

# **DRAFT OPERATION & MAINTENANCE AGREEMENT**

## AGREEMENT

This AGREEMENT is entered into on this the [ ] day of [ ], 2023 at [ ]

AMONGST

1. [ ] established, having its registered office at \_\_\_\_\_, Odissa through Mr. \_\_\_\_\_ holding designation of \_\_\_\_\_ (hereinafter referred to as “[ ]” or “**Authority**” which expression shall unless repugnant to the subject or the context include its successors) of One Part; AND
2. \_\_\_\_\_, a company incorporated under the Companies Act, 1956 having its registered office at \_\_\_\_\_ through its Authorized signatory Mr. \_\_\_\_\_, age \_\_\_\_\_, resident of \_\_\_\_\_ (hereinafter referred to as the ‘**Operator**’ which expression shall unless repugnant to the subject or the context include its successors) of the Second Part.

WHEREAS:

- A. Authority intends to select an operator for [ ] in [ ] through private participation on Equip, Operate, Manage and Transfer (EOMT) format (‘the Project’).

NOW THEREFORE IN CONSIDERATION OF THE FOREGOING AND THE RESPECTIVE COVENANTS AND AGREEMENTS SET FORTH IN THIS AGREEMENT, THE SUFFICIENCY AND ADEQUACY OF WHICH IS HEREBY ACKNOWLEDGED, AND INTENDING TO BE LEGALLY BOUND THE AUTHORITY AND THE OPERATOR (HEREINAFTER REFERRED TO AS “**PARTIES**” AND INDIVIDUALLY AS “**PARTY**”) HEREBY AGREE AND THIS AGREEMENT WITNESSTH AS FOLLOWS:

### 1. DEFINITIONS AND INTERPRETATION

#### 1.1. Definitions

The words and expressions defined in this Agreement shall, unless repugnant to the context or meaning thereof, 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;

“**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; “Affected Party” shall have the meaning set forth in Clause 14.1;

“**Agreement**” means this agreement, the schedules hereto and any amendments thereto made in accordance with the provisions contained in this Agreement;

“**Agreement Date**” means the date of execution of this Agreement;

“**Annual Licence Fee**” shall have the meaning set forth in Clause 4.1.1.

“**Allied Actives**” shall be operation of other similar activities

“**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, authorisations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained by the Operator under Applicable Laws during the subsistence of this Agreement;

**“Approvals”** means all approvals, permissions, authorisations, consents and notifications from any Governmental Authority, regulatory or departmental authority and any other regulatory authority, as may be applicable.

**“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;

**“Bank Guarantee”** means an irrevocable and unconditional bank guarantee payable on demand issued by a bank in favour of Authority and furnished by the Operator to Authority for guaranteeing the due performance of the obligations of the Operator under this Agreement. Here Bank means any Indian Nationalized Bank or any Indian Scheduled Commercial Bank.

**“Bid”** means the documents in their entirety comprised in the bid submitted by the Operator in response to the RFP in accordance with the provisions thereof;

**“Bid Documents”** means the RFP and the Agreement including its schedules;

**“Business Day”** means a day on which banks are generally open for business in India;

**“Clearance”** means, as on the date of execution of this Agreement, any consents, licences, approvals, permits, exemptions, registrations, filings or other authorisations of whatever nature, which is necessary for effective implementation of the Project;

**“Competent Authority”** means any agency, authority, department, ministry, public or statutory Person of the Government of Odisha or Government of India, or any local authority, or any other sub-division thereof with authority over aspects of implementation of the Project having jurisdiction over all or any part of the Project Facility or the performance of all or any of the services or obligations of the Operator under or pursuant to this Concession;

**“Conditions Precedent”** shall have the meaning set forth in Clause 5.1;

**“Commercial Operations Date”** shall have the meaning set forth in Clause 11.3.

**“Completion Certificate”** means the certificate to be issued by Authority to the Operator upon the completion of the furnishing of requisite, equipment’s, etc in the Project Facility to the satisfaction of Authority and as set forth in this Agreement.

**“Completion Period”** means the period from Effective Date till the Commercial Operations Date as per provisions of Article 10.2, after which commercial operations must start;

**“Damages”** shall have the meaning set forth in Sub-clause (t) of Clause 1.2;

**“Developmental Standard(s)”** means the minimum parameters and standards to be achieved by the Operator in the construction, development and operations of the Project in accordance with internationally sound engineering practices, National Building Code and Applicable Law and / or as determined by the relevant Governmental Authority;

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

**“Dispute Resolution Procedure”** means the procedure for resolution of Disputes set forth in Article 18;

**“Drawings”** means all of the drawings, calculations and documents pertaining to the Project and shall include ‘as built’ drawings of the Project;

**“Effective Date”** means the date on which possession to the Project Facility is provided to the Operator, as a licensee, with leave and license rights in respect of the Project Facility as per Article 5 of this Agreement.

**“Encumbrances”** means, in relation to the Project Facilities, 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 Facilities, where applicable herein.

**“Escrow Agreement”** shall have the meaning set forth in Clause 13.1.2;

**“Escrow Bank”** shall have the meaning set forth in Clause 13.1.1;

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

**“Financial Commitment”** means the legally binding undertaking of the Operator to mobilize the financial requirements of the project, for ensuring the completion of the project;

**“Financial Year”** shall mean the year commencing from the 1st April of any calendar year and ending on 31st March of the next calendar year.

**“Force Majeure”** or **“Force Majeure Event”** shall have the meaning set forth in as per Article 12;

**“Furnishing Plan”** details of the Works to be carried out in the project facility and the activities proposed therein.

**“GoO”** means the Government of Odisha;

**“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 Operator in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical 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 the performance of all or any of the services or obligations of the Operator under or pursuant to this Agreement;

**“Lenders”** shall mean the banks, financial institutions, international credit agencies that extend or agree to extend a credit facility to the Operator in relation to the Project;

**“License”** shall have the meaning set forth in Clause 10.1.2;

**“Operation Period”** shall mean the period commencing from COD till the end of the Agreement Period or till termination, in case of premature termination;

**“Operator’s Equipment”** means all machinery, apparatus and other things required for the operationalisation, maintenance and management of the Facility and the remedying of any defects;

**“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 set forth in Clause 9.1;

**“Performance Standards”** means the standards to which the construction, maintenance and operation of the Project must adhere, and which the Operator undertakes to meet;

**“Project”** shall mean Equip, Operate, Manage and Transfer the Project Facility, in accordance with the provisions of this Agreement till the end of the Agreement Period.

**“Project Facility”** having built up and open areas as detailed out in Schedule-A, and including all the amenities and facilities, any other civil structure / building including the movement areas, all external and internal services, drainage facilities, sign boards, HVAC works, electrical works for lighting of and telephone and communication equipment etc. that is constructed by the Authority and has been described in Schedule A and in respect of which rights shall be granted by the Authority to the Operator as per the terms and conditions set forth in this Agreement. Also if the Operator constructs any additional structure during the time of the Agreement Period, and for which due written approval has been taken from Authority, the same shall be considered a part of the Project Facility.

**“Project Monitoring Board”** or **“PMB”** shall have the meaning set forth in Clause 11.5

**“Proposal Acceptance Date”** means the date of the signing of this Agreement;

**“Revenue Share”** shall have the meaning set forth in Clause Error! Reference source not found.;

**“Right of Way”** means the right to enter into the Project Facility premises and develop, operate and maintain the Project in accordance with the provisions of this Agreement;

**“Rs.”** or **“Rupees”** refers to the lawful currency of the Republic of India;

**“SBI Base Rate”** shall mean the base rate as fixed by State Bank of India on 1st April of the respective financial year in which such rate is considered for calculation purposes.

**“Security Interest”** means any existing or future mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, assignment, security interest or other encumbrances of any kind securing or conferring any priority of payment in respect of any obligation of any Person and includes without limitation any right granted by a transaction which, in legal terms, is not the granting of security but which has an economic or financial effect similar to the granting of security in each case under any Applicable Law.

**“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-C, and any

modifications thereof, or additions thereto, as included in the design and engineering for the Project submitted by the Operator to, and expressly approved by Authority;

**“Standards of Reasonable and Prudent Operator”** means the standards, practices, methods and procedures expected from a person seeking in good faith to perform its contractual obligations and in so doing and in the general conduct of its undertaking exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced Person engaged in the same type of undertaking under the same or similar circumstances and conditions including the conditions as contemplated by the Bid Documents.

**"Statutory Auditors"** means a reputable firm of chartered accountants acting as the statutory auditors of the Operator under the provisions of the Companies Act, 1956 including any statutory modification or re-enactment thereof, for the time being in force, and appointed in accordance with Clause 12.2;

**“Taxation” or “Tax”** means all forms of taxation whether direct or indirect and whether levied by reference to income, profits, gains, net wealth, asset values, turnover, added value or other reference and statutory, governmental, state, provincial, local governmental or municipal impositions, duties, contributions, rates and levies (including without limitation social security contributions and any other payroll taxes), whenever and wherever imposed (whether imposed by way of withholding or deduction for or on account of tax or otherwise) and in respect of any person and all penalties, charges, costs and interest relating to it;

**“Third Party Agreements”** means all Agreements entered into between the Operator and third Persons, including, but not limited to other Agreements with Operator and vendors of any goods or services to the Operator.

**“Termination”** means the expiry of the Agreement Period or termination of this Agreement;  
**“Termination Notice”** means the communication issued in accordance with this Agreement by either Party to the other Party terminating this Agreement;

**“User Fee”** means all charges, costs, fees, tariff, rentals and other amounts by whatever name called, payable to Operator by the users or any other Person, etc. pursuant to this Agreement, in lieu of sale of items, consumables etc and for the purpose of rendering of services by the Operator and utilisation of the Project Facility of the Project by such users, or other Persons, at any time and from time to time in relation to the Project;

**“Works”** means the furnishing of the required amenities with requisite furniture, fixtures, equipment, and any other requisite temporary or urgent works required under this Agreement;

## **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 subject to the provisions of this Agreement;
- (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) (f) references to “construction” include, unless the context otherwise requires, investigation, design, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities that are to be completed on or before “Commercial Operations Date” as per the scope of work as defined under Article 2, and “construct” shall be construed accordingly;
- (g) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (h) any reference to day shall mean a reference to a calendar day;
- (i) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- (j) references to any date, period or Milestone shall mean and include such date, period or Milestone as may be extended pursuant to this Agreement;
- (k) 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;
- (l) the words importing singular shall include plural and vice versa;

- (m) references to any gender shall include the other and the neutral gender;
- (n) "lakh or lac" means a hundred thousand (100,000) and "crore" means ten million (10,000,000);
- (o) references to the "winding-up", "merger", amalgamation", "takeover", "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, change in management or relief of debtors;
- (p) 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 the Authority hereunder or pursuant hereto in any manner whatsoever;
- (q) any Agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effective only if it is in writing under the hand of a duly authorized representative of such Party, as the case may be, in this behalf and not otherwise;
- (r) 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;
- (s) 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; and
- (t) the damages payable by either Party to the other Party, 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").
- (u) any reference to Build shall mean Construct and vice-versa unless the context otherwise requires
- (v) any reference to Operate/Operations shall mean Operate and Operations & Maintenance unless the context otherwise requires

1.2.2. Unless expressly provided otherwise in this Agreement, any documentation required to be provided or furnished by the Operator to the Authority and/or the agency or person appointed by the Authority shall be provided free of cost and in two copies, and if the Authority and/or the person appointed by the Authority is required to return any such documentation with their comments and/or approval, they shall be entitled to retain one copy 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.

### **1.3. Measurements and Arithmetic Conventions**

1.3.1. 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 and Errors/Discrepancies**

1.4.1. This Agreement, and all other Agreements and documents forming part of 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 shall, in the event of any conflict between them, be in the following order:

- (a) this Agreement;
- (b) RFP Document
- (c) all other agreements and documents forming part hereof;

i.e. the agreement at (a) above shall prevail over the agreements and documents at (b) and (c) above and (b) shall prevail over all documents in (c) above.

1.4.2. 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;
- (c) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- (d) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail; and
- (e) between any value written in numerals and that in words, the latter shall prevail.

## **2. SCOPE OF THE PROJECT**

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

2.1.1. The Operator shall operate, maintain, market and manage the Project Facility. The Project Facility shall be handed over to the Authority, free of encumbrances & liability, at the end of the Agreement Period or upon the premature termination of this Agreement for any reason.

2.1.2. While undertaking works of the Project, the Operator shall adhere to standards and specifications set forth in Schedule C of this agreement, statutory requirements, and any other norms as applicable from time to time.

- 2.1.3. The Operator shall furnish, operate, manage and transfer the Project Facility throughout the Agreement Period in accordance with the applicable regulations of concerned authorities, as the case may be and the provisions of this Agreement and the Schedules hereof.
- 2.1.4. The Operator shall make Project Facility operational by operating them or by entering into Third Party Agreements with private entities for operations as per the Clause 3.4.
- 2.1.5. The Operator shall perform and fulfil all other obligations of the Operator 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 Operator under this Agreement.
- 2.1.6. The Operator shall be responsible for all the clearances as may be required for the operations of the project.

### **3. CONCESSION**

#### **3.1. Grant of Licence**

- 3.1.1. Subject to and in accordance with the terms and conditions set forth in this Agreement, the Authority hereby grants to the Operator and the Operator hereby accepts the Licence for a period of 10+5 years commencing from the Effective Date, including the exclusive right, authority and authorisation during the subsistence of this Agreement, including extension thereof, to plan, operate, maintain the Project Facilities and enjoy its commercial benefits for the Agreement Period.
- 3.1.2. Subject to and in accordance with the terms and conditions set forth in this Agreement, the Licence hereby granted shall entitle the Operator, the exclusive right and authority to enjoy and undertake the following in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits:
  - (a) To operate, maintain and regulate the use by Third Parties of the Project Facility;
  - (b) To have access to the Project Facility for the purpose of and to the extent conferred by the provisions of this Agreement;
  - (c) To have access and liberty to plan, operate, manage the proposed Project Facility with the associated facilities and services during the Agreement Period in accordance with the provisions of this Agreement. Any construction or development made by the Operator on the specified area in respect of the Project Facility shall be deemed to be the property of the Authority and Authority on its part, as part of this Agreement, provides to the Operator, an exclusive license to operate and maintain the Project Facility during the currency of this Agreement as per the terms and conditions contained herein.
  - (d) Exclusive right and authority, during the Agreement Period, to carry out the specified activities in relation to the Facility;
  - (e) To determine the charges\Rates fixed for the services, consumables in the project site and/or any other license fee, tariff, cost of the Project Facility each year starting from the Effective Date.

- (f) To manage and operate all or any part of the Project Assets without any limitation or restriction other than those expressly set out in this Agreement;
  - (g) To exercise such other rights as Authority may determine as being necessary or desirable for the purposes incidental and necessary for managing and operating the Project.
- 3.1.3. The Operator shall not be entitled to allow the use of the Project Facility/ies by any other person or for any purpose other than to operate and maintain the Project Facility as specified in Clause 3.4.
- 3.1.4. Operator without approval from Authority will not undertake any construction/improvement/ renovation in the Project Asset except for normal repairs & maintenance etc.,
- 3.1.5. Nothing contained herein, including the act of granting permission to operate the Project Facility at the designated location shall vest or create any proprietary interest in the Project Facility or any part thereof including any permanent fixtures, fittings, etc. installed in the structure of the Project Facility in favour of the Operator or any other person claiming through or under the Operator. The Operator shall not in any manner sell, transfer, assign, mortgage, charge, create any lien or otherwise encumber or deal with the Project Facility in any manner. The Operator acknowledges, accepts, and confirms that the covenant contained herein is an essence of this Agreement.
- 3.1.6. It is hereby made clear that in the event of Termination, the Agreement Period shall mean and be limited to the period commencing from the Effective Date and ending with the Termination.

### **3.2. Sole Purpose of the Operator**

- 3.2.1. The Operator having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the Operator shall not, except with the previous written consent of the Authority, be or become directly or indirectly engaged, concerned, or interested in any business other than as envisaged herein.

### **3.3. Actions in Support of the Operator**

- 3.3.1. Authority shall recognize and undertake not to, in any manner, violate or cause breach of the terms and conditions of this Agreement and the Schedules hereof.
- 3.3.2. Authority undertakes not to terminate or repudiate this Agreement prior to the expiry of the Agreement Period otherwise than in accordance with the provisions of this Agreement.
- 3.3.3. Authority shall provide assistance and recommendations to the Competent Authorities, including GoO, in support of the Operator's applications for Clearances / permissions that may be needed from time to time for the implementation of the Project; provided that the Operator has made the requisite applications and is in compliance with the necessary conditions for the grant of such Clearances.

### **3.4. Licensing the Use of the Project Facility or any Part Thereof**

- 3.4.1. The Operator shall have the right to sub-license activities in the Project Facility, provided however, that it shall be obligatory upon the Operator to provide copies of all such sub-license deeds entered into from time to time with Third Parties to the Authority, with incorporated clauses, in all such sub-license deeds with such respective Third Parties, that
- (i) the period of the sub-license shall be for 11 (eleven) months or lesser and pursuant to its expiry, can be renewed, at the discretion of Operator; and
  - (ii) in case of Termination of this Agreement (by efflux of time or pre-mature), all the sub-license(s) shall be terminated and the Facility shall be transferred back to the Authority.
- 3.4.2. The Operator shall ensure to get the format of sub-license deed approved by the Authority and also, submit the signed sub-license deeds to the Authority for information. The Operator may execute sub-license deeds effective from the Operations Date. The sub-licensee/s shall pay the license fees under the sub-license deeds directly to the Operator.

## **4. Consideration of the Contract**

### **4.1. Annual Licence Fee**

- 4.1.1. [The Operator shall pay to Authority an annual amount of Rs \_\_\_\_\_ (Rupees \_\_\_\_\_) as Annual Licence Fee (the "Annual Licence Fee") payable on quarterly basis. The Annual Licence Fee shall be increased by 10% of the previous value, at the end of every 3 years from the date of signing of Agreement.
- 4.1.2. Annual Licence Fee shall become payable from the date of signing of Agreement till the end of the Agreement Period. Operator shall make lump sum payments of Annual Licence Fee to Authority at the beginning of every quarter, not later than 10 days after the commencement of that particular year. The first instalment of Annual Licence Fee shall be made prior to signing of Agreement. All taxes, levies and charges as applicable and payable by the Authority with respect to the collection of the Annual Licence Fee shall have to be paid by the Operator along with and in addition to the payment of Annual Licence Fee. For avoidance of doubt, it is clarified that Authority shall be entitled to receive Annual Licence Fee as well as all applicable taxes from Operator, whether payable by Authority or Operator.
- 4.1.3. In case if the Operator requires additional area other than shown in Schedule A as part of Project Facility, Operator shall have the right to request Authority to provide the same. Authority shall have the option to approve or not approve such request. In case Authority decides to grant such additional area, Operator shall be liable to pay additional Annual Licence Fee on pro rata basis for the additional area along with the specified Annual Licence Fee for the remaining duration of Agreement Period.

### **4.2. Other Provisions**

- 4.2.1. Subject to and in accordance with the provisions of this Agreement, the Consideration hereby given by Operator, the Operator shall be entitled to operate the Project subject to:

- (a) performing and fulfilling all of the Operator's obligations under and in accordance with this Agreement;
  - (b) bearing and paying all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Operator under this Agreement; and
  - (c) at the end of the Agreement Period, the entire furnishings, up gradation and installation put up by the Operator till that date in the Project Facility as part of the scope of work shall be handed over, without taking any consideration, to the Authority.
- 4.2.2. In consideration of the mutual covenants and other good and valuable consideration expressed herein, the Operator hereby agrees to pay the Consideration and agrees to operate the Project as per the scope of work given in Clause 2 and minimum specifications mentioned in the schedules G and to perform/discharge all of its obligations in accordance with the provisions hereof.
- 4.2.3. The Consideration to be paid by Operator to the Authority as per the provisions of this Agreement shall be paid along with additional payment of all taxes, levies and charges that would be required to be paid by Authority for the project.

## **5. Conditions Precedent to the Agreement**

### **5.1. Conditions Precedent**

- 5.1.1. 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 5.1 (the "Conditions Precedent").

### **5.2. Conditions Precedent of Authority**

- 5.2.1. The Operator may, upon signing of the Agreement, by notice require the Authority to satisfy the Conditions Precedent set forth in this Clause 5.2 within a period of 30 (thirty) days from the Agreement Date, and the obligations of the Authority hereunder shall be deemed to have been performed when the Authority shall have provided to for the Operator the Right of Way to the Project Facility, as demarcated under Schedule A, in accordance with the provisions of Clause 10.1;

### **5.3. Conditions Precedent of Operator**

- 5.3.1. The Conditions Precedent required to be satisfied by the Operator prior to the Effective Date shall be deemed to have been fulfilled when the Operator shall have:
- (a) executed and procured execution of the Escrow Agreement;
  - (b) Made applications at its cost and procured all necessary / mandatory clearances, permits, etc., which are required for commencing the construction and execution of the Project, so that all such conditional and/or unconditional clearances, permits, etc., are on full force and effect, throughout the Agreement Period;

- (c) delivered to the Authority a legal opinion from the legal counsel of the Operator with respect to the authority of the Operator to enter into this Agreement and the enforceability of the provisions thereof.

#### **5.4. Obligations to satisfy Condition Precedents**

- 5.4.1. Upon satisfaction of the Conditions Precedent by each Party, the other Party shall forthwith issue a Certificate of Compliance with Conditions Precedent (the "Certificate of Compliance").
- 5.4.2. After the issue of Certificate of Compliance by both Parties, the Authority shall issue the Notice of Commencement to the Operator and the obligations of the Parties under this Agreement shall commence from Effective Date.

#### **5.5. Non-Fulfilment of the Conditions Precedent**

- 5.5.1. In the event of the Agreement not coming into effect on account of the Authority not fulfilling the Conditions Precedent then the Earnest Money Deposit, the Performance Security, as the case may be, and the Annual Licence Fee shall be returned to the Operator, without interest.
- 5.5.2. Notwithstanding anything contained in this clause, the Parties may mutually decide to extend the time period for the fulfilment of the Conditions Precedent.

### **6. Obligations of the Operator**

#### **6.1. Obligations of the Operator**

- 6.1.1. Subject to and on the terms and conditions of this Agreement, the Operator shall at its cost and expense procure finance for and undertake the Project scope of work as mentioned in Article 2 and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 6.1.2. The Operator shall comply with all Applicable Laws in the performance of its obligations under this Agreement.
- 6.1.3. Without prejudice to Clauses 6.1.1 and 6.1.2 above, the Operator shall discharge its obligations as per the National Building Code, Development Control Rules, and the principles of good industry practice and as a reasonable and prudent person, statutory requirements, laws of the land and any other norms, which are applicable from time to time.
- 6.1.4. The Operator shall get prior approval of the Authority in case of there is any change in the Project facilities defined hereof during the Agreement Period.
- 6.1.5. The Operator shall get approval from the Authority prior to the finalisation of the name of the Project. Unless the name negatively affects public sensitivities, the Authority shall not unreasonably withhold approval of the name proposed by the Operator.
- 6.1.6. Without prejudice to Clauses 6.1.1 and 6.1.2 above the Operator shall, at its own cost and expense observe, undertake, comply with and perform, in addition to and not in derogation of, its obligations elsewhere set out in this Agreement, the following:

- (a) make, or cause to be made, necessary applications to the relevant Governmental Agencies with such particulars and details, as may be required for obtaining all Applicable Permits and obtain such Applicable Permits in conformity with the Applicable Laws;
- (b) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes and systems used or incorporated into development and operations of the Project;
- (c) not to damage any other infrastructure or any other utility developed by Authority or any other utilities developed and maintained by any other authority or person and in case of any such damage to undertake the repair and also to pay for any losses that is incurred by Authority or any authority or any other person, as the case may be.
- (d) not make any changes in the structure, facade of the Project Facility while undertaking furnishing and upgradation Works. Operator shall have the option to make changes within four walls of the existing structures, while maintaining the aesthetics of Premises, after taking prior permission for any furnishing and upgradation Works from Authority.
- (e) ensure and procure that the Operator shall comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Operator's obligations under this Agreement;
- (f) not to 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;
- (g) not to create any rights or third party rights on the Site and also to ensure that Authority are not adversely affected in any way;
- (h) shall make payment towards the Authority as per provisions of this Agreement;
- (i) provide all assistance to the PMB as it may require for the performance of its duties and services;
- (j) ensure that no goods are stored that are not permitted by law including those of hazardous, explosive, flammable or combustible in nature that may cause risk by fire, explosion or goods/ material which on account of their weight or nature may cause damage to the premises. The Operator shall be liable or responsible for destruction or damage to the premises;
- (k) set up gas bank for cooking purposes. The Authority will only give NOC for such connections wherever required. Any payment of this account shall have to be borne by the Operator and will not claim any reimbursement from the Authority. Gas bank is the responsibility of the party and any clearance required from civic bodies, fire department etc. would be the responsibility of the Operator;
- (l) ensure only commercial gas cylinders are used for the operations at the Project Facility;

- (m) ensure compliances of all rules and regulations/notifications issued from time to time by Ministry of Health, Municipal Corporations and/or any appropriate authority in this regard
- (n) Ensure that no ambush marketing of any sort takes place in the Project Facility;
- (o) procure at its own costs, expenses and risk all services necessary for the furnishings and operations of the Project including without limitation electricity, water, materials and labour;
- (p) shall pay applicable property tax (on pro rata basis) paid by Authority throughout the Agreement Period;
- (q) ensure that all the furniture, fixtures, equipments, etc, to be made part of the Project Facility shall be of highest standards and acceptable to the Authority;
- (r) ensure that all the furniture, if provided by the Authority, shall be maintained in a proper manner and after every year, if any furniture is found in depleted condition then the same shall be replaced by the Operator at his own cost. PMB at any time, even before completion of a year, may instruct the Operator to replace / repair the furniture or any other moveable or immoveable assets;
- (s) shall bear the cost/ expenditure to be incurred on the commercial operation of the Facility during the entire Agreement Period;
- (t) shall have the right to locate electronic hoardings and advertisement boards, as per the applicable laws after prior approval from Authority, in the Project Facility and generate maximum revenue from it; The Operator will have to follow the colour scheme and design for various hoardings/ display boards as approved by Authority.
- (u) provide a security and watch and ward service at the Facility to maintain the safety and security of the life and property and make provision and arrangement for first aid and prompt medical attention in cases of accidents and emergencies;
- (v) be responsible for all liabilities arising out of operation, maintenance & management of the Project. The Operator shall plan, organise, and execute the Works so that there is least disruption to the movement on adjoining roads and minimal inconvenience to the neighbouring facilities. The Authority shall assist the Operator in all respects with reference to such works, but the assistance or denial thereof shall not release the Operator from its obligations;
- (w) to ensure that no structural damages/ changes are caused to the existing Project building(s) and other permanent structures at the Project Facility as a result of Operator's activities, etc.; However, the Operator shall be entitled to carry out necessary repairs to the existing structure in the licensed premises with prior written approval of the Authority, at its own costs and expenditures without having any claim against the Authority
- (x) shall have the option to advertise the Project in newspapers or through any other mode of communication at own cost;



- (y) shall prepare and evolve, not later than 10 (ten) days prior to the Scheduled Operations Date, a draft Operation and Maintenance Manual (“O&M Manual”) providing the detailed plan for regular and preventive maintenance of the Project. The Operator shall at its cost, provide within 10 (ten) days of its finalisation, submit the draft of the O&M Manual to the Authority for its review. The O&M Manual will become final only after it has received the final approval of the Authority. Within a period of 15 (fifteen) days from the date of receipt of the O&M Manual, the Authority shall revert to the Operator with its comments and suggestions (if any) on the O&M Manual, which shall be implemented, and the O&M Manual shall be re-submitted for approval of the Authority. The Operation and Maintenance Manual shall include all the activities required for regular and periodic maintenance of the Facility during the Operations Period, so that Project Facility is maintained at all times in a manner that it complies with the provisions of the Agreement in sound, durable and functional condition. The Operation and Maintenance Manual of the Facility shall also include service level specifications, performance standards for maintenance, service level indicators, their response/ repair time, frequency of monitoring and the key performance indicators; and
- (z) hand over the Project Facilities on the date of termination of Concession to the Authority, in accordance with the provisions thereof.

## **6.2. Obligations relating to Other Agreements**

- 6.2.1. It is expressly agreed that the Operator shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in any other agreement, and no default under any agreement shall excuse the Operator from its obligations or liability hereunder.
- 6.2.2. The Operator may undertake operation of Project by itself or through one or more contractors possessing requisite technical, financial and managerial expertise/capability; but in either case, the Operator shall remain solely responsible to meet the scope of work as mentioned under Clause 2.1.
- 6.2.3. The Operator shall submit to Authority the drafts of all Third Party Agreements or any amendments or replacements thereto for its review and comments, and Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, to the Operator within 15 (fifteen) days of the receipt of such drafts. Within 7 (seven) days of execution of any Third Party Agreement or amendment thereto, the Operator shall submit to Authority a true copy thereof, duly attested by a Director of the Operator, for its record. For the avoidance of doubt, it is agreed that the review and comments hereunder shall be limited to ensuring compliance with the terms of this Agreement. It is further agreed that any failure or omission of Authority to review and/ or comment hereunder shall not be construed or deemed as acceptance of any such agreement or document by Authority. No review and / or observation of Authority and / or its failure to review and / or convey its observations on any document shall relieve the Operator of its obligations and liabilities under this Agreement in any manner nor shall Authority be liable for the same in any manner whatsoever.

**6.3. Deleted**

**6.4. Obligations relating to Accounts.**

- 6.4.1. In order to collect payment / User Fee from the users, the Operator shall make sure that all the electronic systems installed in the Project Facility, including but not limited to the computer systems relating to accounts, billings, etc are functioning in a proper manner and are transmitting true and correct data of revenue and expenditure, on real time basis;
- 6.4.2. In addition to Clause 6.4.1, the Operator shall follow a computerised system of collection of payment / User Fee, arising out of sale of over-the-counter items, with the help of computerised billing. The billing computers shall be in real time connected with the computers of Authority.
- 6.4.3. All proceeds, collections arising out of any sales and / or services such as sale of over-the counter items, shall be deposited in the Escrow account as mentioned in Clause 13.2; 6.4.4. The Operator shall install, operate & maintain and link up its computer system relating to accounts (i.e., billings, costs, expenses, realizations, revenue, expenditure, etc.) with round the-clock connections to the computer network(s) of Authority / its related entities for the purpose of efficient and transparent regulation of information such as ascertaining true and correct accounts statements relating to the Project Facility etc.;

**6.5. Obligations relating to Environmental Measures**

- 6.5.1. The Operator shall take all reasonable steps to protect the environment (both on and off the Project Facility) and to limit damage and nuisance to people and property.
- 6.5.2. The Operator shall be liable for and shall indemnify, protect, defend and hold harmless the Authority, the Authority 's officers, employees and agents from and against any and all demands, claims, suits and causes of action and any and all liability, costs, expenses, settlements and judgements arising out of the failure of the Operator to discharge its obligations under this Article and to comply with the provisions of health, safety and environmental laws as applicable;

**6.6. Obligations relating to Clearance of Facility**

- 6.6.1. During the execution of the Works, the Operator shall keep the Project Facility free from all unnecessary obstruction and shall store Operator's Equipment or surplus materials in a manner that causes least inconvenience or dispose of such Operator's Equipment or surplus materials. The Operator shall clear away and remove from the Facility any wreckage or rubbish no longer required.
- 6.6.2. Within 15 (fifteen) days of the issue of the Completion Certificate, the Operator shall clear away and remove, from the Project Facility, all surplus materials, rubbish and other debris and keep the Project Facility and surroundings in a clean and safe condition, to the satisfaction of Authority.
- 6.6.3. Within 30 (thirty) days of the expiry of the Agreement Period, the Operator shall clear away and remove from the Project Facility the surplus material, wreckage, rubbish, etc. The Operator shall leave such areas in a clean and safe condition to the satisfaction of

Authority. Provided that if the Operator fails to remove, at the end of the 30-day period, any surplus material, wreckage, rubbish, etc., the Authority may sell or otherwise dispose of such items. The Authority shall be entitled to retain, from the proceeds of such a sale, or from any other amounts due to the Operator, a sum sufficient to meet the costs incurred in connection with such sale or disposal. If the amounts due from the Operator are insufficient to meet the Authority 's costs, the outstanding balance shall be recoverable from the Operator by the Authority.

## **6.7. Safety and Security**

6.7.1. The Operator shall comply with all safety regulations applicable, access arrangements and operations on the Facility. The Operator shall be responsible in the operation of machinery and any other work, to take all precautions to ensure safety of the staff, labourers and public.

6.7.2. The Operator shall be responsible at its cost, for procurement, transport, receiving, unloading and safekeeping of all Materials, Operator's Equipment and other things required for the Works. Unless otherwise stated in this Agreement:

- i. The Operator shall be responsible for keeping unauthorised persons off the Facility and preventing encroachment on the Facility during Agreement Period.
- ii. Authorized Persons shall be limited to the employees of the Operator and persons authorised by the Authority.

6.7.3. In the event of an accident the Operator shall, by most expeditious means, inform the concerned Civil and Police Authorities, and also the Authority. The Operator's responsibilities with regard to the Project shall in no way be diminished by informing the above officials and it shall take expeditious action for the medical and legal aspects notwithstanding any delay on the part of these officials to give any instructions. The Operator shall preserve the Project Facility of such accident intact, until completion of all legal formalities. The Operator shall then arrange for the expeditious removal of the wreckage or debris, and for cleaning the Project Facility. If any portion of the Project Facility suffers any damage, the Operator shall, with the consent of Authority, arrange for the repair and rectification thereof.

6.7.4. The Operator shall, in the event of any accident, incur any expenditure or take any other action as necessary (in accordance with Good Industry Practices).

6.7.5. Any communication to the news media made by the Operator shall provide only enough information to satisfy public concern, and the Operator shall make no admissions nor accept any liability in such communications.

6.7.6. The Operator shall indemnify, defend and hold harmless the Authority, during the term of this Agreement, from and against all liabilities, damages, actions, proceedings, and claims of any nature whatsoever, as suffered by the Operator due to such accidents.

## **6.8. Insurance Requirement**

The Operator shall, at its cost and expense, purchase and maintain insurances as are prudent, including but not limited to the following:

- a) builder's all risk insurance;
- b) loss, damage or destruction of the Project Facilities at replacement value;
- c) comprehensive third party liability insurance including injury or death to the persons who may enter the Project Site ;
- d) workmen's compensation insurance; and - EPF, PF, ESI and Statutory compliances e) any other insurance that may be necessary to protect the Operator, its employees and its assets and the Authority, its employees and agents engaged in or connected to the Project and the Project Site including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (d).

**6.9. Property Tax:**

Operator shall bear proportionately (equivalent to the area under their possession) taxes, cess, property tax and or any other tax which is payable (if any) presently or in future to Authority.

**7. Obligations of the Authority**

**7.1. Obligations of the Authority**

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

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

- (a) upon written request from the Operator, and subject to the Operator complying with Applicable Laws, provide all reasonable support and assistance to the Operator in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project;
- (b) upon written request from the Operator, assist the Operator in obtaining access to all necessary infrastructure facilities and utilities, including water at rates and on terms no less favourable to the Operator than those generally available to commercial customers receiving substantially equivalent services;
- (c) extend the assistance of its good offices on a reasonable effort basis to assist the Operator in the provision of electricity and water;
- (d) not to 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; and
- (e) support, cooperate with and facilitate the Operator in the implementation of the Project.

## **8. Representations and Warranties**

### **8.1. Representations and Warranties of the Operator**

The Operator 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 / Rules 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 legally 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) no order has been made and no resolution has been passed for the winding up of the Operator or for a provisional liquidator to be appointed in respect of the Operator and no petition has been presented and no meeting has been convened for the purpose of winding up the Operator. No receiver has been appointed in respect of the Operator or all or any of its assets. The Operator is not insolvent or unable to pay its debts as they fall due.
- (l) 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 statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (m) 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 entering into this Agreement or for influencing or attempting to influence any officer or employee of the Authority in connection therewith.; and
- (n) it shall not novate the Agreement and any rights and obligation arising therefrom to any party without any written approval from the Authority
- (o) The operator shall strictly adhere to and comply with all statutory compliances as arising out of industrial laws and or notifications circulars received by Government of India, State Government and or any other subs equal arrangement made in the existing laws circulars, notifications from time to time till the completion of this agreement.
- (p) No representation shall be made by the operators to the employees/workers that they were the employees of the Authority. All such employee working in the project facility shall be of operator.

## **8.2. Representations and Warranties of the Authority**

The Authority represents and warrants to the Operator 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 action under the Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under the 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 Operator's ability to perform its obligations under this Agreement;
- (f) it has complied with Applicable Laws in all material respects;
- (g) all information provided by it in the Tender Notice and invitation to bid in connection with the Project is, to the best of its knowledge and belief, true and accurate in all material respects;
- (h) it has good and valid right for upgradation and operation of the Project, and has power and authority to give license of the rights to the Operator; and
- (i) upon the Operator completing the Project as per this Agreement, and performing the covenants herein, it shall not at any time during the period of Concession, interfere with peaceful enjoyment of the Project Facility by the Operator, except in accordance with the provisions of this Agreement.

### **8.3. 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 obligation of either Party under this Agreement.

## **9. Performance Security**

### **9.1. Performance Security**

The Operator shall submit to the Authority a Performance Security equivalent to 10% of the sum of total Annual Licence Fee for first three years, in the form of a Bank Guarantee favouring to Director, Export Promotion and Marketing, Odisha, payable at Bhubaneswar; the Bank Guarantee shall be prepared and submitted as per the format given in Schedule B of this Agreement. The Performance Security equivalent to 10% of the sum total of Annual Licence Fees for three years along with the periodical revision as per this agreement shall be maintained by the Operator during the entire period up until the end of the Agreement Period. All charges, fees, costs and expenses related to the Bank Guarantee shall be borne and paid by the Operator.

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

- 9.2.1. Upon occurrence of an Operator Default during the subsistence of the Performance Security, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to invoke and appropriate the relevant amounts from the Performance Security as Damages for such Operator Default. Upon such invocation and

appropriation from the Performance Security, the Operator shall, within 15 (fifteen) days thereof, replenish, in case of partial appropriation, the Performance Security to its original level, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Operator 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 15.

9.2.2. In the event that the operation of the Project is not commenced by the Scheduled Commercial Operations Date, unless the delay is on account of reasons solely attributable to the Authority or due to Force Majeure, the Authority shall encash 5% of the Performance Security amount per month, for a maximum period of 6 (six) months after which Authority shall be entitled to terminate this Agreement. The Performance Security shall be replenished by the Operator as soon the Performance Security is encashed by Authority.

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

100% (one hundred percent) of the Performance Security in the form of bank guarantee shall be released to the Operator by 1 (one) month after end of Agreement Period or by 1 (one) month after date of Termination whichever is earlier. In any case, Authority shall be entitled to recover any amounts due or receivable from the Operator under this Agreement, before the Performance Security be duly discharged and released to the Operator.

## **10. Access to the Project Facility**

### **10.1. Access**

10.1.1. Authority hereby grants to the Operator access to the Project Facility for carrying out any investigations and tests that the Operator may deem necessary during the Agreement Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of investigations and tests carried out or work undertaken by the Operator on or about the Project Facility pursuant hereto in the event of Termination or otherwise.

10.1.2. In consideration of the Annual Concession, this Agreement and the covenants and warranties on the part of the Operator herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Operator, commencing from the Effective Date, leave and license rights in respect of all the existing structure (along with any buildings, constructions or immovable assets, if any, thereon) comprising the premises of Project Facility which is described, delineated and shown in Schedule-A hereto (the "Licensed Premises"), on an "as is where is" basis, to operate and maintain the said Licensed Premises (the "License"), 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 Agreement Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.



10.1.3. It is expressly agreed that the rights granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by Authority to terminate the rights, upon the Termination of this Agreement for any reason whatsoever.

10.1.4. It is expressly agreed that mining rights do not form part of the rights granted to the Operator under this Agreement and the Operator hereby acknowledges that it shall not have any mining rights or any interest in the underlying minerals on or under the area where cable have been laid. For the avoidance of doubt, mining rights mean the right to mine any and all minerals or interest therein.

## **10.2. Others**

### **10.2.1. Shared Access**

The Operator shall enjoy access to the Project Facility throughout the Agreement Period for carrying out its obligations under this Agreement. However, such access shall not be exclusive and shall be shared with the Authority, which is in lawful possession of the Licensed Premises. The Operator shall be the sole authority for regulating access to the Project Facility. However, access to the Project Facility shall be available, at all times during the Agreement Period, to Authority or a person appointed by the Authority for the purpose of inspection, viewing and exercising the rights of the Authority as set forth in this Agreement.

### **10.2.2. Special/temporary right of way**

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

### **10.2.3. Display of Authority logo**

Notwithstanding any statement to the contrary contained herein, Authority reserves the right to prominently display Authority logo in the Project Facility area as deemed appropriate by the Authority. The cost of installation, operation and maintenance of such logo/sign shall be borne by the Operator for the entire Agreement Period.

10.2.4. Parking Users of Project Facility and the Operator shall be allowed to use the parking space available in the facility. The parking shall be on a chargeable basis and will be collected and enjoyed by Authority or any other contractor appointed for the task by Authority. Under no circumstances shall the Operator be allowed to charge and collect parking fees from the users of Project Facility

## **11. Project Implementation**

### **11.1. Obligations prior to the commencement of any work**

11.1.1. Prior to commencement of any work, the Operator shall:

- (a) submit the furnishing Plan including details of works to be undertaken by Operator within Completion Period (the “Furnishing Plan”) to the Authority for approval within 30 (thirty) days of Effective Date. Any delay in submission of Furnishing Plan, beyond the above mentioned period, shall entail a penalty of 0.1% of Performance Security per day. The Upgradation Plan shall include the details of activities proposed. If Authority objects to the any activities proposed in the Project Facility, Operator shall be liable to change the activities proposed and suggest different activity, which shall again be subject to approval of Authority.
- (b) Appoint its representative duly authorised 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 any work under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and
- (d) Procure all such approvals/consents/permits as necessary as per applicable laws, including structural design approval from Authority

**11.2. Project Completion date**

- 11.2.1. On or after the Effective Date, the Operator shall undertake Furnishing and Fixture works in the Project. The end of forty-five days from the Effective Date shall be the end of Completion Period (the “Scheduled Commercial Operations Date”) for completion of furnishings and the Operator agrees and undertakes that the furnishing, fixtures etc. of the Project Facility shall be completed on or before the Scheduled Commercial Operations Date.

**11.3. Completion Certificate**

- 11.3.1. The Operator after completion of the requisite furnishings of the Project shall inform in writing to the Authority that it has completed as per Furnishing Plan. The Authority shall issue the Completion Certificate after satisfying itself that the work is complete; that the furnishings work conforms to accepted safety norms and is as per the requirements set forth in this Agreement. The date on which the Authority shall issue the Completion Certificate shall be deemed as the Commercial Operations Date (the “Commercial Operations Date”). The Operator can start commercial operations of the Project any time after the Commercial Operations Date.

**11.4. Project Operation**

- 11.4.1. Operator shall operate and maintain the Project Facility during the Agreement Period and adhere to Operation and Maintenance Requirements as mentioned in Schedule G. If Authority / PMB finds Operator failing to meet any Operation and Maintenance Requirements as stated in Schedule G, then Authority / PMB shall give a notice to Operator stating the fault (the “Fault”) and grant 5 (five) days to rectify the same. If Authority / PMB finds the Fault has not been rectified within the time period specified, then Authority shall have the right to rectify the Fault and recover the expenses for the same from Operator. In

such case, Authority shall have the right to encash Performance Security to the extent of expenses incurred in rectification of the fault.

- 11.4.2. Operator shall be required to apply for and obtain clearances as applicable for holding any event in the Project Facility, including but not limited to permissions from local bodies, police, traffic, fire etc.
- 11.4.3. Repair and maintenance of any kind in the Project Facility shall be the responsibility of Operator. However, Operator shall be required to take prior approval of Authority before undertaking any major maintenance in the Project Facility, including but not limited to painting and whitewashing.
- 11.4.4. Operator shall maintain the items mentioned under Schedule H in operational state. Any repair, maintenance and replacement of items will be the responsibility of Operator. Operator shall have to take prior approval of Authority before making any replacements of items stated in Schedule H to this Agreement.
- 11.4.5. Operator shall keep the premises clean and shall ensure proper disposal of any garbage generated in the Project Facility.
- 11.4.6. Operator shall ensure that operation of Project Facility does not disturb operations of other activities
- 11.4.7. Operator shall not damage the existing structures of Project Facility. Operator shall have to take written approval from Authority before carrying out temporary or permanent construction activity in the Project Facility. It shall be the responsibility of Operator that the greenery is not destroyed due to any activities carried out in Project Facility.
- 11.4.8. The Operator recognises and acknowledges the fact that the Project is intended to provide a public facility and the Operator shall have no right to prevent, impede or obstruct any bona fide Users from using the Project Facility, save for regulating such usage under the terms of this Agreement. Under exceptional circumstances, if the Operator apprehends any detriment to the Facility, it shall seek instructions from the Authority, whose decision in this regard shall be final.
- 11.4.9. The opening and closing hours of the Project Facility shall have to comply with the ongoing norms set out by the Authority.
- 11.4.10. Usage of sound system will be allowed after prior consent of Authority. Usage of sound system would not be permitted after 10.00 pm any day and the applicable rules of with regards to the permissible sound level shall be applicable.
- 11.4.11. The activities as mentioned in Schedule D shall be strictly prohibited in the Project Facility.
- 11.4.12. Operator shall be required to obtain prior approval from the Authority for holding any events in the Project premises

## **11.5. Project Monitoring Board (PMB)**

- 11.5.1. Constitution

11.5.1.1. Authority shall ensure that a Project Monitoring Board, comprising General Manager, Financial Controller and Chief Manager from Authority (*to be changed as applicable*) and two persons nominated by the Operator is established one month prior to Scheduled Commercial Operation Date or Commercial Operation Date, whichever is earlier. The Operator shall be obligated to depute its authorized representative to such board by the stipulated date.

11.5.1.2. [ \_\_\_\_\_ ] of Authority shall be chairman of the PMB.

11.5.1.3. The PMB shall, to the extent possible, act by consensus, failing which it will act by majority vote. The PMB shall determine the procedure to be followed for its meetings and carrying out its functions.

11.5.1.4. Tenure

The tenure of PMB shall commence from the date of constitution thereof and shall continue until the end of the Agreement Period/this Agreement by efflux of time or prior termination.

11.5.2. Roles and Responsibilities

11.5.2.1. PMB will ensure smooth implementation of the Project by undertaking the following roles and responsibilities:

- i) Oversee and monitor the progress of the Project in accordance with the provisions of this Agreement and call for explanation in case of deviation, if any;
- ii) Shall prescribe additional standards as and when required and decided upon. In addition to this, the PMB shall ensure that the Operator is adhering to the minimum standards prescribed in the Agreement and the related Schedules;
- iii) Review the curing of defects and defaults in the operation and maintenance of the Project/Project Facility;
- iv) Use best endeavors to assist in resolving, without being liable in any manner, operational issues and disputes between the Operator and the users of the Project Facility;
- v) Review the safety and security of the operations and maintenance activities relating to the Project;
- vi) Take appropriate action in accordance with the provisions of this Agreement, in case of Faults, defects in operation, fraud investigated or grievances received against the Operator;
- vii) Monitor the redressal of complaints and grievances of users of the Project Facility; and
- viii) Appoint competent person / firm as Expert (the "Expert"), from time to time to investigate any defects in the Project Facility and to assist PMB in monitoring the operation and maintenance of the Project by the Operator.

11.5.3. PMB shall meet at least once every quarter in a year or earlier as required.

- 11.5.4. Operator shall extend full co-operation to PMB in performing its functions.
- 11.5.5. Any failure on the part of the PMB in respect of its functioning shall not
- (1) amount to any consent or approval of the activities of the Operator; and
  - (2) release or discharge the Operator of its obligation to carry out the maintenance of the Project Facility.
- 11.5.6. If at any time during performance of the Agreement, the Operator's employees are found to be guilty of misbehavior/misconduct with any member of the public visiting Premises or Authority's authorized representative, or to be incompetent or negligent in performing his/their duties or if in the opinion of the Authority, it is undesirable for such persons to be employed by the Operator in the work at Premises, the Operator, if so directed by Authority or his authorized representative shall forthwith remove such persons(s) from the work of Authority immediately.

## **11.6. Electricity and Water**

11.6.1. Arrangements of power supply at the Facility shall be given to the Operator. Operator shall install a sub-meter for monitoring electricity consumption in Project Facility.

11.6.2. Operator shall be required to pay to Authority cost for the units consumed in Project Facility, as measured by the sub-meter. The cost per unit of electricity shall be the applicable and prevalent rate per unit at which Authority makes payment for the electricity. Operator shall be required to pay for electricity at the end of every two months. Operator shall ensure timely payment of electricity, water and other bills.

[Operator shall be required to pay directly to the electricity department the cost for the units of electricity consumed at the applicable and prevalent rate per unit ]

In the event of default committed by the Operator in making payment of any such taxes the Authority will be entitled to impose a penal interest on the delayed payment as per Clause 21.3, besides right to terminate / revoke the Agreement.

11.6.3. Operator shall be provided three phase electricity connection with \_\_\_\_\_ Ampere current. The said meter shall always remain in the name of Authority. The operator shall be liable to pay the electricity consumption charges regularly for additional 3-phase electricity connection. Operator shall also be allowed to use silent generators to meet any additional requirement of electricity in the Project beyond what is provided by Authority.

11.6.4. Operator is required to make own arrangements of water for Project.

11.6.5. Operator shall have the option to procure water from Authority, to the extent supplied by Authority. Operator shall install a sub-meter for monitoring water consumption in Project Facility. For Any water supplied by Authority, Operator shall be required to pay to Authority cost for the units consumed in Project Facility, as measured by the sub-meter, at the applicable and prevalent rate for water fixed by the relevant authority. Operator shall be required to pay for water at the end of every billing cycle. In the event of default committed by the Operator in making payment of any such taxes the Authority will be entitled to

impose a penal interest on the delayed payment as per Clause 19.3, besides right to terminate / revoke the Agreement.

#### **11.7. Quarterly Statement of Gross Revenue**

11.7.1. During the Operation Period, Operator shall furnish to Authority, within 7 (seven) days of completion of each quarter, a statement of Gross Revenue received substantially in the form set forth in Schedule F (the "Quarterly Statement of Gross Revenue").

#### **11.8. Average Operational Time**

11.8.1. Operator shall achieve Average Operational Time of services of at least 75% of the total days on which Premises is operational. The Average Operational Time for services shall be calculated as follows:

*Average Operational Time for services =  $\frac{\sum(\text{Number of operational days in the year for service})}{(\text{Number of days for which Premises was operational in the year})}$*

11.8.2. Operator shall calculate the Average Operational Time at the beginning of new Operational Year for the preceding Operational Year and submit it to PMB within seven days of commencement of the new Operational Year.

11.8.3. If PMB finds the Average Operational Time to be less than 75%, then Operator shall be required to pay a penalty (the "Penalty") which shall be equivalent to 10% of the Annual Licence Fee for the year for which such Penalty is imposed, to Authority within thirty days of commencement of the new Operational Year. In case Operator fails to pay the amount of penalty within specified time, Authority shall deduct the complete amount of penalty from Performance Security of Operator.

11.8.4. Average Operational Time shall be calculated only during Operations Period and shall not be applicable during the Completion Period.

### **12. Accounts and Audit**

#### **12.1. Accounts**

12.1.1. The Operator shall maintain books of accounts recording all its receipts (including all User Fee and other revenues derived/collected by it from or on account of the Project Facilities 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 Operator shall provide 2 (two) copies of its Balance Sheet, Cash Flow Statement and Profit and Loss Account, along with a report thereon by its Statutory Auditors, within 150 (One Hundred Fifty) days of the close of the Accounting Year to which they pertain and such audited accounts shall form the basis of payments by either Party under this Agreement. Authority shall have the right to inspect the records of the Operator during office hours and require copies of relevant extracts of books of accounts, duly certified by the Statutory Auditors, to be provided to 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.

12.1.2. The Operator shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to 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.

12.1.3. On or before the thirty-first day of August each Year, the Operator shall provide to Authority, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarised information on

(a) Gross Revenue with item wise break-up

(b) such other information as Authority may reasonably require.

## **12.2. Appointment of auditors**

12.2.1. The Operator shall appoint and have during the subsistence of this Agreement as its Statutory Auditors. All fees and expenses of the Statutory Auditors shall be borne by the Operator. The Operator may terminate the appointment of its Statutory Auditors after a notice of 45 (forty five) days to Authority.

12.2.2. Notwithstanding anything to the contrary contained in this Agreement, Authority shall have the right, but not the obligation, to appoint at its cost from time to time and at anytime, another firm (the "Additional Auditors") to audit and verify all those matters, expenses, costs, realisations, and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.

## **12.3. Certification of claims by Statutory Auditors**

Any claim or document provided by the Operator to 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 Quarterly Gross Revenue Statements under Clause 11.7.

## **12.4. Dispute resolution**

In the event of there being any difference between the findings of the Additional Auditors or the Statutory 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 Authority by recourse to the Dispute Resolution Procedure.

## **12.5. Books and Records**

The Operator shall, at its cost:

- i Maintain and submit on a monthly basis, the record of days of operation for Fine Dining and Banqueting, during that month;
- ii Prepare and maintain, on generally accepted Indian accounting principles, proper, accurate and complete books and records and accounts of all transactions related to the Project;
- iii Retain and store on the premises for the Agreement Period all records relating to the Project, which shall be the property of the Authority;
- iv Provide support to the Authority to meet all the data requirements of all Competent Authority/ies.

### **13. Escrow Account**

#### **13.1. Escrow Account**

- 13.1.1. The Operator shall, prior to the Effective Date, open and establish an Escrow Account with a Bank (the "Escrow Bank") in accordance with this Agreement read with the Escrow Agreement.
- 13.1.2. The nature and scope of the Escrow Account are fully described in the agreement (the "Escrow Agreement") to be entered into amongst the Operator, Authority, the Escrow Bank and the Lenders through the Lenders' Representative, which shall be substantially in the form set forth in Schedule E.

#### **13.2. Deposits into Escrow Account**

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

- (a) all monies received in relation to the Project from any source, including the Lenders and the Authority;
- (b) all funds received by the Operator from its share-holders, in any manner or form;
- (c) all User Fee levied and collected by the Operator;
- (d) all Gross Revenue generated from the Project Facility by Operator;
- (e) all Gross Revenue generated by licensees of services from the Project Facility;
- (f) any other revenues from or in respect of the Project; and
- (g) all proceeds received pursuant to any insurance claims.

Provided that the Lenders may make direct disbursements to the Operator in accordance with the express provisions contained in this behalf in the Financing Agreements

#### **13.3. Withdrawals during Agreement Period**

- 13.3.1. The Operator 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 Operator;
- (b) all payments relating to construction of the Project, 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 Authority in accordance with the provisions of this Agreement, and certified by Authority as due and payable to it;
- (e) Annual Licence Fee due and payable to Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) all payments and Damages certified by Authority as due and payable to it by the Operator;
- (h) any reserve requirements set forth in the Financing Agreements; and
- (i) balance, if any, in accordance with the instructions of the Operator.

13.3.2. The Operator shall not in any manner modify the order of payment specified in Clause 13.3.1, except with the prior written approval of Authority.

#### **13.4. Withdrawals upon Termination**

13.4.1. 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 Operator;
- (b) outstanding Annual Licence Fee;
- (c) all payments and Damages certified by Authority as due and payable to it by the Operator,
- (d) outstanding Debt Service;
- (e) incurred or accrued O&M Expenses;
- (f) any other payments required to be made under this Agreement; and
- (g) balance, if any, in accordance with the instructions of the Operator:

Provided that no appropriations shall be made under Sub-clause (g) of this Clause 13.4 until a Vesting Certificate has been issued by Authority under the provisions of Article 16.

13.4.2. The provisions of this Article 13 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 13.4.1 have been discharged.

## **14. Force Majeure**

### **14.1. Force Majeure**

As used in this Agreement, the expression “Force Majeure” or “Force Majeure Event” shall mean occurrence in India of any or all of events, as defined in Clause 14.2, if it affects 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;
- (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice; and
- (iii) has Material Adverse Effect on the Affected Party.

### **14.2. Force Majeure Events**

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

(a) act of God, epidemic, 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 Project Facility);

(b) strikes or boycotts (other than those involving the Operator, contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting services to the Project Facility for a continuous period of 24 (twenty-four) hours and an aggregate period exceeding 7 (seven) days in an Accounting Year;

(c) any failure or delay of a operator but only to the extent caused by another Force Majeure Event and which does not result in any offsetting compensation being payable to the Operator by or on behalf of such contractor;

(d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Operator in any proceedings for reasons other than

- (i) failure of the Operator to comply with any Applicable Law or Applicable Permit, or
- (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or
- (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Authority;

(e) the discovery of geological conditions, toxic contamination or archaeological remains on the Site that could not reasonably have been expected to be discovered through a site inspection; or

(f) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;

(g) 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;

(h) compulsory acquisition in national interest or expropriation of any Project Facility or rights of the Operator or of the contractors;

(i) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Operator or any of the contractors to perform their respective obligations under this Agreement and the Third Party Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Operator's or any contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;

(j) any event or circumstances of a nature analogous to any of the foregoing;

#### **14.3. Duty to Report Force Majeure Event**

Upon occurrence of a Force Majeure Event, the Affected Party shall by notice within thirty six hours of the occurrence of the event 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 with evidence in support thereof;

(b) the estimated duration and the effect or probable effect 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 Event; and

(d) any other information relevant to the Affected Party's claim. The Affected Party shall not be entitled to any relief under the Agreement for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event within 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 effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

#### **14.4. Allocation of Costs Arising out of Force Majeure**

Upon occurrence of any Force Majeure Event, the Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs thereof. 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.

#### **14.5. 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 13, 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.

#### **14.6. Termination Payment for Force Majeure Event**

In case of Termination for Force Majeure Event, the provisions of Clause 15.3 and 15.4 shall be applicable. However, the Performance Security shall be returned to Operator.

#### **14.7. 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 mentioned in Article 18; 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.

### **15. Termination**

#### **15.1. Termination for Operator Default**

Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Operator 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 15 (fifteen) days, the Operator shall be deemed to be in default of this Agreement (a "Operator Default"), unless the default has occurred solely as a result of any breach of this Agreement by Authority or due to Force Majeure event. The defaults referred to herein shall include:

- (a) the Performance Security has been partially or fully invoked and appropriated by the Authority as per the Agreement and the Operator fails to replenish or provide fresh Performance Security within a Cure Period of 15 (fifteen) days;
- (b) the Operator does not make payment to the Authority and remains in default for a period of more than 15 (fifteen) days from the due date of payment;
- (c) the Operator does not complete the furnishing and fixture etc. before the Schedule Commercial Operations Date and continues to be in default for 30 (thirty) days;
- (d) the Operator commits any particular/ similar default for four times, in the Project Facility, at any time during the currency of the Agreement Period;
- (e) the Operator abandons or manifests intention to abandon the Project without prior written consent of the Authority;
- (f) the Operator has failed to make any payment towards damages to any user or any utility within the period specified in this Agreement;
- (g) the Operator repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;

- (h) Change in management control of the Operator which according to the Authority may have Material Adverse Effect towards the completion of the Project;
- (i) an Escrow Default has occurred and the Concessionaire fails to cure the default within the Cure Period stated in Escrow Agreement;
- (j) the Operator is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Operator or for the whole or material part of its assets at any time before the Scheduled Commercial Operations Date;
- (k) the Operator has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;
- (l) a resolution for winding up of the Operator is passed, or any petition for winding up of the Operator is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Operator is ordered to be wound up by Court;
- (m) the Operator has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement;
- (n) the Operator commits a material default in complying with any other provision of this Agreement.;
- (o) the Operator novates and /or assigns the agreement to any third party without any prior approval from the Authority;
- (p) the Agreement Period of - 10+5 years has ended.

#### **15.2. Procedure to issue Termination Notice**

Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Operator Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Operator; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Operator of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Operator 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.

#### **15.3. Effect of Termination**

Upon Termination as per Clause 15.1, the Operator hereby acknowledges that no Termination Payment shall be due or payable by the Authority. Operator acknowledges that within 10 (ten) days of termination, the Operator shall vacate the Project Facility. Operator acknowledges that once the agreement is terminated the Operator shall cease to have access to the Project Facility. No liability with respect to the assets shall devolve on Authority.

#### **15.4. Other Rights and Obligations of the Authority**

Upon Termination for any reason whatsoever, the Authority shall:

(a) be deemed to have cancelled the Operator's access to the Project Facility and taken sole possession and control of the Project Facility and any furnishings, works made in the Project Facility till the date of termination;

(b) take possession and control of all materials, stores and, implements on or about the Project;

(c) be entitled to restrain the Operator and any person claiming through or under the Operator from entering upon the Project Facility or any part of the Project; and

(d) Invoke the Performance Security as part Damages, except when the Termination is due to Force Majeure Event.

(e) In case termination is done by Authority not because of the default of the Operator, then in such condition the Authority will pay for all the financial losses incurred by the Operator and the quantum of the financial losses will be decided by the Arbitrator as per Clause 18.3.

(f) Authority shall have at all times right to reject any third party which has been proposed in relation to the novation of this agreement

## **16. Divestment of Rights and Interest**

### **16.1. Divestment Requirements**

Upon Termination, the Operator 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 all the Project Assets and the Project Facilities, free and clear of all Encumbrances, except as provided under Clause 4.5.1 of this Agreement;

(c) execute such deeds of conveyance, documents and other writings as the Authority may reasonably require for conveying, divesting and assigning all the rights and interest of the Operator in the Project Facilities absolutely unto the Authority or its nominee; and

(d) comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights and interest of the Operator in the Project Facilities, free from all Encumbrances, absolutely unto the Authority or to its nominee.

### **16.2. Vesting Certificate**

The divestment of all rights and interest in the Project Facilities 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 (the "Vesting Certificate"), which will have the effect of constituting evidence of divestment by the Operator of all of its rights and interest in the Project Facilities, 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 construed or interpreted as restricting the exercise of any rights by the Authority or its nominee on, or in respect of, the Project Facilities on the footing that all Divestment Requirements have been complied with by the Operator.

### **16.3. Divestment costs etc.**

16.3.1. The Operator shall bear and pay all costs incidental to divestment of all of the rights and interest of the Operator in the Project Facilities in favour of the Authority upon Termination, save and except that all stamp duties payable on any deeds or Documents executed by the Operator in connection with such divestment shall be borne by the Authority.

16.3.2. In the event of any dispute relating to matters covered by and under this Article 16, the Dispute Resolution Procedure shall apply.

16.3.3. In the event that any of the Divestment Requirements set forth in Clause 16.1 are not fulfilled by the Operator within 15 (fifteen) days from the end of the Agreement Period, the Operator shall be required to pay to the Authority, a penalty equivalent to the multiple of the "Penal Interest Rate" applicable on the date of Termination for each day of delay in the fulfilment of the Divestment Requirements beyond the 15 (fifteen) days specified herein.

For the purpose of this Agreement, Penal Interest Rate shall mean the rate of interest that is two times the rate of interest on the 10-year Government of India Security as on the date of Termination.

## **17. Liability and Indemnity**

### **17.1. General indemnity**

The Operator will indemnify, defend, save and hold harmless the Authority and its officers, employees, agents and consultants against any and all suits, proceedings, actions, demands and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Operator of any of its obligations under this Agreement or any related Agreement, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach of this Agreement on the part of the Authority indemnified persons.

### **17.2. Liability of Authority**

The Authority will indemnify, defend, save and hold harmless the Operator against any and all suits, proceedings, actions, demands and third-party claims for any loss, damage, cost and expense of whatever kind and nature arising out of:

- (a) defect in title and/or the rights of the Authority in the Project Facility given on Concession to the Operator; and/or
- (b) 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 Operator of its obligations under this Agreement, save and except that where any such claim, suit, proceeding, 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 Operator, its subsidiaries, affiliates, contractors, employees or agents and the same shall be the liability of the Operator.

Provided that the liability of Authority in any case or in any manner whatsoever, with respect to this Clause 17.2, shall be limited to the sum of Annual Licence Fee received by Authority in six months before identification or occurrence of such event.

### **17.3. Indemnity by the Operator**

Without limiting the generality of Clause 17.1, the Operator shall fully indemnify, hold harmless and defend the Authority from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Operator to comply with Applicable Laws and Applicable Permits;
- (b) payment of taxes required to be made by the Operator in respect of the income or other taxes of the Operator's contractors, suppliers and representatives; or
- (c) non-payment of amounts due as a result of materials or services furnished to the Operator or any of its contractors which are payable by the Operator or any of its contractors.
- (d) Breach by the Operator of any of the obligations under this Agreement.

### **17.4. No consequential claims**

Notwithstanding anything to the contrary contained in this Clause 16, 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.

### **17.5. Survival on Termination**

The provisions of this Article 17 shall survive Termination.

## **18. Dispute Resolution**

### **18.1. Dispute resolution**

18.1.1. Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 18.2.

18.1.2. The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

### **18.2. Conciliation**

18.2.1. In the event of any Dispute between the Parties, either Party may call upon the MD & CEO of the Authority to mediate and assist the Parties in arriving at an amicable settlement thereof. If the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 18.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 18.3.



### **18.3. Arbitration**

- 18.3.1. Any Dispute which is not resolved amicably by conciliation, as provided in Clause 18.2, shall be decided by reference to Arbitral Tribunal appointed in accordance with Clause 18.3.2. Arbitration shall be held in accordance with the provisions of Arbitration and Conciliation Act, 1996. The venue of arbitration shall be Delhi, and the language of arbitration proceedings shall be English.
- 18.3.2. The Arbitral Tribunal shall consist of three arbitrators. Each Party shall appoint one arbitrator, and the third arbitrator shall be appointed by the two arbitrators so appointed and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Arbitration and Conciliation Act, 1996.
- 18.3.3. The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 18 shall be final and binding on the Parties as from the date it is made, and the Operator and the Authority agree and undertake to carry out such Award without delay.
- 18.3.4. The Operator and the Authority agree that an Award may be enforced against the Operator and/or the Authority, as the case may be, and their respective assets wherever situated.
- 18.3.5. This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

### **19. Assignment and Charges**

#### **19.1. Restrictions on assignment and charges**

- 19.1.1. The Operator shall not assign in favour of any person this Agreement or the rights, benefits and obligations hereunder, save and except with prior consent of Authority.
- 19.1.2. The Operator shall not assign in favour of any person any right or benefit that has not been provided to the Operator by the Authority.
- 19.1.3. The Operator shall not create nor permit to subsist any Encumbrance in the Project Facility. It is further clarified that any assignment or license on the Project Facility and Project Facilities, given to the Operator, shall expire upon termination of this Agreement.
- 19.1.4. Restraint set forth in Sub-articles 19.1.1 and 19.1.3 above, shall not apply to:
- (a) Liens / encumbrances arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Operator;
  - (b) Pledges / hypothecation of goods/ moveable assets, revenue and receivables as security for indebtedness, in favour of the Lenders and working capital providers for the Project; or
  - (c) Assignment of Operator's rights and benefits under this Agreement and other Project related agreements to or in favour of the Lenders, which shall include step in rights, as security for financial assistance provided by them.

Notwithstanding anything contained in Article 19 the rights of the Operator shall not be contrary or in derogation to the provisions relating to Divestment Requirements contained in Clause 16.1.

## **20. Disclaimer**

### **20.1. Disclaimer**

- 20.1.1. The Operator acknowledges that prior to the execution of this Agreement, the Operator has, after a complete and careful examination, made an independent evaluation of the Tender Notice, Scope of the services to be provided, the Project Facility, Specifications and Standards set for providing quality of services, local conditions, possible demand and all information provided by the Authority, 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. Save as provided in Clause 8.2, the Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy and/or completeness of the information provided by it and the Operator confirms that it shall have no claim whatsoever against the Authority in this regard.
- 20.1.2. The Operator acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 20.1.1 above and hereby acknowledges and agrees that the Authority shall not be liable for the same in any manner whatsoever to the Operator or any person claiming through or under this Agreement.

## **21. 21. Miscellaneous**

### **21.1. 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 Delhi shall have jurisdiction over matters arising out of or relating to this Agreement.

### **21.2. Waiver of Immunity**

Each Party 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 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 it in any jurisdiction; and

### **21.3. 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 15 (fifteen) days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay penalty for the period of delay calculated at

a rate equal to SBI Base Rate + 2% (two percent) per annum, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

#### **21.4. Waiver**

21.4.1. 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 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.

21.4.2. 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.

#### **21.5. Liability for Inspection of Documents**

Except to the extent expressly provided in this Agreement:

- (a) no review, comment or inspection by the Authority of any document submitted by the Operator nor any observation or inspection of any document or operations conducted at the Project Facility hereunder shall relieve or absolve the Operator 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 Operator by reason of any review, comment, approval, observation or inspection referred to in Sub clause (a) above.
- (c) the Authority shall not be liable to the Operator by reason of any review, comment, approval, observation or inspection referred to in Sub clause (a) above.

#### **21.6. 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.

#### **21.7. Survival**

21.7.1. Termination shall:

- (a) not relieve the Operator 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.

21.7.2. All obligations surviving Termination shall only survive for a period of 5 (five) years following the date of such Termination.

#### **21.8. 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.

#### **21.9. 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 the Dispute Resolution Procedure set forth under this Agreement or otherwise.

#### **21.10. No Lease**

This Agreement shall not be interpreted or construed to confer lease-hold rights on the Operator by the Authority. It is therefore expressly clarified that this Agreement constitutes a legal licence given by the Authority to the Operator for the sole purpose of the fulfilment of the Operator's obligations as set forth in this Agreement.

#### **21.11. 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.

#### **21.12. Third Parties**

This Agreement is intended solely for the benefit of the Parties, 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, unless expressly provided in this Agreement.

#### **21.13. Successors and Assigns**

This Agreement shall be binding upon, and inure to the benefit of the Parties and their lawful successors, as per the provisions of this Agreement.

**21.14. Notices**

Unless otherwise stated, all notices, approvals, instructions and other communications for the purposes of this Agreement shall be given in writing and may be given by facsimile, by personal delivery or by sending the same by prepaid registered mail addressed to the Party concerned at its address stated in the title of this Agreement or the fax numbers set out below and/or any other address subsequently notified to the other Parties for the purposes of this clause 21.14 and shall be deemed to be effective (in the case of registered mail) 10 calendar days after posting, (in the case of facsimile) two Business Days after receipt of a transmission report confirming dispatch or (in the case of personal delivery) at the time of delivery.

**If to Authority:**

Address : Micro, Small & Medium Enterprises Department, Kharavel Bhawan, Gopabandhu Marg, Keshari Nagar, Bhubaneshwar - 751001

Tel: No. +91 674 2391384/2393055/2393055

Fax No. (0674) 2394051/2550

Attention : The Principal Secretary, Micro, Small & Medium Enterprises Department

**If to the Operator:**

Address :

Telephone :

Fax :

Attention :

**21.15. 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 the English language.

**21.16. Counterparts**

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

**21.17. Validity**

This Agreement shall be valid for the entire Agreement Period .

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED

THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE

SIGNED ON BEHALF OF AUTHORITY

SIGNED, SEALED AND DELIVERED

FOR AND ON BEHALF OF OPERATOR

(Signature) \_\_\_\_\_

by the hand of its authorized

(Name)

representative

(Designation)

(Signature)

(Name)

(Designation)

pursuant to Resolution dated \_\_\_\_\_ of its  
board of directors.

In the presence of

Witness:

(i) Name

Sign:

Date:

Place:

(ii) Name

Sign:

Date:

Place:

## **SCHEDULES OF THE AGREEMENT**

**SCHEDULE A -DETAILS OF THE PROJECT**

Project details has been specified in Appendix-A of the RFP



**SCHEDULE B - FORMAT FOR BANK GUARANTEE**  
**(Performance Security)**

**The General Manager,**

**Authority**

WHEREAS:

- (A). \*\*\*\* (the "Operator") and the General Manager, [Authority name to be inserted....], (the "Authority") have entered into a Agreement dated \_\_\_\_ (the "Agreement") whereby the Authority has agreed to the Operator undertaking Furnishing, Fixtures, Operation, Maintenance and Management of [Project to be inserted.....], [Location..] through Public Private Partnership on , Equip, Operation, Maintenance, Marketing, Management and Transfer (EOMT) basis (hereinafter referred to as the "Project"), subject to and in accordance with the provisions of the Agreement.
- (B). The Agreement requires the Operator to furnish a Performance Security to the Authority in a sum of [Rs \_\_\_\_\_ (Rupees \_\_\_\_\_)] (the "Guarantee Amount") as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the Agreement Period (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 the due and faithful performance of the Operator's obligations during the Operation Period, under and in accordance with the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Operator, 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 an Officer not below the rank of Chief Manager in the [Name of the Authority to be inserted....], that the Operator 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 Operator is in default in due and faithful performance of its obligations during the Operation Period under the Agreement and its decision that the Operator is in default shall be final, and binding on the Bank, notwithstanding any

differences between the Authority and the Operator, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Operator 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 Operator 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 Operator 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, fulfillment and/ or performance of all or any of the obligations of the Operator 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 Operator, 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 Operator 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 fulfillment, compliance and/or performance of all or any of the obligations of the Operator 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, not later than 6 (six) months from the date of expiry of this Guarantee, 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 shall cease to be in force and effect from the date of the Agreement till the end of the concession period or an earlier date if the Agreement is terminated as per any provision of the Agreement, and provided the Operator is not in breach of this Agreement. It will be revised every (\*\*\*\*\*) years as per the increase in annual licence fee Upon request made by the Operator for release of the Performance Security along with the particulars required hereunder, duly certified by a statutory auditor of the Operator, 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 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 authorised 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 for a period of one year or until it is released earlier by the Authority pursuant to the provisions of the Agreement.

Signed and sealed this \*\* day of \*\*\*, 20\*\* at \*\*\*.

SIGNED, SEALED AND DELIVERED

For and on behalf of the BANK by:

(Signature)

(Name)

(Designation)

(Address)

## **SCHEDULE C - SPECIFICATION AND STANDARDS**

### **Reno of Project Facility**

The use of standards and specifications for use of material, construction technology and operations shall adhere to the national and international set of specifications and the best practices in the industry. The work will follow the latest standards, codes and recommendations of the Indian Bureau of Standards and/or other applicable standards, specifications, norms, codes etc. If any relevant/applicable code / standard / specification indicated is superseded by another code/ standard / specification, the later will be applicable.

#### **1. Fire Fighting Facilities:**

Operator shall provide the required fire fighting equipment and facilities including fire exits, fire proof doors, etc conforming to relevant standards and the applicable rules and regulations

#### **2. Facilities for Physically Challenged persons:**

Operator shall provide all the necessary facilities to the entry/exit, seating and movement of physically challenged persons including wheel chairs.

#### **3. Equipment**

The equipment and component parts shall conform to the relevant standards by Bureau of Indian Standards wherever available.

### **SCHEDULE D - LIST OF PROHIBITED ACTIVITIES**

The following activities shall be strictly prohibited in the Project Facility:

1. Smoking and sale / purchase of tobacco products
2. Any activity that is unlawful / illegal or deemed unlawful under any Indian Act or legislation

## **SCHEDULE E - ESCROW AGREEMENT**

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

AMONGST

1 [\*\*\*\* Limited], a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at \*\*\*\* (hereinafter referred to as the "Operator" which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);

2 \*\*\*\*[name and particulars of Lenders' Representative] and having its registered office at \*\*\* acting for and on behalf of the Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Escrow 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 \*\*\*\*[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 substitutes); and

4 \*\*\*\*{name of the Authority}, represented by [Designation..], and having its principal offices at [address....], hereinafter referred to as the "Authority" 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 Agreement dated \*\*\* with the Operator (the "Agreement") for Furnishing, Operation, Maintenance and Management of [name of the project...] through Public Private Partnership on Equip, Furnishing, Operation, Maintenance, Marketing, Management and Transfer (EOMT) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.
- (B). Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (C). The Agreement requires the Operator to establish an Escrow Account, inter alia, on the terms and conditions stated therein.

NOW IT IS HEREBY AGREED as follows:

### **1 DEFINITIONS AND INTERPRETATION**

#### **1.1 Definitions**

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

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

"Agreement" means the Agreement referred to in Recital (A) above and annexed hereto as Annex-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 Escrow Agreement for curing any breach or default of any provision of this Escrow Agreement by the Operator, 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 Operator 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 Escrow 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 Escrow Agreement collectively and "Party" shall mean any of the Parties to this Escrow 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 Sub Accounts 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 Lenders.

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

## **2 ESCROW ACCOUNT**

### 2.1 Escrow Bank to act as trustee

2.1.1 The Operator hereby appoints the Escrow Bank to act as trustee for the Authority, the Lenders' Representative and the Operator 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 Operator 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 Operator, and applied in accordance with the terms of this Escrow Agreement. No person other than the Authority, the Lenders' Representative and the Operator 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 Escrow 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 Operator, Lenders or the Authority with the Escrow Bank. In performing its functions and duties under this Escrow Agreement, the Escrow Bank shall act in trust for the benefit of, and as agent for, the Authority, the Lenders' Representative and the Operator or their nominees, successors or assigns, in accordance with the provisions of this Escrow Agreement.

## 2.3 Establishment and operation of Escrow Account

2.3.1 Within 30 (thirty) days from the date of this Escrow Agreement, and in any case prior to the Effective Date, the Operator 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 Operator 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 Escrow Agreement and such mandates, terms and conditions, or procedures, this Escrow 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 Operator. 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

The rights of the Authority, the Lenders' Representative and the Operator in the monies held in the Escrow Account are set forth in their entirety in this Escrow Agreement and the Authority, the Lenders' Representative and the Operator shall have no other rights against or to the monies in the Escrow Account.

## 2.6 Substitution of the Operator



The Parties hereto acknowledge and agree that upon substitution of the Operator, it shall be deemed for the purposes of this Escrow 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 Operator under this Escrow Agreement on and with effect from the date of substitution of the Operator with the nominated company.

### **3 DEPOSITS INTO ESCROW ACCOUNT**

#### **3.1 Deposits by the Operator**

3.1.1 The Operator 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 Lenders Authority;
- (b) all funds received by the Operator from its share-holders, in any manner or form;
- (c) all User Fee levied and collected by the Operator;
- (d) any other revenues from or in respect of the Project; and
- (e) all proceeds received pursuant to any insurance claims.

3.1.2 The Operator may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Escrow 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) Grant and any other monies disbursed by the Authority to the Operator;
- (b) all User Fee collected by the Authority in exercise of its rights under the Agreement; and
- (c) Termination Payments:

Provided that the Authority shall be entitled to appropriate from the aforesaid amounts, any Annual Licence Fee due and payable to it by the Operator, and the balance remaining shall be deposited into the Escrow Account.

#### **3.3 Deposits by Lenders**

The Lenders' Representative agrees, confirms and undertakes that the 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 Escrow Agreement, the 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 Operator in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

#### **4 WITHDRAWALS FROM ESCROW ACCOUNT**

##### **4.1 Withdrawals during Agreement Period**

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Operator 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 Operator;
- (b) all payments relating to construction of the Project Facility, 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 incurred by the Authority, provided it certifies to the Escrow Bank that it had incurred such expenses in accordance with the provisions of the Agreement and that the amounts claimed are due to it from the Operator;
- (e) Annual Licence Fee due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (h) all payments and Damages certified by the Authority as due and payable to it by the Operator pursuant to the Agreement;
- (i) any reserve requirements set forth in the Financing Agreements; and
- (j) balance, if any, in accordance with the instructions of the Operator.

4.1.2 Not later than 60 (sixty) days prior to the commencement of each Accounting Year, the Operator 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 Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Escrow Agreement, be appropriated and dealt with in the following order: ■

- (a) all taxes due and payable by the Operator;
- (b) outstanding Annual Licence Fee;
- (c) all payments and Damages certified by the Authority as due and payable to it by the Operator pursuant to the Agreement, including any claims in connection with or arising out of Termination;
- (d) outstanding Debt Service;

- (e) incurred or accrued O&M Expenses;
- (f) any other payments required to be made under the Agreement; and
- (g) balance, if any, in accordance with the instructions of the Operator.

Provided that the disbursements specified in Sub-clause (j) of this Clause 4.2 shall be undertaken only after the Vesting Certificate has been issued by the Authority.

#### 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 Escrow 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 Facility, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

### **5 OBLIGATIONS OF THE ESCROW BANK**

#### 5.1 Segregation of funds

Monies and other property received by the Escrow Bank under this Escrow Agreement shall, until used or applied in accordance with this Escrow 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 Operator 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 Operator upon a certificate signed by or on behalf of the Operator;
- (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 Operator or any other person hereunder or in connection herewith; and

(d) shall, within 5 (five) business days after receipt, deliver a copy to the Operator 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 Operator (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 Operator commits breach of this Escrow 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 Operator causes the Escrow Bank to transfer funds to any account of the Operator in breach of the terms of this Escrow 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 Operator commits or causes any other breach of the provisions of this Escrow 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 Agreement.

### **7 TERMINATION OF ESCROW AGREEMENT**

#### 7.1 Duration of the Escrow Agreement

This Escrow Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Operator in respect of the debt, guarantee or financial assistance received by it from the 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 Operator 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 Escrow 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 Operator and the Lenders' Representative made on or after the payment by the Operator of all outstanding amounts under the 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 Operator. 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 Operator 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 Escrow Agreement such as the rights and obligations of Lenders, investment of surplus funds, restrictions on withdrawals by the Operator in the event of breach of this Escrow 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 Escrow Agreement and in the event of any conflict or inconsistency between provisions of this Escrow Agreement and such supplementary escrow agreement, the provisions of this Escrow Agreement shall prevail.

## **9 INDEMNITY**

### 9.1 General indemnity

9.1.1 The Operator will indemnify, defend and hold the Authority, Escrow Bank and the 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 Operator of any of its obligations under this Escrow Agreement or on account of failure of the Operator to comply with Applicable Laws and Applicable Permits.

9.1.2 The Authority will indemnify, defend and hold the Operator 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 Escrow Agreement materially and adversely affecting the performance of the Operator's obligations under the Agreement or this Escrow 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 Operator 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 Escrow Agreement materially and adversely affecting the performance of the Operator's obligations under the 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. Dispute resolution

10.1.1 Any dispute, difference or claim arising out of or in connection with this Escrow Agreement, which is not resolved amicably, shall be decided finally by reference to arbitration to a Board of Arbitrators comprising one nominee of each Party to the dispute, and where the number of such nominees is an even number, the nominees shall elect another person to such Board. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternate Dispute Resolution, New Delhi (the "Rules") or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.

10.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be New Delhi and the language of arbitration shall be English.

#### 11. MISCELLANEOUS PROVISIONS

##### 11.1 Governing law and jurisdiction

This Escrow Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at New Delhi shall have jurisdiction over all matters arising out of or relating to this Escrow Agreement.

##### 11.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

(a) agrees that the execution, delivery and performance by it of this Escrow 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 Escrow 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 Agreement and this Escrow Agreement, the provisions contained in the Agreement shall prevail over this Escrow Agreement.

### 11.4 Alteration of terms

All additions, amendments, modifications and variations to this Escrow 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 Escrow 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 Escrow 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 Escrow 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 Escrow 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 Escrow 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 Escrow 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 Escrow 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 Escrow Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Escrow Agreement.

#### 11.8 Severability

If for any reason whatever any provision of this Escrow 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 10.1 of this Escrow Agreement or otherwise.

#### 11.9 Successors and assigns

This Escrow 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. 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 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 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 Authorized representatives

Each of the Parties shall, by notice in writing, designate their respective authorized 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 authorized representative by similar notice.

#### 11.13 Original Document

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



IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS ESCROW AGREEMENT  
AS OF THE DATE FIRST ABOVE WRITTEN.

SIGNED, SEALED AND SIGNED, SEALED AND DELIVERED DELIVERED

For and on behalf of For and on behalf of

OPERATOR by: LENDERS by the

Lenders' Representative:

(Signature) (Signature)

(Name) (Name)

(Designation) (Designation)

(Address) (Address)

(Fax No.) (Fax No.)

SIGNED, SEALED AND SIGNED, SEALED AND DELIVERED DELIVERED

For and on behalf of For and on behalf of

ESCROW BANK by: DTTDC OF [\*\*\*] by:

(Signature) (Signature)

(Name) (Name)

(Designation) Designation)

(Address) (Address)

**SCHEDULE F – QUARTERLY STATEMENT OF GROSS REVENUE**

Project:

Quarter \_\_\_\_\_:From \_\_\_ To\_\_\_\_\_

<b>Monthly Statement</b>			
<b>Revenue Stream</b>	For Corresponding Month___Previous Year of	For Preceding Month_____	For the Month _____Reported Upon
	Fee Collected	Fee Collected	Fee Collected

## **SCHEDULE G - OPERATION & MAINTENANCE REQUIREMENTS**

The Operator shall, adhere to the following standards of operation and maintenance till the end of Agreement Period:

### **Cleanliness**

- i Operator shall ensure that the Project Facility areas are clean
- ii Operator shall arrange for dustbins in Project Facility areas to minimize littering from Users of the Project Facility
- iii There should be regular sweeping of the Project Facility areas multiple times in a day to ensure cleanliness
- iv While cleaning the Project Facility, Operator shall make sure that the dump shall not be thrown in open areas, except any area which is designated by the Authority for such purpose
- v Operator shall follow adequate waste management and disposal methods for waste generated from Project Facility operations
- vi Operator shall follow the following timetable for routine cleaning of the Project Facility:
  - a) Daily Tasks: [ to be inserted....]
  - b) Weekly Tasks: [ to be inserted....],
  - c) Monthly Tasks: [ to be inserted....]
  - d) Annual Tasks: [ to be inserted....]

### **Operational Requirements**

Information signages and display boards shall be visible, legible and functional. These shall be cleaned once in a week. Damaged signages and boards shall be replaced, repaired within seven days of detection.

Operator shall not damage, destruct or demolish any structure, area or asset, which is owned by Authority, inside or outside Project Facility areas without prior instructions and / or approval of Authority.

Electric Meter – Operator shall check all meters once in a month time to ensure that they are functioning and are showing correct readings.

Standby Power Supply – Operator shall have arrangement of standby power supply by DG sets which should be available 24 hours.

### **Safety**

Any fault in the electrical equipment like switches, receptacles, wiring etc. shall be identified, tested and repaired within 24 hours of detection to prevent accidents.

**SCHEDULE H – PROJECT IMPLEMENTATION SCHEDULE**

## **SCHEDULE I – KEY PERFORMANCE INDICATORS**

### (I) Key Performance Indicators

- 1) Turnaround Time (TAT): The time taken to complete testing and deliver results.
- 2) Accuracy and Precision: The percentage of test results that are within specified tolerances or limits. High accuracy and precision are essential for reliable testing.
- 3) Sample Throughput: The number of samples processed and tested within a given time frame.
- 4) Customer Satisfaction: Feedback and ratings from customers and stakeholders regarding the quality of services, communication, and responsiveness.
- 5) Compliance with Standards: Adherence to international or national testing standards and regulations.
- 6) Calibration and Maintenance: The percentage of testing equipment that is regularly calibrated and maintained to ensure accuracy and reliability.
- 7) Data Security: Measures to ensure the security and confidentiality of test data and reports.
- 8) Cost Efficiency: Measures the laboratory's ability to provide testing services within budget constraints and cost-effective resource utilization.
- 9) Staff Training and Competence: The level of training, expertise, and qualifications of laboratory staff, which is crucial for accurate testing.
- 10) Safety and Environmental Compliance: Adherence to safety protocols and environmental regulations in laboratory operations.
- 11) Sample Tracking: The ability to track and manage samples throughout the testing process to prevent errors or sample mix-ups.
- 12) Equipment Downtime: The amount of time equipment is non-operational due to maintenance, repairs, or breakdowns. Reducing downtime is essential for efficiency.
- 13) Testing Backlog: The number of pending tests or samples awaiting analysis. A high backlog may indicate resource constraints or inefficiencies.
- 14) Test Method Validation: The percentage of testing methods that have been validated to ensure their accuracy and reliability.
- 15) Audit and Accreditation Performance: Results of external audits and accreditation assessments, which reflect the laboratory's compliance with industry standards.
- 16) Resource Utilization: Efficiency in the use of personnel, equipment, and consumables to minimize wastage and reduce costs.
- 17) Stakeholder Feedback and Complaint Resolution: The effectiveness of addressing and resolving complaints and feedback from stakeholders.
- 18) Research and Development: The level of investment and success in research and development efforts to enhance testing methods and capabilities.