent Engineer is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.

1.2.3 The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply.

1.2.4 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act, 1897 shall not apply.

### **1.3 Measurements and arithmetic conventions**

All measurements and calculations shall be in the metric system and calculations done to 2 (two) decimal places, with the third digit of 5 (five) or above being rounded up and below 5 (five) being rounded down.

### **1.4 Priority of agreements, clauses and schedules**

1.4.1 This Agreement, and all other agreements and documents forming part of or referred to in this Agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this Agreement, the priority of this Agreement and other documents and agreements forming part hereof or referred to herein shall, in the event of any conflict between them, be in the following order:

- (a) this Agreement; and
- (b) all other agreements and documents forming part hereof or referred to herein;
- (c) i.e. the Agreement at (a) above shall prevail over the agreements and documents at (b) above.

1.4.2 Subject to the provisions of Clause 1.4.1, in case of ambiguities or discrepancies within this Agreement, the following shall apply:

- (a) between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;
- (b) between the Clauses of this Agreement and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail, **provided however, that Schedule R, which is incorporated into the Agreement by reference, shall prevail over the Agreement.**
- (c) between any two Schedules, the Schedule relevant to the issue shall prevail;
- (d) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- (e) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail; and
- (f) between any value written in numerals and that in words, the latter shall prevail.

## **Part II The Concession**

## **ARTICLE 2 - SCOPE OF THE PROJECT**

### **2.1 Scope of the Project**

- 2.1.1 The scope of the Project (the “**Scope of the Project**”) shall mean and include, during the Concession Period:
- (a) Planning, Design, Financing and Construction of the Project on the Site set forth in **Schedule-A** and as specified in **Schedule-B** together with provision of the Project Assets in conformity with the Specifications and Standards and other provisions of this Agreement and subject to activities permitted to the Authority (Meghalaya State Warehousing Corporation) under the Warehousing Corporation Act.
  - (b) Operation and Maintenance of the Project in conformity with the Specifications and Standards, and other provisions of this Agreement;
  - (c) provide Services in conformity with the Specifications and Standards, and other provisions of this Agreement;
  - (d) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

### **ARTICLE 3 - GRANT OF CONCESSION**

#### **3.1 The Concession**

- 3.1.1 Subject to and in accordance with the provisions of this Agreement, the Applicable Laws, the Applicable Permits and Good Industry Practice, the Authority hereby grants to the Concessionaire and the Concessionaire hereby accepts the exclusive right, license and authority to Design, Finance, Construct, Operate and Maintain the Project at the Site (the "Concession") (subject to the activities permitted to the Authority) and provide Services for a period of 30 (Thirty) years, commencing from the Appointed Date and ending on the Transfer Date, including any extension thereto as may be granted by the Authority as per the terms of this Agreement (the "Concession Period"), which includes construction of the Project Assets and to exercise and/or enjoy the rights, power, privileges and entitlements as set forth in this Agreement. The Concessionaire agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein.
- 3.1.2 Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall entitle and oblige the Concessionaire to undertake the following in accordance with the provisions of Applicable Laws and Applicable Permits, during the Concession Period to:
- (a) Right of Way, access, and license to the Site for the purpose of and to the extent conferred by the provisions of this Agreement;
  - (b) Plan, design, develop, procure, construct, finance, equip, operate, maintain and manage the Project Assets / Project as per the terms and conditions of this Agreement including Specifications and Standards, Applicable Laws, Applicable Permits and Good Industry Practice, and transfer the same to the Authority or a designated Government entity on the Transfer Date;
  - (c) Operate, Manage, and Maintain the Facility and regulate the use thereof by third parties;
  - (d) Demand, collect and appropriate, on behalf of MSWC, Fee from Users liable for payment of Fee for using the Facility and/ or availing any Services or any part thereof and refuse entry to any User if the Fee due is not paid;
  - (e) Pay Concession Fee and receive revenue in accordance with Article 23 (Concession Fee), as consideration for undertaking this Project;
  - (f) perform and fulfil all of the Concessionaire's obligations under and in accordance with this Agreement including Specifications and Standards, Applicable Laws, Applicable Permits and Good Industry Practice;
  - (g) provide Services to the Users and/or any other service providers as per the terms and conditions of this Agreement including Specifications and Standards, Good Industry Practice and Applicable Law;
  - (h) bear and pay all costs, expenses, and charges in connection with or incidental to the performance of the obligations of the Concessionaire under this Agreement;
  - (i) access the common areas, facilities, and infrastructure at the Site, as long as such right to access is limited to the extent that it is required for Design, Build, Operating and Maintaining the Project and/ or providing Services under this Agreement;
  - (j) Neither assign, transfer, or create any lien or Encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Project nor sell, transfer, exchange, lease, sub-license or part

possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement;

3.1.3 Upon the termination of this Agreement, either due to expiry of the Concession Period or due to any other reason, the Concessionaire shall comply with obligations provided in Article 31.

3.1.4 In case of any changes in respect of the activities permitted to the Authority, if interested the concessionaire may seek permission from the Authority for change in the activities as per the revised norms subject to upward negotiation for concession fee.

### **3.2 Substitution of the Authority**

The Parties expressly agree that the Authority may, in pursuance of any re-organization or restructuring undertaken in pursuance of Applicable Laws or in the event the ownership of the Facility is transferred from the Authority to any other public entity, substitute itself by any other public entity having the capacity to undertake and discharge the duties and obligations of the Authority with a similar or greater creditworthiness, and upon such substitution, all the functions, rights and obligations of the Authority under this Agreement shall be deemed to be transferred to the substituted entity in accordance with and subject to Applicable Laws; provided, however, that prior to any such substitution, the Parties shall, on a best endeavor basis, make such arrangements and enter into such further agreements as may be necessary for performance of the irrespective obligations hereunder.

### **3.3 Extension of Concession Period**

In the event that extension of the Concession Period shall have become due under and in accordance with the provisions of this Agreement, the Concessionaire shall apply to the Authority forthwith for extension of the Concession Period in accordance with the provisions of this Agreement. For the sake of clarity, it is understood, agreed, and acknowledged by the Parties that the maximum extension of the Concession Period shall not, under any circumstances, be more than 50% (fifty cent) of the Concession Period in aggregate. The Concessionaire agrees and acknowledges that any and all provisions of this Agreement relating to grant of extension in the Concession Period by the Authority shall always be deemed to be subject to the limitations and restriction prescribed by this Clause 3.3.



#### **ARTICLE 4 - CONDITIONS PRECEDENT**

##### **4.1 Conditions Precedent**

4.1.1 Save and except as expressly provided in Articles 4, 5, 6, 7, 8, 9, 10, 25, 33, 37 and 40, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “**Conditions Precedent**”).

4.1.2 The Concessionaire may, upon fulfilment of its Conditions Precedent in accordance with Clause 4.1.3, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 45 (forty five) days of the notice, or such longer period not exceeding 90 (ninety) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority prior to the Appointed Date shall be deemed to have been fulfilled when the Authority shall have:

- (a) provided to the Concessionaire the Right of Way, access, leave and license rights to the Site; Provided that upon request in writing by the Authority, the Concessionaire may, in its discretion, grant extension of time, not exceeding 90 (Ninety) days, for fulfilment of the Conditions Precedent set forth in this Clause 4.1.2.
  - (b) provided that the Authority has paid all the required due/ fee/ payments towards the Site till the Appointed date.
- 4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire within a period of 90 (Ninety) days from the date of this Agreement shall be deemed to have been fulfilled when the Concessionaire shall have:
- (a) executed and procured execution of the Substitution Agreement;
  - (b) Provided to the Authority the list of existing tenancies, licenses and contracts that it undertakes to continue as on Provisional COD not later than 30 (thirty) days from the date of the Agreement.
  - (c) executed and procured execution of the Escrow Agreement;
  - (d) procured, installed and integrated with MSWC’s accounting software, the billing software for the Project as per provisions of Clause 17.9;
  - (e) executed the Financing Agreements and delivered to the Authority 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;
  - (f) delivered to the Authority from {the Consortium Members} confirmation, in original, of the correctness of their representations and warranties set forth in Sub-clauses (k), (l) and (m) of Clause 7.1 of this Agreement; and
  - (g) delivered to the Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof;
  - (h) Prepare and obtain approval from the Authority for the SOP, as defined in Clause 23.1.9, for flow of revenue collections from the Authority’s account to the Escrow Account.

The Conditions Precedent listed above shall be required to be satisfied by the Concessionaire within a period of 90 (Ninety) days from the date of the Agreement, except Condition

Precedent at 4.1.3 (c), which shall be required to be satisfied within a period of 30 days from the date of the Agreement.

Provided that upon request in writing by the Concessionaire, the Authority may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3.

- 4.1.4 Each Party shall make all reasonable endeavors to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible.
- 4.1.5 The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

#### **4.2 Commencement of Concession Period**

The date on which Financial Close is achieved and all the Conditions Precedent specified in Clause 4.1 are satisfied or waived, as the case may be, shall be the Appointed Date which shall be the date of commencement of the Concession Period. For the avoidance of doubt, the Parties agree that the Concessionaire shall, upon occurrence of the Appointed Date hereunder, by notice convey the particulars thereof to the Authority, and shall thereupon be entitled to commence construction on the Site. However, the Concessionaire may prior to the Appointed Date, subject to prior written approval from the Authority, undertake shifting of obstructing utilities at the Site and/or cutting of trees as set forth in Article 11.

#### **4.3 Deemed Termination upon delay**

Without prejudice to the provisions of Clauses 4.2 and 4.3, and subject to the provisions of Clause 9.3, the Parties expressly agree that in the event the Appointed Date does not occur, for any reason whatsoever, before the 1st (first) anniversary of the date of this Agreement or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties. Provided, however, that in the event the delay in occurrence of the Appointed Date is for reasons attributable to the Concessionaire, the Performance Security of the Concessionaire shall be encashed and appropriated by the Authority and such amount is agreed to be the genuine pre-estimate of the loss caused to the Authority by the Concessionaire, on account of such delay.

## **ARTICLE 5 - OBLIGATIONS OF THE CONCESSIONAIRE**

### **5.1 Obligations of the Concessionaire**

- 5.1.1 Subject to and on the terms and conditions of this Agreement, the Concessionaire shall, at its own cost and expense, procure finance for and undertake the design, engineering, procurement, construction, operation and maintenance of the Project in accordance with the provisions of this Agreement and take reference to the Layout Plan as specified under Schedule – B, Annexure - II and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 5.1.2 The Concessionaire shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- 5.1.3 Subject to the provisions of Clauses 5.1.1 and 5.1.2, the Concessionaire shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.
- 5.1.4 The Concessionaire shall, from time to time, undertake expansion or augmentation of the Project Assets in accordance with the provisions of this Agreement and Good Industry Practice.
- 5.1.5 Save and except as expressly provided in this Agreement, the Concessionaire shall, at all times during the subsistence of this Agreement, pay all taxes, levies, duties, cesses and all other statutory charges, dues, assessments or outgoings payable including that of railways, customs, etc., except for property tax in respect of the Project, Services and other services, or in respect of the materials stored therein, which may be levied by any Government Instrumentality.

All or any statutory charges, including property tax, paid by the Authority in respect of the Project Site/ Project Facilities (including those created or developed by the Concessionaire), shall be reimbursed by the Concessionaire to the Authority, on the failure of which, the same shall be treated as the Concessionaire Default in terms of this Agreement.

- 5.1.6 The Concessionaire shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
- (a) make, or cause to be made, necessary applications to the relevant Governmental Instrumentalities with such particulars and details as may be required for obtaining Applicable Permits for the construction, commissioning and operating the Facility, other than those set forth in Clause 4.1.2, and obtain and keep in force and effect such Applicable Permits in conformity with Applicable Laws;
  - (b) procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes, know-how and systems used or incorporated into the Project perform and fulfil its obligations under all the Financing Agreements executed for development of the Project.
  - (c) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;
  - (d) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Concessionaire's obligations under this Agreement;
  - (e) always act in a manner consistent with the provisions of this Agreement and not cause or fail to do any act, deed or thing, whether intentionally or otherwise, which may in any manner be violative of any of the provisions of this Agreement or Applicable laws;
  - (f) procure that all facilities and amenities within the Project are operated and maintained in accordance with Good Industry Practice and the Users have non-discriminatory access for use of the same in

accordance with the provisions of this Agreement and Applicable Laws;

- (g) ensure that Users are treated with due courtesy and consideration and provided with ready access to Services and information;
- (h) provide, or cause to be provided, Services in accordance with the provisions of this Agreement and Applicable Laws;
- (i) procure the temporary supply of electricity during the Construction Period to the Project from the grid, including procuring standby arrangements for supply of electricity for maintenance of Services in the event of outages or failure of electricity supply from the grid;
- (j) support, cooperate with and facilitate the Authority in the implementation and operation of the Project in accordance with the provisions of this Agreement;
- (k) transfer the Project Assets to the Authority upon Termination/Expiry of this Agreement, in accordance with the provisions thereof;
- (l) procure, as required, the appropriate utilities and Services required or used for the Project;
- (m) keep, on the Site, a copy of this Agreement, publications named in this Agreement, the Drawings, documents relating to the Project, and Change of Scope Order and other communications given under this Agreement. The Authority's representative and its authorized personnel shall have the right of access to all these documents at all reasonable times;
- (n) cooperate with authorized representative of the Authority and personnel of any public Authority;
- (o) not interfere unnecessarily or improperly with the convenience of the public, the Authority and its representatives, employees, agents etc.;
- (p) undertake all necessary superintendence to plan, arrange, direct, manage, inspect and test the Project Assets;
- (q) construct and make alterations or additions to the building/structure/installations on the Site at its own cost under intimation to the Authority and strictly in accordance with the sanction and approval of the concerned local authority or of any other authority, the approval of whom has been mandated under the law for the time being in force. Such alterations shall not compromise the safety aspects.

However, the Concessionaire shall be at liberty, after giving prior written intimation to the MSWC to undertake minor modifications / alterations within the industrial structure / building subject to approvals and permissions as may be required as applicable.

- (r) at its own cost, provide and install the, furniture equipment, fixtures and things necessary for implementing the Project;
- (s) at its own cost bear the cost of developing and maintain roads inside the Facility boundary to achieve seamless connectivity of the Facility with external road connectivity;
- (t) bear and pay all the existing and future rates, Taxes, levies, duties, cess and charges of whatsoever nature in respect of the Project throughout the term or the extended term of the Concession Period to MSWC, if any;
- (u) provide the Project security arrangements on round the clock basis and shall maintain and run the Project in accordance with Good Industry Practice;

- (v) maintain the Site and structure/installations/fixtures in good conditions and order and as per the terms of this Agreement and also abide by the directions given by the relevant departments as may be entrusted with the enforcement of rule and regulation regarding labour safety, health sanitation, cleanliness and hygiene;
- (w) not store any hazardous or explosive substance on the Site unless specific license is obtained from the regulatory body after taking prior consent from the Authority. The Concessionaire shall provide and maintain necessary fire-fighting and fire protection systems in the Site as per the Applicable Law;
- (x) observe and perform all the terms, covenants, conditions and stipulations contained herein and shall not do, omit or suffer to be done any act, deed or thing whereby Authority's rights with respect to the Facility, the assets therein or any part/portion of the Facility in any way prejudiced, affected or extinguished;
- (y) use the Site or any premises erected thereupon for the exclusive purpose of providing the Services to the users of the Facility ("Users") and bonafide visitors to the Site.

## **5.2 Obligations relating to Change in Ownership**

- 5.2.1 The Concessionaire shall not undertake or permit any Change in Ownership, except with the prior written approval of the Authority.
- 5.2.2 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that:
  - i. all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of 25% (twenty-five per cent) or more of the total Equity of the Concessionaire; or
  - ii. acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him, shall constitute a Change in Ownership requiring prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire. The Concessionaire undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Concessionaire without such prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to the acquisition or transfer of shareholding being in compliance with all extant laws, rules and guidelines of GOI including but not limited to Press Note 3, and the Authority shall convey its decision / reply thereon no later than 30 (thirty) days from the date of receipt of request for approval appended with all the necessary and required details. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire from any liability or obligation under this Agreement.

For the purposes of this Clause 5.2.2:

- (a) the expression "acquirer", "control" and "person acting in concert" shall have the meaning ascribed thereto in the Security and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011 or any statutory re-enactment thereof as in force as on the date of acquisition of Equity, or the control of the Board of Directors, as the case may be, of the Concessionaire;
- (b) the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control of any company or companies whether in India or abroad which results in the acquirer acquiring control over the shares or voting rights of shares of the

Concessionaire; and

- (c) power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situate in India or abroad) the Equity of the Concessionaire, not less than half of the directors on the Board of Directors of the Concessionaire or of any company, directly or indirectly whether situate in India or abroad, having ultimate control of 25% (twenty five per cent) or more of the Equity of the Concessionaire shall constitute acquisition of control, directly or indirectly, of the Board of Directors of the Concessionaire.

5.2.3 Upon the expiry or earlier termination of the Concession Period, the Concessionaire shall handover to the Authority the peaceful and vacant possession of the Site including the structure / installations / fixtures erected or installed on the same. Failure to handover the same within a period of 7 (seven) days of the expiry or earlier termination of the Concession Period would make the Concessionaire liable for payment of penalty equivalent to 1% (one per cent) of the last annual Concession Fee per day up-to a maximum of 15 (fifteen) days, after which the Authority shall be entitled to enter upon and take possession of the Site including the Project on as-is- where-is basis.

### **5.3 Employment of trained personnel**

The Concessionaire shall recruit and manage all the personnel required to perform each step/ component of the Services.

The Concessionaire shall ensure that the personnel engaged by it in the performance of its obligations under this Agreement are at all times properly trained for their respective functions in accordance with the Applicable Laws.

The Concessionaire shall adopt an effective human resources policy in accordance with the Applicable Laws.

The Concessionaire shall appoint suitable officers/ staff/ representative to work and supervise the Project and to deal with the Authority.

The Concessionaire shall be responsible for providing requisite training to its personnel at the Project, from time to time.

The Concessionaire shall ensure:

- (a) the compliance of all Applicable Laws and Specifications and Standards by all the Contractors and sub-contractors;
- (b) that the staff and attendants employed at the Project are trained as per the requirements of the Applicable Laws in performing the Services;
- (c) that its personnel are courteous and helpful to the Users.

### **5.4 Branding of the Site**

The Concessionaire shall maintain a high standard in the appearance and aesthetic quality of the site through both appropriate design and sensitive management of all visible elements.

The area near entrance & exit gates of the site or any part thereof are permitted to advertise, display or reflect the name or identity of the Concessionaire or any other entity along with the 'name or brand', The Concessionaire shall ensure that the branding of the site shall not trigger any 'political sentiments' and / or 'religious sentiments' and shall abide by the extant policy in this regard.

### **5.5 Facilities for differently abled and elderly persons**

The Concessionaire shall, in conformity with the guidelines issued from time to time by the Ministry of

Social Justice and Empowerment, or a substitute thereof, procure a barrier free environment for the differently abled and for elderly persons using the Facility.

**5.6 Personnel engaged by the Concessionaire**

The Concessionaire shall ensure that the personnel engaged by the Concessionaire or any of its agency in the performance of its obligations under this Agreement are at all times appropriately qualified, skilled, and experienced in their respective functions in conformity with Good Industry Practice.

**5.7 Risks and Responsibility for the Project**

The Concessionaire shall bear full risk and take full responsibility for the care of the Project, and of the Materials, goods and equipment for incorporation therein, from the date of signing of this Agreement until the date of handing over the Project to the Authority.

Except as otherwise stated in this Agreement, the Concessionaire accepts complete responsibility for having foreseen all difficulties and costs of successfully completing the Project.

**5.8 Obligations relating to security clearance**

Notwithstanding anything to the contrary contained in this Agreement, the engagement of employees, staff and personnel of the Concessionaire and of its Contractors and subcontractors shall always be subject to Applicable Laws. For the avoidance of doubt, it is agreed that refusal of or inability to obtain any such permits and approvals by the Concessionaire or any of its Contractors or sub- contractors shall not constitute a Force Majeure Event, and shall not in any manner excuse the Concessionaire from the performance and discharge of its obligations and liabilities under this Agreement.

**5.9 Obligations relating to taxes**

The Concessionaire shall pay, at all times during the subsistence of this Agreement, save and except the property tax (which shall be reimbursed by the Concessionaire to the Authority, as stated above), all taxes, levies, duties, cesses and all other statutory charges, dues, assessments, or outgoings payable in respect of the Project Facilities.

**5.10 Accidents**

In the event of a major accident on the Site, the Concessionaire shall, by most expeditious means, inform the concerned civil & police authorities and the Authority. The Concessionaire's responsibilities with regard to the construction and operation of the Project shall in no way be diminished by informing the above officials, and the Concessionaire shall be required to take expeditious action for the medical and legal aspects notwithstanding any delay on the part of the officials to give any instructions. The Concessionaire shall preserve the Site of such accident intact until the completion of all legal formalities. The Concessionaire shall then arrange for the expeditious removal of wreckage or debris, and for cleaning the Site. If any portion of the Project Assets suffers any damage, the Concessionaire shall, with the consent of the Authority, arrange for the repair and rectification thereof within a reasonable time as may be agreed by the Parties.

The Concessionaire shall keep the Authority indemnified against all damages on account of any accident and shall incur the sole liability for the same, as the operator of the Project Facilities.

The Concessionaire shall, in event of any accident, incur any expenditure or take any other action as necessary, in accordance with Good Industry Practice.

**5.11 Obligations relating to noise control**

The Concessionaire shall take all such measures as may be necessary in accordance with Applicable Laws and Good Industry Practice to control and mitigate the noise arising from the Facility and its impact on Users and the neighborhood.

**5.12 Obligations relating to management of the Concessionaire**

The management of the Concessionaire shall be carried out as per and in compliance with the Applicable Laws, directions issued by the Authority in terms of this Agreement/ any regulatory body from time to time and/or in compliance with provisions of the Companies Act, 2013 and its amendment(s) from time to time. It shall be the sole and absolute responsibility and obligation of the Concessionaire to remain in compliance and strict adherence with all the Applicable Laws/ directions from the Authority in terms of this Agreement / regulatory body and/or in compliance with provisions of the Companies Act 2013 and its amendments from time to time and the Authority shall not be held responsible or liable for any breach or non-compliance of the same by the Concessionaire.

**5.13 Intellectual Property Permits**

The Concessionaire shall ensure that if any equipment, designated devices, materials or any process are covered by Intellectual Property Rights, the right for such use shall be secured by the Concessionaire by suitable legal arrangements and agreements with the Intellectual Property Rights owner or person empowered to assign the Intellectual Property Rights. A copy of each such agreement shall be filed with the Authority.

**5.14 Water and Electricity**

- 5.14.1 The Concessionaire shall be responsible to procure power, water, and related back-up systems at the Project to maintain uninterrupted power and water supply at all times, including Construction Period.

The Concessionaire shall, post the Appointment date, set up a meter at its own cost to measure the power and water consumption. During the Project construction and operation, the Concessionaire shall pay all the invoices relating to water and electricity connections, running charges as and when due.

- 5.14.2 The Authority shall not be responsible for interruptions and/or insufficiency of power or water supply and the Concessionaire shall directly deal with the concerned agency responsible for supply of power and water.

**5.15 Obligations relating to procurement of goods and services**

- 5.15.1 The Concessionaire agrees and undertakes that it shall procure contracts, goods and services for the construction and operation of the Facility in a fair, transparent, and commercially reasonable manner, and without any undue favor or discrimination in this behalf.

**5.16 Obligations relating to medical aid**

For providing emergency medical aid to Users, the Concessionaire shall set up and operate a medical



aid post at the Facility equipped to render first aid and to assist in accessing emergency medical aid from hospitals in the vicinity.

## **ARTICLE 6 - OBLIGATIONS OF THE AUTHORITY**

### **6.1 Obligations of the Authority**

6.1.1 The Authority shall, at its own cost and expense undertakes, to comply with, and perform all its obligations set out in this Agreement or arising hereunder.

6.1.2 The Authority agrees to provide support to the Concessionaire and undertakes to observe, comply with, and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:-

- (a) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide reasonable support and assistance to the Concessionaire in procuring Applicable Permits, required from any Government Instrumentality for implementation and operation of the Project;
- (b) upon written request from the Concessionaire, provide reasonable assistance to the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favorable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
- (c) pay property tax in relation to the Site on which it is established;

Explanation:- All or any statutory charges, including property tax, paid by the Authority in respect of the Project Site/ Project Facilities (including those created or developed by the Concessionaire), shall be reimbursed by the Concessionaire to the Authority, on the failure of which, the same shall be treated as the Concessionaire Default in terms of this Agreement.

- (d) subject to and in accordance with Applicable Laws, grant to the Concessionaire the authority to regulate use of the Project;
- (e) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
- (f) support, cooperate with and facilitate the Concessionaire in the implementation and operation of the Project in accordance with the provisions of this Agreement; and
- (g) provide to the Concessionaire, upon receiving the Performance Security under Clause 9.1, the Site in accordance with the provisions of Article 10;
- (h) Provide unhindered access to, as shown in the project map attached in Schedule A.
- (i) subject to the Concessionaire complying with Applicable Laws, by making requisite applications, provide reasonable assistance to the Concessionaire in procuring electricity supply within the Project;
- (j) provide to the Concessionaire the Right of Way, access, leave and license rights to the Site in accordance with the provisions of Article 10;
- (k) it has and shall maintain good and valid title to the Site/ it has and shall at all times during the Concession Period maintain legal and valid leasehold rights to the Site for a period that is at least equal to the Concession Period;
- (l) provide complete access to the Site free of encumbrance, including right to use for the purpose of maintaining telephone lines, electricity lines, water piping or for such other public purpose as the

Concessionaire may require, but the charges for the use of such utilities shall be incurred by the Concessionaire;

- (m) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, and subject to the applicable guidelines issued by Government of India, from time to time, facilitate and provide reasonable support to the Concessionaire in procuring statutory approvals for setting up of custom facilities in the Facility;

#### **6.2 Obligations relating to refinancing**

Upon request made by the Concessionaire to this effect, the Authority shall, in conformity with any regulations or guidelines that may be notified by the Government or the Reserve Bank of India, as the case may be, permit and enable the Concessionaire to secure refinancing, in whole or in part, of the Debt Due on such terms as may be agreed upon between the Concessionaire and the entity providing such refinancing to be utilized for the Project purpose only ; provided that it shall not have the effect of increase in financial liability or obligations on the Authority and it shall not jeopardize the interest of the Authority in any manner, and shall always be subject to the prior approval of the Authority, which shall not be unreasonably withheld. For the avoidance of doubt, the tenure of debt refinanced hereunder may be determined mutually between the Senior Lenders and the Authority, but the repayment thereof shall be completed no later than 2 (two) years prior to expiry of the Concession Period.

## **ARTICLE 7 - REPRESENTATIONS AND WARRANTIES**

### **7.1 Representations and warranties of the Concessionaire**

The Concessionaire represents and warrants to the Authority that:

- (a) it is duly organized and validly existing under the laws of India, and has full power and authority to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and other actions under Applicable Laws to authorize the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (c) it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (d) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (e) it is subject to the laws of India, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising there under including any obligation, liability or responsibility hereunder;
- (f) the information furnished in the Bid and as updated on or before the date of this Agreement is true and accurate in all respects as on the date of this Agreement;
- (g) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Articles of Association {or those of any member of the Consortium} or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (h) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other Authority, the outcome of which may result in the breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform any of its obligations under this Agreement;
- (i) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legal binding order of any Government Instrumentality which may result in any material adverse effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (j) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under this Agreement;
- (k) it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.2.
- (l) the {successful bidder/ Consortium Members and its/ their} and its Associates have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and

implementing the Project in accordance with this Agreement.

- (m) {The successful bidder / each Consortium Member} is duly organized and validly existing under the laws of the jurisdiction of its incorporation or registration, as the case may be, and has requested the Authority to enter into this Agreement with {itself/the Concessionaire} pursuant to the Letter of Award, and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (n) all its rights and interests in the Project shall pass to and vest in the Authority on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Authority, and that none of the Project Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;
- (o) no representation or warranty by it contained herein or in any other document furnished by it to the Authority or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (p) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Authority in connection therewith;
- (q) The Concessionaire shall procure and furnish to the Authority the confirmation from the “successful bidder/Consortium Members” to the effect that all information provided by the {successful bidder/ Consortium Members} in response to the Request for Proposal or otherwise, is to the best of their knowledge and belief, if true and accurate in all material respects.
- (r) all undertakings and obligations of the Concessionaire arising from the RFP or otherwise shall be binding on the Concessionaire as if they form part of this Agreement.
- (s) it shall remain solely liable to perform its obligations under this Agreement as well as ensure performance of obligations by its sub-licensees, lessees, Contractors/Sub-Contractors, designers, consultants or agents and nothing contained in this Agreement shall create any contractual relationship or obligation between the Authority and Concessionaire’s Contractors/Sub-Contractors, designers, consultants or agents in any manner whatsoever.
- (t) It shall promptly inform the Authority in writing before initiating any of the following (including any matter incidental or consequential thereto) and give due consideration to the recommendations or suggestions, if any, made by the Authority in respect thereof:
  - (i) to apply for corporate insolvency proceedings under the Insolvency and Bankruptcy code, 2016;
  - (ii) for various other matters pertaining to the winding up of the Concessionaire;

However, the Authority shall not be liable or responsible or incur any liability of any nature arising out of, directly or indirectly, pursuant to any of the above actions taken by the Concessionaire.

## **7.2 Representations and warranties of the Authority**

The Authority represents and warrants to the Concessionaire that:

- (a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute

this Agreement, exercise its rights and perform its obligations, under this Agreement;

- (b) it has taken all necessary actions under Applicable Laws to authorize the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under this Agreement;
- (d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (e) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on the Authority's ability to perform its obligations under this Agreement;
- (f) it has complied with Applicable Laws in all material respects;
- (g) it has the right, power and authority to manage and operate the Facility up to the Appointed Date; and
- (h) It has good, valid and marketable title to the Site/ it has and shall at all times during the Concession Period maintain legal, marketable and valid right, title and interest and absolute and peaceful possession to the Site for a period that is at least equal to the Concession Period and has the power and authority to grant a license in respect thereto to the Concessionaire in the manner contemplated under this Agreement;
- (i) other than the Existing Easements, there are no Encumbrances (including any rights of way, easements, privileges, liberties, and appurtenances) or acquisitions of any nature existing on the Site;
- (j) it has uninterrupted, undisputed, unfettered, absolute, legal and peaceful and vacant physical possession of the Site;
- (k) there are no litigations or claims in respect to the Site or any part thereof, including but not limited to claims/ litigations arising from legacy title issues.

### **7.3 Disclosure**

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its aforesaid representations or warranties untrue or incorrect, such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of remedying any breach of the representation or warranty that has been found to be untrue or incorrect nor shall it adversely affect or waive any right, remedy or obligation of either Party under this Agreement.

## **ARTICLE 8 - DISCLAIMER**

### **8.1 Disclaimer**

- 8.1.1 The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the Request for Proposals, Scope of the Project, Specifications and Standards, Site, existing structures, local conditions, physical qualities of ground, subsoil and geology, availability of construction material and resources, railway connectivity, availability of electricity and water, business potential and all information provided by the Authority or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. Except as otherwise specifically provided under this Agreement, the Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Concessionaire confirms that it shall have no claim whatsoever against the Authority in this regard.
- 8.1.2 The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the Authority shall, except as otherwise specifically provided under this Agreement, not be liable for the same in any manner whatsoever to the Concessionaire, {the Consortium Members and their} Associates or any person claiming through or under any of them.
- 8.1.3 The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above shall not vitiate this Agreement or render it voidable.
- 8.1.4 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 8.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error; provided, however, that a failure on part of the Authority to give any notice pursuant to this Clause 8.1.4 shall not prejudice the disclaimer of the Authority contained in Clause 8.1.1 and shall not in any manner shift to the Authority any risks assumed by the Concessionaire pursuant to this Agreement.
- 8.1.5 Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Concessionaire and the Authority shall not be liable in any manner for such risks or the consequences thereof.
- 8.1.6 The Concessionaire acknowledges and hereby accepts to have satisfied itself as to the sufficiency and correctness/acceptability of the Concession Fee **as per Article 23**.

**Part III**  
**Development and Operations**



## **ARTICLE 9 - PERFORMANCE SECURITY**

### **9.1 Performance Security**

The Concessionaire shall have provided to the Authority prior to the signing of this Agreement, an irrevocable and unconditional guarantee from a Scheduled Commercial Bank for a sum of:

- From the date of execution of the Contract till COD: INR 15 Lakhs (Fifteen Lakhs) with validity of 60 (sixty) days beyond the Construction/Development period.
- From COD till expiry of Concession Period: INR 2.5 Lakhs (Two Lakhs and Fifty Thousand) with validity of 60 (sixty) days beyond the Concession Period.

in the form set forth in Schedule-F (the “**Performance Security**”).

### **9.2 Appropriation of Performance Security**

Upon occurrence of a Concessionaire Default or failure to meet any Condition Precedent, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages for such Concessionaire Default or for failure to meet any Conditions Precedent. Upon such encashment and appropriation from the Performance Security, the Concessionaire shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Concessionaire shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which the Authority shall be entitled to terminate this Agreement in accordance with Article 31. Upon replenishment or furnishing of a fresh Performance Security, as the case may be, as aforesaid, the Concessionaire shall be entitled to an additional Cure Period of 90 (ninety) days for remedying the Concessionaire Default, and in the event of the Concessionaire not curing its default within such Cure Period, the Authority shall be entitled to encash and appropriate such Performance Security as Damages, and to terminate this Agreement in accordance with Article 31.

### **9.3 Release of Performance Security**

The Performance Security shall remain in full force and effect for the entire Concession Period, including any extensions thereto as per clause 3.3, and for a further period of 60 (sixty) days beyond the Concession Period.

### **9.4 Escalation in Performance Security**

Performance Security of Concession Period shall be renewed and escalated @ 10% in every 3 years..

## **ARTICLE 10 - SITE & RIGHT OF WAY**

### **10.1 The Site**

The site of the Project shall comprise of the land area and the existing facility on it described in **Schedule-A** and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the “**Site**”). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the land area required for the Project as set forth in **Schedule-A**,

### **10.2 License, Access and Right of Way**

- 10.2.1 The Authority hereby grants to the Concessionaire access to the Site for carrying out any surveys, investigations and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise. The Concessionaire acknowledges that the condition of the Site is no inferior to the condition as it was on the date of Bid Due Date.
- 10.2.2 In consideration of the Concession Fee, this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, leave and license rights in respect of all the land along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule-A hereto (the “**Licensed Premises**”), on an “as is where is” basis, free of any Encumbrances, to develop, operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed Premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.
- 10.2.3 It is expressly agreed that the license granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Authority to terminate the license, upon the Termination/expiry of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Site by the Concessionaire or its sub-licensee(s)/Contractor(s)/Sub-Contractor(s), agent(s), representative(s) the license in respect of the Site shall automatically terminate, without any further act of the Parties, upon Termination of this Agreement.
- 10.2.4 The Concessionaire hereby irrevocably appoints the Authority (or its nominee) to be its true and lawful attorney, to execute and sign in the name of the Concessionaire a transfer or surrender of the license granted hereunder at any time after the Concession Period has expired or has been terminated earlier in terms hereof, a sufficient proof of which will be the declaration of any duly authorized officer of the Authority, and the Concessionaire consents to it being registered for this purpose.
- 10.2.5 It is expressly agreed that trees on the Site are property of the Authority except that the Concessionaire shall be entitled to exercise usufructuary rights thereon during the Concession Period.
- 10.2.6 The license, access and right of way granted to the Site by this Agreement to the Concessionaire shall always be subject to Existing Easements, and the Concessionaire shall perform its obligations in a manner that the existing roads within the Site or an alternative thereof are open to traffic at all times during the Concession Period.

**10.3 Site to be free from Encumbrances**

The Site shall be made available by the Authority to the Concessionaire pursuant hereto free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to the Authority on account of any costs, compensation, expenses and charges for the acquisition and use of such Site for the duration of the Concession Period, except insofar as otherwise expressly provided in this Agreement. For the avoidance of doubt, it is agreed that existing rights of way, easements, privileges, liberties, and appurtenances to the Licensed Premises shall not be deemed to be Encumbrances. It is further agreed that the Concessionaire accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Site.

**10.4 Protection of Site from encroachments**

During the Concession Period, the Concessionaire shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Contractor or other person claiming through or under the Concessionaire to place or create any Encumbrance or security interest over all or any part of the Site or the Project Assets, or on any rights of the Concessionaire therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement.

**10.5 Special/temporary right of way**

The Concessionaire shall bear all costs and charges for any special or temporary right of way required by it in connection with access to the Site. The Concessionaire shall obtain at its cost such facilities on or outside the Site as may be required by it for the purposes of the Facility and the performance of its obligations under this Agreement.

**10.6 Access to the Authority, Authority Representative and Independent Engineer**

The license, Right of Way and right to the Site granted to the Concessionaire hereunder shall always be subject to the right of access of the Authority, Authority Representative and the Independent Engineer and their employees and agents for inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.

**10.7 Geological and archaeological finds**

It is expressly agreed that mining, geological or archaeological rights do not form part of the license granted to the Concessionaire under this Agreement and the Concessionaire hereby acknowledges that it shall not have any mining rights or interest in the underlying minerals, fossils, antiquities, structures or other remnants or things either of particular geological or archaeological interest and that such rights, interest and property on or under the Site shall vest in and belong to the Government of India/ Meghalaya or the concerned Government Instrumentality. The Concessionaire shall take all reasonable precautions to prevent its workmen or any other person from removing or damaging such interest or property and shall inform the Authority forthwith of the discovery thereof and comply with such instructions as the Authority or the concerned Government Instrumentality may reasonably give for the removal of such property. For the avoidance of doubt, it is agreed that any reasonable expenses incurred by the Concessionaire hereunder shall be reimbursed by the Authority. The Parties further agree as under:

- (i) The Authority shall procure that the instructions hereunder are issued by the concerned Government Instrumentality within a reasonable period and to the extent permissible under the Applicable Law so as to enable the Concessionaire to continue its Construction Works for development of the Facility with such modifications as may be deemed necessary;

- (ii) In case any portion of the Site becomes unavailable for development and implementation of the Project on account of archaeological and / or geological finds, at any time during the Concession Period, the Authority and Concessionaire shall mutually discuss the matter to arrive at a mutually acceptable resolution;
- (iii) However, if on account of any archaeological or geological finds:
  - a) the entire Site, going forward, becomes unavailable for the Project; or
  - b) the Concessionaire and Authority are unable to arrive at a mutually acceptable resolution pursuant to sub clause 10.7 (ii) above, in spite of all reasonable endeavors

In such an event the Concessionaire shall be under an obligation to forthwith, upon written notice and demand, in this regard, from the Authority to peacefully and unconditionally vacate and handover the Site to the Authority and the Concession Agreement shall be deemed to stand terminated, with mutual consent on and with effect from such date as may be specified by the Authority in the notice. In such an eventuality, the Concessionaire shall be entitled to receive Termination Payment in accordance with Clause 31.9.

#### **10.8 Acceptance of Site for Project Development**

The Concessionaire accepts handover of the Site for Project development on 'as is where is' basis and confirms having:

- (a) inspected the Site, including all structures there at and its surroundings;
- (b) satisfied itself as to the nature of the climatic and general physical conditions of the Site, the nature of the ground and subsoil, the form and nature of the Site, and the nature of the design, work and materials necessary for the performance of its obligations under this Agreement; and
- (c) obtained for itself all necessary information as to the risks, contingencies and all other circumstances including contingency under Clause 10.8 above, which may influence or affect the Concessionaire and its rights and obligations under or pursuant to this Agreement.

## **ARTICLE 11 - UTILITIES, ASSOCIATED ROADS AND TREES**

### **11.1 Existing utilities and roads**

Notwithstanding anything to the contrary contained herein, the Concessionaire shall ensure that the respective entities owning the existing roads, right of way or utilities on, under or above the Site are enabled by it to keep such utilities in continuous satisfactory use, if necessary, by providing suitable temporary or permanent diversions with the authority of the controlling body of that road, right of way or utility, and the Authority shall, upon written request from the Concessionaire, initiate and undertake at the Concessionaire's cost, legal proceedings for acquisition of any right of way necessary for such construction.

### **11.2 Shifting of obstructing utilities**

The Concessionaire shall, subject to Applicable Laws and with assistance of the Authority, undertake shifting of any utility including electric lines, water pipes and telephone cables, to an appropriate location within or outside the Site if and only if such utility causes or shall cause a material adverse effect on the construction, operation or maintenance of the Project. The cost of shifting or removing such utilities shall be borne by the Concessionaire.

### **11.3 Utilities required for Project**

11.3.1 The Concessionaire shall, subject to applicable laws and with assistance of the Authority, undertake construction of any utilities required for construction, maintenance and operation of Project, including electrical lines, water pipelines, telephone lines, waste disposal lines, etc. at his own cost. These utilities shall also include any external connections except water and power.

11.3.2 The Concessionaire shall allow, subject to such conditions as the Authority may specify, access to, and use of the Site for laying telephone lines, water pipes, electric cables or other public utilities; provided that the laying of such telephone lines, water pipes, electric cables or other public utilities do not in any way adversely impact the operations of the Project. Where such access or use causes any financial loss to the Concessionaire, it may require the user of the Site to pay compensation or Damages as per Applicable Laws. For the avoidance of doubt, it is agreed that use of the Site under this Clause 11.3 shall not in any manner relieve the Concessionaire of its obligation to maintain the Project in accordance with this Agreement and any damage caused by such use shall be restored forthwith.

### **11.4 Felling of trees**

The Authority shall assist the Concessionaire in obtaining the Applicable Permits for felling of trees to be identified by the Authority for this purpose if and only if such trees cause material adverse effect on construction, operation, and maintenance of the Project. The Concessionaire shall be responsible for cutting of the trees along with transplant / replantation as per the applicable law. The cost of felling of trees and transplant / plantation shall be borne by the Authority. In the event of any delay in felling thereof for reasons beyond the control of the Concessionaire, it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. For the avoidance of doubt, the Parties hereto agree that the felled trees shall be deemed to be owned by the Authority and shall be disposed in such manner and subject to such conditions as the Authority may in its sole discretion deem appropriate.

## **ARTICLE 12 - DESIGN AND CONSTRUCTION OF [THE PROJECT]**

### **12.1 Construction of the Project**

- (a) The Concessionaire shall undertake construction of the Project, on the land specified in Schedule-A, subject to the conditions stipulated in Schedule-B and Schedule-D, the right to sub-license any or all parts thereof by means of Project Agreements in accordance with the Concessionaire's scope of work under and in accordance with the terms of this Agreement.
- (b) The Concessionaire shall undertake or cause to be undertaken at its cost and in accordance with the provisions of this Agreement, Applicable Laws and Good Industry Practice, the development and maintenance of infrastructure such as internal roads, electric supply, water supply, sewerage and drainage system etc. in the site and to the site, forming part of the Project.

### **12.2 Obligations prior to commencement of construction**

12.2.1 In addition to obligations and conditions specified hereinabove, prior to commencement of Construction Works, the Concessionaire shall:

- (a) submit to the Authority and the Independent Engineer its detailed conceptual plan, layout plan, detailed design, engineering drawings, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule as set forth in Schedule-I;
- (b) appoint its representative duly authorized to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, Applicable Laws and Applicable Permits; and
- (d) make its own arrangements for procurement of materials needed for the Project under and in accordance with Applicable Laws and Applicable Permits.

### **12.3 Non-Obstruction - of Traffic**

The Concessionaire shall ensure that its Construction Works do not obstruct, interrupt, or divert the flow of traffic in any manner. The Concessionaire shall at times be responsible for ensuring safe operation of the Project.

### **12.4 Drawings**

12.4.1 In respect of the obligations relating to the Drawings of the Project as set forth in Schedule-G, the following shall apply:

- (a) The Concessionaire shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of detailed conceptual plan, layout plan, detailed architectural and structural designs, engineering drawings, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule (as required for proper execution and completion of the Project as envisaged by the Authority) in relevance to layout provided by Authority and all Drawings to the Independent Engineer for review;
- (b) By submitting the Drawings for review to the Independent Engineer, the Concessionaire shall be deemed to have represented that it has determined and verified that the site-specific design and engineering, including the field construction criteria related thereto, are in conformity with the Specifications and

Standards; Applicable Laws and Good Industry Practice

- (c) Within 15 (fifteen) days of the receipt of the Drawings, the Independent Engineer shall review the same and convey its observations to the Concessionaire with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Concessionaire shall not be obliged to await the observations of the Independent Engineer on the Drawings submitted pursuant hereto beyond the said 15 (fifteen) days period and may begin or continue Construction Works at its own discretion and risk;
- (d) If the aforesaid observations of the Independent Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Concessionaire and resubmitted to the Independent Engineer for review. The Independent Engineer shall give its observations, if any, within 7 (seven) days of receipt of the revised Drawings;
- (e) No review and/or observation of the Independent Engineer and/or its failure to review and/or convey its observations on any Drawings shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the Authority be liable for the same in any manner;
- (f) Without prejudice to the foregoing provisions of this Clause 12.4.1, the Concessionaire shall submit to the Authority for review and comments, its Drawings including location and layout (as required for proper execution and completion of the Project as envisaged by the Authority), and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, within 30 (thirty) days of the receipt of such Drawings. The provisions of the Clause 12.4.1 shall apply mutatis mutandis to the review and comments hereunder.
- (g) Within 90 (ninety) days of Project Completion Date, the Concessionaire shall furnish to the Authority and the Independent Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in its editable digital format or in such other medium or manner as may be acceptable to the Authority, reflecting the Project as actually designed and developed, including an as-built survey illustrating the layout of the and setback lines, if any, of the buildings and structures forming part of Project Facilities.
- (h) The Concessionaire shall at its cost, charges and expenses, prepare the Structural Designs and engineering Drawings in conformity with the Scope of the Project, Specifications and Standards and other provisions of this Agreement, with due approval from Authority (based on Independent Engineer's recommendation).
- (i) Based on the approved detailed conceptual plan (as per Clause 2.1(a)) design and Drawings shall be developed in conformity with the Specifications and Standards set forth in Schedule-D. In the event, the Concessionaire requires any relaxation in design standards due to site conditions, the alternative design, criteria for such section shall be provided for review of the Independent Engineer.
- (j) The Concessionaire shall not be entitled to any extension of time for completing construction or any other relief on account of delay caused due to providing any clarification or in resubmitting the Designs and Drawings. Provided however the Authority at its sole discretion may suitably extend the Construction Period or provide other relief for any such delay not attributable to the Concessionaire.
- (k) The Project shall be executed in accordance with the Drawings provided by the Concessionaire in accordance with the provisions of this Clause 12.4 and the observations of the Authority or Independent Engineer thereon as communicated pursuant to the provisions of Clause 12.4. Such Drawings shall be amended or altered with prior approval of the Authority upon recommendation by the Independent Engineer. If a Party becomes aware of an error or Defect of a technical nature in the design or Drawings, that Party shall promptly give notice to the other Party of such error or Defect and shall cause Suspension of Construction of such part of the Project.
- (l) In the event that the Independent Engineer has observed that the Designs and Drawings are not in

conformity with the Project Requirements, the Concessionaire shall promptly and without any undue delay revise and resubmit the Designs and Drawings or satisfy the Independent Engineer with regards its compliance.

## **12.5 Architectural Design**

- 12.5.1 The Concessionaire shall at all times conform to the architectural parameters, controls, building profiles, facades, dimensions, designs and building materials.
- 12.5.2 The Concessionaire shall, prior to commencement of construction of Project, furnish to the Authority and to the Independent Engineer, its architectural drawings in conformity with the Architectural Design. Within 15 (fifteen) days of the receipt of such architectural drawings, the Authority and/ or the Independent Engineer shall review the same and convey its observations to the Concessionaire with particular reference to their conformity or otherwise with the Architectural Design or aesthetic quality thereof and their harmony with the environment. If the aforesaid observations of the Authority or the Independent Engineer indicate that the architectural drawings are not in conformity with the Architectural Design or require improvement in aesthetic quality or harmony with the environment, the relevant drawings shall be revised by the Concessionaire and resubmitted to the Authority and the Independent Engineer for review. The Authority and/ or the Independent Engineer shall give their observations, if any, within 7 (seven) days of receipt of the revised architectural drawings.
- 12.5.3 The Concessionaire shall not be obliged to await the observations of the Authority on the architectural drawings submitted pursuant hereto beyond the period of 15 (fifteen) days from receipt of the architectural drawings by the Authority and may begin Construction Works at its own discretion and risk, after expiry of the said period. For the avoidance of doubt, no review and/ or observation of the Authority or the Independent Engineer and/ or their failure to review and/ or convey their observations on the architectural drawings shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Authority or the Independent Engineer be liable for the same in any manner.

## **12.6 Construction of the New Facility**

- 12.6.1 On or after the Appointed Date, the Concessionaire shall undertake the Construction Works in conformity with the Specifications and Standards set forth in Schedule- D and Good Industry Practice. The Concessionaire shall construct, install and establish the Project Facilities, including the basic and detailed design, completion, testing and commissioning in accordance with the provisions of this Agreement, including, the Specifications and Standards, Applicable Laws including the applicable architectural controls, building byelaws and zoning requirements, terms of Applicable Permit and Good Industry Practice and after obtaining sanction to the building plans etc. with the design plans and specifications from the proper municipal or other Authority, at its own expenses.

Accordingly, the Concessionaire shall undertake the designing, engineering and Construction Works related to the Project.

- 12.6.2 During the Construction Period, the Concessionaire shall carry out or cause to be carried out the Construction Works with the skill, care and diligence to be expected of appropriately qualified and experienced professional designers, monitors and Contractors with experience of work similar in scope and nature to that required under this Agreement. The Concessionaire shall design, monitor, and execute the development and implementation of the Construction Works using the best design and monitoring principles and practices. The Concessionaire shall adhere to Construction Quality Plan, and the Specifications and Standards set out herein.
- 12.6.3 In the event that the development is not completed and Final COD does not occur within 1 (one) year from the Scheduled Completion Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, the Authority shall be entitled to terminate this Agreement.



**12.7 Extension of Time**

12.7.1 Without prejudice to any other provision of this Agreement for and in respect of extension of time, the Concessionaire shall be entitled to extension of time in the Project Completion Schedule (the “**Time Extension**”) to the extent that the Project is or will be delayed by any of the following reasons, namely:

- (a) delay in providing the right to access the Site;
- (b) Change of Scope (unless an adjustment to the Scheduled Completion Date has been agreed under Article 12);
- (c) occurrence of a Force Majeure event;
- (d) any delay, impediment or prevention caused by or attributable to the Authority, the Authority's personnel or the Authority's other licensees on the Site but does not include the inspection time/review time by the Authority or its representative/personnel;
- (e) any other cause or delay which entitles the Concessionaire to Time Extension in accordance with the provisions of this Agreement

12.7.2 The Concessionaire shall, no later than 15 (fifteen) business days from the occurrence of an event or circumstance specified in Clause 12.7.1, inform the Authority's Representative by notice in writing, with a copy to the Authority, stating in reasonable detail with supporting particulars, the event or circumstances giving rise to the claim for Time Extension in accordance with the provisions of this Agreement. Provided that the period of 15 (fifteen) business days shall be calculated from the date on which the Concessionaire became aware, or should have become aware, of the occurrence of such an event or circumstance.

12.7.3 In the event of the failure of the Concessionaire to issue to the Authority's Representative a notice in accordance with the provisions of Clause 12.7.2 within the time specified therein, the Concessionaire shall not be entitled to any Time Extension and its right for any such claims in future, if any, shall stand forfeited. For the avoidance of doubt, in the event of failure of the Concessionaire to issue notice as specified in this Clause 12.7.3, the Authority shall be discharged from any and all liabilities in connection with any such claim.

12.7.4 The Authority's Representative shall, on receipt of the claim in accordance with the provisions of Clause 12.7.2, examine the claim expeditiously within the time frame specified herein. In the event the Authority's Representative requires any clarifications to examine the claim, the Authority's Representative shall seek the same within 15 (fifteen) days from the date of receiving such claim. The Concessionaire shall, on receipt of the communication of the Authority's Representative requesting for clarification, furnish the same to the Authority's Representative within 10 (ten) days thereof. The Authority's Representative shall, within a period of 60 (sixty) days from the date of receipt of such clarifications, forward in writing to the Concessionaire its determination of the claim for Time Extension. Such determination of the claim for Time Extension by the Authority's Representative shall be final and binding on the Parties.

Provided that when determining each extension of time under this Clause 12.7, the Authority's Representative shall review previous determinations and may increase but shall not decrease the total Time Extension.

**12.8 Sub-licensing of the Project**

Subject to the provisions of Article 12, and with the intimation to the Authority, Concessionaire may sub-license part of the Project Assets comprising the Project, such that the period and validity of such sub-license shall not extend beyond the Concession Period.

The Concessionaire shall ensure that none of the provisions of the sub-license agreements are contrary or inconsistent with the provisions of the Concession Agreement and/or creating any liability, of any nature, upon the Authority.

It is clarified that primary responsibility of ensuring that such Project Agreement is not contrary or inconsistent with existing provision of Concession Agreement will rest with Concessionaire.

- 12.8.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 12.8.1, the Concessionaire or the sub licensee shall not assign or in any manner create an Encumbrance on any Project Asset forming part of the Project without prior written approval of the Authority, which approval the Authority may, in its discretion, deny only if such sub-license, assignment or Encumbrance has or may have a Material Adverse Effect on the rights and obligations of the Authority under this Agreement or Applicable Laws; For the avoidance of doubt, it is agreed that if the Authority does not deny the approval required under this Clause 12.8.2 within a period of 60 (sixty) days from the date of receiving a notice with required particulars and documents from the Concessionaire, the approval shall be deemed to have been granted to the extent such sub-license, assignment or Encumbrance, as the case may be, is in accordance with the provisions of this Agreement.

- 12.8.2 The Concessionaire agrees and undertakes that in respect of any sub-license, or assignment on any Project Asset, it is entitled to receive a monthly fee, charge, rent or revenue share as the case may be.

In addition, if any amount to be accepted or demanded, whether by way of security, deposit, advance or under any other head whatsoever, the same shall be received in the name of the Authority and shall be deposited by the Concessionaire with the Authority only in respect of such sub-license or it should be deposited in the Escrow Account to be kept in separate sub- account which will be utilized only and only as and when the same is required to be returned on conclusion of sub-license period or earlier if the sub-licensee is terminated on account of any reason.

#### **12.9 Rights of sub-licensees after Termination of Concession Agreement**

On termination of Concession Agreement, the sub-licensee (or any occupancy rights by whatever term referred to) shall not have any right whatsoever and will be required to immediately vacate and hand over the possession of the premises to the Authority without any claim.

#### **12.10 Compliance with Applicable Laws**

The Concessionaire agrees and undertakes that it shall, in respect of the Project, at all times conform to Applicable Laws and the rules, regulations or by-laws made there under relating to buildings, structures, road works, open spaces, electric supply, water supply, sewerage and other like matters.

#### **12.11 Advertisement on the Site**

- (a) The Concessionaire may undertake or permit to undertake any form of commercial advertising at the Site. All advertising on the Site shall also conform to Good Industry Practice. It is further agreed that the Project shall be known, promoted, displayed, and advertised by the name of the Concessionaire.

However, MSWC shall have the right to display its signboard at suitable places as mutually agreed with the Concessionaire.

- (b) For the avoidance of doubt, it is agreed that the right of the Concessionaire hereunder shall be subject to Applicable Laws, as in force and effect from time to time.

**12.12 Incomplete Construction**

In the event the Concessionaire fails to complete the Project by the Scheduled Completion Date, including any Time Extension granted under this Agreement, the Concessionaire shall endeavor to complete the balance work expeditiously and shall pay Damages to the Authority in accordance with the provisions of Clause 15.2 for delay of each day until the Project is completed in accordance with the provisions of this Agreement. Recovery of Damages under this Clause shall be without prejudice to the rights of the Authority under this Agreement including the right to Termination under Article 31.

## ARTICLE 13 – MONITORING OF CONSTRUCTION

### 13.1 Inspection

During the Construction Period, the Independent Engineer shall inspect the Project at least once in 4 months and make a report of such inspection (the “**Inspection Report**”) stating in reasonable detail the defects or deficiencies, if any, with particular reference to the Project Completion Schedule, Scope of the Project and Specifications and Standards. The Independent Engineer shall send a copy of the Inspection Report to the Authority and the Concessionaire within 7 (seven) days of such inspection and upon receipt thereof, the Concessionaire shall rectify and remedy the defects or deficiencies, if any, stated in the Inspection Report. Such inspection or submission of Inspection Report by the Independent Engineer shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.

### 13.2 Tests

- 13.2.1 For determining that the Construction Works conform to the Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at such time and frequency and in such manner as specified in Schedule H and as agreed between the Independent Engineer and the Concessionaire, in accordance with Good Industry Practice for quality assurance. Such schedule of tests shall be agreed upon by the Parties within 30 (thirty) days from the Appointed Date. The size of sample for such test shall, to the extent possible, not exceed 10% (ten per cent) of the quantity and/or number of tests prescribed by the agencies operating in the logistic parks / ICDs / CFS / warehouse zones etc. including but not limited to MSWC, MES/CPWD, IBC, BIS, IRC and/or MoRTH as per Good Industry Practice for the construction works undertaken by the Authority through their contractors. The Concessionaire shall, with due diligence, carry out or cause to be carried out all the test in accordance with the instructions of the Independent Engineer and furnish the results thereof to the Independent Engineer. One half of the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the Authority to the Concessionaire. For the avoidance of doubt, the costs to be incurred on any test which is undertaken for determining the rectification of any defect or deficiency in construction shall be borne solely by the Concessionaire.

In the event that results of any tests conducted under this Clause 13.2 establish any defects or deficiencies in the Construction Works, the Concessionaire shall carry out remedial measures and furnish a report to the Independent Engineer in this behalf. The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests to determine that such remedial measures have brought the Construction Works into compliance with the Specifications and Standards, and the procedure set forth in this Clause 13.2 shall be repeated until such Construction Works conform to the Specifications and Standards. For the avoidance of doubt, it is agreed that tests pursuant to this Clause 13.2 shall be undertaken in addition to and independent of the tests that shall be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice. It is also agreed that a copy of the results of such tests shall be sent by the Concessionaire to the Independent Engineer forthwith.

### 13.3 Suspension of unsafe Construction Works

- 13.3.1 Upon recommendation of the Independent Engineer on any error or defect of a technical nature in the designs and Drawing without rectification of which the Project cannot be carried out as per this Agreement, the Authority may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the Authority, such work threatens the safety of any equipment, maintenance or any individual on or about the Project. Provided, however, that in case of an emergency, the Authority may *suo moto* issue the notice referred to hereinabove.
- 13.3.2 The Concessionaire shall, pursuant to the notice under Clause 13.3.1, suspend the Construction Works

or any part thereof for such time and in such manner as may be specified by the Authority and there upon carry out remedial measures to secure the safety of suspended works and or any individual on or about the Project. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Authority recommending whether or not the suspension hereunder may be revoked. All costs and expenses arising out of or relating to tests and inspections conducted by the Independent Engineer to inspect such remedial measures shall be borne by the Concessionaire. Upon receiving the recommendations of the Independent Engineer, the Authority shall either revoke such suspension or instruct the Concessionaire to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 13.3 shall be repeated until the suspension hereunder is revoked.

- 13.3.3 Subject to the provisions of Clause 28.7, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the period of suspension (the **"Preservation Costs"**) shall be borne by the Concessionaire; provided that if the suspension has occurred as a result of any breach of this Agreement by the Authority, the Preservation Costs shall be borne by the Authority.
- 13.3.4 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates beyond the Scheduled Completion Date to which the Concessionaire is reasonably entitled, and shall notify the Authority accordingly whereupon the Authority shall extend the Scheduled Completion Date in accordance with the recommendations of the Independent Engineer. In all other cases, there shall not be any extension in the Scheduled Completion Date on account of any suspension in the Construction Works.
- 13.3.5 In the event that the Scheduled Completion Date is extended pursuant hereto, the Concession Period shall be deemed to be extended by a period equal in length to the period of extension of the Scheduled Completion Date subject to a maximum of 10% (ten per cent) of the initial Concession Period of 30 (Thirty) years.

#### **ARTICLE 14 - COMPLETION CERTIFICATE**

##### **14.1 Completion Certificate**

Upon Completion of Construction Works and the Independent Engineer determining the successful completion of the planned development, it shall forthwith issue to the Concessionaire and the Authority a Completion Certificate. The Completion certificate shall be issued separately for subsequent development of the Project upon completion of Construction Works and successful tests and inspection as determined by the Independent Engineer.

The Concessionaire shall have to obtain the Completion Certificate from the Authority before commencing Commercial Operations. For the avoidance of doubt, it is agreed that the Completion Certificate shall be issued by the Authority to the Concessionaire only upon Concessionaire obtaining of all necessary/ mandatory statutory approvals/ licenses/ Applicable Permits from respective authorities with respect to the Project e.g., Fire NOC, Occupation Certificate, etc. to the satisfaction of the Authority.

##### **14.2 Completion Certificate not a cessation of liability**

The issuance of Completion Certificate shall not in any way alter the liability of the Concessionaire, constitute a waiver of unfulfilled obligations, bar remedy or rectification of defects or constitute an acceptance of the Construction Works.

##### **14.3 Safety certification prior to Final COD**

The Concessionaire shall, not later than 30 (thirty) days prior to the likely Final COD, notify the Authority and the Independent Engineer of the compliance of Safety Requirements and invite them to observe any or all the tests that may be specified by the Independent Engineer in accordance with Applicable Laws and Good Industry Practice to determine and certify that the Project is safe for entering into commercial service, and the costs of such tests shall be shared equally between the Concessionaire and the Authority; provided that in case of failure in any test requiring repetition thereof, the cost of such second or subsequent test shall be borne entirely by the Concessionaire.

#### **ARTICLE 15 - ENTRY INTO COMMERCIAL SERVICE**

##### **15.1 Commercial Operation Date (COD)**

- 15.1.1 The Project, shall be deemed to be complete when the Completion Certificate is issued for the New Facilities under the provisions of Article 14. The initial commercial operation date of the Project shall be the Appointed Date (the **“Provisional COD”**), whereupon the Concessionaire, its authorized representatives or the sub-licensees, under valid and subsisting sub-licensing agreements, shall be entitled to demand and collect Fee. The final commercial operation date of the Project shall be the date on which Completion Certificate for the New Facilities is issued (the **“Final COD”**). The New Facilities shall enter into commercial service on Final COD whereupon the Concessionaire, its authorized representatives or the sub-licensees/lessee, under valid and subsisting sub-licensing agreements, shall be entitled to demand and collect Fee, provided however, that the entry of Project into commercial service shall always be subject to compliance with the provisions of Clause 14.3.
- 15.1.2 In the event that the Authority prevents, or causes to be prevented, or in any manner delays the entry of the Project into commercial service after the handover of Existing Facilities and/or after issuance of Completion Certificate for any reason attributable to the Independent Engineer or the Authority, as the case may be, the Concessionaire may declare Provisional COD/ Final COD (as the case may be) and notify the Authority forthwith. In the event of any Dispute relating to the declaration of Provisional COD or Final COD hereunder, the Dispute Resolution Procedure shall apply.

##### **15.2 Damages for delay**

Subject to the provisions of Clause 12.6, if Final COD does not occur within 1 year construction/development period from execution of the Concession Agreement, unless the delay is on account of reasons solely attributable to the Authority or due to Force Majeure, the Concessionaire shall pay Damages to the Authority in a sum calculated at the rate of 0.1 % (zero point one per cent) of the amount of Performance Security for delay of each day until Final COD is achieved.

## ARTICLE 16 - CHANGE OF SCOPE

### 16.1 Change of Scope

- 16.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of addition, deletion, and modification of works and Services which are not included in the Scope of the Project as contemplated by this Agreement (the “**Change of Scope**”). Any such Change of Scope shall be made in accordance with the provisions of Article 16 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the Authority.
- 16.1.2 If the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved Services, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 60 (sixty) days of receipt of such notice, either accept such Change of Scope with or without modifications, if any, and initiate proceedings therefore in accordance with this Article 16 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope.
- 16.1.3 Any works or services which are provided under and in accordance with this Article 16 shall form part of the Project and the provisions of this Agreement shall apply *mutatis mutandis* to such works or services.

### 16.2 Procedure for Change of Scope

- 16.2.1 In the event of the Authority determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated there under (the “**Change of Scope Notice**”).
- 16.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Authority such information as is necessary, together with preliminary Documentation in support of:
- (a) the impact, including Material Adverse Effect with reasonable justification and evidence, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period; and
  - (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the Authority to its contractors, along with proposed premium/discount on such rates; provided that the cost incurred by the Concessionaire in providing such information shall be reimbursed by the Authority to the extent such cost is certified by the Independent Engineer as reasonable.
- 16.2.3 Upon receipt of information set forth in Clause 16.2.2, if the Authority decides to proceed with the Change of Scope, it shall convey its preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time and costs for implementation thereof. Upon reaching an agreement, the Authority shall issue an order (the “**Change of Scope Order**”) requiring the Concessionaire to proceed with the performance thereof. In the event that the Parties are unable to agree, the Authority may, by issuing a Change of Scope Order, require the Concessionaire to proceed with the performance thereof pending resolution of the Dispute, or carry out the works in accordance with Clause 16.5.
- 16.2.4 The provisions of this Agreement, in so far as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works undertaken by the Concessionaire under this Article 16.

### 16.3 Restrictions on certain works



16.3.1 Notwithstanding anything to the contrary contained in this Article 16, but subject to the provisions of Clause 16.3.2, the Authority shall not require the Concessionaire to undertake any works or services if such works or services are likely to delay completion of the Project by the Scheduled Completion Date; provided that in the event that the Authority considers such works or services to be essential, it may issue a Change of Scope Order, subject to the condition that the works forming part of or affected by such Order shall not be reckoned for purposes of determining completion of the Project and issuing the Provisional Certificate.

16.3.2 Notwithstanding anything to the contrary contained in Article 16, the cumulative cost of implementing all the orders pertaining to Change of Scope shall not exceed 10% (ten per cent) of the Overall Total Project Cost at any time during the Concession Period. The cost of change of scope shall be part of the Overall Total Project Cost of the project.

Note: For Clause 16.3.2, the Overall Total Project Cost shall be the Value in INR as set forth by the Authority under Article 47.

#### **16.4 Power of the Authority to undertake works**

16.4.1 Notwithstanding anything to the contrary contained in Clauses 16.1.1, the Authority may, after giving notice to the Concessionaire and considering its reply thereto, award any works or services, contemplated under Clause 16.1.1, to any person on the basis of open competitive bidding; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria, and thereupon securing the award of such works or services. It is also agreed that the Concessionaire shall provide access, assistance and cooperation to the person who undertakes the works or services hereunder.

16.4.2 The works undertaken in accordance with this Clause 16.4 shall conform to the Specifications and Standards and shall be carried out in a manner that minimizes disruption in operation of the Project. The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works carried out under this Clause 16.4.

## **ARTICLE 17 - OPERATION AND MAINTENANCE**

### **17.1 O&M obligation of the Concessionaire**

- 17.1.1 During the Operation Period, the Concessionaire shall operate and maintain the Project, and provide Services to the Users in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvement to the Project to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Specifications and Standards and Good Industry Practice. The Concessionaire shall be inter alia at its own cost, expense, and consequences responsible and liable for/ to:
- (a) Investigate, study, design, construct as per specifications, operate and maintain the Project in accordance with the provisions of this Agreement, Good Industry Practices and Applicable Laws;
  - (b) Obtain all Applicable Permits in conformity with the Applicable Laws and be in compliance thereof at all times during the Concession Period;
  - (c) Ensure that services of water supply, sewerage, drainage, electricity, telephone, etc. at the Site or in the vicinity, encountered during the period of construction / operation / maintenance of the Project and rail line are not damaged. In case of any shifting of utilities required during construction, the Concessionaire will have to bear the upfront charges of such shifting. All the coordination work with concerned Agencies including the clearances/ permissions for shifting of utilities will be the responsibility of the Concessionaire;
  - (d) Procure and maintain in full force and effect, as necessary, appropriate proprietary rights, licenses, Agreements and permissions for materials, methods, processes and systems used in or incorporated into the Project;
  - (e) Provide all assistance to the Independent Engineer/Authority as they may reasonably require for the performance of their duties and services under this Agreement;
  - (f) Provide to the Authority/Independent Engineer the reports on a regular basis during the Implementation Period and Operations Period in accordance with the provisions of this Agreement;
  - (g) Adhere to the provisions of all laws of the land including municipal laws and bylaws and rules in connection with display of advertisements. The Concessionaire shall also pay/ ensure payment of advertisement tax, service tax, other taxes & levies if any, in respect of the advertisements displayed.
  - (h) Make efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire's obligations under this Agreement;
  - (i) Develop, implement and administer a surveillance and safety program for the Project and the Users thereof including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Applicable Laws and Good Industry Practice;
  - (j) Not place or create nor permit any worker or other person claiming through or under the Concessionaire to create or place any Encumbrance over all or any part of the Project Assets, or on any rights of the Concessionaire therein, save and except as expressly set forth in this Agreement;
  - (k) Notwithstanding any provision in this Agreement be solely responsible for safety, stability, soundness and durability of the Project including all structures forming part thereof and their compliance with the Specifications and Standards as per Agreement during Construction as well as Operation and Maintenance Period and be liable for any claims arising there from.

- (l) Ensure that the Site remains free from all encroachments and take all steps necessary to remove encroachments, if any;
  - (m) Operate and maintain the Facility at all times during the Operation Period in conformity with this Agreement including but not limited to the Specifications and Standards, the Maintenance Programme and Good Industry Practice;
  - (n) Ensure that Site and Facilities created are not defaced by any kind of writings/posters;
  - (o) Follow all labour laws and regulations and pay the wages, deposit PF& ESI contributions and other dues to its workers in time. The Concessionaire shall indemnify the Authority from any claims in this regard and submit certificates with details of PF and ESI deposited for each of its employees (and employees of its contractors for which Authority is likely to be Principal Employer under this Contract) every quarter.
  - (p) Intimate the Authority and the Independent Engineer about any misconduct or misdeeds or any act or incident involving the Concessionaire or any of its personnel or any of its sub-licensee(s), lessee(s), Contractor(s)/ sub-contractor(s), agent(s), representative(s) in any criminal or civil case and shall not hold the Authority liable for any of the same or consequences thereof in any manner whatsoever.
  - (q) Ensure that the Project Assets are handed over to Authority in sound condition on the Transfer Date;
  - (r) Minimize disruption in the event of accidents or other incidents affecting the safety and use of the Project by providing a rapid and effective response and maintaining liaison with emergency services of the State;
  - (s) Prevent with the assistance of concerned law enforcement agencies, any unauthorized use of the Project;
  - (t) Prevent, with the assistance of the concerned law enforcement agencies, any encroachments on, or unauthorized entry to the Site by any Third Party;
  - (u) Protect the environment and provision of equipment and materials thereof;
  - (v) Ensure operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project;
  - (w) Maintain a public relations unit to interface with and attend to suggestions from the Users, government agencies, media, and other agencies.
  - (x) permitting safe, smooth, and uninterrupted use by the Users of the Project to avail the Services, including prevention of loss or damage thereto, during normal operating conditions;
  - (aa) carrying out periodic preventive maintenance of the Project;
  - (bb) taking all measures relating to fire precautions in accordance with Applicable Laws, Applicable Permits and Good Industry Practice;
- 17.1.2 The Concessionaire shall remove promptly from the Project all surplus construction machinery and materials, water materials (including hazardous materials and waste water), rubbish and other debris (including, without limitation, accident debris) and keep the Project in a clean, tidy and orderly condition at all times during the concession period, and in conformity with Applicable Laws, Applicable Permits and Good Industry Practice.

For the avoidance of doubt, it is agreed that the debris and material excavated shall be carried to and deposited at the location identified by the Authority and/or Independent Engineer.

- 17.1.3 If the Concessionaire fails to comply with any directions issued by the Authority or any Government Instrumentality acting under any Applicable Laws, as the case may be, and is liable to pay a penalty under the provisions of Applicable Laws, such penalty shall be borne solely by the Concessionaire, and shall not be claimed from the Authority. For the avoidance of doubt, payment of any penalty under the provisions of Applicable Laws shall be in addition to, and independent of the Damages payable under this Agreement.

## **17.2 Maintenance and Service Requirements**

The Concessionaire shall procure that at all times during the Operation Period, the Project conforms to the maintenance requirements and service requirements set forth in Schedule-J (the “**Maintenance Manual, Service Maintenance Requirements**”).

## **17.3 Maintenance Manual**

- 17.3.1 No later than 180 (one hundred and eighty) days prior to the Scheduled Completion Date, the Concessionaire shall, in consultation with Independent Engineer, evolve a repair and maintenance manual (the “**Maintenance Manual**”) for the regular and preventive maintenance of the Project in conformity with the Specifications and Standards, Maintenance Requirements, Safety Requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the Authority and 2 (two) copies to the Independent Engineer. The Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 17.3 shall apply, mutatis mutandis, to such revision.
- 17.3.2 Without prejudice to the provision of Clause 17.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Assets and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Assets, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

## **17.4 Maintenance Programme**

- 17.4.1 On or before Final COD and no later than 45 (forty five) days prior to the beginning of each Accounting Year during the Operation Period, as the case may be, the Concessionaire shall provide to the Authority and the Independent Engineer, its proposed annual programme of preventive, urgent and other scheduled maintenance (the “**Maintenance Programme**”) to comply with the Maintenance Requirements, Maintenance Manual and Safety Requirements. Such Maintenance Programme shall include;
- (a) preventive maintenance schedule;
  - (b) arrangements and procedures for carrying out urgent repairs;
  - (c) criteria to be adopted for deciding maintenance needs;
  - (d) intervals and procedures for carrying out inspection of all elements of the Project;
  - (e) intervals at which the Concessionaire shall carry out periodic maintenance;
  - (f) arrangements and procedures for carrying out safety related measures, and
  - (g) intervals for major maintenance works and the scope thereof.
  - (h) Routine maintenance schedule;
  - (i) Frequency of carrying out intermediate and periodic overhaul of the equipment.
- 17.4.2 Within 15 (fifteen) days of receipt of the Maintenance Programme, the Authority/ Independent Engineer (as the case may be) shall review the same and convey its comments to the Concessionaire with particular reference to its conformity with the Maintenance Requirements, Maintenance Manual and Safety Requirements.

- 17.4.3 The Concessionaire may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 17.4.1 and 17.4.2 shall apply mutatis mutandis to such modifications.

**17.5 Damages for breach of maintenance obligations**

- 17.5.1 Deleted Deleted

**17.6 Overriding powers of the Authority**

- 17.6.1 If in the reasonable opinion of the Authority, the Concessionaire is in material breach of its obligations under this Agreement and, in particular, the Maintenance Requirements, and such breach is causing or likely to cause material deterioration of Project Assets, the Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Concessionaire to take reasonable measures immediately for rectifying such breach.

- 17.6.2 In the event of the Concessionaire, upon notice under Clause 17.6.1, fails to rectify the breach within a reasonable period, the Authority may exercise overriding powers under this Clause 17.6.2 and take over the performance of any or all the obligations of the Concessionaire to the extent deemed necessary by it for rectifying the breach; provided that the exercise of such overriding powers by the Authority shall be of no greater scope and of no longer duration than is reasonably required hereunder; provided further that any costs and expenses incurred by the Authority in discharge of its obligations hereunder shall be deemed to be O&M Expenses, and the Authority shall be entitled to recover the costs and Damages directly from the Escrow Account as if such costs and Damages were O&M Expenses, and for that purpose, the Concessionaire hereby agrees to give irrevocable instructions to the Escrow bank to make payment from the Escrow Account in accordance with the instruction of the Authority under this Clause 17.6.2 and debit the same to O&M Expenses under para 4.1.1 (h) and 4.2 (d) of the Escrow Agreement.

**17.7 Restoration of loss or damage to the Project**

Save and except as otherwise expressly provided in this Agreement, in the event that the Project or any part thereof suffers any loss or damage during the Concession Period from any cause whatsoever, the Concessionaire shall, at its cost and expense, rectify and remedy such loss or damage forthwith so that the Project conforms to the provisions of this Agreement.

**17.8 Advertising on the Site**

The Concessionaire is eligible to construct hoarding boards for advertisement on the Site and generate revenue, provided such advertising thereon, does not violate instructions issued by Authority. All advertising on the Site shall conform to Good Industry Practice. For avoidance of doubt, it is agreed

that the rights of Concessionaire here under shall be subject to Applicable Laws, as in force and effect from time to time and no compensation shall be claimed on account thereof.

**17.9 Billing Software**

- 17.9.1 All billing at the Facility shall be done through computer software. The Concessionaire shall obtain prior approval from the Authority before obtaining the software license.MSWCMSWCMSWC.
- 17.9.2 MSWC
- 17.9.3 Upon installation and integration of the selected software, all billing and realization transactions with respect to revenue generated from the Project shall be done through the software.MSWCMSWC.

## **ARTICLE 18 - SAFETY REQUIREMENTS**

### **18.1 Safety Requirements**

- 18.1.1 The Concessionaire shall comply with provisions of this Agreement, Applicable Laws and Applicable permits and conform to Good Industry Practice for securing the safety of the Users and other persons present at the Facility. In particular, the Concessionaire shall develop, implement and administer a surveillance and safety programme for providing a safe environment on or about the Facility, and shall comply with the safety requirements set forth in Schedule-K (the “**Safety Requirements**”).
- 18.1.2 The Authority, if need be, shall appoint an experienced and qualified firm or organization (the “**Safety Consultant**”) for carrying out safety audit of the Project in accordance with the Safety Requirements, and shall take all other actions necessary for securing compliance with the Safety Requirements.
- 18.1.3 No later than 180 (one hundred and eighty) days prior to the Scheduled Completion Date, the Concessionaire shall, in consultation with Independent Engineer, evolve a repair and maintenance manual (the “**Maintenance Manual**”) for the regular and preventive maintenance of the Project and rail connectivity in conformity with the Specifications and Standards, Maintenance Requirements, Safety Requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the Authority and 2 (two) copies to the Independent Engineer. The Maintenance Manual shall be revised and updated once every 3 (three) years.
- 18.1.4 Without prejudice to the provision of Clause 17.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Assets and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Assets, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

## **ARTICLE 19 - MONITORING OF OPERATION AND MAINTENANCE**

### **19.1 Quarterly status reports**

During Operation Period, the Concessionaire shall, no later than 7 (seven) days after the close of each quarter, furnish to the Authority and the Independent Engineer a quarterly report stating in reasonable detail the condition of the Project including its compliance or otherwise with the Maintenance Requirements, Maintenance Manual, Maintenance Programme and Safety Requirements, and shall promptly give such other relevant information as may be required by the Independent Engineer or the Authority. In particular, such report shall separately identify and state in reasonable detail the defects and deficiencies that require rectification.

### **19.2 Inspection**

The Independent Engineer shall inspect the Project at least once a month. It shall make a report of such inspection (the “**O&M Inspection Report**”) stating in reasonable detail the defects or deficiencies, if any, with particular reference to the Maintenance Requirements, Maintenance Manual, the Maintenance Programme and Safety Requirements, and send a copy thereof to the Authority and the Concessionaire within 7 (seven) days of such inspection. It is expressly agreed between the Parties that any inspection carried out by Independent Engineer or the submission of the O&M Inspection Report shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.

### **19.3 Tests**

For determining that the Project conforms to the Maintenance Requirements, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests specified by it in accordance with Good Industry Practice. The Concessionaire shall, with due diligence, carry out or cause to be carried out all such tests in accordance with the instructions of the Independent Engineer and furnish the results of such tests forthwith to the Independent engineer. One half of the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the Authority to the Concessionaire.

### **19.4 Remedial measures**

- 19.4.1 The Concessionaire shall repair or rectify the defects or deficiencies, if any, set forth in the O&M Inspection Report or in the test results referred to in Clause 19.3 and Schedule H and furnish a report in respect thereof to the Independent Engineer and the Authority within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Concessionaire shall submit progress reports of the repair works once every week until such works are completed in conformity with this Agreement.
- 19.4.2 The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Project into compliance with the Maintenance Requirements and the procedure set forth in this Clause 19.4 shall be repeated until the Project conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the Authority shall be entitled to recover Damages from the Concessionaire, under and in accordance with the provisions of Clause 17.5

### **19.5 Reports of unusual occurrence**

- 19.5.1 The Concessionaire shall, prior to the close of each week or on the day of the occurrence of an



accident/untoward incident, send to the Authority and the Independent Engineer, by facsimile or e-mail, a report stating accidents and / or unusual occurrences on the Project relating to the safety and security of the Users and the Project. A monthly summary of such reports shall also be sent with-in 3 (three) days of closing of each month, as the case may be. For the purposes of this Article 19, accidents and unusual occurrences on the Site shall include:

- a. death or injury to any person;
- b. damaged or dislodged fixed equipment;
- c. any damage or obstruction on the Project, which results in slow down of the services being provided by the Concessionaire;
- d. any damage or obstruction to the Users or the property of the Users;
- e. disablement of any equipment during operation;
- f. communication failure affecting the operation of the Project;
- g. smoke, fire, theft, trespass, or other breach of security of the Project;
- h. flooding of the Project; and
- i. such other relevant information as may be required by the Authority or the Independent Engineer.

Provided, however, that in the event no report is sent prior to the close of any day as required hereunder, it shall be presumed that no accident or unusual occurrence, as specified in this Clause 19.5.1, has occurred on that day.

- 19.5.2 In the event of an Emergency, the Concessionaire shall furnish a report, as soon as reasonably practicable but no later than 12 (twelve) hours after the occurrence of such Emergency, setting out the details of the same and the measures taken to mitigate the impact thereof. The Concessionaire shall also furnish the details of the steps taken to ensure that such accident and/or unusual occurrence does not take place again in the future.

**ARTICLE 20 - SECURITY**

**20.1 Security**

- 20.1.1 Without prejudice to the obligations of the Concessionaire to obtain insurance for the Project in accordance with the provisions of this Agreement, the Concessionaire acknowledges and agrees that unless otherwise specified in this Agreement, it shall, at its own cost and expense, procure or cause to be procured security of the Project for the prevention of terrorism, hijacking, sabotage, major accident and/or similar acts or occurrences in such manner and to such extent as it may reasonably determine.
- 20.1.2 The Concessionaire shall, without in any way affecting the functioning of any existing MSWC facility or public infrastructure facility, provide and maintain perimeter fencing or other suitable protection around the Project and shall be responsible for the security arrangements for the Project in order to maintain orderly conduct of its business and the security thereof.

## **ARTICLE 21 - INDEPENDENT ENGINEER**

### **21.1 Appointment of Independent Engineer**

The Authority shall appoint an consulting firm/ individual expert in accordance with the selection criteria set forth in Schedule-L, to be the independent consultant under this Agreement (the “**Independent Engineer**”). The appointment shall be made at the Authority’s sole discretion. On expiry or termination of the aforesaid period, the Authority may, in its discretion, renew the appointment or appoint another firm.

### **21.2 Duties and functions**

21.2.1 The Independent Engineer shall discharge its duties and functions substantially in accordance with the terms of reference set forth in Schedule-M.

21.2.2 A true copy of all communications sent by the Authority to the Independent Engineer and by the Independent Engineer to the Authority shall be sent forthwith by the Independent Engineer to the Concessionaire.

21.2.3 A true copy of all communications sent by the Independent Engineer to the Concessionaire and by the Concessionaire to the Independent Engineer shall be sent forthwith by the Independent Engineer to the Authority.

21.2.4 The Independent Engineer shall periodically submit data on the progress / status of Construction Works, financial progress and other requisite details at such intervals, as mentioned in the TOR, which shall enable the Authority for updating the project specific website.

21.2.5 The Independent Engineer shall periodically submit data on operation and maintenance status and other requisite details at such intervals, as mentioned in the TOR.

### **21.3 Remuneration**

The remuneration, cost and expenses of the Independent Engineer shall be paid by the Authority and subject to the limits set forth in Schedule-L, one-half of such remuneration, cost and expenses shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receiving a statement of expenditure from the Authority.

### **21.4 Termination of appointment**

21.4.1 The Authority may, in its discretion, terminate the appointment of the Independent Engineer at any time, but only after appointment of another Independent Engineer in accordance with Clause 21.1 and may reappoint the same or another Independent Engineer at a later date during the Construction Period at the sole discretion of the Authority.

21.4.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Authority and seek termination of the appointment of the Independent Engineer. Upon receipt of such representation, the Authority shall hold a tripartite meeting with the Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the Authority and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with Dispute Resolution Procedure. In the event that the appointment of the Independent Engineer is terminated hereunder, the Authority shall appoint forthwith another Independent Engineer in accordance with Clause 21.1.

### **21.5 Authorized signatories**

The Authority shall require the Independent Engineer to designate and notify to the Authority to the person who will sign for and on behalf of the Independent Engineer, and any communication or document required to be signed by the Independent engineer shall be valid and effective only if signed by the designated person; provided that the Independent Engineer may, by notice in writing, substitute the designated person by any other person.

**21.6 Dispute resolution**

If either Party disputes any advice, instruction, decision, direction or award of the Independent Engineer, or, as the case may be, the assertion or failure to assert jurisdiction, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure as set out under Clause 37.1.

**21.7 Interim arrangement**

In the event that the Authority does not appoint an Independent Engineer, or the Independent Engineer so appointed has relinquished its functions or defaulted in discharge thereof, the Authority may, in the interim, designate and authorize any person to discharge the functions of the Independent Engineer in accordance with the provisions of this Agreement, save and except that such person shall not exercise any functions relating to review, comment, approval or inspection as specified in this Agreement for and in respect of the Independent Engineer, and such functions shall be discharged as and when an Independent Engineer is appointed in accordance with the provisions of this Agreement. Provided, however, that nothing contained in this Clause 21.7 shall in any manner restrict the rights of the Authority to enforce compliance of the provisions of this Agreement.

**Part IV**  
**Financial Covenants**

**ARTICLE 22 - FINANCIAL CLOSE**

**22.1 Financial Close**

- 22.1.1 The Concessionaire hereby agrees and undertakes that it shall achieve Financial Close within 180 (one hundred and eighty) days from the date of this Agreement and in the event of delay, it shall be entitled to a further period not exceeding [120 (one hundred and twenty)] days, subject to payment of Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day of delay, or for a further period not exceeding 200 (two hundred) days, subject to payment of Damages specified in Clause 4.3; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred solely as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. For the avoidance of doubt, the Damages payable hereunder by the Concessionaire shall be in addition to the Damages, if any, due and payable under the provisions of Clause 4.3.
- 22.1.2 The Concessionaire shall, upon occurrence of Financial Close, notify the Authority forthwith, and shall have provided to the Authority, at least 2 (two) days prior to Financial Close, 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders.

**22.2 .**

**ARTICLE 23 – ANNUAL LEASE RENTAL, UPFRONT PREMIUM & CONCESSION FEE**

**23.1 Annual Lease Rental**

- 23.1.1 In consideration of the grant of Concession, the Annual Lease Rental of INR ..... which is above the minimum threshold of INR 6,10,000/- for the 1<sup>st</sup> Year has been accepted by the Authority and paid in advance by the Concessionaire.
- 23.1.2 The Annual Lease Rental shall be escalated by 10% in every 3 years.
- 23.1.3 Concessionaire has also made the payment of INR 30,00,000/- (Indian Rupees Thirty Lakhs only) as the One-time Upfront Premium.
- 23.1.4 The Concessionaire shall pay the Annual Concession Fee of INR 1,000/- (Indian Rupees One Thousand only) to be escalated @ 10% in every 3 (three) years.
- 23.1.5 In the event the Concessionaire fails to make payment of the amount due to the Authority, without prejudice to its other rights, the Authority shall be entitled to invoke and encash the Performance Guarantee. The encashment of the Performance Guarantee shall be without prejudice to the Authority's right to treat the non-payment of the amount by the Concessionaire on the due date, as a breach and terminate the Agreement and also to claim simple interest @12% (twelve percent) per annum for the delayed period, without prejudice to other rights and remedies as may be available to the Authority.

**23.2 MSWC's right to set-off**

- 23.2.1 The Authority shall deduct GST at source at applicable rates in case transactions under this Agreement are liable to GST deduction at source. Under GST regime, the Concessionaire is required to correctly and timely disclose the details of output supplies to the Authority, as per GST rules in its GST returns. Non-compliance would result in mis-match of claims and denial of input tax credit to the Authority. Notwithstanding anything contained in this Agreement, in case of such default by the Concessionaire, the amount of Input tax credit denied in GST along with interest and penalty shall be recovered from the amounts payable to the Concessionaire or the available Performance Guarantees.

- 23.2.2 The Concessionaire shall be liable to indemnify the Authority for any tax demand and interest and/or penalty thereon arising due to negligence/ fault of the Concessionaire.
- 23.2.3 Reconciliation to be conducted on quarterly basis. It shall be the responsibility of the Concessionaire to coordinate with MSWC officials and fix the date and time of meeting. For each such meeting, Minutes shall be recorded and signed by both the sides.



**ARTICLE 24 - USER FEE**

**24.1 Collection of Fee by the Concessionaire**

- 24.1.1 On and from Provisional COD, and till the Transfer Date, the Concessionaire or its authorized representatives or the sub-licensees (under valid and subsisting sub-license agreement's) shall have the sole and exclusive right to demand and collect, Fee from the Users as deemed appropriate as per market conditions and fair market practices.

**24.2 Revision of Fee**

- 24.2.1 Subject to the terms and conditions of this Agreement, the Concessionaire may modify/ revise the Fees at any time during the Operation Period.

## **ARTICLE 25 - ESCROW ACCOUNT**

### **25.1 Escrow Account**

- 25.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the “**Escrow Bank**”) in accordance with this Agreement, read with the Escrow Agreement.
- 25.1.2 The nature and scope of the Escrow Account is fully described in the agreement (the “**Escrow Agreement**”) to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Senior Lenders through the Lenders’ Representative, which shall be substantially in the form set forth in Schedule-N.

### **25.2 Deposits into Escrow Account**

The Concessionaire shall deposit or cause to be deposited the following inflows and receipts into the Escrow Account:

- (a) all accruals from the Project
- (b) all amounts received from sub-lease and rent.

### **25.3 Withdrawals during Concession Period**

- 25.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:
- (a) all taxes due and payable by the Concessionaire for and in respect of the Project;
  - (b) all payments payable to the Authority in accordance with the terms of the Concession Agreement, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
  - (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
  - (d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
  - (e) Annual Lease Rental and Concession Fee due and payable to the Authority;
  - (f) monthly proportionate provision of Debt Service due in an Accounting Year;
  - (g) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;

- (h) Any reserve requirements set forth in the Financing Agreements; and
- (i) balance, if any, in accordance with the instructions of the Concessionaire.

25.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 25.3.1, except with the prior written approval of the Authority. Any such modification of the order of payment, without the prior written approval of the Authority, shall be deemed to be void and non-est.

#### **25.4 Withdrawals upon Termination**

25.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Escrow Account shall, upon Termination, be appropriated in the following order:

- (a) All taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) Outstanding Annual Lease Rental or Concession Fee and other payments due from the Concessionaire to the Authority.
- (d) All payments and Damages certified by the Authority as due and payable to it by the Concessionaire; the Concessionaire hereby agrees to give irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of the Authority and debit the same to O&M Expenses.
- (e) Retention and payments relating to the liability for defects and deficiencies set forth in Article 33;
- (f) Outstanding Debt Service including the balance of Debt Due;
- (g) Outstanding Subordinated Debt;
- (h) any other payments required to be made under this Agreement; and
- (i) balance, if any, in accordance with the instructions of the Concessionaire

Provided that no appropriations shall be made under Sub-clause (j) of this Clause 25.4.1 until a Vesting Certificate has been issued by the Authority under the provisions of Article 32.

25.4.2 The provisions of this Article 25 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 25.4.1 have been discharged.

## **ARTICLE 26 - INSURANCE**

### **26.1 Insurance during Concession Period**

The Concessionaire shall affect and maintain at its own cost, during the Construction Period and the Operation Period, such insurances for such maximum sums as may be required under the Financing Agreements and Applicable Laws, and such insurances as may be necessary or prudent in accordance with Good Industry Practice. The Concessionaire shall also affect and maintain such insurances as may be necessary for mitigating the risks that may devolve on the Authority as a consequence of any act or omission of the Concessionaire during the Construction Period. The Concessionaire shall ensure that in each insurance policy, the Authority shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Escrow Account. For the avoidance of doubt, the level of insurance to be maintained by the Concessionaire after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.

### **26.2 Notice to the Authority**

No later than 30 (thirty) days prior to commencement of the Construction Period or the Operation Period, as the case may be, the Concessionaire shall by notice furnish to the Authority, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 26. Within 15 (fifteen) days of receipt of such notice, the Authority may require the Concessionaire to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

### **26.3 Evidence of Insurance Cover**

All insurances obtained by the Concessionaire in accordance with this Article 26 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 15 (fifteen) days of obtaining any insurance cover, the Concessionaire shall furnish to the Authority, notarized true copies of the certificate(s) of insurance, copies of insurance policies and premia payment receipts in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 30 (thirty) days after notice of such proposed cancellation, modification or non-renewal has been delivered by the Concessionaire to the Authority.

### **26.4 Remedy for failure to insure**

If the Concessionaire shall fail to effect and keep in force all insurances for which it is responsible pursuant hereto, the Authority shall have the option to either keep in force any such insurances, and pay such premia and recover the costs thereof from the Concessionaire, or in the event of computation of a Termination Payment, treat an amount equal to the Insurance Cover as deemed to have been received by the Concessionaire.

### **26.5 Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Concessionaire pursuant to this Article 31 shall include a waiver of any and all rights of subrogation or recovery of the insurers there under against, *inter alia*, the Authority, and its assigns, successors, undertakings and their subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

### **26.6 Concessionaire's waiver**

The Concessionaire hereby further releases, assigns and waives any and all rights of subrogation or recovery against, inter alia, the Authority and its assigns, undertakings and their subsidiaries, affiliates, employee, successors, insurers and underwriters, which the Concessionaire may otherwise have or acquire in or from or in any way connected with any loss, liability or obligation covered by policies of insurance maintained or required to be maintained by the Concessionaire pursuant to this Agreement (other than third party liability insurance policies) or because of deductible clauses in or inadequacy of limits of any such policies of insurance.

**26.7 Application of insurance proceeds**

The proceeds from all insurance claims, except life and injury, shall be credited to the Escrow Account, and the Concessionaire shall, notwithstanding anything to the contrary contained in Clause 25.3, apply such proceeds for any necessary repair, reconstruction, reinstatement, replacement, improvement or delivery of the Project, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

**26.8 Insurance Cover**

Without prejudice to the provisions contained in Clause 26.1, the Concessionaire shall, during the Operation Period, procure and maintain Insurance Cover including but not limited to the following:

- (a) Loss, damage or destruction of the Project Assets, including assets handed over by the Authority to the Concessionaire, at replacement value;
- (b) Comprehensive third party liability insurance including injury to or death of personnel of the Authority or others caused by the Project;
- (c) The Concessionaire's general liability arising out of the Concession;
- (d) Liability to third parties for goods or property damage;
- (e) Workmen's compensation insurance; and
- (f) any other insurance that may be necessary to protect the Concessionaire and its employees, including all Force Majeure Events that are insurable at commercially reasonable premiums and not otherwise covered in items(a) to (e) above

**26.9 Compliance with conditions of insurance policies**

The Concessionaire expressly acknowledges and undertakes to fully indemnify the Authority from and against all losses and claims arising from the Concessionaire's failure to comply with conditions imposed by the insurance policies affected in accordance with this Agreement.

## **ARTICLE 27 - ACCOUNTS AND AUDIT**

### **27.1 Audited Accounts**

- 27.1.1 The Concessionaire shall maintain books of accounts recording all its receipts (including all revenues recovered, Gross Revenue including Realizable Fee, and all incomes derived/collected by it from or on account of the Project and/or its use), income, expenditure, payments (including payments from the Escrow Account), assets and liabilities, in accordance with this Agreement, Good Industry Practice, Applicable Laws and Applicable Permits. The Concessionaire shall provide 2 (two) copies of its Balance Sheet, Cash Flow Statement, Profit and loss Account, along with a report thereon by its Statutory Auditors, within 180 (one hundred and eighty) days of the close of the Accounting Year to which they pertain and such audited accounts, save and except where expressly provided to the contrary, shall form the basis of payments by either Party under this Agreement. The Authority shall have the right to inspect the records of the Concessionaire during office hours on any working day and require copies of relevant extracts of books of Accounts, duly certified by the statutory auditors, to be provided to the Authority for verification of basis of payments, and in the event of any discrepancy or error being found, the same shall be rectified and such rectified account shall form the basis of payments by either Party under this Agreement.
- 27.1.2 The Concessionaire shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to the Authority its unaudited financial results in respect of the preceding quarter, in the manner and form prescribed by the Securities and Exchange Board of India for publication of quarterly results by the companies listed on a stock exchange.
- 27.1.3 On or before the 31<sup>st</sup> (thirty-first) day of [October] each Year, the Concessionaire shall provide to the Authority, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarized information on revenues derived from the Project, and such other information as the Authority may reasonably require.

### **27.2 Appointment of Auditors**

- 27.2.1 The Concessionaire shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it from the mutually agreed list of 10 (ten) reputable firms of chartered accountants (the “**Panel of Chartered Accountants**”), such list to be prepared substantially in accordance with the criteria set forth in Schedule-O. All fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.
- 27.2.2 The Concessionaire may terminate the appointment of its Statutory Auditors after a notice of 45 (forty-five) days to the Authority, subject to the replacement Statutory Auditors being appointed from the Panel of Chartered Accountants.
- 27.2.3 Notwithstanding anything to the contrary contained in this Agreement, the Authority shall have the right, but not the obligation, to appoint at its cost from time to time and at any time, another firm (the “**Additional Auditors**”) from the Panel of Chartered Accountants as may be decided by the Authority to audit and verify all those matters, expenses, costs, realizations and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.
- 27.2.4 The Authority shall have the right, but not the obligation, to appoint at its cost, for the duration of the Concession Period, another firm (the “**Concurrent Auditors**”) as may be decided by the Authority to undertake concurrent audit of the Concessionaire’s accounts.

### **27.3 Certification of claims by Statutory Auditors**

Any claim or document provided by the Concessionaire to the Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto

shall be valid and effective only if certified by its Statutory Auditors. For the avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business including the submission of any periodic information in pursuance of the provisions of this Agreement, save and except where such certification is expressly provided.

**27.4 Set-off**

In the event any amount is due and payable by the Authority to the Concessionaire, it may set-off any sums payable to it by the Concessionaire and pay the balance remaining. Any exercise by the Authority of its rights under this Clause shall be without prejudice to any other rights or remedies available to it under this Agreement or otherwise.

**27.5 Dispute Resolution**

In the event of there being any difference between the findings of the Additional Auditors or the Concurrent Auditors, as the case may be, and the certification provided by the Statutory Auditors, such Auditors shall meet to resolve the differences and if they are unable to resolve the same, such Dispute shall be resolved by the Authority by recourse to the Dispute Resolution Procedure as set out under Clause 37.1.

**Part V: Force Majeure and Termination**



## **ARTICLE 28 - FORCE MAJEURE**

### **28.1 Force Majeure**

As used in this Agreement, the expression “**Force Majeure**” or “**Force Majeure Event**” shall, save and except as expressly provided otherwise, mean occurrence in India of any or all of events, as defined in Clauses 28.2, if it prevents the performance by the Party claiming the benefit of Force Majeure (the “**Affected Party**”) of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome such event(s) by exercise of due diligence and following Good Industry Practice.

### **28.2 A Force Majeure Event**

A Force Majeure Event shall mean one or more of the following acts or events:

- (a) act of God, epidemic, pandemic, government mandated lockdowns, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);
- (b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting supplies and services to the Facility for a continuous period of 24 (twenty four) hours and an aggregate period exceeding 7 (seven) days in an Accounting Year;
- (c) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, rebellion, revolution, insurrection, terrorist or military action, usurped power, civil commotion or politically motivated sabotage;
- (d) Industry-wide or State-wide strikes or industrial action for a continuous period of 24 (twenty four) hours and exceeding an aggregate period of 7 (seven) days in an Accounting Year;
- (e) Any civil commotion, boycott or political agitation which prevents operations by the Concessionaire for an aggregate period exceeding 7 (seven) days in an Accounting Year;
- (f) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;

### **28.3 Duty to report Force majeure Events**

28.3.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 28 with evidence in support thereof;
- (b) the estimated duration and the effect or probable effects which such Force Majeure Event is having or will have on the Affected Party’s performance of its obligations under this Agreement;
- (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Events; and
- (d) any other information relevant to the Affected Party’s claim.

28.3.2 The Affected party shall not be entitled to any relief for or in respect of a Force majeure Events unless it

shall have notified the other party of the occurrence of the Force Majeure Events as soon as reasonably practicable, and in any events no later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable Material Adverse Effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

- 28.3.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 28.3.1, and such other information as the other Party may reasonably request the Affected Party to provide.

#### **28.4 Effect of Force Majeure Event on the Concession**

- 28.4.1 Upon the occurrence of any Force Majeure Events prior to the Appointed Date, the period set forth for fulfilment of Conditions Precedent in Clause 4.1.3 and in Clause 22.1.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event.

- 28.4.2 At any time after the Appointed Date, if any Force Majeure Event occurs:

- (a) before Final COD, the Concession Period and the dates set forth in the Project Completion Schedule shall be extended by a period equal in length to the duration for which such Force Majeure Events subsists; or
- (b) after Final COD, whereupon the Concessionaire is unable to perform the Services and consequently collect the Fees despite making best efforts, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from providing the Services and collecting the Fee on account thereof. However, the maximum extension in the Concession Period shall be limited only up to a maximum period of 4.5 (Four and half) years or less, as per the assessment of the Authority.

#### **28.5 Allocation of costs arising out of Force Majeure**

- 28.5.1 Upon occurrence of any Force Majeure Events prior to the Appointed Date, the Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs thereof.
- 28.5.2 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Project (the “**Force Majeure Costs**”) shall be borne by the respective parties; i.e., the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof.

For the avoidance of doubt, Force Majeure Costs may include payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Events, but shall not include loss of Fee revenues, or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent such information is relevant.

- 28.5.3 Save and except as expressly provided in this Article 28, neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.

#### **28.6 Termination Notice for Force Majeure Event**

If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion

terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 28, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days' time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

#### **28.7 Termination Payment for Force Majeure Event**

28.7.1 If Termination is on account of a Force Majeure Event, the Authority shall make Termination Payment to the Concessionaire in an amount equal to:

- (a) 100% (one hundred per cent) of the proportionate Debt Due; less any insurance proceeds and
- (b) 50% (fifty percent) of the proportionate Adjusted Equity

However, the total termination payment by the authority to the Concessionaire in any case shall not exceed the depreciated value of assets/ Project on the date of termination.

Note: For the avoidance of doubt, Debt Due and Adjusted Equity payable shall be in proportion to the Total Project Cost.

#### **28.8 Dispute Resolution**

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be finally settled in accordance with the Dispute Resolution Procedure as set out under Clause 37.1, provided that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.

#### **28.9 Excuse from performance of obligations**

If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event, provided that;

- (a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- (b) the Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

**ARTICLE 29 - COMPENSATION FOR BREACH OF AGREEMENT**

**29.1 Compensation for default by the Concessionaire**

Subject to the provisions of Clause 29.4, in the event of the Concessionaire being in material breach or default of this Agreement, it shall pay to the Authority by way of compensation, all direct costs suffered or incurred by the Authority as a consequence of such material breach or default, within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 29.1 for any material breach or default in respect of which Damages are expressly specified and payable under this Agreement or for any consequential losses incurred by the Authority.

**29.2 Compensation for default by the Authority**

Subject to the provisions of Clause 29.4, in the event of the Authority, being in material breach or default of this Agreement at any time after the Appointed Date, shall compensate the Concessionaire for the loss suffered by extending the Concession Period in the proportion that can mitigate the loss suffered by such extension. However, any such extension of the Concession Period shall not exceed more than 50% (fifty per cent) of the Concession Period and such extension shall be the sole remedy of the Concessionaire and no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this Agreement.

**29.3 Compensation to be in addition**

Compensation payable under this Article 29 shall be in addition to, and not in substitution for, or derogation of, Termination Payment, if any.

**29.4 Mitigation of costs and damage**

The Party not in breach shall make all reasonable efforts to mitigate or limit the costs and damage arising out of or as a result of breach of Agreement by the other Party.

## **ARTICLE 30 - SUSPENSION OF CONCESSIONAIRE'S RIGHTS**

### **30.1 Suspension upon Concessionaire Default**

Upon occurrence of a Concessionaire Default, the Authority shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (i) suspend all rights of the Concessionaire under this Agreement including the Concessionaire's right to collect Fee, generate income, and other revenues pursuant hereto, and (ii) exercise such rights itself and perform the obligations hereunder or authorize any other person to exercise or perform the same on its behalf during such suspension (the "**Suspension**"). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 180 (one hundred and eighty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders' Representative, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days.

Explanation: It is clarified that the period of Suspension shall be counted as part of the Concession Period and the Concessionaire shall not be entitled for any extension in lieu thereof.

### **30.2 Authority to act on behalf of Concessionaire**

30.2.1 During the period of Suspension, the Authority shall, on behalf of the Concessionaire, provide the Services and Operate the Project and collect all Fee and revenue under and in accordance with this Agreement, and the Fee shall be deposited in the Escrow Account. The Authority shall be entitled to make withdrawals from the Escrow Account for meeting the O&M Expenses and for meeting the costs incurred by it for remedying and rectifying the cause of Suspension, and thereafter for defraying the expenses specified in Clause 25.3.

30.2.2 During the period of Suspension hereunder, all rights and liabilities vested in the Concessionaire in accordance with the provisions of this Agreement shall continue to vest in the Concessionaire and all things done or actions taken, including expenditure incurred by the Authority for discharging the obligations of the Concessionaire under and in accordance with this Agreement and the Project Agreements, shall be deemed to have been done or taken for and on behalf of the Concessionaire and the Concessionaire undertakes to indemnify the Authority for all costs incurred during such period. The Concessionaire hereby sub-licenses respectively, the Authority or any other person authorized by the Authority under Clause 30.1 to use during Suspension, all Intellectual Property belonging to or licensed to the Concessionaire with respect to the Project Facility and its designs, engineering (as required for proper execution and completion of the Project as envisaged by the Authority), construction, operation and maintenance, and which is used or created by the Concessionaire in performing its obligations under the Agreement.

### **30.3 Revocation of Suspension**

30.3.1 In the event that the Authority, acting in accordance with the provisions of Article 30, shall have rectified or removed the cause of Suspension within a period not exceeding 90 (ninety) days from the date of Suspension, it shall revoke the suspension forthwith and restore all rights of the Concessionaire under this Agreement. For the avoidance of doubt, the Parties expressly agree that the Authority may, in its discretion, revoke the Suspension at any time, whether or not the cause of Suspension has been rectified or removed hereunder.

30.3.2 Upon the Concessionaire having cured the Concessionaire Default within a period not exceeding 90 (ninety) days from the date of Suspension, the Authority shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement.

### **30.4 Substitution of Concessionaire**

At any time during the period of Suspension, the Lenders' Representative, on behalf of Senior Lenders, shall be entitled to substitute the Concessionaire under and in accordance with the Substitution Agreement, and upon receipt of notice there under from the Lenders' Representative, the Authority shall withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of Suspension, and any extension thereof under Clause 30.1, for enabling the Lenders' Representative to exercise its rights of substitution on behalf of Senior Lenders.

**30.5 Termination**

- 30.5.1 At any time during the period of Suspension under this Article 30, the Concessionaire may by notice require the Authority to (i) revoke the Suspension and (ii) issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 30.4, the Authority shall, within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 31.
- 30.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 30.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, mutatis, mutandis, to such Termination as if a Termination Notice had been issued by the Authority upon occurrence of a Concessionaire Default.
- 30.5.3 The termination of the Agreement under this Clause shall be without prejudice to the right of the Authority to recover Damages from the Concessionaire, in terms of the Agreement.

## **ARTICLE 31 - TERMINATION**

### **31.1 Termination for Concessionaire Default**

31.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (the “**Concessionaire Default**”), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:-

- (a) The Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a Cure Period of 30 (thirty) days;
- (b) Subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to cure, within a Cure Period of 90 (ninety) days from the date of encashment of the Performance Security, the Concessionaire Default for which whole or part of the Performance Security was appropriated;
- (c) the Concessionaire abandons or manifests intention to abandon the construction or operation of the Project without the prior written consent of the Authority;
- (d) Final COD does not occur within the period specified in Clause 12.6.3;
- (e) the Concessionaire is in breach of the Maintenance Requirements or the Safety Requirements, as the case may be;
- (f) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;
- (g) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;
- (h) upon occurrence of a Financial Default, the Lenders’ Representative has by notice required the Authority to undertake Suspension or Termination, as the case may be, in accordance with the Substitution Agreement and the Concessionaire fails to cure the default within the Cure Period specified hereinabove;
- (i) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;
- (j) the Concessionaire creates any Encumbrance in breach of this Agreement;
- (k) the Concessionaire repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- (l) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- (m) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all or part of the assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
- (n) an execution levied on any of the assets of the Concessionaire has caused a Material Adverse Effect;
- (o) a resolution for insolvency of the Concessionaire is passed, or any petition for insolvency of the

Concessionaire is admitted before a court (including Tribunal) of competent jurisdiction in accordance with the provisions of Insolvency and Bankruptcy Code, 2016 and such petition has not been withdrawn within 30 (thirty) days from the date of issuance of notice therein.

- (p) if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its assets;
- (q) if the Concessionaire has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the opinion of the Authority, a Material Adverse Effect;
- (r) if a resolution for winding up of the Concessionaire is passed, or any petition for winding up of the Concessionaire is admitted by a court (including tribunal) of competent jurisdiction in accordance with the provisions of Insolvency and Bankruptcy Code, 2016 or Companies Act, 2013 and a liquidator (including provisional liquidator) or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Concessionaire is ordered to be wound up by a court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements; and provided that:
  - a. the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
  - b. the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
  - c. each of the Project Agreements remains in full force and effect;
- (s) any representation or warranty of the Concessionaire herein contained which is, as of the date hereof, found to be materially false, incorrect or misleading or the Concessionaire is at any time hereafter found to be in breach thereof;
- (t) the Concessionaire submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;
- (u) The Concessionaire issues a Termination Notice in violation of this Agreement
- (v) the Concessionaire has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; OR
- (w) the Concessionaire commits a default in complying with any other provision of this Agreement if such default causes a Material Adverse Effect on the Authority.

31.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of Clause 31.1.3.

31.1.3 The Authority shall, if there be Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 31.1.2 to inform the Leaders' Representative and grant 15



(fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement.

Provided that the Lenders' Representative may, instead of exercising the Senior Lenders' right of substitution, procure that the default specified in the notice is cured within the aforesaid period of 180 (one hundred and eighty) days, and upon such curing thereof, the Authority shall withdraw its notice referred to above and restore all the rights of the Concessionaire.

Provided further that upon written request from the Lenders' Representative and the Concessionaire, the Authority may, in its sole discretion, extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the Authority may deem appropriate.

### **31.2 Termination for Authority Default**

31.2.1 In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the "Authority Default") unless the default has occurred as a result of any breach of this Agreement by the Concessionaire or due to Force Majeure. The defaults referred to herein shall include the following:

- (a) The Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Concessionaire;
- (b) the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement.

31.2.2 The Cure Period shall commence from the date on which the Concessionaire notifies to the Authority that any such default as mentioned above in Clause 31.2.1 has occurred.

31.2.3 Without prejudice to any other right or remedy which the Concessionaire may have under this Agreement, upon occurrence of an Authority Default, the Concessionaire shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Concessionaire shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 30 (thirty) days to the Authority to make a representation, and may after the expiry of such 30 (thirty) days, whether or not it is in receipt of such representation, issue the Termination Notice.

### **31.3 Termination Payment**

31.3.1 Upon Termination on account of a **Concessionaire Default** during the Operation Period, (post occurrence of Final COD) the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due. However, the total termination payment by the Authority to the Concessionaire in any case shall not exceed the depreciated value of assets/ Project on the date of termination.

31.3.2 Upon Termination on account of Concessionaire Default during the Construction Period, prior to the Final COD, no Termination Payment shall be due and payable for and in respect of expenditure comprising the first forty per cent (40%) of the Project Cost and in the event of expenditure exceeding

such forty per cent (40%) and forming part of Debt Due, the provisions of Clause 31.3.1 shall, to the extent applicable to Debt Due, apply for and in respect of the expenditure exceeding such forty per cent (40%).

31.3.3 Upon Termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:

- (a) 100% (one hundred per cent) of the proportionate Debt Due; less any insurance proceeds and
- (b) 150% (one hundred and fifty percent) of the proportionate Adjusted Equity

Note: For the avoidance of doubt, Debt Due and Adjusted Equity payable shall be in proportion to the value of work done, as determined by the Independent Engineer.

The Equity and Debt Due shall be arrived at by adopting the proportion between debt and equity as specified in the Financing Agreements.

31.3.4 The Concessionaire expressly agrees that upon expiry of the Concession Period or the extended Concession Period in accordance with Clause 31.9, no Termination Payment shall be due and payable by the Authority to the Concessionaire.

31.3.5 Termination Payment shall become due and payable to the Concessionaire within 60 (sixty) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Prime Lending Rate (PLR) on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 120 (One Hundred & Twenty) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

31.3.6 The Concessionaire expressly agrees that Termination Payment under this Article 31 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

31.3.7 The Parties also agree that for the purposes of computing Termination Payment, the Debt Due shall at no time exceed 70% (Seventy per cent) of the Total Project Cost.

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#### 31.4 Other rights and obligations of the Authority

Upon Termination for any reason whatsoever, the Authority shall:

- (a) be deemed to have taken possession and control of the Project forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- (c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;
- (d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 32.1; and
- (e) succeed upon election by the Authority, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and

agrees that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums and the Concessionaire shall keep the Authority and its officers protected and indemnified against any such claim or action by any third party in terms of Article 35 hereof. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.

**31.5 Survival of rights**

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 31.3.4, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments, Divestment Requirements, and Indemnity shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.

**31.6 Certain limitations on Termination Payment**

31.6.1 Termination Payment due and payable under this Agreement shall be computed with reference to the Debt Due and Adjusted Equity, as the case may be, in accordance with the provisions of this Agreement. The Parties agree that for the purposes of computing Termination Payment, the Debt Due shall at no time exceed 70% (seventy per cent) of the Total Project Cost.

31.7 The amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. Provided further that all borrowings in foreign currency shall be restricted to the financing of Total Project Cost and any borrowings in excess thereof shall not qualify for computation of Termination Payment. It is clarified that the rate of conversion of such foreign currency shall be calculated on the date of issue of Termination Notice.

**31.8 Limitation of Liability**

Neither Party shall be liable to the other for any loss of profit, loss of business, loss of production, loss of contracts or for any indirect or other consequential loss or damage whatsoever that may be suffered by the other Party, except to the extent that such consequential loss or damage is attributable to gross negligence, deliberate default, fraud, fraudulent misrepresentation or willful misconduct by the defaulting Party, its personnel or agents.

The aggregate liability of either Party, under or in connection with the Agreement other than those provided under Clause 31.3, 31.7, and 31.8 of this Agreement, shall not exceed [100% (one hundred percent)] of the Total Project Cost.

**31.9 Mutual Foreclosure**

31.9.1 Without prejudice to any provision of this Agreement, the Authority and Concessionaire may terminate this Agreement by mutual consent in circumstances which does not constitute Authority's Default, Concessionaire's Default or Force Majeure. Such a foreclosure can occur in any of the following 2 possible position as per the mutual consent of the Authority and the Concessionaire:

- a. Type A Foreclosure: Foreclosure with mutual consent *without any liability or consequential future liability* for either Party.
- b. Type B Foreclosure: Foreclosure with mutual consent with compensation to the Concessionaire

including any pending settlements / claims as per the provisions under Clause 31.8.2.

- 31.9.2 Should a Party intend to foreclose this Agreement by mutual consent, the intending Party shall issue a Notice to the other Party and upon issuance of such Notice, the other Party may within a reasonable time-frame either agree to such foreclosure or raise objection(s) to the same by intimating either of the two possible positions to the intending Party in writing.
- 31.9.3 In either case of the other Party agreeing to the proposed termination and with prior written approval of the Lender's Representative or otherwise, the Parties may negotiate the terms and conditions of the mutual foreclosure agreement and this Agreement shall stand terminated upon execution of mutual foreclosure agreement. Unless otherwise agreed between the parties, the Concessionaire shall not be entitled to any Termination Payment on the mutual foreclosure of the Agreement.
- 31.9.4 Any attempt or endeavour for foreclosure by mutual agreement under this Clause shall, subject to the rights and obligations of the Parties surviving under this Clause, be without prejudice to the rights and obligations of the Parties herein and the factum of such an attempt or exercise shall not stop either of the Parties from discharging their contractual obligations under this Agreement. For the avoidance of doubt, it is agreed that all the rights, claims, and obligations of either party arising under this Agreement shall cease upon execution of the Mutual Foreclosure Agreement hereunder.
- 31.9.5 For the avoidance of doubt, it is clarified that such foreclosure shall not affect the Concessionaire in any way if it wishes to bid in future projects of the Authority.

## **ARTICLE 32 – DIVESTMENT OF RIGHTS AND INTEREST**

### **32.1 Divestment Requirements**

32.1.1 Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements:

- (a) notify to the Authority forthwith the location and particulars of all Project Assets;
- (b) deliver forthwith the actual or constructive possession of the Project free and clear of all Encumbrances,
- (c) cure all Project Assets, structures and equipment, of all defects and deficiencies so that the Project is compliant with the Safety Requirements, and Maintenance Requirements; provided that in the event of Termination during the Construction Period, all Project Assets shall be handed over on 'as is where is' basis after bringing them to a safe condition;
- (d) deliver and transfer relevant records, reports, Intellectual Property and other licenses pertaining to the Project and its design, engineering (as required for proper execution and completion of the Project as envisaged by the Authority), construction, operation and maintenance, including all programmes and manuals pertaining thereto, and complete 'as built' Drawings as on the Transfer Date, in accordance with this Agreement. For the avoidance of doubt, the Concessionaire represents and warrants that the Intellectual Property delivered hereunder shall be adequate and complete for the design, engineering, construction and proper execution and completion of the Project, construction and its operation and maintenance of the Project, as and shall be assigned to the Authority free of any Encumbrance;
- (e) the staff recruited by the Concessionaire shall not be transferred to the Authority upon termination of this Agreement;
- (f) transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws;
- (g) execute such deeds of conveyance, documents and other writings as the Authority may reasonably require for conveying, divesting and assigning all the rights, title and interest of the Concessionaire in the Project, including manufacturers' warranties in respect of any plant or equipment and the right to receive outstanding insurance claims to the extent due and payable to the Authority, absolutely unto the Authority or its nominee; and
- (h) comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights, title and interest of the Concessionaire in the Project Facilities, free from all Encumbrances, absolutely unto the Authority or to its nominee.

32.1.2 Subject to the exercise by the Authority of its rights under this Agreement or under any of the Project Agreements to perform or procure the performance by a third party of any of the obligations of the Concessionaire, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the issuance of any Termination Notice, until the Termination of this Agreement becomes effective in accordance with its terms.

### **32.2 Inspection and cure**

Not earlier than 90 (ninety) days prior to Termination but not later than 15 (fifteen) days prior to the effective date of such Termination, the Independent Engineer shall verify, after giving due notice to the Concessionaire of the time, date and venue of such verification, compliance by the Concessionaire with the Maintenance Requirements, and if required, cause appropriate tests to be carried out at the Concessionaire's cost for this purpose. Defaults, if any, in the Maintenance Requirements shall be cured by the Concessionaire at its cost and the provisions of Article 33 shall apply, *mutatis mutandis*, in

relation to curing of defects or deficiencies under this Article 32.

### **32.3 Cooperation and assistance on transfer of Project**

- 32.3.1 The Parties shall cooperate on a best efforts basis and take all necessary measures, in good faith, to achieve a smooth transfer of the Project in accordance with the provisions of this Agreement so as to protect the safety of and avoid undue delay or inconvenience to the Users, other members of the public or the lawful occupiers of any part of the Site.
- 32.3.2 The Parties shall provide to each other, 9 (nine) months prior to the Transfer Date in the event of Termination by efflux of time and immediately in the event of either Party conveying to the other Party its intent to issue a Termination Notice, as the case may be, as much information and advice as is reasonably practicable regarding the proposed arrangements for operation of the Project following the Transfer Date. The Concessionaire shall further provide such reasonable advice and assistance as the Authority, its Concessionaire or agent may reasonably require for operation of the Project until the expiry of 6 (six) months after the Transfer Date.
- 32.3.3 The Authority shall have the option to purchase or hire from the Concessionaire at a fair market value and free from any encumbrance all or any part of the plant and machinery used in connection with the Project but which does not form part of the assets specified in Clause 32.1.1 and is reasonably required in connection with operation of the Project. For the avoidance of doubt, in the event of dispute or difference relating to fair market value, the Dispute Resolution Procedure as set out under Clause 37.1 shall apply.
- 32.3.4 The Authority reserves the right to invite bids for the Project at an appropriate time before expiry of Concession Period to enable smooth transition. The Concessionaire reserves the right to bid. The Authority reserves the right to amend the bid conditions, scope of work etc. while inviting fresh bids. The Concessionaire shall allow the core team (consisting of maximum of four persons) of the successful bidder the fresh bid(s) to enter the premises 7 (seven) days before expiry of Concession Period to monitor work and take charge at the appointed hour.
- 32.3.5 During re-bidding of the Project, the Concessionaire shall have the first right of refusal, subject to the following:
- (a) The Concessionaire shall participate in the re-bid of the Project;
  - (b) The Authority shall reserve the right to modify existing or introduce new terms and conditions and bid parameters; and
  - (c) The Concessionaire shall have a right to match the highest bid to exercise the first right of refusal if its bid is within the range of 10% (ten per cent) of the most competitive bid received.

### **32.4 Vesting Certificate**

The divestment of all rights, title and interest in the Project shall be deemed to be complete on the date when all of the Divestment Requirements have been fulfilled, and the Authority shall, without unreasonable delay, thereupon issue a certificate substantially in the form set forth in Schedule-P (the “**Vesting Certificate**”), which will have the effect of constituting evidence of divestment by the Concessionaire of all of its rights, title and interest in the Project, and their vesting in the Authority pursuant hereto. It is expressly agreed that any defect or deficiency in the Divestment Requirements shall not in any manner be constructed or interpreted as restricting the exercise of any rights by the Authority or its nominee on, or in respect of, the Project on the footing that all Divestment Requirements have been complied with by the Concessionaire.

### **32.5 Divestment costs etc.**

- 32.5.1 The Concessionaire shall bear and pay all costs incidental to divestment of all of the rights, title and

interest of the Concessionaire in the Project in favor of the Authority upon Termination, save and except that all stamp duties payable on any deeds or Documents executed by the Concessionaire in connection with such divestment shall be borne by the Authority.

- 32.5.2 In the event of any Dispute relating to matters covered by and under this Article 32, the Dispute Resolution Procedure as set out under Clause 37.1 shall apply.

#### **ARTICLE 33 – DEFECTS LIABILITY AFTER TERMINATION**

##### **33.1 Liability for defects after Termination**

The Concessionaire shall be responsible for all defects and deficiencies in the Project, during the Concession Period and for a period of 120 (one hundred and twenty) days after Termination (including expiry of the Concession Period), and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies during the aforesaid period.

##### **33.2 Retention of Escrow Account**

33.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 33.2.3, a sum equal to 5% (five per cent) of the Annual Lease Rental for the year immediately preceding the Transfer Date, shall be retained in the Escrow Account for a period of 120 (one hundred and twenty) days after Termination for meeting the liabilities, if any, arising out of or in connection with the provisions of Clause 33.1.

33.2.2 Without prejudice to the provisions of Clause 33.2.1, the Independent Engineer shall carry out an inspection of the Project at any time between 210 (two hundred and ten) and 180 (one hundred and eighty) days prior to the Termination and if it recommends that the status of the Project is such that a sum larger than the amount stipulated in Clause 33.2.1 should be retained in the Escrow Account and for a period longer than the aforesaid 120 (one hundred and twenty) days, the amount recommended by the Independent Engineer shall be retained in the Escrow Account for the period specified by it.

33.2.3 The Concessionaire may, for the performance of its obligations under this Article 33, provide to the Authority a guarantee from a Bank for a sum equivalent to the amount determined under Clause 33.2.1 or 33.2.2, as the case may be, and for the period specified therein, substantially in the form set forth in Schedule F (the “**Performance Guarantee**”), to be modified, mutatis mutandis, for this purpose, and the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the required amounts from the Performance Guarantee for undertaking the repairs or rectification at the Concessionaire’s risk and cost in accordance with the provisions of this Article 33. Upon furnishing of a Performance Guarantee under this Clause 33.2.3, the retention of funds in the Escrow Account in terms of Clause 33.2.1 or 33.2.2, as the case may be, shall be dispensed with.



**Part VI**  
**Other Provisions**

#### **ARTICLE 34 - ASSIGNMENT AND CHARGES**

##### **34.1 Restrictions on assignment and charges**

- 34.1.1 Subject to Clauses 34.2 and 34.3, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the Authority, which the Authority shall be entitled to decline without assigning any reason.
- 34.1.2 Subject to the provisions of Clause 34.2, the Concessionaire shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which the Concessionaire is a party, except with prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

##### **34.2 Permitted assignment and charges**

The restraints set forth in Clause 34.1 shall not apply to:

- (a) liens arising by operation of law in the ordinary course of business of the Project;
- (b) mortgages/pledges/hypothecation of goods/assets other than Project Assets and their related documents of title, a charge on the Escrow account arising or created in the ordinary course of business of the Project, and a security only for indebtedness to the Senior Lenders under the Financing Agreements and/or for working capital arrangements for the Project. For the avoidance of doubt, the Senior Lenders would be entitled to create a lien on the Escrow Account, subject to and without prejudice to the rights of the Authority under this Agreement.
- (c) assignment of rights, interest and obligations of the Concessionaire to or in favour of the Lenders' Representative as nominee and for the benefit of the Senior Lenders, to the extent covered by and in accordance with the Substitution Agreement as security for financing provided by Senior Lenders under the Financing Agreements; and
- (d) liens or encumbrances required by any Applicable Law.

##### **34.3 Substitution Agreement**

- 34.3.1 The Lenders' Representative, on behalf of Senior Lenders, may exercise the right to substitute the Concessionaire or the Selected Bidder/Consortium Members of the Concessionaire pursuant to the agreement for substitution of the Concessionaire (the "**Substitution Agreement**") to be entered into amongst the Concessionaire, the Authority and the Lenders' Representative, on behalf of Senior Lenders, substantially in the form set forth in Schedule-Q.
- 34.3.2 Upon substitution of the Concessionaire or the Selected Bidder/Consortium Members of the Concessionaire under and in accordance with the Substitution Agreement, the Nominated Company substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations of the Concessionaire under this Agreement as if it were the Concessionaire; provided that where the Concessionaire is in breach of this Agreement on the date of such substitution, the Authority shall by notice grant a Cure Period of 120 (one hundred and twenty) days to the substituted Concessionaire for curing such breach.

##### **34.4 Assignment by the Authority**

- 34.4.1 Notwithstanding anything to the contrary contained in this Agreement, the Authority may, after giving 60 (sixty) days' notice to the Concessionaire, assign and/ or transfer any of its rights and benefits and/or obligations under this Agreement to an assignee who is, in the reasonable opinion of the

Authority capable of fulfilling all of the Authority's then outstanding obligations under this Agreement.

- 34.4.2 Any assignment under this Article 34 shall be subject to the approvals and consents required therefor under Applicable Laws. Provided, however, that the grant of any consent or approval under Applicable Laws shall not oblige the Authority to grant its approval to such assignment, save and except as provided herein.

## **ARTICLE 35 - LIABILITY AND INDEMNITY**

### **35.1 Indemnity by the Concessionaire**

- 35.1.1 The Concessionaire will indemnify, defend, save and hold harmless the Authority and its officers, servants, agents, Government Instrumentalities and Government owned and/or controlled entities/enterprises, (the “**Authority Indemnified Persons**”) against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Concessionaire of any of its obligations under this Agreement or any related agreement or on account of any defect or deficiency in the provision of Services by the Concessionaire to any User or from any negligence of the Concessionaire under contract or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Authority Indemnified Persons.
- 35.1.2 The Authority shall indemnify, defend, save and hold harmless the Concessionaire against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature arising out of (i) defect in title and/or the rights of the Authority in the land comprised in the Site, and/or (ii) breach by the Authority of any of its obligations under this Agreement or any related agreement, which materially and adversely affect the performance by the Concessionaire of its obligations under this Agreement, save and except that where any such claim, suit, proceedings, action, and/or demand has arisen due to a negligent act or omission, or breach of any of its obligations under any provision of this Agreement or any related agreement and/or breach of its statutory duty on the part of the Concessionaire, its subsidiaries, affiliates, contractors, servants or agents, the same shall be the liability of the Concessionaire.

### **35.2 Indemnity by the Concessionaire**

- 35.2.1 Without limiting the generality of Clause 35.1, the Concessionaire shall fully indemnify, hold harmless and defend the Authority and the Authority Indemnified Persons from and against any and all loss and/or Damages arising out of or with respect to:
- (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits;
  - (b) payment of taxes required to be made by the Concessionaire in respect of the income or other taxes of the Concessionaire’s contractors, suppliers and representatives; or
  - (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its contractors which are payable by the Concessionaire or any of its contractors.
- 35.2.2 Without limiting the generality of the provisions of this Article 35, the Concessionaire shall fully indemnify, hold harmless and defend the Authority Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Authority Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, confidentiality rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire’s Contractors in performing the Concessionaire’s obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Project, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for the Authority a license, at no cost to the Authority, authorizing continued use of the infringing work. If the Concessionaire is unable to secure such license within a

reasonable time, the Concessionaire shall, at its own expense, and without impairing the Specifications and Standards, either replace the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

**35.3 Notice and contest of claims**

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 35 (the “**Indemnified Party**”) it shall notify the other Party (the “**Indemnifying Party**”) within 30 (thirty) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

**35.4 Defence of claims**

35.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 35, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

35.4.2 If the Indemnifying Party has exercised its rights under Clause 35.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

35.4.3 If the Indemnifying Party exercises its rights under Clause 35.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

- (a) the employment of counsel by such party has been authorized in writing by the Indemnifying Party; or
- (b) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or the Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defence of such action and shall have been so notified by the Indemnified Party; or
- (c) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
  - i. that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or

- ii. that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 35.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

**35.5 No consequential claims**

Notwithstanding anything to the contrary contained in this Article 35, the indemnities herein provided shall not include any claim or recovery in respect of any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement.

**35.6 Survival on Termination**

The provisions of this Article 35 shall survive Termination of this Agreement.

#### **ARTICLE 36 - RIGHTS AND TITLE OVER THE SITE**

##### **36.1 Licensee rights**

For the purpose of this Agreement, the Concessionaire shall have rights to the use of the Site as a licensee subject to and in accordance with this Agreement, and to this end, it may regulate the entry and use of the Project by third parties in accordance with and subject to the provisions of this Agreement.

##### **36.2 Access rights of the Authority and others**

36.2.1 The Concessionaire shall allow free access to the Site at all times for the authorized representatives and vehicles of the Authority, Senior Lenders, and the Independent Engineer, and for the persons and vehicles duly authorized by any Government Instrumentality to inspect the Project and to investigate any matter within their Authority, and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.

36.2.2 The Concessionaire shall, for the purpose of operation and maintenance of any utility or road specified in Article 11, allow free access to the Site at all times for the authorized persons and vehicles of the controlling body of such utility or road.

##### **36.3 Property taxes**

All property taxes on the land shall be payable by the Authority as owner of the Site.

It is clarified that the Authority shall be liable to pay property tax for Project Site/ land only. Any other statutory charges dues including property tax due and payable for facility created/ developed by the Concessionaire shall be reimbursed by the Concessionaire, and any default in such reimbursements to the Authority shall be treated as default by the Concessionaire.

##### **36.4 Restriction on sub-licensing**

The Concessionaire shall not do the following, which shall constitute an act of Concessionaire Default:-

- (a) Without intimating the authority enter into Contractual Arrangements, including the sub-licensing, franchising or similar arrangements in respect of the built-up area subject to the provisions of Clause of 5.1, which, however, shall not involve the transfer of the leasehold rights therein or thereof;
- (b) Without intimating the authority appoint Sub-contractors for the implementation of the Project at the Site in accordance with the provisions of the Concession Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint Contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project.

36.5 The Parties agree that in the event of Termination prior to expiry of such maximum permissible period, the tenure of the sub-licensees / lessees and the rights of the sub-licensees / lessees shall automatically and forthwith terminate without the need for any action to be taken by the Authority upon the Termination of the Agreement.

#### **ARTICLE 37 - DISPUTE RESOLUTION**

##### **37.1 Dispute resolution**

- 37.1.1 Any dispute, disagreement, claim or other difference arising out of or in connection with this Agreement ("Dispute") shall be resolved in accordance with this Clause 37.1 (Dispute Resolution).
- In the first instance, the Parties shall attempt to resolve the dispute through good faith discussions.
  - In case the Parties are unable to resolve any Dispute through good faith discussions, either Party shall be entitled to refer such Dispute to arbitration by serving notice on the other Party.
  - In cases where the claim amount is INR 50 Crores or less, the Arbitral Tribunal shall comprise of a Sole Arbitrator to be appointed from a panel/ list of 5 (Five) persons, as suggested by the Authority to the Concessionaire. Upon receipt of reference of such suggested list of 5 persons by the Authority, the Concessionaire shall select the Sole Arbitrator within a period of 7 (seven) days from the date of receipt of the aforesaid panel/ list, failing which the Sole Arbitrator shall be selected by the Authority, from the aforesaid panel/ list of 5 persons.
  - In cases where the claim amount is in excess of INR 50 Crores, the Arbitral Tribunal shall comprise of 3 (Three) members, 1 (One) to be nominated each by a Party, and the Presiding Arbitrator to be jointly appointed by the 2 (two) nominated arbitrators.
- 37.1.2 The Parties agree that the arbitration proceedings shall be governed by the provisions of the Arbitration and Conciliation Act 1996 of India (or any statutory modification or reenactment thereof for the time being in force). The language of the arbitration shall be English. The seat and venue for such arbitration shall be at Shillong.
- 37.1.3 The arbitral proceedings in respect of a particular dispute shall commence on the date on which the arbitrator calls upon the party to file its claim.
- 37.1.4 Except on the termination of the Agreement, the Concessionaire shall be obliged to continue to provide the Service(s) to the Authority under the Agreement, and continue to carry out the Scope of Work as per this Agreement even during the arbitration proceedings, and no payment due & payable to the Concessionaire (except the payment in dispute), shall be withheld on account of such proceedings.
- 37.1.5 The cost of arbitral proceedings shall be borne by the Party/ Parties as per the provisions of the Arbitration and Conciliation Act 1996.
- 37.1.6 The arbitration award shall be a reasoned award. The same shall be final and binding on the Parties. The right to refer any Dispute to arbitration pursuant to this Clause 37.1 (Dispute Resolution) shall survive the expiry or termination of this Agreement.



#### **ARTICLE 38 - DISCLOSURE**

##### **38.1 Disclosure of Specified Documents**

The Concessionaire shall make available for inspection by any person, copies of this Concession Agreement, the Maintenance Manual, the Maintenance Programme, the Maintenance Requirements and the Safety Requirements (hereinafter collectively referred to as the “**Specified Documents**”), free of charge, during normal business hours on all working days at the Concessionaire’s office on all working days at the Site and the Concessionaire’s registered office. The Concessionaire shall prominently display at the Site, public notices stating the availability of the Specified Documents for such inspection, and shall provide copies of the same to any person upon payment of copying charges on a ‘no profit no loss’ basis

##### **38.2 Disclosure of Documents relating to safety**

The Concessionaire shall make available for inspection by any person copies of all Documents and data relating to safety of the Project, free of charge, during normal business hours on all working days, at the Concessionaire’s registered office. The Concessionaire shall make copies of the same available to any person upon payment of copying charges on a ‘no profit no loss’ basis.

##### **38.3 Withholding disclosure of Protected Documents**

Notwithstanding the provisions of Clauses 38.1 and 38.2, the Authority shall be entitled to direct the Concessionaire, from time to time, to withhold the disclosure of Protected Documents (as defined herein below) to any person in pursuance of the aforesaid Clauses.

##### *Explanation:*

The expression Protected Documents shall mean such of the Specified Documents or documents referred to in Clauses 38.1 and 38.2, or portions thereof, the disclosure of which the Authority is entitled to withhold under the provisions of the Right to Information Act, 2005.

#### **ARTICLE 39 - REDRESSAL OF PUBLIC GRIEVANCES**

##### **39.1 Complaints Register**

- 39.1.1 The Concessionaire shall maintain a public relations office at the Project where it shall keep a register (the “**Complaint Register**”) open to public access at all times for recording of complaints by any person (the “**Complainant**”). Further, the website / IT platform of the Concessionaire shall allow registration of complaints. The Concessionaire shall provide the Authority with a login ID through which the Authority can monitor the complaints. Information relating to the availability of and access to the Complaint Register shall be prominently displayed by the Concessionaire at the Project so as to bring it to the attention of all Users.
- 39.1.2 The Complaint Register shall be securely bound, and each page thereof shall be duly numbered. It shall have appropriate columns including the complaint number, date, name and address of the Complainant, substance of the complaint and the action taken by the Concessionaire. Immediately after a complaint is registered, the Concessionaire shall give a receipt to the Complainant stating the date and complaint number.
- 39.1.3 Without prejudice to the provisions of Clauses 39.1.1 and 39.1.2, the Authority may, in consultation with the Concessionaire, specify the procedure for making complaints in electronic form and for responses thereto.

##### **39.2 Redressal of complaints**

- 39.2.1 The Concessionaire shall inspect the Complaint Register every day and take prompt and reasonable action for redressal of each complaint. The action taken shall be briefly noted in the Complaint Register and a reply stating the particulars thereof shall be sent by the Concessionaire to the Complainant under a certificate of posting.
- 39.2.2 Within 7 (seven) days of the close of each month, the Concessionaire shall send to the Authority and to the Independent Engineer a true photocopy of each of the pages of the Complaint Register and complaints received on IT platform including the action taken thereof on which any entry has been recorded during the course of such month, and upon perusal thereof, the Authority may, in its discretion, advise the Concessionaire to take such further action as the Authority may deem appropriate for a fair and just redressal of any grievance. The Concessionaire shall consider such advice and inform the Authority of its decision thereon, and if the Authority is of the opinion that the Complainant is entitled to further relief, it may refer the matter to the competent forum for its disposal under the Consumer Protection Act, 1986, and advise the Complainant to pursue the complaint at his own risk and cost.

#### **ARTICLE 40 - MISCELLANEOUS**

##### **40.1 Governing law and jurisdiction**

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts at Shillong alone shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

##### **40.2 Waiver of immunity**

Each Party unconditionally and irrevocably:

- (a) agrees that execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its asset, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Party with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to its in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgment or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgment that may be made or given in connection therewith).

##### **40.3 Depreciation and Interest**

- 40.3.1 For the purposes of depreciation under Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the Authority shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under Applicable Laws.
- 40.3.2 Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rate.

##### **40.4 Delayed payments**

The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to 3% (three per cent) above the Bank Prime Lending Rate (PLR), and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

##### **40.5 Waiver**

- 40.5.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement;
  - (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;

- (b) shall not be effective unless it is in writing and executed by a duly authorized representative of the Party;  
and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

40.5.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

#### **40.6 Liability for review of Documents and Drawings**

Except to the extent expressly provided in this Agreement:

- (a) no review, comment or approval by the Authority or the Independent Engineer of any Project Agreement, Document or Drawing submitted by the Concessionaire nor any observation or inspection of the construction, operation or maintenance of the Project nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Concessionaire from its obligations, duties and liabilities under this Agreement, the Applicable Laws and Applicable Permits; and
- (b) the Authority shall not be liable to the Concessionaire by reason of any review, comment, approval, observation or inspection referred to in Sub-clause (a) above.

#### **40.7 Exclusion of implied warranties etc.**

This Agreement expressly excludes any warranty, condition or other undertaking implied at law or by custom or otherwise arising out of any other agreement between the Parties or any representation by either Party not contained in a binding legal agreement executed by both Parties.

#### **40.8 Survival**

40.8.1 Termination shall:

- (a) not relieve the Concessionaire or the Authority, as the case may be, of any obligations hereunder which expressly or by implication survive termination hereof, and
- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

40.8.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.

#### **40.9 Entire Agreement**

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn. For the avoidance of doubt, the Parties hereto agree that any obligations of the Concessionaire arising from the Request for Proposal, shall be deemed to form part

of this Agreement and treated as such.

**40.10 Severability**

If for any reason whatsoever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure set forth under this Agreement under Clause 37.1 or otherwise.

**40.11 No partnership**

This Agreement shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party, and neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

**40.12 Third parties**

This Agreement is intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and nothing in this Agreement shall be construed to create any duty to, standard of care with reference to, or any liability to, any person not a Party to this Agreement.

**40.13 Successors and assigns**

This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

**40.14 Notices**

Any notice or other communication to be given by any Party to the other Party under or in connection with the matters contemplated by this Agreement shall be in writing and shall:

- (a) in the case of the Concessionaire, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Concessionaire may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside Shillong may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number as the Concessionaire may from time to time designate by notice to the Authority; in the case of the Authority, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the Chairman of the Authority with a copy delivered to the Authority Representative or such other person as the Authority may from time to time designate by notice to the Concessionaire; provided that if the Concessionaire does not have an office in Shillong it may send such notice by facsimile or email and by registered acknowledgement due, air mail or by courier; and
- (b) any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date and time of delivery; provided that in the case of facsimile or email, it shall be deemed to have been delivered on the working day following the date of its delivery.

**40.15 Supplementary Agreement**

The Parties agree that the Parties may execute a Supplementary Agreement, in writing, novating any terms and conditions of this Agreement.

**40.16 Language**

All notices required to be given by one Party to the other Party and all other communications, Documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

**40.17 Counterparts**

This Agreement may be executed in two counterparts, each of which, when executed and delivered, shall constitute and original of this Agreement.

#### ARTICLE 41 - DEFINITIONS

##### 41.1 Definitions

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

**“Access Road”** means road connecting the Site to the carriageway of Highway alongside which the Project is located;

**“Accounting Year”** means the financial year commencing from the first day of April of any calendar year and ending on the thirty-first day of March of the next calendar year;

**“Adjusted Equity”** means the Equity funded in Indian Rupees and adjusted on the first day of the current month (the **“Reference Date”**), in the manner set forth below, to reflect the change in its value on account of depreciation and variations in Price Index, and for any Reference Date occurring:

- (a) on or before Final COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Total Project Cost, revised to the extent of one half of the variation in Price Index occurring between the first day of the month of Appointed Date and the Reference Date;
- (b) from Final COD and until the fourth (4th) anniversary thereof, an amount equal to the Adjusted Equity as on Final COD shall be deemed to be the base (the **“Base Adjusted Equity”**) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following Final COD to the extent of variation in Price Index occurring between Final COD and the Reference Date; and
- (c) after the fourth (4th) anniversary of Final COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by zero-point one percent (0.32%) thereof at the commencement of each month following the fourth (4th) anniversary of Final COD and the amount so arrived at shall be revised to the extent of variation in Price Index occurring between Final COD and the Reference Date;

For the avoidance of doubt, the Adjusted Equity shall, in the event of Termination, be computed as on the Reference Date immediately preceding the Transfer Date; provided that no reduction in the Adjusted Equity shall be made for a period equal to the duration, if any, for which the Concession Period is extended, but the revision on account of Price Index shall continue to be made;

**“Affected Party”** shall have the meaning as set forth in Clause 28.1;

**“Agreement”** or **“Concession Agreement”** means this Agreement, its Recitals, the Schedules hereto and any amendments thereto made in accordance with the provisions contained in this Agreement;

**“Applicable Laws”** means all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made there under, and judgments, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;

**“Applicable Permits”** means all clearances, licenses, permits, authorizations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the construction, operation and maintenance of the Project during the subsistence of this Agreement;

**“Appointed Date”** means the date on which Financial Close is achieved and shall be deemed to be the date of commencement of the Concession Period. For the avoidance of doubt, every Condition

Precedent shall have been satisfied or waived prior to the Appointed Date and in the event all Conditions Precedent are not satisfied or waived, as the case may be, the Appointed Date shall be deemed to occur only when each and every Condition Precedent is either satisfied or waived, as the case may be;

“**Arbitration Act**” means the Arbitration and Conciliation Act, 1996 and shall include modifications to or any re-enactment thereof, as in force from time to time;

“**Associate**” or “**Affiliate**” means, in relation to either Party {and/or Consortium Members}, a person who controls, is controlled by, or is under the common control,[ or is owned, managed, advised or sponsored by commonly controlled investment managers (whether by operation of law, contract (whether directly or indirectly) or otherwise)] with such Party {or Consortium Member} (as used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);

“**Associated Firm**” shall have the same meaning as ascribed to the expression “Associate”, provided that the reference to 50% (fifty per cent) of voting shares in respect of an Associate shall be read as more than **25% (twenty-five per cent)** of voting shares in the case of an Associated Firm.

“**Authority Default**” shall have the meaning as set forth in Clause 31.2.1;

“**Authority Representative**” means such person or persons as may be authorized in writing by the Authority to act on its behalf under this Agreement and shall include any person or persons having Authority to exercise any rights or perform and fulfil any obligations of the Authority under this Agreement;

“**Bank**” means a bank incorporated in India and having a minimum net worth of Rs. 1,000 Crore (Rupees one thousand Crore)

“**Bid**” means the documents in their entirety comprised in the bid submitted by the {selected bidder/ Consortium} in response to the Request for Proposals in accordance with the provisions thereof “**Bid Due Date**” shall have the meaning as ascribed to it under Volume I-RFP;

“**Bid Security or Earnest Money Deposit (EMD)**” means the security provided by the [Concessionaire/ {selected bidder/Consortium}] to the Authority along with the Bid in a sum of Rs. 5,00,000/- (Rupees Five Lakhs only)<sup>26</sup>, in accordance with the Request for Proposal, and which is to remain in force until substituted by the Performance Security;

“**Business Day**” means day (other than a Sunday) on which banks in the State where the Project is situated are generally open for business;

“**Change in Law**” means the occurrence of any of the following after the Bid Date:

- (a) the enactment of any new Indian law;
- (b) the repeal, modification, or re-enactment of any existing Indian law;
- (c) the commencement of any Indian law which has not entered into effect until the Bid Date;
- (d) a change in the interpretation or application of any Indian law by a judgment of a court of record which has become final, conclusive, and binding, as compared to such interpretation or application by a court of record prior to the Bid Date; or
- (e) any change in the rates of any of the Taxes that have a direct effect on the Project;



**“Change in Ownership”** means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the {selected bidder/ Consortium Members}, together with {its/their} Associates, in the total Equity to decline below 51% (fifty one per cent) thereof during Construction Period and 6 (six) months thereafter; provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process for the purposes of meeting the minimum conditions of eligibility or for evaluation of its application or Bid, as the case may be,) in the proportion of the equity holding of {the selected bidder/ any Consortium Member} to the total Equity, if it occurs prior to completion of a period of 6 (six) months after Final COD, shall constitute Change in Ownership;

**“Change of Scope”** shall have the meaning as set forth in Clause 16.1.1;

**“Company”** means the company acting as the Concessionaire under this Agreement;

**“Completion Certificate”** shall have the meaning as set forth in Clause 14.1;

**“Concession”** shall have the meaning as set forth in Clause 3.1.1;

**“Concessionaire”** shall have the meaning attributed thereto in the array of Parties as set forth in the Recitals;

**“Concession Fee”** shall have the meaning as set forth in Clause 23.1;

**“Concession Period”** means the period starting on and from the Appointed Date and ending on the Transfer Date;

**“Concessionaire Default”** shall have the meaning as set forth in Clause 31.1.1;

**“Conditions Precedent”** shall have the meaning as set forth in Clause 4.1.1;

{**“Consortium”** shall have the meaning as set forth in Recital (D);}

{**“Consortium Member”** means a company specified in Recital (D) as a member of the Consortium;}

“Construction Period” means the period from Appointed Date until the Project Completion Date;

**“Construction Works”** means all works and things necessary to complete the Project in accordance with this Agreement;

**“Contractor”** means the person or persons, as the case may be, with whom the Concessionaire has entered into any of the EPC Contract, the O&M Contract or any other material agreement or contract for construction, operation and/or maintenance of the Project or matters incidental thereto, but does not include a person who has entered into an agreement for providing financial assistance to the Concessionaire;

**“Cure Period”** means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default and shall:

- (f) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;
- (g) not relieve any Party from liability to pay Damages or compensation under the provisions of this Agreement; and

(h) not in any way be extended by any period of Suspension under this Agreement;

provided that if the cure of any breach by the Concessionaire requires any reasonable action by the Concessionaire that must be approved by the Authority or the Independent Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the Authority or the Independent Engineer to accord their approval;

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**“Damages”** shall have the meaning as set forth in Sub-clause (w) of Clause 1.2.1;

**“Debt Due”** means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:

- (a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the **“principal”**) but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;
- (b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and
- (c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;

provided that if all or any part of the Debt Due is convertible into Equity at the option of Senior Lenders and/or the Concessionaire, it shall for the purposes of this agreement be deemed to be Debt Due even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken; provided further that the Debt Due shall in no case exceed seventy percent (70%) of the Total Project Cost;

**“Debt Service”** means the sum of all payments on account of principal, interest, financing fees and charges due and payable in an Accounting Year to the Senior Lenders for and in respect of Debt Due under the Financing Agreements;

**“Development Period”** means 1 (One) year period from the Appointed Date; **“Dispute”**

shall have the meaning as set forth in Clause 37.1.1;

**“Dispute Resolution Procedure”** means the procedure for resolution of Disputes as set forth in

Article 37.1.1;

**“Divestment Requirements”** means the obligations of the Concessionaire for and in respect of Termination as set forth in Clause 32.1;

**“Document”** or **“Documentation”** means documentation in printed or written form, or in tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form;

**“Drawings”** means all of the drawings, calculations and documents pertaining to the Project as set forth in Schedule-G, and shall include ‘as built’ drawings of the Project;

**“EPC Contractor”** means the person with whom the Concessionaire has entered into an EPC Contract;

**“Emergency”** means a condition or situation that is likely to endanger the security of the individuals on or about the Project, including Users thereof, or which poses an immediate threat of material damage to any of the Project Assets;

**“Encumbrances”** means, in relation to the Project any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, where applicable herein but excluding utilities referred to in Clause 11.1;

**“Equity”** means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost, and for the purposes of this Agreement shall include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Concessionaire, and any interest-free funds advanced by any shareholder of the Concessionaire for meeting such equity component, but does not include equity support by the Authority ;

**“Escrow Account”** means an Account which the Concessionaire shall open and maintain with a Bank in which all inflows and outflows of cash on account of capital and revenue receipts and expenditures shall be credited and debited, as the case may be, in accordance with the provisions of this Agreement, and includes the sub-accounts of such Escrow Account;

**“Escrow Agreement”** shall have the meaning as set forth in Clause 25 .1.2;

**“Escrow Bank”** shall have the meaning as set forth in Clause 25.1.1;

**“Escrow Default”** shall have the meaning as set forth in Schedule-N;

**“Existing Facilities”** means the existing warehousing facilities built on the Site that are under operational use currently under the Authority and shall be handed over to the Concessionaire as part of the Site;

**“Fee”** means the charge levied on and payable by a User for provision of any or all of the Services, in accordance with the Schedule of Fees and this Agreement;

**“Final COD”** or **“Final Commercial Operation Date”** shall have the meaning as set forth in Clause 15.1.1;

**“Financial Close”** means the fulfilment of all conditions precedent to the initial availability of funds under the Financing Agreements;

**“Financial Default”** shall have the meaning as set forth in Schedule-Q;

**“Financial Model”** means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues there from on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein;

**“Financial Package”** means the financing package indicating the Total Project Cost/ Overall Total

Project Cost of Project completion and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements and Subordinated Debt;

**“Financing Agreements”** means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes any amendments or modifications made to them;

**“Force Majeure”** or **“Force Majeure Event”** shall have the meaning ascribed to it in Clause 28.1.

**“GOI”** or **“Government”** means the Government of India;

**“Good Industry Practice”** means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Concessionaire in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner and for providing safe, economical, reliable and efficient manner

**“Government Instrumentality”** means any department, division or sub-division of the Government of India or the State Government and includes any commission, board, Authority, agency or municipal and other local authority or statutory body, including panchayat, under the control of the Government of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Project or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement;

**“Indemnified Party”** means the Party entitled to the benefit of an indemnity pursuant to Article 35;

**“Indemnifying Party”** means the Party obligated to indemnify the other Party pursuant to Article 35;

**“Independent Engineer”** shall have the meaning as set forth in Clause 21.1;

**“Insurance Cover”** means the aggregate of the maximum sums insured under the insurances taken out by the Concessionaire pursuant to Article 26, and includes all insurances required to be taken out by the Concessionaire under Clause 26.1 but not actually taken, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable or deemed to be insured and payable in relation to such act or event;

**“Intellectual Property”** means all patents, trademarks, service marks, logos, get-up, trade names, internet domain names, rights in designs, blue prints, programmes and manuals, drawings, copyright (including rights in computer software), database rights, semi-conductor, topography rights, utility models, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world;

**“Lead Member”** shall have the meaning as set forth in Recital (D);

**“Lenders’ Representative”** means the person duly authorised by the Senior Lenders to act for and on

behalf of the Senior Lenders with regard to matters arising out of or in relation to this Agreement, and includes its successors, assigns and substitutes;

“**Licensed Premises**” shall have the meaning as set forth in Clause 10.2.2;

“**LOA**” or “**Letter of Award**” means the letter of award referred to in Recital (D);

“**Maintenance and Service Requirements**” shall have the meaning as set forth in Clause 17.2;

“**Master Plan**” shall mean master plan finalized in terms of Article 12 for construction, development and operation of the warehousing and logistics facilities in accordance with the provisions of this Agreement, and includes the vacant land earmarked for expansion of the Project;

“**Material Adverse Effect**” means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;

“**Monthly Fee Statement**” shall have the meaning ascribed to it in Clause 24.3;

“**Nominated Company**” means a company selected by the Lenders’ Representative and proposed to the Authority for substituting the Concessionaire in accordance with the provisions of the Substitution Agreement;

“**O&M**” means the operation and maintenance of the Project and includes all matters connected with or incidental to such operation and maintenance, provision of services and facilities, and revenue generation in accordance with the provisions of this Agreement;

“**O&M Contract**” means the operation and maintenance contract that may be entered into between the Concessionaire and the O&M Contractor for performance of all or any of the O&M obligations;

“**O&M Contractor**” means the person, if any, with whom the Concessionaire has entered into an O&M Contract for discharging O&M obligations for and on behalf of the Concessionaire;

“**O&M Expenses**” means expenses incurred by or on behalf of the Concessionaire or by the Authority, as the case may be, for all O&M including (a) cost of salaries and other compensation to employees, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all taxes, duties, cess and fees due and payable for O&M, (e) all repair, replacement, reconstruction, reinstatement, improvement and maintenance costs, (f) payments required to be made under the O&M Contract, or another contract in connection with or incidental to O&M, and (g) all other expenditure required to be incurred under Applicable Laws, Applicable Permits or this Agreement;

“**O&M Inspection Report**” shall have the meaning as set forth in Clause 19.2;

“**Operation Period**” means the period commencing from Final COD and ending on the Transfer Date;

“**Overall Total Project Cost**” shall have the meaning as ascribed to it under the definition of Total Project Cost;

“**Panel of Chartered Accountants**” shall have the meaning as set forth in Clause 27.2.1;

“**Parties**” means the parties to this Agreement collectively and “**Party**” shall mean any of the parties to this Agreement individually;

“**Performance Security**” shall have the meaning as set forth in Clause 9.1.;

“**Preservation Costs**” shall have the meaning as set forth in Clause 13.5.3;

“**Project**” means the construction, operation and maintenance of the Project, including Existing Facilities and New Facilities in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Project;

“**Project Agreements**” means this Agreement, the Financing Agreements, EPC Contract, O&M Contract, and any other material agreements or contracts that may be entered into by the Concessionaire with any person in connection with matters relating to, arising out of or incidental to the Project, but does not include the Escrow Agreement, Substitution Agreement, or any agreement for procurement of goods and services during construction period involving a consideration of up to Rs.[5(five)] Crore;

“**Project Assets**” means all physical and other assets relating to and forming part of the Site including (a) rights over the Site in the form of license, (b) tangible assets such as civil works and equipment including foundations, embankments, electrical systems, communication systems, rest areas, (c) Project Facilities situated on the Site; (d) buildings and immovable fixtures (e) all rights of the Concessionaire under the Project Agreements; (f) financial assets, such as receivables, security deposits etc.; (g) insurance proceeds; and (h) Applicable Permits and authorizations relating to or in respect of the Project.

“**Project Completion Date**” means the date on which the Completion Certificate is issued under the provisions of Article 14;

“**Project Facilities**” means all the amenities and facilities situated on the Site, as described in Schedule-B under the Project;

“**Protected Documents**” shall have the meaning ascribed to it in the Explanation to Clause 38.3;

“**Provisional COD**” or “**Provisional Commercial Operation Date**” shall have the meaning as set forth in Clause 15.1.1;

“**RBI**” means the Reserve Bank of India, as constituted and existing under the Reserve Bank of India Act, 1934, including any statutory modification or replacement thereof, and its successors;

“**Re.**”, “**Rs.**” or “**Rupees**” or “**Indian Rupees**” means the lawful currency of the Republic of India;

“**Realisable Fee**” means all the Fee due and realisable under this Agreement, with or without any discounts or reduction in Fee, but does not include Fee that the Concessionaire has not been able to realise after due diligence and best efforts. For the avoidance of doubt, Realisable Fee shall be the amount so declared by the Concessionaire on the basis of its provisional accounts or the audited accounts, as the case may be, which shall truthfully reflect the actual collection of Fee, and in the event of a dispute thereto, the Dispute Resolution Procedure shall apply

“**Reference Exchange Rate**” means, in respect of any one currency that is to be converted into another currency in accordance with the provisions of this Agreement, the exchange rate as of 12.00 (twelve) noon on the relevant date quoted in Delhi by the State Bank of India, and in the absence of such rate, the average of similar rates quoted in Delhi by the Bank of India and the Bank of Baroda;

“**Reference Index Date**” means, in respect of a specified date, the last date of the preceding month with reference to which the Construction Price Index or the O&M Price Index is revised.

“**Request for Proposals**” or “**RFP**” shall have the meaning set forth in Recital (D);

“**Right of Way**” means the constructive possession of the Site, together with all way leaves, easements, license, unrestricted access use and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project in accordance with this Agreement;

“**Safety Consultant**” shall have the meaning set forth in Clause 18.1.2;

“**Safety Requirements**” shall have the meaning set forth in Clause 18.1.1;

“**Scheduled Completion Date**” shall have the meaning set forth in Clause 12.6;

“**Scope of the Project**” shall have the meaning set forth in Clause 2.1;

“**Senior Lenders**” means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold *pari passu* charge on the assets, rights, title and interests of the Concessionaire;

“**Services**” shall mean the Core Logistics Services and Value-Added Services and shall include the services as outlined in **Schedule-C**;

“**Site**” shall have the meaning set forth in Clause 10.1;

“**Specifications and Standards**” means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Project, as set forth in Schedule-D, and any modifications thereof, or additions thereto, as included in the engineering for the Project submitted by the Concessionaire to, and expressly approved by, the Authority;

“**Specified Assets**” means and includes all or any of the Project Assets forming part of the Project but shall in no case include any land;

“**State**” means the State of Meghalaya in which the Project is situated and “**State Government**” means the government of that State;

“**Statutory Auditors**” means a reputable firm of chartered accountants acting as the statutory auditors of the Concessionaire under the provisions of the Companies Act, 2013 including any statutory modification or re-enactment thereof, for the time being in force, and appointed in accordance with Clause 27.2.1;

“**Subordinated Debt**” means the aggregate of the following sums expressed in Indian Rupees or in the currency of debt, as the case may be, outstanding as on the Transfer Date:

- (a) the principal amount of debt provided by lenders or the Concessionaire’s shareholders for meeting the Total Project Cost and subordinated to the financial assistance provided by the Senior Lenders; and
- (b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Prime Lending Rate (PLR) in case of loans expressed in Indian Rupees and lesser of the actual interest rate and 6 (six)- month LIBOR (London Inter Bank Offer Rate) plus 2% (two per cent) in case of loans expressed in foreign currency, but does not include any interest that had fallen due 1 (one) year prior to the Transfer Date;

provided that if all or any part of the Subordinated Debt is convertible into Equity at the option of the lenders and/or the Concessionaire's shareholders, it shall for the purposes of this Agreement be deemed to be Subordinated Debt even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

**"Substitution Agreement"** shall have the meaning as set forth in Clause 34.3;

**"Supplementary Agreement"** shall mean the agreement executed between the Parties novating any term and/or condition of the Agreement, upon the execution of which all rights and claims of the Concessionaire in respect of the novated terms and conditions shall cease;

**"Suspension"** shall have the meaning as set forth in Clause 30.1;

**"Taxes"** means any Indian taxes including excise duties, customs duties, goods and services tax, local taxes, cess and any impost or surcharge of like nature (whether Central, State or local) on the goods, materials, equipment and services incorporated in and forming part of the Project charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;

**"Termination"** means the expiry or termination of this Agreement and the Concession hereunder;

**"Termination Notice"** means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;

**"Termination Payment"** means the amount payable by the Authority to the Concessionaire, upon Termination; and may consist of payments on account of and restricted to the Debt Due and Adjusted Equity, as the case may be, which form part of the Total Project Cost in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment.

**"Tests and Inspection"** means the tests set forth Schedule-H to determine the completion of the Project in accordance with the provisions of this Agreement and shall, mutatis mutandis,

**"Total Project Cost"** means the capital cost incurred on construction and financing of the Project, and shall be limited to the lowest of:

- (a) the aggregate value of capital cost of the Project as set forth in the Financial Package; and
- (b) the aggregate value of actual capital cost of the Project upon completion; and
- (c) the Estimated Project Cost as provided in the RFP;

provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement; provided further that in the event WPI increases, on an average, by more than 6% (six per cent) per annum for the period between the date hereof and Final COD, the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount hereinbefore specified such that the effect of increase in WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost;

**"Total Turnover"** shall mean the aggregate of all revenue earned from the operations or directly attributable to the project either by the Concessionaire or through any other arrangement.

Explanation: For the removal of doubts, it is clarified that any amount charged by the concessionaire to



the users in relation to the project, whether or not such revenue is actually realized from the users, shall form part of the Total Turnover.

Provided however that any income earned from the following activities shall be excluded from the computation of Total Turnover:

- i. income from investing surplus funds by the concessionaire;
- ii. income from any other investments not directly related to the project;
- iii. any deposit amounts linked to sub-license agreements including the security deposit.

Provided also that notwithstanding anything contained in this Agreement the Total turnover shall not include taxes.

**“Transfer Date”** means the date on which this Agreement and the Concession hereunder expires pursuant to the provisions of this Agreement or is terminated by a Termination Notice;

**“User”** means a person who uses or intends to use the Services of the Project or any part thereof on payment of Fee or in accordance with the provisions of this Agreement and Applicable Laws;

*Explanation: For avoidance of doubt, it is clarified that the term “person” referred in the definition of “User” above shall also include any company, corporation, unincorporated organization, or any other legal entity or their agents etc. using the Services of the Project.*

**“User Charter”** shall have the meaning as set forth in Clause 23.4;

**“Vesting Certificate”** shall have the meaning as set forth in Clause 32.4;

**“WPI”** means the Wholesale WPI for all commodities as published by the Ministry of Industry, GOI and shall include any index which substitutes the WPI, and any reference to WPI shall, unless the context otherwise requires, be construed as a reference to the latest monthly WPI published no later than 30 (thirty) days prior to the date of consideration hereunder; and

**“Press Note 3”** means Press Note no. 3 (2020 Series) dated April 17, 2020 issued by the Department for Promotion of Industry and Internal Trade, Government of India;

**“Price Index”** shall comprise:

- a) seventy percent (70%) of WPI; and
- b) thirty percent (30%) of CPI (IW),

which constituents may be substituted by such alternative index or indices as the Parties may by mutual consent determine;

**“SBI MCLR”** means the one-year ‘Marginal Cost of Funds based Lending Rate’ issued by the State Bank of India on a monthly basis;

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

SIGNED, SEALED AND DELIVERED

For and on behalf of THE Authority by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(e-mail address)

THE COMMON SEAL OF CONCESSIONAIRE has been affixed pursuant to the resolution passed by the Board of Directors of the Concessionaire at its meeting held on the ..... day of ..... 20..... Hereunto affixed in the presence of ..... Director, who has signed these presents in token thereof and.....Company Secretary / Authorised Officer who has countersigned the same in token thereof;

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(e-mail address)

In the presence of:

- 1.
- 2.

## **SCHEDULES**

**SCHEDULE – A - SITE OF THE PROJECT**

**1. The Site**

a) The Site (geo- co-ordinates provided in Annex -I) of the Project Facility shall include the land, buildings and structures as described in Annex-I of this Schedule A; and

b) An inventory of the Licensed Premises including the land area, buildings, structures, road works, trees and any other immovable property on, or attached to, the Licensed Premises shall be prepared jointly by the Authority Representative and the Concessionaire, and such inventory shall form part of the memorandum of the Agreement.



**SCHEDULE – B – DEVELOPMENT OF THE WAREHOUSE FACILITY**

1. Development of the Project Facility

Development of the Project Facility shall include construction of the Facility as described in this Schedule-B and in conjunction with Schedule A and Schedule D.

2. Project Facility

Notwithstanding anything contrary to facilities mentioned of Schedule A, the development of the Facility shall include:

Warehousing zone and allied facilities

- a) Warehousing zone, Internal roads and Circulation Area
- b) Internal Roads
- c) Paved area for circulation

Vehicle Parking

- d) Parking facilities for vehicles that come to avail the Services of the Warehouse Facility

Supporting Facilities

- e) Facilities for providing O&M services,

Utilities (as applicable)

- f) Utilities such as water distribution network, sump & overhead tank, rainwater harvesting, storm water drains, sewage treatment plant, solid waste management, electrical substation and distribution network, street lighting, yard lighting, fire station, fire water supply with hydrants & fire network, etc., and all other required facilities for the smooth operation of the Warehouse Facility.
- g) IT Infrastructure (hardware and software) required for maintenance of cargo entry records, records for Core Logistics Services, Value Added Services and such other services as set forth in Schedule C.

Landscaping and Horticulture Area

- h) Open landscape and horticulture area

Any other Facility

- i) Any other facilities or Services required on case-to-case basis for smooth functioning and operation of the Warehouse Facility.

The development of the Warehouse Facility shall be undertaken in conformity with the Specifications and Standards set forth in Schedule-D.

Annexure I (Schedule - B)  
**PROPOSED MASTER PLAN**

< > (To be updated)

Annexure II (Schedule – B)  
**Provision related to Environment Protection**

The Concessionaire shall in addition to the terms and conditions of the approvals, sanctions, permissions granted by relevant Government Instrumentality, relating to the Project, also comply and adhere to the following terms and conditions:

**General Conditions: (Construction Phase)**

- a) The solid waste generated should be properly collected and segregated. Dry/inert solid waste should be disposed of to the approved sites for land filling after recovering recyclable material.
- b) Disposal of muck construction spoils, including bituminous material during construction phase should not create any adverse effect on the neighboring communities and be disposed taking the necessary precautions for general safety and health aspects of people, only in the approved sites with the approval of competent authority.
- c) Any hazardous waste generated during construction phase should be disposed of as per applicable rules and norms with necessary approvals of the State Pollution Control Board.
- d) Adequate drinking water and sanitary facilities should be provided for construction workers at the Site. The safe disposal of wastewater and solid wastes generated during the construction phase should be ensured.
- e) Arrangement shall be made that wastewater and storm water do not get mixed.
- f) Water demand during construction should be reduced by use of pre-mixed concrete, curing agents and other best practices
- g) Permission to draw ground water for construction of basement if any shall be obtained from the competent Authority prior to construction/operation of the project.
- h) Fixtures for showers, toilet flushing, and drinking should be of low flow either by use of aerators or pressure reducing devices or sensor-based control.
- i) The Energy Conservation Building code shall be strictly adhered to.
- j) All the topsoil excavated during construction activities should be stored for use in horticulture/landscape development within the Project Site.
- k) Additional soil for levelling of the proposed Site shall be generated within the Site (to the extent possible) so that natural drainage system of the area is protected and improved.
- l) Soil and ground water samples to be tested to ascertain that there is no threat to ground water quality by leaching of heavy metals and other toxic contaminants.
- m) Concessionaire to strictly adhere to all the conditions mentioned in State Protection and Preservation of Tree Act, as applicable, and as amended during the validity of Environment Clearance.
- n) Vehicles hired for transportation of raw material shall strictly comply the emission norms prescribed by Ministry of Road Transport & Highways Department. The vehicle shall be adequately covered to avoid spillage/leakages.
- o) Ambient noise levels should conform to applicable standards both during day and night. Incremental pollution loads on the ambient air and noise quality should be closely monitored during construction phase. Adequate measures should be taken to reduce ambient air and noise level during construction phase, so as to conform to the stipulated standards by CPCB/MPCB.



- p) Diesel power generating sets proposed as source of backup power for elevators and common area illumination during construction phase should be of enclosed type and conform to rules made under the Environment (Protection) Act, 1986. The height of stack of DG sets should be equal to the height needed for the combined capacity of all proposed DG sets. Use of low sulphur diesel is preferred. The location of the DG sets may be decided with in consultation with State Pollution Control Board.
- q) Regular supervision of the above and other measures for monitoring should be in place all through the construction phase, so as to avoid disturbance to the surroundings by a separate environment cell /designated person.

**General Conditions: (Operation Phase)**

- a)
  - i. The solid waste generated should be properly collected and segregated.
  - ii. Wet waste should be treated by organic waste convertor and treated waste (manure) should be utilized in the existing promises for gardening. And, no wet garbage shall be disposed outside the premises.
- b) Dry/inert solid waste should be disposed of to the approved sites for land filling after recovering recyclable material.
- c) E-waste shall be disposed through Authorized vendor as per E-waste (Management and Handling) Rules 2016.
  - i. The installation of the Sewage Treatment Plant (STP) should be certified by an independent engineer and a report in this regard should be submitted to the Meghalaya State Pollution Control Board and Environment department before the project is commissioned for operation. Treated effluent emanating from STP shall be recycled/ reused to the maximum extent possible Treatment of 100% grey water by decentralized treatment should be done. Necessary measures should be made to mitigate the odour problem from STP.
  - ii. Concessionaire to ensure 100 % treatment to sewage/liquid waste and explore the possibility to recycle at least 50% of water.
- d) Concessionaire shall ensure completion of STP. MSW disposal facility, green belt, development prior to occupation of the buildings. Concessionaire to explore possibility of utilizing excess treated water in the adjacent area for gardening before discharging it into sewer line.
- e) The Occupancy Certificate shall be issued by the Competent Authority to the Project only after ensuring sustained availability of drinking water, connectivity of sewer line to the Project Site and proper disposal of treated water as per environmental norms.
- f) Traffic congestion near the entry and exit point from the roads adjoining the proposed Project Site must be avoided. Parking should be fully internalized, and no public space should be utilized.
- g) Concessionaire to provide adequate electric charging points for electric vehicles (EVs).
- h) Green Belt Development shall be carried out considering Central Pollution Control Board (CPCB) guidelines including selection of plant species and in consultation with the local DFO, Agriculture Dept.
- i) A separate environment management cell with qualified staff shall be set up for implementation of the stipulated environmental safeguards.
- j) Separate funds shall be allocated for implementation of environmental protection measures/EMP along with item-wise break-up. These cost shall be included as part of the Bidding. The funds earmarked for the environment protection measures shall not be diverted for other purposes.
- k) Concessionaire should submit half yearly compliance reports in respect of the stipulated prior environment clearance terms and conditions in hard & soft copies to the State Pollution Control Board,

with intimation to the Authority.

- l) The Concessionaire shall upload the status of compliance of the stipulated Environment Clearance conditions, including results of monitored data on their website and shall update the same periodically..

**General Conditions for the Project**

- a) Concessionaire has to strictly abide by the conditions stipulated by State Expert Appraisal Committee (SEAC) & State Environment Impact Assessment Authority (SEIAA).
- b) If applicable Consent for Establishment shall be obtained from State Pollution Control Board under Air and Water Act and a copy shall be submitted to the Environment department before start of any construction work at the site.
- c) Under the provisions of Environment (Protection) Act, 1986, legal action shall be initiated against the Concessionaire if it was found that construction of the project is deviating the environmental clearance.
- d) .
- e) .
- f) No further Expansion or modifications, other than mentioned in the EIA Notification, 2006 and its amendments shall be carried out without prior approval of the SEIAA. In case of deviations or alterations in the project proposal from those submitted to SEIAA for clearance, a fresh reference shall be made to the SEIAA as applicable to assess the adequacy of conditions imposed and to add additional environmental protection measures required, if any.

**General Conditions for the Project:**

The specific conditions, if any, during obtaining Environment Clearance laid down by SEIAA shall be complied by the Concessionaire, strictly in accordance to the rules and regulations, at its own cost.

#### **SCHEDULE – C – SERVICES**

The Concessionaire may provide the following indicative list of Services in accordance with the provisions of this Agreement and Applicable Laws:

##### **Part-A Core Logistics Services**

Core Logistics Services shall mean:

- i. Warehousing Services;
- ii. Specialized storage solutions Services;
- iii. Cargo aggregation and distribution Services;
- iv. Services at Container terminals and/ or bulk/ break-bulk cargo terminals; and
- v. Such other services as may be specified by the Authority and mutually agreed with the Concessionaire from time to time as per Applicable Law.
- vi. Services in relation to Customs Electronic Data Interchange (EDI) Service Centre, with required amenities and facilities.
- vii. Services from Cargo scanning facilities along with provision of container scanners.
- viii. Any other services as the Concessionaire may request to undertake on case to case basis

##### **Part – B Supporting Services**

Supporting facilities shall mean to include:

- i. Services relating to Parking space and O&M services;
- ii. Services relating to ancillary facilities for drivers and other staff;
- iii. Services relating to Office space; and

##### **Part – C General Provisions**

- i. Conduct of all the Services as required by the Applicable Law and the provisions of this Agreement;
- ii. Provision of such other services as may be specified by the Authority.

#### **SCHEDULE – D – SPECIFICATIONS AND STANDARDS**

The Concessionaire shall ensure compliance as per industry best practices, as may become applicable from time to time including but not limited to the specifications and standards set forth herein for development of the Project.

##### **General standards**

- a) Bureau of Indian Standards (BIS), Indian Standards, National Building Code, Central Public Works Department (CPWD), Ministry of Road Transport and Highways (MoRTH), Indian Road Congress (IRC), Indian Railways Standards.
- b) Relevant International Standards or codes as applicable in the United States of America or the European Union or Singapore; and
- c) Any other specifications/standards/codes proposed by the Concessionaire and reviewed by the Independent Engineer.

In the absence of any specific provision in this Agreement, the following standards shall apply in order of priority:

In case of any conflict or inconsistency in the provisions of the applicable Indian Standards or codes and International Standards or codes, the Indian Standards or codes shall apply.

The latest version of the specified codes and standards which were notified/published at least 60 (sixty) days prior to the bid date in respect of this Agreement shall apply. For subsequent phases, updated codes and specifications in force at the time of actual execution shall be considered.

**SCHEDULE – E – APPLICABLE PERMITS**

**PART I**

**1. Applicable Permits**

**The Concessionaire shall obtain, as required under Applicable Laws, all Applicable Permits required for development of the warehouse in New Shillong, SCHEDULE – F – PERFORMANCE SECURITY**

To,  
**Name and address**

**WHEREAS:**

(A) [•] (the “**Concessionaire**”) and the [•] (“**Authority**”) have entered into a Concession Agreement dated [•] (the “**Agreement**”) whereby the Authority has resolved to establish a Warehouse Facility at Mawkhanu, New Shillong in the State of Meghalaya on Design, Build, Finance, Operate and Transfer (“**DBFOT**”) basis, subject to and in accordance with the provisions of the Agreement.

(B) The Agreement requires the Concessionaire to furnish a Performance Security to the Authority in a sum of [INR [•] (Rupees [•])] assessed by the Authority mentioned in the Agreement) (the “**Guarantee Amount**”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, (as defined in the Agreement).

(C) We, [•] through our Branch at [•] (the “**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance Security.

**NOW, THEREFORE**, the Bank hereby, unconditionally, and irrevocably, guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably guarantees and undertakes to pay to the Authority upon occurrence of any failure or default in due and faithful performance of all or any of the Concessionaire’s obligations during the Construction Period, under and in accordance with the provisions of the Agreement, on its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Concessionaire, such sum or sums upto an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of its authorized representative, that the Concessionaire has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Construction Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any dispute between them pending before any court, tribunal, arbitrators or any other Authority or body, or by the discharge of the Concessionaire for any reason whatsoever.
3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the

compliance with, fulfilment and/or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.

6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for the period specified in paragraph 8 below and unless a demand or claim in writing is made by the Authority on the Bank under this Guarantee, no later than 180 (one hundred and eighty) days from the date of expiry of this Guarantee (“**Claim Period**”), all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.
8. The Performance Security, subject to the Claim Period mentioned in Clause (7) above, shall cease to be in force and effect when the Commercial Operation Date under the Agreement has occurred. Upon request made by the Concessionaire, after the expiry of the Claim Period, for release of the Performance Security along with the particulars required hereunder including that the Commercial Operation Date under the Agreement has occurred, duly certified by a statutory auditor of the Concessionaire, and the Authority shall release the Performance Security forthwith.
9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorized to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.
11. This Guarantee shall come into force with immediate effect and shall remain in force and effect until the date which is 180 (one hundred and eighty) days after the occurrence of [Commercial Operation Date] of phase [\*] under the Concession Agreement as notified to the Bank by the Authority.

**Signed and sealed this [•] day of [•] 20 [•] at [•]**

**SIGNED, SEALED AND DELIVERED**

For and on behalf of the **BANK** by:

(Signature)

(Name)

(Designation)

(Code Number)

(Address)

**NOTES:**

- i. The bank guarantee should contain the name, designation and code number of the officer(s) signing the guarantee.
- ii. The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.

**SCHEDULE – G – DRAWINGS**

**1. Drawings**

In compliance of the obligations set forth in Clause 12.4 of this Agreement, the Concessionaire shall furnish to the Independent Engineer and Authority, free of cost, all Drawings related to the Warehouse Facility

**2. Additional drawings**

If the Independent Engineer determines that for discharging its duties and functions under this Agreement, it requires any drawings other than those listed herein, it may by notice require the Concessionaire to prepare and furnish such drawings forthwith. Upon receiving a requisition to this effect, the Concessionaire shall promptly prepare and furnish such drawings to the Independent Engineer.



## **SCHEDULE – H – TESTS**

### **1. Schedule for Tests**

- 1.1. The Concessionaire shall, no later than 90 (ninety) days prior to the likely completion of the Project Facility, notify the Independent Engineer and the Authority of its intent to subject the Project Facility to Tests, and no later than 15 (fifteen) days prior to the actual date of Tests, furnish to the Independent Engineer and the Authority detailed inventory and particulars of all works and equipment forming part of the Project Facility.
- 1.2. The Concessionaire shall notify the Independent Engineer of its readiness to subject the Project Facility to Tests at any time after 7 (seven) days from the date of such notice, and upon receipt of such notice, the Independent Engineer shall, in consultation with the Concessionaire, determine the date and time for each Test and notify the same to the Authority who may designate its representative to witness the Tests. The Independent Engineer shall thereupon conduct, or cause to be conducted, any of the following Tests in accordance with Article 14 and this **Schedule-H**.

### **2. Tests**

#### **2.1. Visual and Physical Test**

The Independent Engineer shall conduct a visual and physical check of the Project Facility, to determine that all works and equipment forming part thereof conform to the provisions of this Agreement.

#### **2.2. Trial run**

The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out a trial run to determine that the Project Facility construction is in conformity with the Specifications and Standards, especially with respect to the capacity of each of its systems and equipment.

#### **2.3. Environmental audit:**

The Independent Engineer shall carry out a check to determine conformity of the Project Facility with the environmental requirements set forth in Applicable Laws and Applicable Permits.

#### **2.4. Safety review:**

The Independent Engineer shall carry out a safety audit of the Project Facility to determine its compliance with the provisions of **Schedule-K** and this Agreement.

#### **2.5. Air compression and diesel generator sets:**

The Independent Engineer shall conduct or cause to be conducted Tests to determine that the air compression units of all utilities conform with their rated capacities; and the diesel generator sets are capable of being operated for 48 hours in full load and no-load conditions.

### **3. Agency for conducting Tests**

All Tests set forth in this **Schedule-H** shall be conducted by the Independent Engineer or such other agency or person as it may specify in consultation with the Authority.

### **4. Tests for Safety Certification**

Tests for determining the conformity of the Project Facility with the Safety Requirements shall be conducted in

accordance with Good Industry Practice and in conformity with Applicable Laws and Applicable Permits.

**5. Completion Certificate/ Provisional Certificate**

Upon successful completion of Tests, the Independent Engineer shall issue the Completion Certificate or the Provisional Certificate, as the case may be, in accordance with the provisions of Article 14.

**6. Tests during construction**

Without prejudice to the provisions of this Schedule-H, tests during construction shall be conducted in accordance with the provisions of Clause 13.3.1.

## **SCHEDULE – I – PROJECT COMPLETION SCHEDULE**

### **Project Completion Schedule**

During Construction Period, the Concessionaire shall comply with the requirements set forth in this Schedule-I for each of the Project Milestones and the Scheduled Completion Date (the “**Project Completion Schedule**”). Within 15 (fifteen) days of the date of achievement of each Project Milestone, the Concessionaire shall notify the Authority of such compliance along with necessary particulars thereof.

#### **1 Project Milestone-I:**

- 1.1 Prior to the occurrence of Project Milestone-I, the Concessionaire shall have submitted the Detailed Project Report of the Project to the Authority and the Independent Engineer for review and approval.
- 1.2 Project Milestone-I shall occur at completion of 3 (three) months from the Appointed Date (the “**Project Milestone-I**”)

#### **2 Project Milestone-II Scheduled Completion Date**

- 2.1 The Scheduled Completion Date shall be 60 (sixty) months from the Appointed Date.
- 2.2 On or before the Scheduled Completion Date, the Concessionaire shall have completed the construction of New Facilities in accordance with this Agreement.

#### **3 Extension of period**

Upon extension of any or all of the aforesaid Project Milestones and/or the Scheduled Completion Date, under and in accordance with the provisions of this Agreement, the Project Completion Schedule shall be deemed to have been amended accordingly.



Annexure I (Schedule – J)  
**SERVICE QUALITY MANUAL**

The Concessionaire shall furnish the Service Quality Manual for all the Services undertaken under Schedule C of this Agreement but not limited to the major Services to the Independent Engineer:

- i. Core Logistics Services
- ii. Supporting Services
- iii. Security Services
- iv. Other Services as prescribed by the Authority

The Service Quality Manual shall adhere to ISO 9001:2015-Quality management systems which shall include, but not limited to the following:

- i. Customer focus
- ii. Leadership
- iii. Involvement of people
- iv. Process approach
- v. System approach to management
- vi. Continuous improvement
- vii. Factual approach to decision making
- viii. Mutually beneficial supplier relationships

The Service Quality Manual shall be revised on an annual basis based on the quantum and type of the Services at the Project Facility and as approved by the Independent Engineer.

## **SCHEDULE – K – SAFETY REQUIREMENTS**

### **1. Guiding principles**

- 1.1. Safety Requirements aim at reduction in injuries, loss of life and damage to property resulting from accidents on or about the Project, irrespective of the person(s) at fault.
- 1.2. Safety Requirements apply to all phases of construction, operation, and maintenance with emphasis on identification of factors associated with accidents, consideration of the same, and implementation of appropriate remedial measures.
- 1.3. Safety Requirements include measures associated with safe movement, safety management, safety equipment, fire safety, enforcement, and emergency response, with particular reference to the Safety Guidelines specified in Annex - I of this **Schedule -K**.

### **2. Obligations of the Concessionaire**

- a) Applicable Laws and Applicable Permits.
- b) Provisions of this Agreement.
- c) Manuals, if any, issued by the Authority or any Designated GOI Agency.
- d) Relevant Standards/Guidelines contained in internationally accepted codes; and
- e) Good Industry Practice.

### **3. Appointment of Safety Consultant**

- 3.1. For carrying out safety audit of the Project Facility under and in accordance with this Schedule K, the Authority shall appoint from time to time, one or more qualified firms or organizations as its consultants (the “**Safety Consultant**”). The Safety Consultant shall employ a team comprising, without limitation, one safety engineer and one logistics services engineer to undertake safety audit of the Project Facility.
- 3.2. Once in every Accounting Year, a safety audit shall be carried out by the Safety Consultant. It shall review, compile, and analyse the annual report and accident data of the preceding year, and undertake an inspection of the Project Facility. The Safety Consultant shall complete the safety audit within a period of 1 (one) month and submit a safety report (the “**Safety Report**”) recommending specific improvements, if any, required to be made to the Project Facility. The Safety Report shall be submitted to the Authority in 5 (five) copies. One copy each of the Safety Report shall be forwarded by the Authority to the Concessionaire and the Independent Engineer forthwith.

### **4. Safety measures during Operation Period**

- 4.1. The Concessionaire shall develop, implement and administer a safety programme for the Project Facility, staff, Users and persons, and property belonging to the Users, which shall include correction of safety violations and deficiencies, and all other actions necessary to provide a safe environment in accordance with this Agreement.
- 4.2. The Concessionaire shall keep a copy of every first information report recorded by the Police / or details of the accidents resulting equipment malfunctions or failure or human error with respect to any accident occurring on or about the Project Facility. In addition, the Concessionaire shall also collect data for all cases of accidents not recorded by the Police. The information so collected shall be summarised and submitted to the Authority at the conclusion of every quarter.
- 4.3. The Concessionaire shall submit to the Authority before the 31<sup>st</sup> (thirty first) May of each year, an annual report

(in three copies) containing, without limitation, a detailed listing and analysis of all accidents of the preceding Accounting Year and the measures taken by the Concessionaire pursuant to the provisions of Paragraph 4.1 of this **Schedule-K** for averting or minimising such accidents in future.

- 4.4. Once in every Accounting Year, the Authority shall cause a safety audit to be carried out for review and analysis of the annual report and accident data of the preceding year. The recommendations of such safety audit shall be communicated to the Concessionaire and the Independent Engineer. Within 15 (fifteen) days of receipt of such communication from the Authority, the Concessionaire and the Independent Engineer shall send their respective comments thereon to the Authority, and no later than 15 (fifteen) days of receiving such comments, the Authority shall review the same and by notice direct the Concessionaire to carry out any or all of the recommendations with such modifications as the Authority may specify.

#### **5. Costs and Expenses**

Costs and expenses incurred in connection with the Safety Requirements set forth herein, including the provisions of Paragraph 2 of this Schedule-K, shall be borne by the Concessionaire.

Annexure I (Schedule – K)  
SAFETY GUIDELINES

**1. System integrity**

In the design of the Project Facility, particular care shall be taken to minimise the likely incidence of failure.

**2. Safety management**

A safety statement shall be prepared by the Concessionaire once every quarter to bring out clearly the system of management of checks and maintenance tolerances for various elements comprising the Project Facility and compliance thereof. The statement shall also bring out the nature and extent of staff training and awareness in dealing with such checks and tolerances. Two copies of the statement shall be sent to the Independent Engineer within 15 (fifteen) days of the close of every quarter.

**3. Emergency**

A set of emergency procedures shall be formulated to deal with different emergency situations and the operations staff shall be trained to respond appropriately during emergency through periodic simulated exercises as laid down in a manual for management of disasters (the “Disaster Management Manual”) to be prepared and published by the Concessionaire prior to Final COD. The Concessionaire shall provide 5 (five) copies each of the Disaster Management Manual to the Authority and the Independent Engineer no later than 30 (thirty) days prior to Final COD.

**4. Fire safety**

- 4.1. The Concessionaire shall conform to the standards specified by the US National Fire Protection Association (NFPA) in NFPA-61-B.
- 4.2. To prevent fire in the Project Facility, the Concessionaire shall use fire resistant materials in the construction thereof and shall avoid use of materials which are to some extent flammable, or which emit smoke and harmful gases when burning.
- 4.3. To deal with incidents of fire, the Concessionaire shall provide a hydrant-based fire-fighting system.

**5. Surveillance and Safety Manual**

The Concessionaire shall, no later than 60 (sixty) days prior to Final COD, evolve and adopt a manual for surveillance and safety of the Project Facility (the “Surveillance and Safety Manual”), in accordance with Good Industry Practice, and shall comply therewith in respect of the security and safety of the Project Facility, including its gate control, sanitation, fire prevention, environment protection. The Concessionaire shall provide 5 (five) copies each of the Surveillance and Safety Manual to the Authority and the Independent Engineer no later than 30 (thirty) days prior to Final COD.

**6. Watch and Ward**

The Concessionaire shall, at its own expense and in accordance with Good Industry Practice, provide and maintain all lighting, fencing, watch and ward arrangements for the safety and security of the Project Facility and all persons affected by it.



**SCHEDULE – L - SELECTION OF INDEPENDENT ENGINEER**

**1. Selection of Independent Engineer**

- 1.1. The provisions of the Model Request for Proposals for Selection of Technical Consultants, issued by the Ministry of Finance vide OM No. 24(23)/PF-II/2008 dated 21 May, 2009 or its subsequent amendments, or any substitute thereof shall apply for selection of an experienced firm to discharge the functions and duties of an Independent Engineer. Provided, however, that no entity which is owned or controlled by the Authority shall be eligible for appointment as the Independent Engineer hereunder.
- 1.2. In the event of termination of an Independent Engineer appointed in accordance with the provisions of Paragraph 1.1, the Authority shall appoint another firm of technical consultants forthwith or may engage a government-owned entity in accordance with the provisions of Paragraph 4 of this **Schedule-L**.

**2. Terms of Reference**

The Terms of Reference for the Independent Engineer shall substantially conform with Schedule-M.

**3. Fee and expenses**

- 3.1. In determining the nature and quantum of duties and services to be performed by the Independent Engineer during the Construction Period, the Authority shall endeavour that payments to the Independent Engineer on account of fee and expenses do not exceed 2% (two per cent) of the Overall Total Project Cost, including Equity Support. Payments not exceeding such 2% (two per cent) shall be borne equally by the Authority and the Concessionaire in accordance with the provisions of this Agreement.
- 3.2. The nature and quantum of duties and services to be performed by the Independent Engineer during the Construction Period shall be determined by the Authority in conformity with the provisions of this Agreement and with due regard for economy in expenditure. All payments made to the Independent Engineer on account of fee and expenses during the Construction Period shall be borne equally by the Authority and the Concessionaire.

**4. Appointment of government entity as Independent Engineer**

- 4.1. Notwithstanding anything to the contrary contained in this Schedule, the Authority may in its discretion appoint a government-owned entity as the Independent Engineer; provided that such entity shall be a body corporate having as one of its primary function the provision of consulting, advisory and supervisory services for engineering projects; provided further that a government owned entity which is owned or controlled by the Authority shall not be eligible for appointment as Independent Engineer.

## **SCHEDULE – M- TERMS OF REFERENCE FOR INDEPENDENT ENGINEER**

### **1. Scope**

- 1.1. These Terms of Reference for the Independent Engineer (the “**TOR**”) are being specified pursuant to the Concession Agreement dated [•] (the “**Agreement**”), which has been entered into between the Authority and [•] (the “**Concessionaire**”) to establish Project Facility at [•] in district [•] in the State of [•] on Design, Build, Finance, Operate and Transfer (“**DBFOT**”) basis, [and a copy of which is annexed hereto and marked as Annex-I to form part of this TOR].
- 1.2. This TOR shall apply to construction, designing, operation and maintenance of the Project Facility.

### **2. Definitions and interpretation**

- 2.1. The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.
- 2.2. References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.
- 2.3. The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Agreement shall apply, *mutatis mutandis*, to this TOR.

### **3. Role and functions of the Independent Engineer**

- 3.1. The role and functions of the Independent Engineer shall include the following
  - 3.1.1. : (i) review of the Drawings and Documents as set forth in Paragraph 4;
  - 3.1.2. (ii) review, inspection and monitoring of Construction Works as set forth in Paragraph 4;
  - 3.1.3. (iii) review, inspection and testing of Project Facility as set forth in Paragraph 4;
  - 3.1.4. (iv) conducting Tests on completion of construction and issuing Completion Certificate/ Provisional Certificate as set forth in Paragraph 4;
  - 3.1.5. (v) review, inspection and monitoring of O&M as set forth in Paragraph 5;
  - 3.1.6. (vi) review, inspection, and monitoring of Divestment Requirements as set forth in Paragraph 6;
  - 3.1.7. (vii) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
  - 3.1.8. (viii) determining, as required under the Agreement, the period, or any extension thereof, for performing any duty or obligation;
  - 3.1.9. (ix) assisting the Parties in resolution of Disputes as set forth in Paragraph 8; and
  - 3.1.10. (x) undertaking all other duties and functions in accordance with the Agreement.
- 3.2. The Independent Engineer shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

#### **4. Construction Period**

- 4.1. The Independent Engineer shall undertake a detailed review of the Drawings to be furnished by the Concessionaire along with supporting data, including the geo-technical and hydrological investigations, topographical surveys and other surveys conducted as part of the feasibility report and any further revision thereof. The Independent Engineer shall complete such review and send its comments/observations to the Authority and the Concessionaire within 15 (fifteen) days of receipt of such Drawings. In particular, such comments shall specify the conformity or otherwise of such Drawings with the Scope of the Project and Specifications and Standards.
- 4.2. The Independent Engineer shall review any Drawings or modified Drawings or supporting Documents sent to it by the Concessionaire and furnish its comments within 7 (seven) days (or such other shorter period, if any, as specified in the Agreement) of receiving such Drawings or Documents.
- 4.3. The Independent Engineer shall review the business plan, detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments within 15 (fifteen) days of receipt thereof.
- 4.4. The Independent Engineer shall review the detailed design and the manufacturing, installation, testing and commissioning plans for the Project Facility sent to it by the Concessionaire and furnish its comments within 15 (fifteen) days of receipt thereof.
- 4.5. Upon reference by the Authority, the Independent Engineer shall review and comment on the EPC Contract or any other contract for construction, operation and maintenance of the Project Facility, and furnish its comments within 7 (seven) days from receipt of such reference from the Authority.
- 4.6. The Independent Engineer shall review the monthly progress report furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receipt of such report.
- 4.7. The Independent Engineer shall inspect the Construction Works and equipment (if any) once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20<sup>th</sup> (twentieth) day of each month in any case, and make out a report of such inspection (the “**Inspection Report**”) setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works and equipment with the Scope of the Project and the Specifications and Standards.
- 4.8. The Independent Engineer may inspect the Project Facility more than once in a month if any lapses, defects, or deficiencies require such inspections.
- 4.9. For determining that the Construction Works conform to Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. For purposes of this Paragraph 4.9, the tests prescribed in the relevant Manuals specified by the Government in relation to structures, buildings, lines, equipment and electrical systems (the “**Quality Control Manuals**”) or any modification/substitution thereof shall be deemed to be tests conforming to Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- 4.10. The sample size of the tests, to be specified by the Independent Engineer under Paragraph 4.9, shall comprise 10% (ten per cent) of the quantity or number of tests prescribed for each category or type of tests in the Quality Control Manuals; provided that the Independent Engineer may, for reasons to be recorded in writing, increase the aforesaid sample size by up to 10% (ten per cent) for certain categories or types of tests.
- 4.11. The timing of tests referred to in Paragraph 4.9, and the criteria for acceptance/ rejection of their results shall be determined by the Independent Engineer in accordance with the Quality Control Manuals. The tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the tests that may be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice.

- 4.12. In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests to determine that such remedial works have brought the Construction Works into conformity with the Specifications and Standards, and the provisions of this Paragraph 4 shall apply to such tests.
- 4.13. If at any time during the Construction Period, the Independent Engineer determines that the Concessionaire has not made adequate arrangements for the safety of workers or any other persons in the zone of construction, or that any work is being carried out in a manner that threatens the safety of the workers or any other persons in the zone of construction, it shall make a recommendation to the Authority forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- 4.14. In the event that the Concessionaire carries out any remedial measures to secure the safety of suspended works and other persons in the zone of construction, it may, by notice in writing, require the Independent Engineer to inspect such works, and within 3 (three) days of receiving such notice, the Independent Engineer shall inspect the suspended works and make a report to the Authority forthwith, recommending whether or not such suspension may be revoked by the Authority.
- 4.15. If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of dates set forth in the Project Completion Schedule, to which the Concessionaire is reasonably entitled, and shall notify the Authority and the Concessionaire of the same.
- 4.16. The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in Schedule-H and issue a Completion Certificate or Provisional Certificate. For carrying out its functions under this Paragraph and all matters incidental thereto, the Independent Engineer shall act under and in accordance with the provisions of Article 14 and Schedule-H.
- 4.17. Upon reference from the Authority, the Independent Engineer shall make a fair and reasonable assessment of the costs of providing information, works and services as set forth in Article 16 and certify the reasonableness of such costs for payment by the Authority to the Concessionaire.
- 4.18. The Independent Engineer shall aid and advise the Concessionaire in preparing the Maintenance Manual.

## SCHEDULE-N - ESCROW AGREEMENT

THIS ESCROW AGREEMENT is entered into on this the [•] day of [•] 20 [•]

### AMONGST

1. [•], a company incorporated under the provisions of the [•] and having its registered office at..... (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
2. [•] (insert name and particulars of Lenders’ Representative) and having its registered office at..... and acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
3. [•] (insert name and particulars of the Escrow Bank) and having its registered office at..... (hereinafter referred to as the “**Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted substitutes); and
4. **THE MEGHALAYA STATE WAREHOUSING CORPORATION**, represented by [•], and having its offices at [•] (hereinafter referred to as the “**Authority**” or “**MSWCMSWC**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).

### WHEREAS:

(A) The Authority has entered into a Concession Agreement dated [•] with the Concessionaire (the “**Concession Agreement**”) for developing a Warehouse Facility at [•] in district [•] in the State of [•] (“**Project**”) on Design, Build, Finance, Operate and Transfer (“**DBFOT**”) basis, [and a copy of which is annexed hereto and marked as Annexure-A to form part of this Agreement].

(B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.

(C) The Concession Agreement requires the Concessionaire to establish an Escrow Account, *inter alia*, on the terms and conditions stated therein.

**NOW, THEREFORE**, in consideration of the foregoing and the respective covenants and agreements set forth in this Agreement, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

## 1. DEFINITIONS AND INTERPRETATION

### 1.1. Definitions

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

“**Agreement**” means this Escrow Agreement and any amendment thereto made in accordance with the provisions contained herein;

“**Concession Agreement**” means the Concession Agreement referred to in Recital (A) above [and annexed hereto as Annexure-A], and shall include all of its Recitals and Schedules and any amendments made thereto in accordance with the provisions contained in this behalf therein;

“**Cure Period**” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Concessionaire, and shall commence from the date on which a notice is delivered by the Authority

or the Lenders' Representative, as the case may be, to the Concessionaire asking the latter to cure the breach or default specified in such notice;

**"Escrow Account"** means an escrow account established in terms of and under this Agreement, and shall include the Sub-Accounts;

**"Escrow Default"** shall have the meaning ascribed thereto in Clause 6.1;

**"Lenders' Representative"** means the person referred to as the Lenders' Representative in the foregoing Recitals;

**"Parties"** means the parties to this Agreement collectively and "Party" shall mean any of the Parties to this Agreement individually;

**"Payment Date"** means, in relation to any payment specified in Clause 4.1, the date(s) specified for such payment; and

**"Sub-Accounts"** means the respective sub-accounts of the Escrow Account, into which the monies specified in Clause 4.1 would be credited every month and paid out if due, and if not due in a month, then appropriated proportionately in such month and retained in the respective subaccounts and paid out therefrom on the Payment Date(s).

## **1.2. Interpretation**

**1.2.1.** References to Lenders' Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders' Representative, acting for and on behalf of Senior Lenders.

**1.2.2.** The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.

**1.2.3.** References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.

**1.2.4.** The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement

## **2. ESCROW ACCOUNT**

### **2.1. Escrow Bank to act as trustee**

**2.1.1.** The Concessionaire hereby appoints the Escrow Bank to act as trustee for the Authority, the Lenders' Representative and the Concessionaire in connection herewith and authorises the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

**2.1.2.** The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the Authority, the Lenders' Representative and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Authority, the Lenders' Representative and the Concessionaire shall have any rights hereunder as the beneficiaries of, or as third-party beneficiaries under this Agreement.

### **2.2. Acceptance of Escrow Bank**

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Concessionaire, Senior Lenders or the Authority with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank shall act in trust for the benefit of,

and as agent for, the Authority, the Lenders' Representative and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

### **2.3. Establishment and operation of Escrow Account**

**2.3.1.** Within 30 (thirty) days from the date of this Agreement, and in any case prior to the Appointed Date, the Concessionaire shall open and establish the Escrow Account with the [•] (name of Branch) Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.

**2.3.2.** The Escrow Bank shall maintain the Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.

**2.3.3.** The Escrow Bank and the Concessionaire shall, after consultation with the Lenders' Representative, agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

### **2.4. Escrow Bank's fee**

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Concessionaire. For the avoidance of doubt, such fee and expenses shall form part of the O&M Expenses and shall be appropriated from the Escrow Account in accordance with Clause 4.1.

### **2.5. Rights of the Parties**

Save and except as otherwise provided in the Concession Agreement, the rights of the Authority, the Lenders' Representative and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Authority, the Lenders' Representative and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

### **2.6. Substitution of the Concessionaire**

The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Nominated Company, pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the Nominated Company is a Party hereto and the Nominated Company shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Nominated Company.

## **3. DEPOSITS INTO ESCROW ACCOUNT**

### **3.1. Deposits by the Concessionaire**

**3.1.1.** The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

- a) all monies received in relation to the Project from any source, including the Senior Lenders, lenders of Subordinated Debt and the Authority;
- b) all funds received by the Concessionaire from its share-holders, in any manner or form;
- c) all Fee and any other revenues from or in respect of the Project, including the proceeds of any rentals, deposits, capital receipts or insurance claims; and
- d) all payments by the Authority, after deduction of any outstanding Concession Fee.

**3.1.2.** The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

### **3.2. Deposits by the Authority**

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

- a) Any other monies disbursed by the Authority to the Concessionaire;
- b) All Fee collected by the Authority in exercise of its rights under the Concession Agreement; and
- c) Termination Payments.

Provided that, notwithstanding the provisions of Clause 4.1.1, the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire under the Concession Agreement, and the balance remaining shall be deposited into the Escrow Account.

### **3.3. Deposits by Senior Lenders**

The Lenders' Representative agrees, confirms and undertakes that the Senior Lenders shall deposit into and/or credit the Escrow Account with all disbursements made by them in relation to or in respect of the Project; provided that notwithstanding anything to the contrary contained in this Agreement, the Senior Lenders shall be entitled to make direct payments to the EPC Contractor under and in accordance with the express provisions contained in this behalf in the Financing Agreements.

### **3.4. Interest on deposits**

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account; provided that the Escrow Bank shall be entitled to appropriate therefrom the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

## **4. WITHDRAWALS FROM ESCROW ACCOUNT**

### **4.1. Withdrawals during Concession Period**

**4.1.1.** At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date(s):

- a) all taxes due and payable by the Concessionaire for and in respect of the Project;
- b) all payments relating to construction of the Project payable in accordance with the terms of the Concession Agreement, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of the Concession Agreement, and certified by the Authority as due and payable to it;
- e) Concession Fee due and payable to the Authority;
- f) monthly proportionate provision of Debt Service due in an Accounting Year;
- g) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement;
- h) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;
- i) any reserve requirements set forth in the Financing Agreements; and



- j) balance, if any, in accordance with the instructions of the Concessionaire

**4.1.2.** No later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

#### **4.2. Withdrawals upon Termination**

Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:

- a) all taxes due and payable by the Concessionaire for and in respect of the Project;
- b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- c) outstanding Concession Fee and other payments;
- d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, and any claims in connection with or arising out of Termination;
- e) retention and payments arising out of, or in relation to, liability for defects and deficiencies set forth in Article 33 of the Concession Agreement;
- f) outstanding Debt Service including the balance of Debt Due;
- g) outstanding Subordinated Debt;
- h) incurred or accrued O&M Expenses;
- i) any other payments required to be made under the Concession Agreement; and
- j) balance, if any, in accordance with the instructions of the Concessionaire.

#### **4.3. Application of insufficient funds**

Funds in the Escrow Account shall be applied in the serial order of priority set forth in Clauses 4.1 and 4.2, as the case may be. If the funds available are not sufficient to meet all the requirements, the Escrow Bank shall apply such funds in the serial order of priority until exhaustion thereof.

#### **4.4. Application of insurance proceeds**

Notwithstanding anything in this Agreement, the proceeds from all insurance claims, except life and injury, shall be deposited into and/or credited to the Escrow Account and utilised for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

#### **4.5. Withdrawals during Suspension**

Notwithstanding anything to the contrary contained in this Agreement, the Authority may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 30 of the Concession Agreement. Any instructions given by the Authority to the Escrow Bank during such period shall be complied with as if such instruction were given by the Concessionaire under this Agreement and all actions of the Authority hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

### **5. OBLIGATIONS OF THE ESCROW BANK**

#### **5.1. Segregation of funds**

Monies and other property received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received and shall be segregated from other funds and property of the Escrow Bank.

## **5.2. Notification of balances**

7 (seven) business days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the Concessionaire and/or the Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Lenders' Representative of the balances in the Escrow Account and Sub-Accounts as at the close of business on the immediately preceding business day.

## **5.3. Communications and notices**

In discharge of its duties and obligations hereunder, the Escrow Bank:

- a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;
- b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;
- c) shall, within 5 (five) business days after receipt, deliver a copy to the Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and
- d) shall, within 5 (five) business days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Lenders' Representative in connection herewith.

## **5.4. No set off**

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies and properties held by the Escrow Bank in the Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

## **5.5. Regulatory approvals**

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

# **6. ESCROW DEFAULT**

## **6.1. Escrow Default**

**6.1.1.** Following events shall constitute an event of default by the Concessionaire (an "**Escrow Default**") unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority or the Lenders' Representative:

- a) the Concessionaire commits breach of this Agreement by failing to deposit any receipts into the Escrow Account as provided herein and fails to cure such breach by depositing the same into the Escrow Account within a Cure Period of 5 (five) business days;
- b) the Concessionaire causes the Escrow Bank to transfer funds to any account of the Concessionaire in breach of the terms of this Agreement and fails to cure such breach by depositing the relevant funds into the Escrow Account or any Sub-Account in which such transfer should have been made, within a Cure Period of 5 (five) business days; or
- c) the Concessionaire commits or causes any other breach of the provisions of this Agreement and fails to cure the same within a Cure Period of 5 (five) business days.

**6.1.2.** Upon occurrence of an Escrow Default, the consequences thereof shall be dealt with under and in accordance with the provisions of the Concession Agreement.

## **7. TERMINATION OF ESCROW AGREEMENT**

### **7.1. Duration of the Escrow Agreement**

This Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Concessionaire in respect of the debt, guarantee or financial assistance received by it from the Senior Lenders, or any of its obligations to the Authority remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

### **7.2. Substitution of Escrow Bank**

The Concessionaire may, by not less than 45 (forty-five) days prior notice to the Escrow Bank, the Authority and the Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders' Representative and arrangements are made satisfactory to the Lenders' Representative for transfer of amounts deposited in the Escrow Account to a new Escrow Account established with the successor Escrow Bank. The termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

### **7.3. Closure of Escrow Account**

The Escrow Bank shall, at the request of the Concessionaire and the Lenders' Representative made on or after the payment by the Concessionaire of all outstanding amounts under the Concession Agreement and the Financing Agreements including the payments specified in Clause 4.2, and upon confirmation of receipt of such payments, close the Escrow Account and Sub-Accounts and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Escrow Account hereunder, the Escrow Agreement shall be deemed to be terminated.

## **8. SUPPLEMENTARY ESCROW AGREEMENT**

### **8.1. Supplementary escrow agreement**

The Lenders' Representative and the Concessionaire shall be entitled to enter into a supplementary escrow agreement with the Escrow Bank providing, inter alia, for detailed procedures and documentation for withdrawals from Sub-Accounts pursuant to Clause 4.1.1 and for matters not covered under this Agreement such as the rights and obligations of Senior Lenders and lenders of Subordinated Debt, investment of surplus funds, restrictions on withdrawals by the Concessionaire in the event of breach of this Agreement or upon occurrence of an Escrow Default, procedures relating to operation of the Escrow Account and withdrawal therefrom, reporting requirements and any matters incidental thereto; provided that such supplementary escrow agreement shall not contain any provision which is inconsistent with this Agreement and in the event of any conflict or inconsistency between provisions of this Agreement and such supplementary escrow agreement, the provisions of this Agreement shall prevail.

## **9. INDEMNITY**

### **9.1. General indemnity**

**9.1.1.** The Concessionaire will indemnify, defend and hold the Authority, Escrow Bank and the Senior Lenders, acting through the Lenders' Representative, harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

**9.1.2.** The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.

**9.1.3.** The Escrow Bank will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfil its obligations under this Agreement materially and adversely affecting the

performance of the Concessionaire's obligations under the Concession Agreement other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Escrow Bank, its officers, servants and agents.

#### **9.2. Notice and contest of claims**

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 9.1 or in respect of which it is entitled to reimbursement (the "Indemnified Party"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "Indemnifying Party") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

### **10. DISPUTE RESOLUTION**

#### **10.1. Dispute Resolution**

**10.1.1.** Any dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be referred to the Dispute Resolution Board as set forth in Clause 37.2.

**10.1.2.** The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The place of arbitration shall be Delhi and the language of arbitration shall be English.

### **11. MISCELLANEOUS PROVISIONS**

#### **11.1. Governing law and jurisdiction**

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts in the State of ..... shall have jurisdiction over all matters arising out of or relating to this Agreement.

#### **11.2. Waiver of sovereign immunity**

The Authority unconditionally and irrevocably:

- a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;
- c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

#### **11.3. Priority of agreements**

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

#### **11.4. Alteration of terms**

All additions, amendments, modifications, and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

#### **11.5. Waiver**

**11.5.1.** Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement
- b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- c) shall not affect the validity or enforceability of this Agreement in any manner.

**11.5.2.** Neither the failure by any Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by any Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

#### **11.6. No third-party beneficiaries**

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

#### **11.7. Survival**

**11.7.1.** Termination of this Agreement:

- a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
- b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

**11.7.2.** All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

#### **11.8. Severability**

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10 of this Agreement or otherwise.

#### **11.9. Successors and assigns**

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

#### **11.10. Notices**

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and e-mail are set out under its name on the

signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on a business day, or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

**11.11. Language**

All notices, certificates, correspondence, and proceedings under or in connection with this Agreement shall be in English.

**11.12. Authorised representative**

Each of the Parties shall, by notice in writing, designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

**11.13. Original Document**

This Agreement may be executed in 4 (four) counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

**IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.**

SIGNED, SEALED AND DELIVERED

For and on behalf of **CONCESSIONAIRE** by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of **SENIOR LENDERS** by the

Lenders' Representative

(Signature)

(Name)

(Designation)

(Address)

SIGNED, SEALED AND DELIVERED

For and on behalf of **ESCROW BANK** by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

In the presence of

1. [•]

2. [•] Fax No.

SIGNED, SEALED AND DELIVERED



For and on behalf of [•] by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

In the presence of

1. [•]

2. [•]



SCHEDULE-P - VESTING CERTIFICATE

- 1. The [●] (the “**Authority**”) refers to the Concession Agreement dated [●] (the “**Agreement**”) entered into between the Authority and [●] (the “**Concessionaire**”) for [●] (the “**Project**”) on Design, Build, Finance, Operate and Transfer (“**DBFOT**”) basis.
- 2. The Authority hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 32.1 of the Agreement on the basis that upon issue of this Vesting Certificate, the Authority shall be deemed to have acquired, and all title and interest of the Concessionaire in or about the Project Facility shall be deemed to have vested unto the Authority, free from any encumbrances, charges and liens whatsoever.
- 3. Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

Signed this [●] day of [●], 20[●] at [●].

AGREED, ACCEPTED AND SIGNED

For and on behalf of **THE Authority** by:

(Signature)  
(Name)  
(Designation)  
(Address)

SIGNED, SEALED AND DELIVERED

For and on behalf of **CONCESSIONAIRE** by

(Signature)  
(Name)  
(Designation)  
(Address)

In the presence of:

- 1. [●]
- 2. [●]

#### SCHEDULE-Q - SUBSTITUTION AGREEMENT

This SUBSTITUTION AGREEMENT is entered into on this the [●] day of [●] 20[●].

#### AMONGST

1. **THE MEGHALAYA STATE WAREHOUSING CORPORATION**, represented by [●], and having its offices at [●] (hereinafter referred to as the “**Authority**” or “**MSWCMSWC**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors, and assigns);
2. [●], a [●] incorporated under the provisions of the [●] and having its registered office at [●] (hereinafter referred to as the “**Concessionaire**” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns and substitutes);
3. [●] [name and particulars of Lenders’ Representative] and having its registered office at [●], acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**”, which expression shall unless repugnant to the context or meaning thereof include its successors and substitutes);

#### WHEREAS:

(A) The Authority has entered into a Concession Agreement dated [●] with the Concessionaire (the “**Concession Agreement**”) for development of a Project Facility at [●] in district [●] in the State of [●] (“**Project**”) on Design, Build, Finance, Operate and Transfer (“**DBFOT**”) basis, [and a copy of which is annexed hereto and marked as Annexure-A to form part of this Agreement].

(B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.

(C) Senior Lenders have requested the Authority to enter into this Substitution Agreement for securing their interests through assignment, transfer, and substitution of the Concession to a Nominated Company in accordance with the provisions of this Agreement and the Concession Agreement.

(D) In order to enable implementation of the Project including its financing, construction, operation and maintenance, the Authority has agreed and undertaken to transfer and assign the Concession to a Nominated Company in accordance with the terms and conditions set forth in this Agreement and the Concession Agreement.

**NOW IT IS HEREBY AGREED** as follows:

#### 1. DEFINITIONS AND INTERPRETATION

##### 1.1. Definitions

In this Substitution Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

“**Agreement**” means this Substitution Agreement and any amendment thereto made in accordance with the provisions contained in this Agreement;

“**Financial Default**” means occurrence of a material breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 90 (ninety) days;

“**Lenders’ Representative**” means the person referred to as the Lenders’ Representative in the foregoing Recitals;

“**Nominated Company**” means a company, within the meaning of the Companies Act, 2013, selected by the Lenders’ Representative, on behalf of Senior Lenders, and proposed to the Authority for assignment/transfer of the Concession as provided in this Agreement;

“**Notice of Financial Default**” shall have the meaning ascribed thereto in Clause 3.2.1; and

“Parties” means the parties to this Agreement collectively and “Party” means any of the Parties to this Agreement individually.

## 1.2. Interpretation

- 1.2.1. References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Senior Lenders.
- 1.2.2. References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.
- 1.2.3. The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.
- 1.2.4. The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

## 2. ASSIGNMENT

### 2.1. Assignment of rights and title

The Concessionaire hereby assigns the rights, title and interest in the Concession to, and in favour of, the Lenders’ Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Senior Lenders under the Financing Agreements.

## 3. SUBSTITUTION OF THE CONCESSIONAIRE

### 3.1. Rights of substitution

- 3.1.1. Pursuant to the rights, title and interest assigned under Clause 2.1, the Lenders’ Representative shall be entitled to substitute the Concessionaire by a Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.
- 3.1.2. The Authority hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Nominated Company selected by the Lenders’ Representative in accordance with this Agreement. For the avoidance of doubt, the Senior Lenders or the Lenders’ Representative shall not be entitled to operate and maintain the Project as Concessionaire either individually or collectively.

### 3.2. Substitution upon occurrence of Financial Default

- 3.2.1. Upon occurrence of a Financial Default, the Lenders’ Representative may issue a notice to the Concessionaire (the “**Notice of Financial Default**”) along with particulars thereof and send a copy to the Authority for its information and record. A Notice of Financial Default under this Article 3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.
- 3.2.2. Upon issue of a Notice of Financial Default hereunder, the Lenders’ Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Agreements, substitute the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement.
- 3.2.3. At any time after the Lenders’ Representative has issued a Notice of Financial Default, it may by notice require the Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project in accordance with the provisions of Article 30 of the Concession Agreement, and upon receipt of such notice, the Authority shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders’ Representative and the Concessionaire, the Authority may extend the aforesaid period of 180 (one hundred and eighty) days by a

period not exceeding 90 (ninety) days. For the avoidance of doubt, the Authority expressly agrees and undertakes to terminate the Concession Agreement forthwith, upon receipt of a written request from the Lenders' Representative at any time after 240 (two hundred and forty) days from the date of Suspension hereunder.

### **3.3. Substitution upon occurrence of Concessionaire Default**

- 3.3.1. Upon occurrence of a Concessionaire Default, the Authority shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days' time to the Lenders' Representative to make a representation stating the intention to substitute the Concessionaire by a Nominated Company.
- 3.3.2. In the event that the Lenders' Representative makes a representation to the Authority within the period of 15 (fifteen) days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the Authority shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days, provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days; provided further that the Lenders' Representative may at any time withdraw its representation hereunder and upon such withdrawal, the Authority may terminate this Agreement in accordance with the provisions hereof.

### **3.4. Procedure for substitution**

- 3.4.1. The Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Authority under Clause 3.3.2, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the take over and Transfer of the Project including the Concession to the Nominated Company upon such Nominated Company's assumption of the liabilities and obligations of the Concessionaire towards the Authority under the Concession Agreement and towards the Senior Lenders under the Financing Agreements.
- 3.4.2. To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfil the eligibility criteria that were laid down by the Authority for shortlisting the bidders for award of the Concession; provided that the Lenders' Representative may represent to the Authority that all or any of such criteria may be waived in the interest of the Project, and if the Authority determines that such waiver shall not have any material adverse effect on the Project, it may waive all or any of such eligibility criteria.
- 3.4.3. Upon selection of a Nominated Company, the Lenders' Representative shall request the Authority to:
- a) accede to transfer to the Nominated Company the right to develop, operate and maintain the Project in accordance with the provisions of the Concession Agreement;
  - b) endorse and transfer the Concession to the Nominated Company, on the same terms and conditions, for the residual Concession Period; and
  - c) enter into a Substitution Agreement with the Lenders' Representative and the Nominated Company on the same terms as are contained in this Agreement.
- 3.4.4. If the Authority has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 15 (fifteen) days from the date of proposal made by the Lenders' Representative, give a reasoned order after hearing the Lenders' Representative. If no such objection is raised by the Authority, the Nominated Company shall be deemed to have been accepted. The Authority thereupon shall transfer and endorse the Concession within 15 (fifteen) days of its acceptance/deemed acceptance of the Nominated Company; provided that in the event of such objection by the Authority, the Lenders' Representative may propose another Nominated Company whereupon the procedure set forth in this Clause 3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire.
- 3.4.5. The transfer of Concession hereunder to a Nominated Company may, notwithstanding anything to the

contrary in this Agreement and the Concession Agreement, be undertaken by transfer of no less than 75% (seventy five per cent) of the equity of the Concessionaire to the Nominated Company, and upon such

transfer hereunder, the Concessionaire shall be deemed to be the Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.

### **3.5. Selection to be binding**

The decision of the Lenders' Representative and the Authority in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Lenders' Representative or the Senior Lenders or the Authority taken pursuant to this Agreement including the transfer/assignment of the Concession in favour of the Nominated Company. The Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assets of the Project or the Concessionaire's shares. It is hereby acknowledged by the Parties that the rights of the Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or Authority and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the Authority or the Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders' Representative.

## **4. PROJECT AGREEMENTS**

### **4.1. Substitution of Nominated Company in Project Agreements**

The Concessionaire shall ensure and procure that each Project Agreement contains provisions that entitle the Nominated Company to step into such Project Agreement, in its discretion, in place and substitution of the Concessionaire in the event of such Nominated Company's assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

## **5. TERMINATION OF CONCESSION AGREEMENT**

### **5.1. Termination upon occurrence of Financial Default**

At any time after issue of a Notice of Financial Default, the Lenders' Representative may by a notice in writing require the Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the Authority shall undertake Termination under and in accordance with the provisions of Article 31 of the Concession Agreement.

### **5.2. Termination when no Nominated Company is selected**

In the event that no Nominated Company acceptable to the Authority is selected and recommended by the Lenders' Representative within the period of 180 (one hundred and eighty) days or any extension thereof as set forth in Clause 3.3.2, the Authority may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

### **5.3. Realization of Debt Due**

The Authority and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realisation of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Escrow Account in accordance with the provisions of the Concession Agreement and the Escrow Agreement.

## **6. DURATION OF THE AGREEMENT**

### **6.1. Duration of the Agreement**

This Agreement shall come into force from the date hereof and shall expire at the earliest to occur of the following events:

- a) Termination of the Concession Agreement; or
- b) no sum remains to be advanced, or is outstanding to the Senior Lenders, under the Financing Agreements.

## **7. INDEMNITY**



#### **7.1. General indemnity**

- 7.1.1. The Concessionaire will indemnify, defend and hold the Authority and the Lenders' Representative harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.
- 7.1.2. The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.
- 7.1.3. The Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lenders' Representative, its officers, servants and agents.

#### **7.2. Notice and contest of claims**

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 7.1 or in respect of which it is entitled to reimbursement (the "Indemnified Party"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "Indemnifying Party") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

### **8. DISPUTE RESOLUTION**

#### **8.1. Dispute Resolution**

- 8.1.1. Any dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be referred to the Dispute Resolution Board as set forth in Clause 37.2. The matters which cannot be resolved through Dispute Resolution board shall be decided finally by reference to arbitration as set forth in Clause 37.3
- 8.1.2. 8.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be Delhi and the language of arbitration shall be English.

### **9. MISCELLANEOUS PROVISIONS**

#### **9.1. Governing law and jurisdiction**

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts in the State shall have jurisdiction over all matters arising out of or relating to this Agreement.

#### **9.2. Waiver of sovereign immunity**

The Authority unconditionally and irrevocably:

- a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any

jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;

- c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

### **9.3. Priority of agreements**

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

### **9.4. Alteration of terms**

All additions, amendments, modifications, and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorized representatives of the Parties.

### **9.5. Waiver**

9.5.1. Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- c) shall not affect the validity or enforceability of this Agreement in any manner.

9.5.2. Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

### **9.6. No third-party beneficiaries**

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

### **9.7. Survival**

9.7.1. Termination of this Agreement:

- a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
- b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

9.7.2. All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

### **9.8. Severability**

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable,

the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Article 8 of this Agreement or otherwise.

#### **9.9. Successors and assigns**

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

#### **9.10. Notices**

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile. The address for service of each Party and its facsimile number are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on any day, or on a day that is a public holiday, the notice shall be deemed to be received on the first working day following the date of actual receipt. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

#### **9.11. Language**

All notices, certificates, correspondence, and proceedings under or in connection with this Agreement shall be in English.

#### **9.12. Authorised representatives**

Each of the Parties shall by notice in writing designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

#### **9.13. Original Document**

This Agreement may be executed in three counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

**IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.**

SIGNED, SEALED AND DELIVERED

For and on behalf of **CONCESSIONAIRE** by

(Signature)  
(Name)  
(Designation)  
(Address)  
(Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of THE Authority by:

(Signature)  
(Name)  
(Designation)  
(Address)  
(Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of **SENIOR LENDERS**

by the Lenders' Representative:

(Signature)  
(Name)

(Designation)

(Address)

(Fax No.)

In the presence of:

1. [•]

2. [•]