

ASIAN DEVELOPMENT BANK

TA 7055-IND: Capacity Development of National Capital Region Planning Board (NCRPB) –
Package 1 (Components A and C)

Model Contract Documents (Volume II)

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Introduction

Draft Contract – Water Supply Sector

1. This contract document is prepared with a focus on water supply systems. It is a generic document which can be used for any component of water supply system such as source improvement, treatment facility, booster station and conveying main, internal distribution system etc. Furthermore, this document can be customized for a variety of different PPP options.

Draft Contract – Sewerage Sector

2. This contract document is prepared with a focus on the sewerage sector. This document is a combination of construction contract and a concession agreement. This document is prepared with a view that one contractor is selected for construction of both sewer collection system and the sewerage treatment plant, wherein the employer is responsible for financing and operation of collection system and the contractor is responsible for construction of sewer collection system and design, finance, construction and operation of the treatment plant. The contractor will recover the cost of treatment plant based on the treatment charges on per MLD basis. Further, this document captures the delegation of powers to functionaries. This delegation can also be used for other sectors.

Draft Contract – Solid Waste Management

3. The document is prepared for privatization of primary and secondary collection of the solid waste management.

Draft Contract – Road Sector¹

4. The contract document is a Government of India document, who has prepared two documents one is for projects costing of less than Rs. 100 Cr and the second is for the projects costing of more than Rs. 100 Cr.

¹ Source: <http://www.pppinindia.com>

WATER SUPPLY SCHEME FOR _____ LOCAL BODY

AGREEMENT BETWEEN

[Private Operator]
&
[Contracting Authority]

SIGNED ON *[Date of Agreement]*

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This concession agreement is entered into aton this the day of.....

between

[Contracting Authority and the address]

here-in-after referred as 'owner'

and

[Private Operator and the address]

here-in-after referred as 'contractor'

AND WHEREAS the Project is promoted by *[Contracting authority or the respective state government]*. As part of the Project it is proposed that the expertise of a private operator will be used to help the *[Name of the Contracting authority]* to improve the water supply services in the *[Proposed area]*.

AND WHEREAS the owners has determined on the basis of the feasibility report¹ to implement the project for the *[finance, construct, Operate and maintain]*² of water supply system, the entire system being hereinafter referred to as the "Facility"

AND WHEREAS the Owner undertook the process of competitive bidding in order to select a suitable Contractor (being a Person or a group of Persons acting jointly and severally) for *[finance, construction, maintenance & operation]*³ of the Facility, for which purpose the Owner issued an Invitation for Bids (hereinafter referred to as "IFB") dated *[date of IFB]* inviting bids from Contractors to implement the said project for and on behalf of Owner;

AND WHEREAS the Owner has agreed for the Bid of the contractor, for the Contract Price and concession period and subject to the terms & conditions hereinafter contained to grant the Contract for *[finance construction, operation & maintenance]* of the Facility to the successful Contractor, to provide the services;

AND WHEREAS in consideration of the Contract Price and concession period set out in the Schedules to this Contract, and the covenants by the Contractor herein contained, the Owner wards unto the Contractor the contract for the *[finance construction, operation & maintenance]* of the Facility;

AND WHEREAS the Contractor has undertaken to implement the project, on strictly commercial principles and in accordance with the terms of this Contract to:

[Components⁴ of the projects such as

¹ If applicable

² Include or remove the options such as design, finance, construct, etc... based on the project.

³ Include or remove the options such as design, finance, construct, etc... based on the project.

⁴ Include/remove the components and activities such as survey, asset database creation, etc... based on the project.

1. *source improvement,*
2. *distribution system,*
3. *conveying main,*
4. *pumping station, etc...]*

AND WHEREAS after due evaluation of the Bids and all clarifications thereof, submitted in response to the Bidding Documents (including clarifications on the Bid documents), the Owner has awarded the tender for implementation of the said Project to [Name of the Private Operator] for the [design, finance, construct and operate]⁵ of the Facility [Name of the Private Operator] is referred to as the Contractor;

AND WHEREAS the Contractor has undertaken to [design, finance, construct and operate]⁶ the water supply system, required for the due implementation of the said Project for and on behalf of Owner in accordance with the terms of this Contract, In compliance with the Bidding Documents and the bids submitted consequent thereto, the Contractor has entered into this Contract with Owner, specifying the terms and conditions in relation to the [design, finance, construct and operate]⁷ of the Facility, in accordance with the terms of this Contract and has agreed to provide financial and performance guarantees to Owner in order to ensure the due implementation of the Project by the Contractor in terms of this Contract;

AND WHEREAS the Contractor recognizes and acknowledges the fact that the tender for implementation of the Project has been awarded to it on the basis of its experience, technical know-how, ability and financial net-worth taken together,

NOW THEREFORE, in consideration of the mutual Contract to be bound by the terms hereof, Owner and the Contractor (each individually a "Party" hereto, and collectively the "Parties") hereby agree to be bound by the provisions of this Contract which are set out in the following parts of this Contract and the special conditions and specifications therein namely:

- 1) The Contract Covenants; and
- 2) The [design finance, Construction and maintenance⁸] Contract;

Each of which shall be read in conjunction with the Schedules thereto, and form an integral part of the Contract, and be deemed to be attached herein. For interpreting any ambiguities or discrepancies, the precedence of contract Parts shall be in the order set out above.

⁵ Include or remove the options such as design, finance, construct, etc... based on the project.

⁶ Include or remove the options such as design, finance, construct, etc... based on the project.

⁷ Include or remove the options such as design, finance, construct, etc... based on the project.

⁸ Include or remove the options such as design, finance, construct, etc... based on the project.

1. DEFINITIONS

1.1. In the Contract the words and expressions defined shall have the meanings assigned to them below, except where the context requires otherwise or where they are defined elsewhere in the Contract:

"Adjudicator"	shall be _____ or such other person who shall be mutually agreed upon by the parties, who shall resolve disputes in the first instance as provided for in <u>Clause 22.2</u>
"Advance Bank Guarantee"	shall have the meaning set out in <u>Clause 9.2</u>
"Applicable Laws"	means any statute, ordinance, regulation or by-law or any rule, code or direction including applicable technical, safety or environmental standards or any license, consent, permit authorisation or other approval or interpretation thereof of India and/or [State Government] or body or regulatory authority thereof, as they may be issued and in force from time to time;
"Board"	means the National Capital Region Planning Board;
"Bonus"	shall have the meaning assigned to it in <u>Schedule 6.</u>
"Bulk Water Supply Points"	means the points where bulk water is feed into the internal distribution system.
"Bulk Water"	means the water supplied at the bulk water supply point;
"Capital Works"	shall have the same meaning given to it in <u>Clause 3.2.3;</u>
"Clause" or "sub-Clause"	means a clause or sub-clause of the Contract or the corresponding Schedule, unless otherwise specified;
"Continuous Pressured Water Supply"	means continuous water supply 24 hours ⁹ a day at a minimum pressure of 6m at all Customer Water Connection Points every day, measured at identified Critical Zone Points.

⁹ As applicable

"Contract"	means this Contract of Services for <i>[brief components and location of the project]</i> with all amendments, attachments, appendices, and exhibits thereto;
"Corporation Employees"	means the employees of the Corporations who work for this project;
"Corporations"	means the Municipal Corporations constituted under the <i>[state government]</i> Act in the district of <i>[Name of the district]</i> ;
"Corrupt Practice"	means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the selection process or in Contract execution.
"Critical Zone Points"	shall mean the points of the distribution network wherein the flow and pressure measuring devices would be installed to measure the pressure in the water supply network.
"Customer Water Connection Points"	means the water connection points from which the Customers take delivery of the water;
"Customers"	means all entities (including individuals) in the project area provides water services and includes all those customers in existence as at the Effective Date and entities which become customers after the Effective Date;
"Deputation Rules"	means the <i>[Respective state departments (Deputation of Employees) Rules, (___)]</i> .
"Dispute"	means a dispute or difference of whatever nature howsoever arising under, out of, or in connection with this Contract between any of the Parties.
"Draft Investment Programme"	shall have the meaning set out in <u>Clause 3.2.3;</u>
"Draft Operation and Management Plan"	shall have the meaning set out in <u>Clause 3.5;</u>
"Effective Date"	means the date of execution of this Contract by all the Parties first above written;
"Environment Management Plan"	means the environment management plan set out in <u>Schedule 4;</u>

"Equipment, Materials and Supplies"	means all equipment, materials and supplies of any kind, which are necessary for the operation and maintenance of the Facilities and the performance of the Services;
"Expiry Date"	means the date of expiry of the <i>[Concession Period]</i> under this Contract or such earlier date on which the Contract is validly terminated;
"Facilities"	means the infrastructure and non-infrastructure assets forming part of the water supply system needed to provide the water supply services within the specified location which shall be upgraded from time to time as part of the Final Investment Programme during the Term of the Contract;
"Final Investment Programme"	shall have the meaning set out in <u>Clause 3.2.8</u> ;
"Final Operation and Management Plan"	shall have the meaning set out in <u>Clause 3.9</u> ;
"Final Takeover Date"	means the date of commencement of the Operation and Management Period as set out in <u>Clause 3.6</u> .
"Fixed Remuneration"	shall have the meaning assigned to it in <u>Clause 10</u> .
"Force Majeure"	shall have the meaning set out in <u>Clause 21</u>
"Fraudulent Practice"	means a misrepresentation of facts in order to influence a selection process or the execution of a contract to the detriment of the Government of <i>[Name of the Respective State Government]</i> , and includes collusive practice prior to or after submission of proposals designed to establish prices at artificial non-competitive levels and to deprive the Government of <i>[Name of the Respective State Government]</i> of the benefits of free and open competition.
"Government"	means the Government of <i>[Name of the Respective State Government]</i> ;
"Gross Negligence"	means any reckless disregard of any provision of this Contract, which has a materially adverse effect the Facilities;
"Implementation Period"	shall have the meaning set out in <u>Clause 3.1</u> ;

"Initial Takeover Date"	means the date on which the contracting authority issues the certificate of commencement of Preparatory Period in accordance with <u>Clause 3.2.8;</u>
"Intellectual Property"	means all intellectual property or other property rights of every kind, including without limitation all patents, registered design rights, works subject to the laws of copyright, trade secrets, processes, trademarks and service marks whether registered or not, goodwill and know-how and any associated or similar rights (including in all cases applications and right to apply therefore and documentation thereof);
"Investment Amount"	means the absolute amount stated in <u>Clause 3.2.6,</u> which shall be made available by <i>[Contracting authority/financial institutions¹⁰]</i> to the project as per the terms stated in this Contract, for the purpose of funding the requirements of the Final Investment Programme during the Term;
"Municipal Employees"	means the employees of the Municipality who work for this project;
"Municipality"	means the Municipality constituted under the <i>[state government]</i> Act in the district of <i>[Name of the district]</i> ;
"Notice to Correct"	shall have the meaning set out in <u>Clause 16;</u>
"Operation and Management Period"	shall have the meaning set out in <u>Clause 4;</u>
"Party" or "Parties"	means the local bodies, departments, private operator or any one of them as the context indicates;
"Performance Bank Guarantee"	shall have the meaning set out in <u>Clause 9.1;</u>
"Performance Remuneration"	shall have the meaning assigned to it in <u>Clause 10.</u>
"Performance Targets"	means the performance targets to be achieved by the contractor during the specified Period or the Operation and Management Period, as set out in this Contract as the context may require;

¹⁰ If the project requires funding from the contractor, then contractor has to be mentioned

"Preparatory Period A"	shall have the meaning set out in <u>Clause 3.1(i);</u>
"Preparatory Period B"	shall have the meaning set out in <u>Clause 3.1(ii);</u>
"Procurement Guidelines" ¹¹	means the guidelines prescribed by the [respective state/ the lenders of the project] specified in <u>Schedule 6.</u>
"Project Operational Data"	shall have the meaning set out in <u>Schedule 10;</u>
"Project"	means the [Name of the project];
"Request for Proposal"	means the request for proposal for selection of the private operator for the Project issued by the [Contracting Authority].
"Retention Money"	means [___ %] of all payments of the contract to be retained by the [contracting authority] as per the terms provided in <u>Schedule 6.</u>
"Schedules" or "Schedule"	means the schedules forming part of this Contract, or any one of them, as the context requires.
"Services"	means the services rendered by the private operator in performance of the Performance Targets and in performance of other obligations under this Contract;
"Sub-Contractors"	shall have the same meaning given to it in <u>Clause 14;</u>
"Term"	shall have the same meaning given to it in <u>Clause 2.2;</u>
"Willful Default"	means an intentional disregard of any provision of this Contract, which has a materially adverse effect on the Facilities.
"Water Supply Rules"	means the water supply rules of [Respective state government/ local body]

[Please include/remove the above definitions based on the specific project needs]

1.2. Headings and Marginal Notes

The headings and marginal notes are not part of the Clauses, and shall not be taken into consideration in their interpretation.

¹¹ Include if required

1.3. Interpretation

Words importing persons or parties shall include firms and corporations and any organisation having legal capacity. Words importing the singular also include the plural and vice versa where the context requires. Words importing one gender also include other genders.

1.4. Governing Law

This Contract shall be governed by and interpreted in accordance with Indian law.

2. APPOINTMENT AND TERM

2.1. Appointment

2.1.1. Prior to the execution of the Contract, the contractor has delivered to owner the Performance Bank Guarantee ____% of the contractors Remuneration under this Contract, in form and substance set out in the Request for Proposal and stated in **Clause 9.1** of this Contract. On delivery of the Performance Bank Guarantee and execution of this Contract, the owner, hereby appoints the contractor to provide the Services within the project area and to perform the obligations of the contractor under this Contract.

2.1.2. On the execution of the Contract, the contractor will have to furnish an advance bank guarantee for the amount to the owner, in form and substance set out in the Request for Proposal and as stated in **Clause 9.2** of this Contract. On receipt of advance bank guarantee the contractor will receive an advance of the equivalent of ____% of the Remuneration.

2.2. Term

This Contract shall continue in full force and effect from the Effective Date until the Expiry Date (the "**Term**").

3. IMPLEMENTATION PERIOD

3.1. General

The _____ week implementation period (the "**Implementation Period**") shall commence from the Effective Date. The Implementation Period shall have the following two phases:

- (i) The period between the Effective Date and the Initial Takeover Date ("**Preparatory Period A**"); and
- (ii) The period between the Initial Takeover Date and the Final Takeover Date ("**Preparatory Period B**").

3.2. Preparatory Period A

3.2.1. Within _____ working days of the Effective Date, the contractor shall provide owner with a list of the names of the members of its team who involves in designing¹² the system.

3.2.2. The team shall be granted access to the existing facilities and other sites for study and survey purpose.

3.2.3. No later than ____ months from the Effective Date, the contractor shall:

- (i) obtain all required permissions, sanctions, clearances and permits (other than Owner Clearances) for the construction, operation and maintenance of the facility
- (ii) complete the survey works
- (iii) design the system and submit to the owner for its review and approval a comprehensive plan prepared ("**Draft Investment Programme**") which shall be prepared within the time set out above, which shall include and explain:
 - (a) Detailed design, drawing, estimates and a detailed work plan [PERT Chart]
 - (b) Investment plan

3.2.4. In the event the contractor fails to provide the Draft Investment Programme within the time as mentioned in **Clause 3.1**, for any reason whatsoever, owner may, at its sole discretion, agree to provide additional time to the contractor, to complete these obligations, or may immediately terminate the Contract.

3.2.5. Within ____ weeks of the date on which the owner receives the Draft Investment Programme from the contractor the owner shall review and approve or suggest revisions to the Draft Investment Programme. In case the owner fails to approve the Draft Investment Programme or suggest any revisions thereto within the stipulated period of ____ weeks, the Draft Investment Programme submitted by the contractor would be deemed, approved.

3.2.6. The Investment Amount to be suggested by the contractor in the Draft Investment Programme shall not exceed Rs. [____] (*amount in words*). The Investment Amount shall not include the contractor remuneration during O&M period as stated in **Schedule 6**. In case the investment amount stated by the contractor in the Investment Programme exceeds the Investment Amount, owner shall have the option at its sole discretion to terminate the Contract with immediate effect.

3.2.7. In the event the contractor disagrees with the changes suggested by the owner to the Draft Investment Programme the owner and the contractor shall meet to discuss and resolve these issues. In case the owner and the contractor are unable to agree on the changes to the Draft Investment Programme within ____ weeks of receipt of owner's suggestions by the contractor in terms of **Clause 3.2.5**, the owner may at its sole discretion, terminate the Contract with immediate effect.

¹² Provided design is part of the contractors responsibilities

3.2.8. In the event the owner and the contractor are able to arrive at an agreement with regard to the details of the Draft Investment Programme, or if the Draft Investment Programme is deemed to be approved as provided in **Clause 3.2.5:**

- (i) the owner and the contractor shall sign off on the finalised version of the Draft Investment Programme ("**Final Investment Programme**"); and
- (ii) immediately thereafter, the owner shall issue to all Parties a certificate for commencement of Preparatory Period B specifying the initial takeover date ("**Initial Takeover Date**") and the duration of the Preparatory Period B which shall be _____ weeks, unless extended by the owner in accordance with the terms of this Contract.

3.3. Initial Takeover Date and Preparatory Period B

3.3.1. Events on Initial Takeover Date

On the Initial Takeover Date, or as soon thereafter as possible:

- (i) The owner will hand over the site based on the work plan approved.
- (ii) The owner will help the contractor in coordinating with other departments for traffic and other diversions.

3.3.2. During the Preparatory Period B the contractor shall perform the following functions to implement the Final Investment Programme:

During this period, the contractor shall, subject to the approval of the owner:

- (i) Manage the implementation process including planning, scheme identification, project appraisal, design and specification;
- (ii) Execute the Capital Works as per the plan approved in the preparatory period A
- (iii) Report the progress both physically and financially to the owner on a regular basis and as and when requested by the owner.
- (iv) In case of any deviation from the plan approved in the preparatory period A, the contractor has to get approval from the owner. The decision of the owner on deviation is the final;

[Include Payment and Cost overrun clause if payment to capital works is made by the owner]

3.3.3. Obligations of Parties during the Preparatory Period B

- (i) The Contractor's Obligations during the Preparatory Period B: In addition to the specific obligations of the contractor stated above with respect to Preparatory Period A and Preparatory Period B, the contractor shall additionally have the obligations set forth in **Schedule 9** during the Preparatory Period B.
- (ii) The Owner's Obligations during the Preparatory Period B: During the Preparatory Period B, the owner shall have the obligations set forth in **Schedule 8.**

3.3.4. If any Party/ies fails to achieve at any time during Preparatory Period B, any or all of their respective obligations stated under **Clause 3.3.3**, then **Clause 16** of this Contract will apply.

3.4. Within _____ weeks of the completion of the capital works, the contractor has to obtain approval from owner for commencement of the operation. The contractor has to prepare and submit a draft operations and management plan,

3.5. In case the owner and the contractor do not agree to the Draft Operation and Management Plan within _____ weeks of receipt of the owners' suggestions to the Draft Operation and Management Plan, the owner may provide further time for agreement for approval of the Draft Operation and Management Plan. In the event the contractor and the owner are unable to agree to the Draft Operation and Management Plan within such additional time, the owner may at its sole discretion terminate the Contract with immediate effect.

3.6. On finalisation of the Operation and Management Plan ("**Final Operation and Management Plan**") within Preparatory Period B, the owner shall immediately issue of a certificate for commencement of Operation and Management Period specifying the final takeover date ("**Final Takeover Date**") and signifying commencement of the Operation and Management Period from the Final Takeover Date.

4. OPERATION AND MANAGEMENT PERIOD

4.1. The operation and management period ("**Operation and Management Period**") of _____ weeks shall commence from the Final Takeover Date.

4.2. Performance Obligations of the Contractor during the Operation and Management Period

During the Operation and Management Period the contractor shall have the performance obligations as set forth in **Schedule 10**.

4.3. Obligations of the owner during the Operation and Management Period

During the Operation and Management Period, the owner shall have the obligations set forth in **Schedule 9**.

5. PERFORMANCE TARGETS DURING THE OPERATION AND MANAGEMENT PERIOD

5.1. During the Operation and Management Period, the contractor must meet all the following Performance Targets:

[Some of the sample performance targets are listed below, include/remove relevant performance indicator specific to the project:

- (a) Continuous Pressured Water Supply must be provided to every connected property and stand-post connected to the public network in the project area.
- (b) Emergency stoppages shall not exceed twelve hours and no more than an average of four emergency stoppages [of less than 12 hours each] shall occur in any continuous period of twelve months.

- (c) 100% of all property connections (individual and shared), public stand-posts and feeds to street storage tanks must be metered and computerised records of the readings must be maintained.
- (d) 100% of Customer meters must be read every month and a bill for water used based on these volumetric readings must be issued to 100% of connected properties each month by the contractor with prior approval of the Owner obtained pursuant to the provision of the generated bills to the Owner before dispatch to the Customers.
- (e) Real (physical) losses from the distribution network within the project area must be reduced in the following manner:

Elapsed time from the Final Takeover Date (in Months)	Losses (in litres/connection/day/meter pressure)

- (f) System connection requests must be fulfilled within 7 days of directions being issued by the Owner subsequent to the payment of connection fee.
- (g) Customer service and support centre must be situated at a location easily accessible to residents of the given project area and operated on a 24-hour basis.
- (h) All Customer queries and complaints to be responded to within 24 hours and redressed within 7 days of such complaint or query, except the complaints concerning low pressure or poor quality of water, which must be responded to within 12 hours and redressed within 24 hours of such complaint.
- (i) leaks appearing at the surface must be repaired within 24 hours of notification/observance.]

5.2. The owner shall either by itself or through the third party constantly monitors achievement of Performance Targets by the contractor during the Operation and Management Period.

6. GENERAL PERFORMANCE OBLIGATIONS OF THE CONTRACTOR

In addition to its specific obligations under the Preparatory Period B and the Operation and Management Period of the Contract, the contractor shall have the general obligations set forth in **Schedule 11**.

If the contractor fails to achieve its specific obligations as provided in **Schedule 11**, at any time during the Preparatory Period B and the Operation and Management Period, then **Clause 16** of this Contract will immediately come into effect.

7. ENVIRONMENT

7.1. Protection of the Environment

The contractor shall take all reasonable steps to protect the environment in the project area and to limit damage and nuisance to people and property resulting from pollution, noise and other results of the Services. The contractor shall ensure that air emissions and surface discharges from the project area shall not exceed the values prescribed

by Applicable Law and the Environment Management Plan¹³. The contractor will be required to respect all aspects of this Environment Management Plan and for ensuring compliance with the Environment Management Plan by Sub-Contractors involved in works in the project area, in the course of implementing the Contract.

7.2. Indemnification by the contractor

The contractor shall indemnify and hold harmless the local body/government departments against any fines or penalties imposed under the Applicable Law in respect of environmental laws.

7.3. Security of the project area

The contractor shall take all lawful steps to ensure that unauthorised persons are kept out of the facilities within the project area.

8. Technical Auditor¹⁴

The owner will appoint an independent third party to act as an independent technical auditor (the "**Technical Auditor**") to monitor compliance by the contractor with its obligations under the Contract.

9. BANK GUARANTEES

9.1. Performance Bank Guarantee

9.1.1. Simultaneously with execution of the Contract, the contractor has delivered to the owner a performance bank guarantee ("**Performance Bank Guarantee**") of Rs. [] representing ____% of the contractor Remuneration from either (a) at the contractor's option, by a bank located in India or a foreign bank through a correspondent bank located in India, or (b) with the agreement of the owner directly by a foreign bank acceptable to the owner.

9.1.2. The contractor shall keep the Performance Bank Guarantee valid and enforceable throughout the Term of the contract and for a period of ____ days after the Term. In case the Performance Bank Guarantee provided by the contractor to the owner is set to expire for any reason whatsoever at any time before expiry of ____ days after the Term, the contractor shall renew and provide to the owner renewed Performance Bank Guarantee at least ____ days prior to its date of expiry. Upon any failure on part of the contractor to renew the Performance Bank Guarantee or to keep it valid and enforceable in terms of this Clause, the Performance Bank Guarantee will be en-cashed by the owner without giving any notice to the contractor or to any other Party. This is without prejudice to any other action that may be taken by the owner under the terms and conditions of this Contract.

9.1.3. The owner, without prejudice to any of its rights or remedies under this Contract, is free to en-cash the Performance Bank Guarantee in part or in full, in terms

¹³ If given as schedule please mention the schedule

¹⁴ Keep the clause only if the third party auditor is appointed. If appointed, include a separate schedule indicating the terms of reference and refer the same in this clause

of **Clause 18 and 19** of this Contract. In the event of the invocation of any amount of the Performance Bank Guarantee by the owner under this Contract, the contractor shall immediately take appropriate steps to establish the Performance Bank Guarantee at its full value contemplated under this Contract within ____ days of the date when the Performance Bank Guarantee is wholly or partially invoked by the owner.

9.1.4. The Performance Bank Guarantee shall be released by owner on satisfactory fulfillment of all contractual obligations of the contractor under this Contract after ____ days of expiry of the Term of the Contract.

9.2. Advance Bank Guarantee¹⁵

9.2.1. Simultaneously with execution of the Contract and on delivery the advance bank guarantee for the advance sum to the owner, the contractor will receive an advance of ____% of the contractor's remuneration. The advance bank guarantee ("**Advance Bank Guarantee**") shall be issued either (a) at the contractor's option, by a bank located in India or a foreign bank through a correspondent bank located in India, or (b) with the agreement of the owner directly by a foreign bank acceptable to the owner.

9.2.2. The contractor shall keep the Advance Bank Guarantee valid and enforceable till such time that the entire Advance Sum has been set off. In case the Advance Bank Guarantee provided by the contractor to the owner is set to expire for any reason whatsoever at any time before the full amount setoff, the contractor shall renew and provide to the owner renewed Advance Bank Guarantee at least ____ days prior to its date of expiry. Upon any failure on part of the contractor to renew the Advance Bank Guarantee or to keep it valid and enforceable in terms of this Clause, the Advance Bank Guarantee will be en-cashed by the owner without giving any notice to the contractor or to any other Party. This is without prejudice to any other action that may be taken by the owner under the terms and conditions of this Contract.

10. CONTRACTOR REMUNERATION AND BONUS

10.1. The contractor's entire remuneration ("**Contractor Remuneration**^{16m}") for the Services and performance under this Contract shall include two components viz. the fixed remuneration ("**Fixed Remuneration**") and the performance remuneration ("**Performance Remuneration**"). The contractor Remuneration under this Contract shall be Rs. [____] [**Note: insert amount**] payable in the manner set out in **Schedule 6.**

10.2. In addition to the contractor Remuneration, the contractor may be entitled to receive Bonus¹⁷ for higher performance of its performance obligations and Performance Targets, in the manner and as specified in **Schedule 6.**

10.3. If the owner unreasonably delays the payment of any amounts due to the contractor for a period in excess of ____ days from the date on which such amount falls due as stipulated in **Schedule 6,** the owner shall be liable to pay interest

¹⁵ Applicable only if any advance payment made to the contractor

¹⁶ It is better to have fixed and performance based payments. Fixed payment helps contractors in running the operations and performance payment motivates contractors in improving performance. However this can be modified according to the payment method decided for the project

¹⁷ Modify based on the project

on the said amount for each day of delay at the rate of prevailing medium term State Bank of India prime lending rate¹⁸ calculated weekly.

10.4. Unless otherwise specified, the contractor shall pay such taxes, duties, fees and other impositions as may be levied on the contractor Remuneration and Bonus under the Applicable Law. All payments under this Contract shall be subject to deduction of applicable withholding taxes.

10.5. The contractor Remuneration and Bonus as set out in this **Clause 10** shall constitute the contractor's sole remuneration in connection with this Contract or the Services, and the contractor shall not accept for its own benefit any trade commission, discount, or similar payment in connection with activities pursuant to this Contract or to the Services or in the discharge of its obligations under the Contract, and the contractor shall use its best efforts to ensure that the owner's Employees, any sub-contractors, and agents of either of them similarly shall not receive any such additional remuneration.

11. INTELLECTUAL PROPERTY

11.1. The contractor shall make available to and hereby licenses the owner to use free of charge all Intellectual Property owned by the contractor (or to the extent they are legally able to do so licensed to the contractor by third parties) which is required in connection with the performance of the contractor's obligations under this Contract (the "**Contractor Intellectual Property**"). This license is for the purposes of providing the Services but no other purpose. Such license shall terminate _____ years after the termination of this Contract but shall otherwise be irrevocable, shall be royalty free, shall not be transferable and shall not carry the right to grant sub-licenses. Notwithstanding anything contained herein, any Intellectual Property that is created specifically in connection with the Services by the contractor during the Term of this Contract, shall be owned by the Owner for whom the Service was carried out and the contractor hereby assigns all its rights in such Intellectual Property, including all copyrights, patent and moral rights arising there from and related thereto, to the Owner. The contractor shall execute all necessary and appropriate documents and deeds as the Owner may require in order to perfect the title of the Owner to the Intellectual Property.

11.2. The Owner shall, to the extent it is legally able to do so, grant the contractor during the term of this Contract a royalty free, non-exclusive, irrevocable personal and non-transferable license to use Intellectual Property which is owned by or licensed to the Owner by third parties (the "**Owner Intellectual Property**") only to the extent necessary to enable the contractor to perform its obligations under this Contract. Such licenses shall not carry the right to grant sub-licenses.

11.3. The contractor shall indemnify the Owner in full in respect of all loss, damage and expense of whatever kind and nature arising out of the use by the Owner of the contractor Intellectual Property in accordance with its terms which infringes the rights of any third party.

¹⁸ Interest rate can also be mentioned explicitly

11.4. The Owner shall indemnify the contractor in full in respect of all loss, damage and expense of whatever kind and nature arising out of the use by the contractor of any Owner Intellectual Property in accordance with its terms which infringes the rights of any third party.

11.5. The contractor shall use reasonable efforts:

- (a) to ensure that Intellectual Property owned or developed by third parties and utilised by the contractor in connection with the performance of its obligations under this Contract is licensed to the contractor on reasonable terms for the purposes of the operations and maintenance or repair of the Facilities and otherwise for the purposes of the Contract but for no other purpose; and
- (b) to ensure that no Intellectual Property of a third party is otherwise used in the performance of the contractor's obligations under this Contract without the prior written approval of the Owner.

11.6. All plans, drawings, specifications, designs, reports, and other documents and software submitted by the contractor in accordance with this Contract shall become and remain the property of the owner, and the contractor shall, not later than upon termination or expiration of this Contract, deliver all such documents and software to the owner, together with a detailed inventory thereof. The contractor may retain a copy of such documents and software. Restrictions about the future use of these documents, if any, shall be specified by the owner and shall be binding on the contractor surviving termination of this Contract.

12. Labour and Labour Regulations

12.1. Labour

The Contractor shall, unless otherwise provided in the Contract, make his own arrangement for all staff and labour, local or other, and for their payment, housing, feeding and transport.

The Contractor shall, if required by the owner, deliver to the owner a return in detail, in such form and at such intervals as the owner may prescribe, showing the staff and numbers of the several classes of labour from time-to-time employed by the Contractor on the Site and such other information as the owner may require.

12.2. Compliance with Labour Regulations

During continuance of the Contract, the Contractor and his sub-contractors shall abide at all times by all existing labour enactment and rules made there under, regulations, notifications and bye-laws of the State or Central Government or local authority and any other labour law (including rules), regulations, bye-laws that may be passed or notification that may be issued under any labour law in future either by the State or the Central Government or the local authority. The Contractor shall keep the Owner indemnified in case any action is taken against the Owner by the competent authority

on account of contravention of any of the provisions of any Act or rules made there under, regulations or notifications including amendments.

If the Owner is caused to pay or reimburse, such amounts as may be necessary to cause or observe, or for non-observance of the provisions stipulated in the notifications! bye-laws/Acts/Rules/regulations including amendments if any, on the part of the Contractor, the owner shall have the right to deduct any money due to the Contractor including his amount of performance security. The owner shall also have the right to recover from the Contractor any sum required or estimated to be required for making good the loss or damage suffered by the Owner.

13. PROCUREMENT¹⁹

13.1. The contractor shall ensure that all Equipment, Materials and Supplies required for the carrying out of the Final Investment Programme will be procured by the contractor.

13.2. The contractor shall also ensure that all materials and workmanship used in the course of the Contract will be in accordance with the standard specifications used by the owner or, in absence of an appropriate specification, in accordance with the Indian national standards.

13.3. The contractor is responsible for the procurement and for the testing and maintenance of supplies of all goods and services necessary for the Facilities within the project area to ensure compliance with the contractor's obligations under this Contract.

14. SUB-CONTRACTING

14.1. The contractor may sub-contract any part but not all of the Services to be provided by it under the Contract to third party sub-contractors (the "**Sub-Contractors**") after obtaining prior written consent of the owner. Specifically, the contractor shall not sub-contract any of the following Services to any Sub-Contractor:

[Project components which should not be sub contracted]

14.2. If the contractor does sub-contract any part of the Services, the contractor shall not be relieved from any liability or obligation under this Contract and the contractor shall continue to be responsible for the negligent acts, omissions or defaults of any Sub-Contractor as fully as if they were the negligent acts, omissions or defaults of the contractor, its officers, employees or agents.

15. INSURANCE

15.1. **Insurance of the Facilities by the contractor**

¹⁹ In-order to achieve efficiency, flexibility should be given to the contractor on procurement

The contractor shall insure the Facilities against all loss or damage for the duration of the Contract. This insurance shall cover loss or damage from any cause. Such insurance shall be for a limit of not less than the full replacement cost of the Facilities and shall also cover the costs of demolition and removal of debris. Such insurance shall be procured in such a manner that the Owner and the contractor are covered from the Initial Takeover Date until the Expiry Date and are indicated as Loss Payee.

15.2. Insurance against Injury to Persons and Damage to Property

The contractor shall insure against liability to third parties, with the owner, the contractor and Sub-Contractors as co-insured's, for any loss, damage, death or body injury which may occur to any physical property except things insured under **Clause 15.1** or to any person (except persons insured under **Clause 15.3**) which may arise out of the performance of the Contract. Such insurance shall be for a limit of not less than _____ years.

15.3. Insurance for Workers

The contractor shall effect and maintain insurance against losses and claims arising from the death or injury to any person. For any Sub-Contractor's employees, the Sub-Contractor may effect such insurance, but the contractor shall be responsible for compliance with this Clause.

15.4. General Requirements for Insurances

Each insurance policy shall be consistent with the general terms agreed in writing prior to the Effect Date, and such agreement shall take precedence over the provisions of this Clause.

15.5. Submission of Insurance Documentation by the Contractor

The contractor shall, within ____ weeks from the Effective Date, submit to the owner:

- (i) Evidence that the insurances described in this Clause have been effected; and
- (ii) copies of the policies for the insurances described in this Clause.

When each premium has been paid, the contractor shall submit copy receipts to the owner. The contractor shall also, when providing such evidence, policies and receipts to the owner, notify the owners representative of so doing.

15.6. Approval of Insurance

The contractor shall effect all insurances for which it is responsible with insurers and in terms approved by the owner. Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify such loss or damage.

15.7. Compliance with Conditions of Insurance Policies

The contractor shall comply with the conditions stipulated in each of the insurance policies. The contractor shall make no material alteration to the terms of their insurance policies without the prior approval of the owner to the extent required by the

terms of this Contract. If an insurer makes (or purports to make) any such alteration, the contractor shall notify the owner immediately upon becoming aware thereof.

15.8. The Contractor's Failure to Maintain Insurances

If the contractor fails to effect and keep in force any of the insurances required under the Contract, or fails to provide satisfactory evidence, policies and receipts in accordance with this Clause, owner may, without prejudice to any other right or remedy, effect insurance for the coverage relevant to such default, and pay the premiums due. Such payments shall be recoverable from the contractor by the owner, and may be deducted by owner from any monies due, or to become due, to the contractor.

15.9. General

Nothing in this Clause limits the obligations, liabilities or responsibilities of the contractor under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the contractor in accordance with their other obligations under this Contract.

15.10. Notification

Each Party shall promptly notify the other Party of any claim under any of the insurance policies referred to in this Clause, accompanied by full details of the incident giving rise to such claim. Each Party shall afford to the other Party all such assistance as may reasonably be required for the preparation and negotiation of insurance claims, save where such claim is against the Party required to give assistance.

16. Default - Notice to Correct

16.1. If at any time during the Term of this Contract, the contractor fails to carry out, in accordance with this Contract, any of its performance obligations under **Clause 3.3.4, Clause 4**, Performance Targets under **Clause 5**, any of its general obligations under **Clause 6** or any of the obligations of the contractor under this Contract excluding those specifically set out under **Clause 17.1** or in the event the contractor is guilty of Gross Negligence or Willful Default in the performance of any of its obligations hereunder (including without limitation operating the Facilities in violation of any operating permit), the owner may give notice to the contractor in writing requiring it to make good such failure and remedy the same within a specified reasonable time of not exceeding _____ days ("**Notice to Correct**").

16.2. If at any time during the Term of this Contract, the owner fails to effect payment to the contractor of contractor Remuneration or Bonus due and payable in terms of **Clause 10** or fails to effect payment of invoices raised by the contractor under the Final Investment Programme in accordance with **Clause 11.2** for any reason other than reasons stated in **Clause 11.3**, the contractor may give a Notice to Correct to the owner in writing requiring the owner to make good such failure and remedy the same within a period of time not exceeding _____ days.

16.3. If at any time during the Operation and Management Period of this Contract, the Parties other than the contractor fail to carry out, in accordance with this Contract, any of their obligations with respect to any of the project are as set out in this Contract

other than the obligations listed in **Clause 16.2** above, or in the event any of the Parties other than the contractor is guilty of Gross Negligence or Willful Default in performance of its respective obligations hereunder, the contractor may give Notice to Correct to the owner in writing requiring it to make good such failure and remedy the same within a specified reasonable period of not exceeding _____ days.

16.4. The contractor shall, in every Notice to Correct issued under **Clause 16.2 or Clause 16.3**, explain in reasonable detail the effect(s) of failure by the notified Party in compliance with its obligations and/or failure in compliance with the Notice to Correct on the performance of the contractor under the Contract including details of the consequential defaults likely to be inevitably committed by the contractor under this Contract. No Notice to Correct can be issued by the owner onto the contractor under Clause 16.1 seeking performance by the contractor of an obligation under the Contract, unless owner or any other Party complies with the Notice to Correct already issued and served upon them by the contractor in which the contractor has notified its inability to comply with, or likely default in compliance of, such obligation due to or arising out of non-compliance by the owner or such other Party with any of their obligations under the Contract. Nothing contained herein shall restrict the right of the owner to issue a Notice to Correct onto the contractor upon compliance with such prior Notice to Correct served upon by the contractor onto the owner or any other Party, or to issue a Notice to Correct onto the contractor in respect of any obligation(s) of the contractor in connection of which no Notice to Correct has been issued by the contractor.

17. TERMINATION

17.1. Termination by the owner

At any time during the Term, owner may at its sole option immediately terminate this Contract for any or all of the project area, by written notice to the contractor ("**Termination Notice**") under any of the circumstances set out in **sub-Clause (i) to (viii)** at its sole discretion:

- (i) under **Clause 3.2.4, Clause 3.2.6, Clause 3.2.7 and Clause 3.5** of this Contract; or
- (ii) if the contractor fails to comply with a Notice to Correct; or
- (iii) if the contractor becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against it, compounds with its creditors, or carries on business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or event occurs which (under any applicable law) has a similar effect to any of these acts or events; or
- (iv) if as the result of Force Majeure, the contractor is unable to perform a material portion of the Services for a period of not less than _____ days; or
- (v) if the contractor, in the judgment of the owner has engaged in Corrupt Practice or/and Fraudulent Practice in competing for or in executing the Contract; or.

- (vi) if the contractor fails to maintain a Performance Bank Guarantee in accordance with **Clause 9**; or
- (vii) if the contractor has delayed the completion of the Services by the number of days for which the maximum amount of liquidated Damages can be paid in accordance with **Clause 18 and Clause 19**; or
- (viii) if the owner, in its sole discretion, decides to terminate this Contract.

Provided that, if the owner terminates the Contract only with respect to one or more of the specific project area, the Contract shall remain valid, binding and enforceable *inter se* all the applicable Parties with respect to balance project area where the Contract survives.

17.2. Termination by the Contractor

The contractor may immediately terminate this Contract by a written Termination Notice to the owner on occurrence of any of the events specified in sub-Clause (i) to (ii) below:

- (i) if the owner fails to comply with a Notice to Correct served upon it by the contractor under **Clause 16.2**; or
- (ii) if as the result of Force Majeure, the contractor is unable to perform a material portion of the Services for a period of not less than _____ days.

Provided further that, if the contractor terminates the Contract only with respect to one or more of the specific project area(s), the Contract shall remain valid, binding and enforceable *inter se* all the applicable Parties with respect to balance project area where the Contract survives.

18. CONSEQUENCES OF TERMINATION AND NON-PERFORMANCE

18.1. Payment Upon Termination

Upon termination of this Contract pursuant to **Clause 17.1 or 17.2**, the owner shall pay the contractor the Fixed Remuneration pursuant to **Schedule 6** for the Services that are satisfactorily performed by the contractor prior to the effective date of termination;

In the event of termination of the Contract in all project area pursuant to **sub-Clause (iv) or (viii) of Clause 17.1 or pursuant to Clause 17.2**, the owner shall as soon as practicable release the Performance Bank Guarantee and Retention Money of the contractor.

18.2. Payment of Damages

Upon termination of the Contract under any sub-Clause of **Clause 17.1**, except termination under **sub-Clause (iv) or (viii)**, the owner shall be entitled to:

- (i) recover liquidated damages from the contractor in accordance with **Clause 19**;
- (ii) forfeit the Retention Money and invoke the Performance Bank Guarantee if the termination is consequent to any reason other than under **sub-Clause (iv) or (viii) of Clause 17.1** or pursuant to **Clause 17.2**.

18.3. Hand Back Procedure

On the Expiry Date, the contractor and the owner shall jointly inspect the Facilities and identify any damage or defect in the Facilities. In the event any damage or defect is identified, that is attributable to the contractor, the contractor shall be required to rectify the damage or defects within _____ days of the same being identified, to the satisfaction of the owner. In the event the contractor fails to rectify the damages or defects the owner shall be entitled to claim appropriate costs and damages from the contractor by invoking the Performance Bank Guarantee or by adjustment from the Retention Money.

19. LIQUIDATED DAMAGES

19.1. The maximum amount of liquidated damages for the whole contract is ____% of the contractor Remuneration under this Contract.

19.2. No liquidated damages shall be payable by the contractor on account of non-achievement of any of the duties, functions or responsibilities stated under **Clause 3.2.1, Clause 3.2.3,** or on termination of the Contract under **Clause 3.2.4, Clause 3.2.6 or Clause 3.2.7.** In the event of non-achievement of any Targets set out at during the **preparatory Period B** or non-achievement of any Performance Targets set out at **Clause 5.1** immediately on commencement of the Operation and Management Period, the contractor shall be liable to payment of liquidated damages at the rate of _____ % per day, which shall be recovered from the contractor Remuneration.

19.3. Any liquidated damages payable by the contractor to the owner under this Contract shall be first adjusted from the contractor Remuneration payable to the contractor under this Contract. In the event, the contractor Remuneration is insufficient to satisfy such liquidated damages, the owner shall direct the contractor to effect payment of the liquidated damages within a specified period of not more than two weeks. In the event of failure of the contractor to effect payment of the liquidated damages to the owner with the specified period, the owner shall be entitled to invoke the Performance Bank Guarantee to recover the liquidated damages without any prior notice to the contractor.

20. CONTRACTOR INDEMNITY

20.1. The contractor shall indemnify, defend and hold harmless all the other Parties, jointly and severally, and their successors, assigns and affiliates, stockholders, officers, directors, employees, agents and representatives, from and against any and all damages, obligations, losses, claims, cost, charges, fines, penalties or other expenses of every kind and character whether absolute, accrued, threatened, contingent, assessed, incurred or sustained or which may be sustained by any of such Parties in any capacity, resulting from any breach by the contractor of the terms of this Contract or the obligations of the contractor hereunder or resulting from any negligent acts, omissions or defaults in discharge by the contractor of its obligation under this Contract, and from and against any and all liabilities whether civil or criminal in nature in, before, or by, any court, commission, arbitrator or governmental agency or authority.

20.2. The owner shall be entitled to raise a demand on the contractor for indemnification under this Contract on its own behalf or on behalf of any other Party. Any and all obligations of the contractor under this indemnification provision shall be promptly and fully discharged net of taxes within ____ business days of a demand in writing raised by the owner. In the event the contractor fails to remit the amount demanded within a period of ____ business days, interest at the rate of prevailing medium term State Bank of India prime lending rate²⁰ calculated weekly, shall be payable to the owner on a pro rata basis for each business day of delay. Any and all costs (including advocates and other legal costs) incurred by any Party other than the contractor in mitigating, reducing or challenging any action, claim or demand shall be fully borne by the contractor on an ongoing basis and the contractor hereby indemnifies the Parties from any loss, fines or penalties arising from the failure of the contractor to discharge its indemnities herein contained.

21. FORCE MAJEURE

21.1. Definition of Force Majeure

"**Force Majeure**" means an event which is beyond the reasonable control of a Party and which makes a Party's performance under this Contract impossible or so impractical as to be considered impossible under the circumstances, including but not limited to:

- (i) act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
- (ii) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
- (iii) rebellion, revolution, insurrection, or military or usurped power, or civil war or terrorist attack or sabotage;
- (iv) contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly; or
- (v) riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to (i) employees of the contractor (ii) excluding local body Employees; and (iii) any local body staff who are part of a local body /state wide strike who are not engaged under this Contract but are required to provide essential services to the local body/state Employees or of any of its sub-contractors, engaged on operating and maintaining the Facilities.

21.2. Effect of Force Majeure Event

Subject to right to terminate the Contract contained in **Clause 17**, no Party to this Contract shall be considered in default or in contractual breach to the extent that performance of obligations is prevented by a Force Majeure event.

²⁰ Interest rate can also be mentioned explicitly

21.3. Contractors Responsibility

Upon occurrence of any Force Majeure event which may affect performance of the contractors' obligations, it shall promptly notify the owner, and shall endeavor to continue to perform its obligations as far as reasonably practicable. The contractor shall also notify the owner of any proposals to overcome the constraints caused by an event, including any reasonable alternative means for performance, but shall not effect such proposals without the consent of the owner.

21.4. Owners Responsibility

Upon occurrence of an event considered by the owner to constitute Force Majeure and which may affect performance of the obligations of the owner, the owner shall promptly notify the contractor and shall endeavour continuance of such obligations by itself or by any other agency decided at that time, as far as reasonably practicable.

21.5. Extension of Time

Any period within which a Party shall, pursuant to this Contract, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

21.6. Payments

During the period of their inability to perform the Services as a result of an event of Force Majeure, the contractor shall be entitled to continue to be paid under the terms of this Contract, as well as to be reimbursed for additional costs reasonably and necessarily incurred by it during such period for the purposes of the Services and in reactivating the Service after the end of such period.

22. DISPUTE RESOLUTION

22.1. Amicable Settlement

The Parties shall use their best efforts to settle amicably all Disputes arising out of or in connection with the Contract or its interpretation.

22.2. Reference to Adjudicator.

If any dispute arises between the owner and the contractor in connection with, or arising out of, the Contract or the provision of the Services, whether during carrying out the Services or after their completion, the matter shall be referred to the Adjudicator within [____] days of the notification of disagreement of one Party to the other.

The Adjudicator shall give a decision in writing within [____] days of receipt of a notification of a dispute.

The Adjudicator shall be paid by the hour at the rate specified in the Request for Proposal, together with reimbursable expenses of the types specified in Request for Proposal, and the cost shall be divided equally between the owner and the contractor, whatever decision is reached by the Adjudicator.

22.3. Replacement or Adjudicator

Should the Adjudicator resign or die, or should the Owner and the Contractor agree that the Adjudicator is not fulfilling his functions in accordance with the provisions of the Contract, a new Adjudicator will be jointly appointed by the Owner and the Contractor. In case of disagreement between the Owner and the Contractor, within _____ days, the Adjudicator shall be designated by the appointing authority designated in the contract data at the request of either party.

22.4. Notice for Arbitration

Either Party may refer a decision of the Adjudicator to an Arbitrator within _____ days of the Adjudicator's written decision. If neither Party refers the dispute to arbitration within the above _____ days, the Adjudicator's decision will be final and binding.

22.5. Arbitration

- (i) In case of dispute or difference arising between the Owner and a domestic Contractor relating to any matter arising out of or connecting with this Contract, such dispute or difference shall be settled in accordance with the Arbitration and Conciliation Act 1996. The Arbitral Tribunal shall consist of three arbitrators, one each to be appointed by the Owner and Contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two arbitrators appointed to reach upon a consensus within a period of _____ days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of the Institution of Engineers (India).
- (ii) If one of the Parties fails to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above within _____ days after receipt of the notice of the appointment of its arbitrator by the other Party, then the President of the Institution of Engineers (India), both in cases of foreign Contractor as well as Indian Contractor, shall appoint the arbitrator. A certified copy of the order of the president of the Institution of Engineers (India), making such an appointment shall be furnished to each of the Parties.
- (iii) Arbitration proceedings shall be held at _____, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.
- (iv) The decision of the majority of arbitrators shall be final and binding upon both Parties. The cost and expenses of the arbitration proceedings will be paid as determined by the Arbitral Tribunal. However, the expenses incurred by each Party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the Arbitrator appointed by such party or on its behalf shall be borne by each party itself.
- (v) Performance under the Contract shall continue during the arbitration proceedings and payments due to time Contractor by the Owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.
- (vi) Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Adjudicator for the purpose of

obtaining his said decision pursuant to **Sub—Clause 22.2**. No such decision shall disqualify the owner representative (most of the cases project engineer) from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

22.6. **Failure to comply with Adjudicator's Decision**

Wherever either Party has not given notice of intention to commence arbitration of a dispute within the period slated in **Sub-Clause 22.4** and the related decision has become final and binding, either Party may, if the other Party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with **Sub-Clause 22.5**.

22.7. **Failure to comply with Decision by Arbitral Tribunal**

Either Party may refer a decision of the arbitration to a court in [respective state] of competent jurisdiction, within [____] days of the decision of the tribunal. If neither Party refers the dispute to court within the above [____] days, the decision of the Arbitral tribunal will be final and binding.

22.8. **Performance to Continue During Dispute**

Performance of this Contract and all obligations hereunder shall continue during any Disputes or any Dispute resolution mechanism. However, payment due or payable by Owner to the contractor shall be withheld on account of a pending reference to any Dispute resolution mechanism, to the extent that such amount of the payment is subject of such Dispute. All undisputed amounts must continue to be paid in the manner specified.

23. CONFIDENTIALITY

23.1. **Confidential Information**

The Contractor shall keep confidential all matters relating to the Services, the Facilities and this Contract and will not make any disclosure, and shall use reasonable endeavors to ensure that their employees, sub-contractors and agents do not make any disclosure, to any person of any information, data, experience and know-how, documents, secrets, dealings, transactions or affairs of or relating to the Parties, the Services, the Facilities or this Contract (the "**Confidential Information**"). The confidentiality obligation shall not apply to the following:

- (i) any matter which the contractor can demonstrate is already generally available and is in the public domain other than through unauthorised disclosure by the contractor; or
- (ii) any disclosure, which may reasonably be, required for the performance of the contractor's obligations under this Contract or the compliance by the contractor with any statutory obligations or for the purposes of legal proceedings.
- (iii) any information, which was already in the contractor's possession before it was communicated by the Board.

23.2. Survival of Confidentiality Obligations

The provisions and obligations set out in this Clause shall survive and remain in force for ____ number of years upon and following the termination of this Contract.

24. GENERAL

24.1. Assignment

Any party shall not assign or otherwise transfer all or any of their rights or obligations under this Contract without prior written consent of the other Parties to this Contract, provided that the contractor may (without the consent of the owner):

- (i) delegate and/or sub-contract any of its rights or obligations under this Contract but without relieving the contractor of its obligations under the Contract; or
- (ii) assign, transfer or create security over all or any benefit of the contractor for the purposes of obtaining financing.

24.2. Announcements

The Parties warrant to and undertake with each other that they shall not, and shall procure that their employees, agents and sub-contractors shall not, issue or make any public announcement or statement regarding the Services, the signature, performance or termination of this Contract or the contractor's appointment there-under unless, prior thereto, the other Party has been furnished with a copy thereof and has approved the same in writing.

24.3. Notices

All notices, requests, demands, and other communications hereunder shall be in writing and shall be delivered personally or sent by prepaid, registered air mail, return receipt requested, or by facsimile transmission to the intended recipient thereof at the address or facsimile number set forth below. Any such notice, demand or communication shall be deemed to have been duly given immediately (if given or made by a confirmed facsimile), or ____ number of days after mailing, and in proving the same it shall be sufficient to show that the receipt of a facsimile was confirmed by the recipient. The addresses and facsimile numbers of the Parties for purposes of service of notices under this Contract are as follows:

If to the *[Name of the contracting authority]*: _____

Attn: []

Fax No.: _____

With copy to:

If to the *[Other government/financial institution if reqd.]*: _____

Attn: []

Fax No.: _____

With copy to: the [Owner]

If to the Contractor: _____

Attn: []

Fax No.: _____

Any Party may change its address for the purpose of this Contract by giving written notice to the other Party at the address and in the manner provided above.

24.4. Waiver

No forbearance, indulgence or relaxation or inaction by any Party at any time to require performance of any of the provisions of this Contract shall in any way affect, diminish or prejudice the right of such Party to require performance of that provision. Any waiver or acquiescence by any Party of any breach of any of the provisions of this Contract shall not be construed as a waiver or acquiescence of any right under or arising out of this Contractor of the subsequent breach, or acquiescence to or recognition of rights other than as expressly stipulated in this Contract.

24.5. Partial Invalidity

If any provision of this Contract or the application thereof to any Person or circumstance shall be invalid or unenforceable to any extent for any reason including by reason of any law or regulation or government policy, the remainder of this Contract and the application of such provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each provision of this Contract shall be valid and enforceable to the fullest extent permitted by law. Any invalid or unenforceable provision of this Contract shall be replaced with a provision, which is valid and enforceable and most nearly reflects the original intent of the unenforceable provision.

24.6. Amendments

No modification or amendment to this Contract and no waiver of any of the terms or conditions hereof shall be valid or binding unless made in writing and duly executed by the [Name of the Contracting Authority].

24.7. Conflicts

In the event of any conflict between the terms of this Contract and those of the Request For Proposal, as amongst the Parties hereto, to the extent permitted by law, the terms of this Contract shall prevail and the Parties shall take all such steps as are within their powers, to ensure that the terms and conditions of this Contract are adhered to.

24.8. Entirety

This Contract including the Schedules which are attached hereto and are an integral part of the Contract, constitutes the entire Contract between the Parties with respect to the subject matter hereof to the exclusion of and shall supersede the Request For Proposal, all other term sheets, agreements, proposals, negotiations, conversations, discussions, arrangements, understandings and assurances, either written or oral, existing or proposed, between all or amongst any two or more Parties hereto or persons claiming under them.

24.9. Costs

Each of the Parties hereto shall pay their own costs and expenses relating to the negotiation, preparation, and execution of this Contract and the transactions contemplated by this Contract.

24.10. Jurisdiction

The courts at [location] shall have jurisdiction over all disputes, controversy or claims between the Parties under this Contract.

IN WITNESS WHEREOF the Parties have executed this Contract on the date, which appears on page 1.

SIGNED by)
for and on behalf of)
[Contracting Authority])
in the presence of)

SIGNED by)
for and on behalf of)
[Contractor])
in the presence of)

SCHEDULE 1 – Scope of the project

[Detailed scope of work and the water supply requirements of the project area]

SCHEDULE 2 - Important Water Supply Points

[If bulk water supply is separate scope, mention the bulk water supply points preferably by both in maps and in texts. This section can also used to mention any important points relevant for this project]

SCHEDULE 3 - Project Area Statistics

[Summary of water supply related statistics in the project area and in the local body(ies). Include maps, drawings and mark important point in the map]

SCHEDULE 4 - Environment Management Plan

[Environment Management Plan for the project – If external aided funds accessed for the project then this plan should be in consistence with the respective External aided agency norms]

SCHEDULE 5 - Procurement Guidelines

*[This schedule is **optional**. If required, procurement procedures for the goods and equipments of the private operator can be included. If external funds were accessed then the respective agency guidelines may be prescribed. **However flexibility should be given to the contractor and the contract should be focused on the performance rather than procurement**]*

SCHEDULE 6 - Payment Procedure

[Include fixed and performance based payment mechanism. In addition to variable payment mechanism, include bonuses which will motivate the contractor further. The remunerations should be linked to performance targets mentioned in Clause 5 of this contract. If owner is proposed to fund for capital works include the payment terms accordingly.]

SCHEDULE 7 - Obligation of contracting authority during construction period

[some of the standard conditions are given below. However the obligations specific to the projects are to be included]

During the Preparatory Period B, the owner shall have the following obligations:

- (a) *Overall Project management including review, finalisation, maintenance and supervision of the Final Investment Programme, disbursement of OC Remuneration and Bonus as set out in Schedule 6, as payable, the taking of decisions regarding the completion of the Capital Works and the achievement of the respective obligations by each party, and the issue of the certificate of commencement of Operation and Management Period;*
- (b) *The approval of investments in the project area*

]

SCHEDULE 8 - Obligation of contractor during construction period

[some of the standard conditions are given below. However the obligations specific to the projects are to be included]

The Contractor shall have the following obligations during the Preparatory Period B.

- (a) *To review and suitably update the existing assets and its plan in the project area.*
- (b) *To carry on basic plumbing and to replace, with the approval of the Owner, illegal property water connections with legal connections where the property owner accepts the option to legitimise the connection, and if the property owner does not opt to legalise the connection, to facilitate disconnection of such illegal connections by the Owner*
- (c) *To carry on basic plumbing to replace the Customer connections with appropriate economical and efficient piping and plumbing materials;*
- (d) *To replace or install Customer metering on all points of Customer supply;*
- (e) *To extend the existing water distribution network to supply water to properties presently unconnected to the distribution network in the project area;*
- (f) *To install a meter, in its own lockable chamber, at every stand-post directly connected to the public network or fed from a storage tank filled from the public network and to replace all faucets on stand-posts with self-closing taps.*
- (g) *To install a class 3 meter in a lockable box on the connection pipe to every connected property at the external side of the wall of the main building (within the compound, if a compound wall exists, or at a safe and convenient location if there is no compound wall) where the connection enters the building.*

- (h) To ensure that each property has only one connection and to facilitate removal/disconnection of multiple connections with prior permission of the Owner.
- (i) To replace the connection pipe between the meter and the first faucet or ball-cock valve within every presently connected property, using high density polyethylene pipe, and fitted with one of the following two options, or any other practical and economic solution the contractor may propose, at the end of this pipe:
- (j) To re-confirm, by conducting a house to house survey, the data already collected [and provided to the contractor by the owner] and prepare a computerised database in the project area:
- (k) To establish a customer service centre in each zone to carry out the functions of customer billing and collection as well as manage customer relations, support and complaints in terms of this Contract including but not limited to response and redressed of complaints concerning leakages in the distribution system, billing, water reduction, water quality and provide assistance in imparting education concerning use of Continuous Pressured Water Supply, installation of new connection, water usage and plumbing.

Etc...]

SCHEDULE 9 - Obligation of owner during O&M period

[some of the standard conditions are given below. However the obligations specific to the projects are to be included

During the Preparatory Period B, the owner shall have the following obligations:

- (i) Receive requests for approvals for new connections
- (ii) Receive monthly payments and connection charges
- (iii) Manage, operate and maintain Bulk Water supplies (if bulk water supply is responsible of the owner)
- (iv) Co-ordinate with the contractor, in respect of providing new connections to un-connected properties, where property owners request and fulfill necessary conditions and pay the required fee

]

SCHEDULE 10 - Obligation of contractor during O&M period

[some of the standard conditions are given below. However the obligations specific to the projects are to be included

- i. The Contractor shall operate and maintain the facility in good repair during the concession Period;

- ii. *The Contractor shall not dispose²¹ of any by-products or waste or sludge in or around the Site, which could harm the environment;*
- iii. *That prior to the end of the concession Period, the facility shall be brought into good repair;*
- iv. *The facility shall be handed back to the Owner at the end of the contract Period, free from occupation and any encumbrances²², attachments, or lien of any sort, including payment of all statutory and other expenses such as electricity, water, sewerage charges and any such charges due to any authority/person;*
- v. *That the Owner shall at all times be indemnified from any liability for loss or damage arising out of any cause whatsoever (except where expressly arising out of a breach of Owner's covenants), from the Contractor's construction, maintenance or operation;*
- vi. *That it shall observe and perform all terms, covenants, conditions and stipulations of this Contract;*
- vii. *That it shall not use the demised premises for any other use than as agreed under this Contract.*
- viii. *The contractor shall maintain the right to construct, on the demised property, in-order to accommodate Office Storage Space, Water tank and other super structures necessary for the functioning of the system at the cost of the Contractor himself, and shall take full responsibilities in arranging for the aforesaid facilities.*
- ix. *That the aforesaid facilities shall be constructed with due permission of the appropriate authorities, and the construction shall be carried out on condition that the appropriate authorities receive consent from the Owner to enable the same.*
- x. *That the Contractor shall operate the facility after obtaining necessary permission and clearances from the Pollution Control Board and carry out the same in strict consonance with norms and guidelines issued by the Pollution Control Board.*
- xi. *That it shall, in accordance with the aforesaid clause, obliged to maintain the area and its surroundings clean, neat and in sanitary conditions without polluting the surrounding vicinity.*
- xii. *The Contractor shall operate the facility in consonance with the Pollution Control Board Guidelines, various Labour Laws and other rules and regulations applicable there under.*
- xiii. *That in violation of any of the aforesaid rules and guidelines, the Contractor shall be held liable in terms of the penalty contemplated under the relevant acts.*

]

SCHEDULE 11 - General obligations of the contractor

[some of the standard conditions are given below. However the obligations specific to the projects are to be included]

In addition to its specific obligations under the Preparatory Period B and the Operation and Management Period of the Contract, the contractor shall have the following general obligations as they may be applicable during the term of the Contract:

- (a) *The Contractor shall perform the Services in accordance with this Contract, and carry out its obligations with all due diligence, efficiency, and economy, in accordance with generally accepted professional techniques and practices, and shall observe sound management practices, and employ appropriate advanced technology and safe methods. The Contractor shall always act, in respect of any matter relating to this Contractor to the Services, as faithful advisers to the owner, and shall at all times support and safeguard the owner's legitimate interests in any dealings with sub-contractors or third parties.*

²¹ Incase of water treatment plant (WTP)

²² Wherever the areas available for such activities. Some of the potential areas are areas under service reservoirs, WTP, booster stations, etc...

- (b) Day-to-day management and operation of the distribution system within the project area including establishment of a customer service centre in each zone which will carry out the functions of customer billing and collection as well as manage customer relations, support and complaints for a period of ____ years from the Final Takeover Date in coordination with owner and their agents for those operations, where appropriate.
- (c) The contractor shall carry on basic plumbing and shall replace, with the approval of the owner, illegal property water connections with legal connections where the property owner accepts the option to legitimise the connection, and if the property owner does not so opt to legitimise the connection, to facilitate disconnection of such illegal connections by the Owner.
- (f) The contractor shall be responsible for maintaining all contractor Permits to perform the Services throughout the Term.
- (g) The contractor shall ensure that all materials and workmanship used in the course of the Contract shall be in accordance with the standard specifications used by the owner, or in absence of and appropriate Board specification, in accordance with the Indian National Standards.
- (i) The contractor shall replace or install Customer metering on all points of Customer supply and regularly calibrate all the meters installed in the project area for accurate readings to avoid under estimation of non-revenue water;
- (k) The contractor shall achieve the Performance Target relating to physical losses by using a combination of different measures including, but not limited to, the following:
- (i) Control of pressure in the system, while meeting the minimum zone pressure requirement, by a combination of pressure control and the laying of alternative network feeder, concrete pipes within the project area.
 - (ii) Detection, location and repair of leaks on the distribution networks using good quality pipe clamps.
 - (iii) The contractor will use their experience and diagnostic analysis of the system to determine the most cost-effective measures to achieve the Performance Targets during the Preparatory Period B and the Operation and Management Period.
- (o) Neither the contractor nor its employees shall engage, either directly or indirectly, in any of the following activities:
- (i) during the term of this Contract, any business or professional activities in the India which would conflict with the activities assigned to them under this Contract;
 - (ii) after the termination of this Contract, such other activities as may be specified by the owner.

]

SCHEDULE 12 - [Contracting authority] Employees for Deputation

[Include this schedule if applicable. This will be useful when the excess staffs are available with the owner and the contractor is willing to use them for the project]

Sl. No.	Category of Staff	Name of the Cities/departments		
1.	Assistant Engineer / Junior Engineer			
2.	Work Inspector			
3.	Valve men			
4.	Fitters			
5.	Clerk			
6.	Bill Collector			
7.	Etc...			
	Total			

SEWERAGE SCHEME FOR _____ LOCAL BODY

AGREEMENT BETWEEN

[Private Operator]
&
[Contracting Authority]

SIGNED ON *[Date of Agreement]*

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This contract made on this ___ day of *[month and year]*

Between

[Contracting Authority] a body corporate constituted under section *[fill up the relevant section]* of *[Act]* and having its office at *[Place]* and represented by *[individual or designation]* (here in after referred to as “OWNER” which expression shall, unless the context otherwise requires includes its subsidiaries, successors and assignees)

And

[Private operator] and represented by having its registered office at *[Address]* and hereinafter referred as the “CONTRACTOR”, which expression shall unless the context otherwise requires include its successors.

WHEREAS the owner as on the public interest, decided to construct an sewerage system in the *[area/local body]*

AND WHEREAS the owners has determined on the basis of the feasibility report¹ to implement the project for the construction of the sewerage collection system and *[finance, construct, Operate and maintain]*² of the sewerage treatment plant, the entire system being hereinafter referred to as the “Facility”

AND WHEREAS the Owner undertook the process of competitive bidding in order to select a suitable Contractor (being a Person or a group of Persons acting jointly and severally) for *[finance, construction, maintenance & operation]*³ of the Facility, for which purpose the Owner issued an Invitation for Bids (hereinafter referred to as “IFB”) dated *[date of IFB]* inviting bids from Contractors to implement the said project for and on behalf of Owner;

AND WHEREAS the Owner has agreed for the Bid of the contractor, for the Contract Price and concession period and subject to the terms & conditions hereinafter contained to grant the Contract for *[finance construction, operation & maintenance]* of the Facility to the successful Contractor, to provide the services;

AND WHEREAS in consideration of the Contract Price and concession period set out in the Schedules to this Contract, and the covenants by the Contractor herein contained, the Owner wards unto the Contractor the contract for the *[finance construction, operation & maintenance]* of the Facility;

¹ If applicable

² Include or remove the options such as design, finance, construct, etc... based on the project.

³ Include or remove the options such as design, finance, construct, etc... based on the project.

AND WHEREAS the Contractor has undertaken to implement the project, on strictly commercial principles and in accordance with the terms of this Contract to:

1. *Survey and set out the Facility;*
2. *Excavate the ground, including pavement and footpaths, structures and shifting utilities as required.*
3. *Supply and lay sewer pipes, construct all appurtenant structures like Manholes, etc.;*
4. *Restore the pavement, utilities and structures;*
5. *Construction of pumping stations and supply and installation of pump sets and electrical installations.*
6. *Sewage treatment plant (STP) and disposal arrangements, approved by the Owner & Pollution Control Board, at the site designated by the Owner;*
7. *Operate the STP to treat the effluent to the standards specified in the Schedules and as required by the state/central norms.*
8. *Carry out all environmental and pollution control works, including effluent and sludge treatment and disposal, in accordance with applicable laws and regulations;*
9. *Undertake all other works connected with the construction, operation and maintenance of the STP Facility; and*
10. *At the end of the Concession Period hand-over the STP of [Capacity] back to the Owner in good repair and free from all encumbrances.]⁴*

AND WHEREAS after due evaluation of the Bids and all clarifications thereof, submitted in response to the Bidding Documents (including clarifications on the Bid documents), the Owner has awarded the tender for implementation of the said Project to [Private Operator] for the [design, finance, construct and operate]⁵ of the Facility [Private Operator] is referred to as the Contractor;

AND WHEREAS the Contractor has undertaken to the construction of sewerage collection system and [design, finance, construct and operate]⁶ of the STP, required for the due implementation of the said Project for and on behalf of Owner in accordance with the terms of this Contract, In compliance with the Bidding Documents and the bids submitted consequent thereto, the Contractor has entered into this Contract with Owner, specifying the terms and conditions in relation to the design, construction, operation and maintenance of the Facility, in accordance with the terms of this Contract and has agreed to provide financial and performance guarantees to Owner in order to ensure the due implementation of the Project by the Contractor in terms of this Contract;

AND WHEREAS the Contractor recognizes and acknowledges the fact that the tender for implementation of the Project has been awarded to it on the basis of its experience, technical know-how, ability and financial net-worth taken together,

⁴ Include or remove the components based on the project.

⁵ Include or remove the options such as design, finance, construct, etc... based on the project.

⁶ Include or remove the options such as design, finance, construct, etc... based on the project.

NOW THEREFORE, in consideration of the mutual Contact to be bound by the terms hereof, Owner and the Contractor (each individually a “Party” hereto, and collectively the “Parties”) hereby agree to be bound by the provisions of this Contact which are set out in the following parts of this Contract and the special conditions and specifications therein namely:

1. The Contract Covenants;
2. The Construction Contract; and
3. The [*design finance, Construction and maintenance*⁷] of the STP Concession Contract;

Each of which shall be read in conjunction with the Schedules thereto, and form an integral part of the Contract, and be deemed to be attached herein. For interpreting any ambiguities or discrepancies, the precedence of contract Parts shall be in the order set out above.

II. CONTRACT COVENANTS

1. DEFINITIONS

“Additional Areas”	means the areas of land other than the sites, which the Contractor uses at its own cost and responsibility, for storage of materials, operation of equipment, fabrication, or any other Works connected with the Project.
“Adjudicator”	is the person appointed jointly by the Owner and the Contractor to resolve disputes in the first instance, as provided for in Clause 8 of the Contract Covenants. The name of the Adjudicator is defined in the Contract Data.
“Award Date”	is the date on which the Owner issues the Notification of Award to the Contractor’s Bid.
“Bill of Quantities”	means the priced and completed Bill of Quantities forming part of the Bid.
“Clearance”	means any consent, license, approval, permit, exemption or other authorisation of whatever nature, which is required to be granted by any Competent Authority to undertake and implement the Project.
“Commencement Date” or “Start Date”	given in Contract data C 1.2 . It is the date when the Contractor shall commence execution of the works.
“Compensation Events”	are those defined in Clause 39 of the Construction Part of this Contract.

⁷ Include or remove the options such as design, finance, construct, etc... based on the project.

“Competent Authority”	means any agency, authority, department, ministry, public or statutory Person, whether autonomous or not of the Government of India or State Government, or any local) Authority including Owner, or any other sub-division thereof
“Completion Date”	is the date of completion of the construction Works as certified by the Engineer in accordance with <u>Sub Clause 47</u> of the Construction Part of this Contract.
“Construction Contract”	is the part of this Contract, which deals with the construction of the Facility by the Contractor.
“Construction Documents”	means and includes all drawings, calculations, computer application software (programs), samples, patterns, models, operation and maintenance manuals, and other manuals and information of a similar nature.
“Construction Period”	means the period from the Commencement Date to the date of completion of construction, as set out in <u>Schedule C-I</u> .
“Construction Price”	is the price quoted by the Contractor as a total price schedule, and accepted by Owner in the Notification of Award, for the construction of the sewerage system.
“Contract Data”	defines the documents and other information, which comprise the Contract.
“Contract”	means this Contract between the Owner and the Contractor, including the Contract Covenants. [Design, Finance, Construct and maintenance ⁸] Contract including the general conditions, special conditions, schedules and drawings annexed to each of these; the Notification of Award, and any other documents expressly included specifically therein.
“Contractor’s Bid”	is the completed Bidding document submitted by the Contractor to the Owner.
“Contractor’s Plant” or “Contractor’s Equipment”	means all machinery, apparatus and other things (other than Temporary Works) required for the execution and completion of the works and the remedying of any defects, and includes any equipment referred to in the tender as “Construction Equipment” but does not include Plant materials, or other things intended to form or forming part of the Permanent Works.

⁸ Include or remove the options such as design, finance, construct, etc... based on the project

“Contractor’s Representative”	means the Person appointed by the Contractor as its representative under this Contract.
“Contractor”	means <i>[Private Operator]</i> acting jointly and severally, and its legal successors in title, but not (except with the consent of Owner) any assignee, whose Bid to carry out the Works has been accepted by the Owner.
“Day”	means a calendar day
“Defect Liability Period”	is the period named in the Contract data and from the Completion Date and the concession period shall be as indicated in the contract data as part of the contract.
“Defect”	is any part of the Works not completed in accordance with the Contract
“Directive”	means any present or future requirement, instruction, direction, order, rule or regulation of any Competent Authority which is legally binding or which is notified by Engineers to the Contractor and any modification, extension or replacement thereof from time to time.
“Drawings”	shall mean the maps, drawings, plans, tracings or prints thereof annexed to this Contract or forming part of it and shall include any corrections/modifications thereof by the competent authority.
“Engineer”	is the Person or Persons appointed by Owner and notified to the Contractor, who shall be responsible for supervising the Contractor, administering the Contract, certifying payments due to the Contractor, issuing and valuing Variations to the Contract, awarding extensions of time, and valuing the Compensation Events. The Owner may also appoint any Person or Persons to assist the Engineer and provide project management services for this Contract.
“Equipment”	is the contractors machinery and vehicles brought temporarily to the Site to construct the Works.
“Facility”	means the Site, the utilities and structures constructed thereon under this Contract, the access arrangements, utilities such as electrical and water supply lines, and all other appurtenances and meters etc., complete.
“IFB”	means the invitation for bids document issued by Owner, along with all addenda and clarifications in writing. Unless repugnant to the context, the term “IFB” is synonymous with “Tender Documents” and “Bidding Documents”.

“Initial Contract Price”	is the Contract Price listed in the Owner’s Notification of Award.
“Intended Completion Date”	is the date on which it is intended that the Contractor shall complete the Works. The Intended Completion Date is specified in the Contract Data, in the form of PERT/Bar Charts. Only the Owner may revise the Intended Completion Date by issuing an extension of time.
“Concession Period”	is the period commencing from the date of completion, testing, commissioning & functioning of the __MLD module of the STP.
“Liabilities”	includes all and any claims, liabilities, costs, damages, expenses, fines and penalties.
“Maintenance”	means the maintenance of the STP and includes inspection, surveys, testing, checks, repair and remedying the defects in the STP, or any other corrective action required to meet the specifications or Directives of Competent Authority.
“Materials”	means things of all kinds (other than Plant) to be provided and incorporated in the Permanent Works by the Contractor, including the supply-only items (if any) which are to be supplied by the Contractor.
“Month”	means calendar months
“Notification of Award”	means the letter from the Owner to the Contractor accepting the Contractor’s quoted Contract Price and Concession Period and indicating the Owner’s notification to the Contractor to enter into an agreement for the said Project.
“Owner”	means the contracting authority or employer of this contract
“Parts of Contract”	This Contract consists of three parts. These shall individually be referred to as ‘Part’ and collectively as ‘Parts’ of this Contract. These are: (i) The contract covenants (ii) The construction contract and (iii) The STP Concession Contract;
“Performance standards”	means the standards in the Schedules to this contract, to which the construction, maintenance and operation of the Facility must adhere, and which the Contractor undertakes to meet.
“Person”	means any natural person, firm, corporation, company, voluntary association, partnership, joint venture, trust, incorporated organisation, unincorporated organisation, Competent Authority or other entity, having legal capacity to sue and be sued in its name.

“Plant”	is any integral part of the Works, which is to have a mechanical, electrical, electronic or chemical or biological function.
“Project”	means the construction and completion of the Facility and all activities incidental thereto such as engineering, commissioning, insurance of the Facility, etc., complete. It also includes the <i>financing</i> , construction, operation and maintenance of the STP and effluent disposal arrangements.
“Prudent Utility Practices”	means (in the absence of any definite provision in any specification referred to in the Schedule) sound international engineering practices <i>consistent</i> with applicable law, regulation, reliability, mid safety as approved by Engineer.
“Schedules”	means the Schedules to this contract.
“Services”	means the construction Works and the operation and maintenance services for the Facility including manning, operating, inspection, repair and other services required to fulfill the Contractor's obligations under the Contract.
“Sewerage Treatment Plant (STP) Concession Contract”	means the part of this Contract between Owner and the contractor under which the Contractor shall finance, design, construct, operate and maintain the STP and effluent disposal system part of the Project and transfer the Facility to Owner as per the terms of this Contract.
“Site Investigation Reports”	are those which were included in the Bidding documents and are <i>factual interpretative</i> reports about the surface and sub-surface conditions at the site.
“Site”	means the all places at or over or through which the Works are carried out.
“Specifications”	shall mean and include the specifications referred to in this contract and the Schedules to this Contract, or as added to, amplified or superseded by any special specifications, and any modification or addition made or approved by the Engineer.
“STP Site”	means the plot of land demarcated by Owner, and described in detail in <u>Schedule STP-2</u> upon which the Contractor has to setup the STP.
“STP”	means the Sewage Treatment Plant and effluent disposal system to be financed, designed, constructed, commissioned, operated and maintained (and all activities incidental thereto) during the Concession Period by the Contractor.

“Subcontractor”	means any Person named in this Contract as a subcontractor, manufacturer or supplier for a part of the Works or any Person to whom a part of the works has been subcontracted in accordance with this Contract, and the legal successors in title to such Person, but does not include any assignee of such Person.
“Tax”	means any Indian tax, duty, levy, toll, charge whatsoever charged, imposed or levied by Central or State Governments or Competent Authority.
“Technical Requirements”	means and includes the description of the scope, standard, design criteria and performance standards, specifications, drawings and similar information as set forth in the schedules to this Contract and any alterations and modifications thereto.
“Temporary works”	are works designed, constructed, installed, and removed by the Contractor which are needed for construction or installation of the Works.
“Tender”	means the Contractor’s quoted offer to Owner for the Project, as modified and clarified during negotiations and as accepted by the Notification of Award. The word “Tender” is synonyms with “Bid”.
“Treatment Charges”	means the sum payable to the Contractor under the STP Contract for treatment of sewage as set out in <u>Schedule STP-4.</u>
“Sewerage Contract”	means this contract
“Variation”	means any alteration or modification to the Project Requirements which is approved by Engineer or approved as a variation by Engineer in accordance with this Contract.
“Works”	means the design, construction, completion, commissioning of and remedying of defects in any component of the Facility, and any other permanent, temporary or urgent works required under this Contract.
“Year”	means 365 days.

2. OWNER COVENANTS

The owner hereby covenants with the Contractor as under:

[Some of the sample covenants]

1. That it shall hand over the Site for sewerage system, progressively from the Commencement Date on an as-is-where-is basis to the Contractor.

2. That it shall secure all necessary plan approvals listed as Owner Clearances for the project, to enable the Contractor to construct the facility;
3. That it shall pay the Contractor the sum stated (Contract Price) in the construction contract
4. That it shall ensure the supply of sewage to the STP, at the quantum specified in / **Schedule STP 4**, and pay the Treatment Charges;
5. It shall not include in or impede in any manner or otherwise limit, restrict or impose conditions (other than those provided in this Contract) in relation to: (i) to the construction, operation and maintenance of the Facility; (ii) the implementation of the project by the Contractor and (iii) the possession, control and use, by the Contractor of the STP constructed thereon under the terms of this Contract;
6. It shall enter into appropriate further documentation or additional writings as the Contractor may reasonably require to give effect to the provisions of this Contract and the Contractors' financing plans. Provided however that no such documentation shall place any additional obligations on the Owner than envisaged under this Contract;
7. That it shall recognise the rights of lenders to the Contractor, to the extent set forth in **Clause 22** of the STP Concession Contract.]

3. CONTRACTOR'S COVENANTS

The Contractor hereby covenants with the Owner as follows:

[Some of the sample covenants]

1. That it shall take over the site progressively on an as-is-where-is basis from the Commencement Date;
2. That it shall carry out the necessary surveys, site clearing, excavations, shifting of utilities, etc.
3. That it shall lay the sewer pipes, pumping mains, provide joints and connections, and all appurtenances complete, and construct the pumping stations, install pump sets.
4. That it shall test and commission the system, and rectify any defects therein;
5. That it shall design and construct an STP as set out in the technical requirements;
6. That it shall commence and progress the work of construction of the STP and effluent disposal system such that it progresses in a balanced manner to the progress of the sewerage system. The progress shall be considered as balanced if the following milestones are met:

Physical Progress of STP _____ MLD	Progress of sewerage works as % completed value of Rs. _____ Crores.
Earthwork and all Civil works up to 1000 mm	20%

<i>above ground level complete</i>	
<i>All civil works to be complete</i>	35%
<i>All equipment to be delivered on site</i>	40 %
<i>Complete erection, testing and commissioning of works, and trial run to be carried out to demonstrate the quality of effluent</i>	60%

Provided that if these construction milestones of the STP are not met, the Contractor shall not be eligible for any further payment under the Construction Part of the Contract, until the said milestones are achieved.

- 7. That it shall connect the sewerage system to the STP;*
- 8. That it shall commission the STP and treat the sewage from the sewerage system, and dispose the treated effluent & solid waste complying at all times with norms for effluent treatment and disposal, as set out by Competent Authority.*
- 9. That it shall pay all expenses, dues, charges due to any Person, such as electricity, water charges, telephone and such charges for which' the Contractor shall be completely responsible:*
- 10. That it shall obtain all required permissions, sanctions, clearances and permits for the construction, operation and maintenance of the Facility, including the Contractor Clearances; with the help of the Owner, this includes diversion of traffic.*
- 11. That it shall construct the Facility in accordance with this Contract, special conditions and specification, and obtain planning permissions and all other permissions, sanctions, clearances and permits required for a Facility of this nature;*
- 12. That it shall maintain the Facility in good repair during the Concession Period;*
- 13. That prior to the end of the Concession Period, the STP shall be brought into good repair, and shall be handed back to the Owner free from occupation and any encumbrances, attachments, or lien of any sort including payment of all statutory and other expenses such as electricity, water, sewage charges and any such charges due to any person;*
- 14. That the Owner shall at all times be indemnified from any liability for loss or damage arising out of any cause whatsoever (except where expressly arising out of a breach of Owner's covenants), from the Contractors construction, maintenance or operation activities in the facility or Site;*
- 15. The Contractor shall save, harmless and indemnify the Owner from and against all claims and proceedings for or on account of infringement of any patent right, design trademark or name or other protected rights in respect of any Contractor's Equipment, materials or Plant used for or in connection with this Contract and from and against all damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto.*
- 16. That the Contractor shall be fully responsible towards designing , constructing and maintaining the Facility in a safe and secure manner, consistent with the law*

of the land, laws and regulations regarding such facility, and directives of any Competent Authority and planning permissions.

17. That it shall observe and perform all terms, covenants, conditions and stipulations of this Contract;]

4. CONTRACT STRUCTURE

4.1. Entire Contract

Both Parties recognise that this Contract consists of three Parts. This Contract (and its Parts) contain the entire contract between the parties with respect to the subject matter hereof and expressly excludes any warranty, condition or other undertaking implied at law or by custom and supersedes all previous contracts and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Contract in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Contract.

4.2. Invalidity of Parts

If any provision or Part of this Contract be declared invalid, unenforceable or illegal by the court of any jurisdiction to which it is subject such invalidity, unenforceability or illegality shall not prejudice or affect the remaining provisions or Parts of this Contract which shall continue in full force and effect, notwithstanding such invalidity, unenforceability or illegality.

4.3. Carry-over Defaults

If either Party breaches or defaults on any Part of this Contract, such default of one Part shall be treated as defaults of all other Parts of this Contract. The Party in breach or default would also be liable for the carry-over default of other Parts of this Contract, including the forfeiture of Performance Security thereof.

5. POSSESSION OF SITE

The Site forms part of areas for public use, and shall remain fully in the control of the owner. The Contractor under this Contract shall be permitted to work on the Site specifically under this Contract, on an as-is-where-is basis, with all utilities, structures, fences, boundaries, horticulture, etc. It shall be the responsibility of the Contractor to clear the site (only to the extent required), including safeguarding trees and utilities. Released materials (if any) shall be the property of the Owner.

The Contractor is being permitted to work at the Site under this Contract to construct the Facility including developing, establishing, constructing, operating and maintaining the Facility, but the title of the land shall always vest with the Owner. The Contractor shall have no rights to mortgage, transfer, assign or otherwise encumber the Demised Premises and any or all of its rights and interest in relation thereto or to otherwise create a security interest in favour of the lenders over the Demised Premises.

5.1. Owner Clearances

The Owner shall obtain the following Clearances from Competent Authority:

- (i) Permission for cutting the roads;

- (ii) Permissions for shifting Utility and service lines during construction;
- (iii) Environmental Clearance for setting up of the STP.

However the contractor shall provide any reasonable assistance, designs and drawings to the Owner or Competent Authority, for obtaining the Owner Clearances.

5.2. Other Clearances

The Contractor shall obtain and maintain any other Clearances from Competent Authority for carrying out the Works for the Project, other than the Owner Clearances set out above.

6. ENVIRONMENTAL OBLIGATIONS

The Contractor shall be fully responsible for all environmental obligations arising out of this Contract, during construction of the Facility as well as during the Concession Period for the STP. Proper sanitary, plumbing and garbage disposal plans should be laid and executed to ensure compliance to the Prudent Utility Practices and requirements of local authority, and the Pollution Control Boards. Untreated effluent shall not be let out. Effluent, sludge and other solid wastes shall be disposed off as per the requirement of the Pollution Control Boards.

The contractor shall be responsible for the removal from the Site and the Facility or for otherwise making safe, in accordance with applicable Indian Law, any materials generated or released by the Contractor which are toxic or similarly hazardous to the health or safety of persons or to the environment.

The Contractor shall take all necessary and appropriate steps to protect the environment (both on and off the Site) and to limit damage and nuisance to people and property resulting from pollution, noise and other results of its operations. The Contractor shall ensure that air emissions, surface discharges and effluent from the Facility shall in any case not exceed the limits prescribed by Law.

The Contractor is not permitted to cut any tree, without express sanction of the Owner and any other authority concerned. In case such cutting is unavoidable, the Contractor shall ensure plantation of trees to three times the number of trees cut, and also their maintenance and subsistence.

7. REPRESENTATION AND WARRANTY

Each Party represents and warrants to the other Party that:

- (i) This Contract constitutes the legal, valid and binding obligation and is enforceable against it in accordance with the terms hereof,
- (ii) it has full power and authority to execute, deliver and perform its obligations under the Contract and to carry out the transactions contemplated hereby; and
- (iii) it has taken all necessary actions to authorise the execution, delivery and performance of the Contract.

8. DISPUTES

8.1. Engineer's Decision

If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within ____ days of the notification of the Engineer's decision.

8.2. Adjudicator to Decide

The Adjudicator shall give a decision in writing, within ____ days of receipt of a notification of a dispute.

8.3. Payment to Adjudicator

The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data the cost shall be divided equally between the Owner and the Contractor, whatever decision is reached by the Adjudicator.

8.4. Replacement or Adjudicator

Should the Adjudicator resign or die, or should the Owner and the Contractor agree that the Adjudicator is not fulfilling his functions in accordance with the provisions of the Contract; a new Adjudicator will be jointly appointed by the Owner and the Contractor. In case of disagreement between the Owner and the Contractor, within ____ days, the Adjudicator shall be designated by the Appointing Authority designated in the Contract Data at the request of either party.

8.5. Notice for Arbitration

Either Party may refer a decision of the Adjudicator to an Arbitrator within ____ days of the adjudicator's written decision. If neither Party refers the dispute to arbitration within the above ____ days, the Adjudicator's decision will be final and binding.

8.6. Arbitration

- (i) In case of dispute or difference arising between the Owner and the Contractor relating to any matter arising out of or connecting with this Contract, such dispute or difference shall be settled in accordance with the Arbitration and Conciliation Act 1996. The Arbitral Tribunal shall consist of three arbitrators, one each to be appointed by the Owner and Contractor. The third arbitrator shall be chosen by the two arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two arbitrators appointed to reach upon a consensus within a period of ____ days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of the Institution of Engineers (India).
- (ii) If one of the Parties fails to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above within ____ days after receipt of the notice of the appointment of its arbitrator by the other Party, then the President of the Institution of Engineers (India), both in cases of foreign Contractor as well as Indian Contractor, shall appoint the arbitrator. A certified copy of the order of the president of the Institution of Engineers (India), making such an appointment shall be furnished to each of the Parties.

- (iii) Arbitration proceedings shall be held at _____, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.
- (iv) The decision of the majority of arbitrators shall be final and binding upon both Parties. The cost and expenses of the arbitration proceedings will be paid as determined by the Arbitral Tribunal. However, the expenses incurred by each Party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the Arbitrator appointed by such party or on its behalf shall be borne by each party itself.
- (v) Performance under the Contract shall continue during the arbitration proceedings and payments due to the Contractor by the Owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.
- (vi) Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Adjudicator for the purpose of obtaining his said decision pursuant to **Sub—Clause 8.2**. No such decision shall disqualify the owner representative (most of the cases project engineer) from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

8.7. Failure to comply with Adjudicator's Decision

Wherever either Party has not given notice of intention to commence arbitration of a dispute within the period slated in **Sub-Clause 8.5** and the related decision has become final and binding, either Party may, if the other Party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with **Sub-Clause 8.6**. The provision of **sub clause 8.1** shall not apply to any such reference

8.8. Failure to comply with Decision by Arbitral Tribunal

Either Party may refer a decision of the arbitration to a court in [*respective state*] of competent jurisdiction, within [_____] days of the decision of the tribunal. If neither Party refers the dispute to court within the above [_____] days, the decision of the Arbitral tribunal will be final and binding.

8.9. Performance to Continue During Dispute

Performance of this Contract and all obligations hereunder shall continue during any Disputes or any Dispute resolution mechanism. However, payment due or payable by Owner to the contractor shall be withheld on account of a pending reference to any Dispute resolution mechanism, to the extent that such amount of the payment is subject of such Dispute. All undisputed amounts must continue to be paid in the manner specified.

9. REGISTRATION COSTS

Any stamp duty and registration charges payable pertaining to this Contract and execution and registration thereof shall be borne by the Contractor.

10. LABOUR

The Contractor shall, unless otherwise provided in the Contract, make his own arrangement for all staff and labour, local or other, and for their payment, housing, feeding and transport.

The Contractor shall, if required by the Engineer, deliver to the Engineer a return in detail, in such form and at such intervals as the Engineer may prescribe, showing the staff and numbers of the several classes of labour from time-to-time employed by the Contractor on the Site and such other information as the Engineer may require.

11. COMPLIANCE WITH LABOUR REGULATIONS

During continuance of the Contract, the Contractor and his sub-contractors shall abide at all times by all existing labour enactment and rules made there-under, regulations, notifications and bye-laws of the State or Central Government or local authority and any other labour law (including rules), regulations, bye-laws that may be passed or notification that may be issued under any labour law in future either by the State or the Central Government or the local authority. The Contractor shall keep the Owner indemnified in case any action is taken against the Owner by the competent authority on account of contravention of any of the provisions of any Act or rules made there under, regulations or notifications including amendments.

If the Owner is caused to pay or reimburse, such amounts as may be necessary to cause or observe, or for non-observance of the provisions stipulated in the notifications/bye-laws/Acts/Rules/regulations including amendments if any, on the part of the Contractor, the Engineer shall have the right to deduct any money due to the Contractor including his amount of performance security. The Engineer shall also have the right to recover from the Contractor any sum required or estimated to be required for making good the loss or damage suffered by the Owner.

III. CONSTRUCTION CONTRACT

A- GENERAL

1. DEFINITIONS

The Definitions shall be as given in the Contract Covenants

2. INTERPRETATION

2.1. In interpreting these Conditions of Contract, singular also means plural, male also means female or neuter, and the other way around. Headings have no significance. Words have their normal meaning under the language of the Contract unless specifically defined. The Engineer will provide instructions clarifying queries about the Conditions of Contract.

2.2. If sectional completion is specified in the Contract Data, references in the Conditions of Contract to the Works, the Completion Date, and the Intended Completion Date apply to any Section of the Works (other than references to the Completion Date and Intended Completion date for the whole of the Works).

2.3. The documents forming the Contract shall be interpreted in the following order of priority:

- (i) This Contract agreement
- (ii) Notification of Award, notice to proceed with the works
- (iii) Contractor's Bid
- (iv) Contract Data
- (v) Conditions of Contract
- (vi) Specifications
- (vii) Drawings
- (viii) Bill of quantities and
- (ix) any other document listed in the Contract Data as forming part of the Contract.

3. LANGUAGE AND LAW

The language of the Contract and the law governing the Contract are stated in the Contract Data

4. ENGINEER'S DECISIONS

Except where otherwise specifically stated, the Engineer will decide contractual matters between the Owner and the Contractor in the role representing the Owner.

5. DELEGATION

The Engineer may delegate any of his duties and responsibilities to other people except to the Adjudicator after notifying the Contractor and may cancel any delegation after notifying the Contractor.

6. COMMUNICATIONS

Communications between Parties, which are referred to in the conditions, are effective only when in writing. A notice shall be effective only when it is delivered (in terms of Indian Contract Act).

7. SUBCONTRACTING

The Contractor may subcontract with the approval of the Engineer but may not assign the Contract without the approval of the Owner in writing. Subcontracting does not alter the Contractor's obligations.

8. OTHER CONTRACTORS

The Contractor shall co-operate and share the Site with other contractors if any, public authorities, utilities, and the Owner between the dates given in the Schedule of Other Contractors. The Contractor shall as referred to in the Contract Data, also provide facilities and services for them as described in the Schedule. The Owner may modify the schedule of other contractors and shall notify the contractor of any such modification.

9. PERSONNEL

9.1. The Contractor shall employ the key personnel to carry out the functions stated in the Schedule or other personnel approved by the Engineer. The Engineer will approve any proposed replacement of key personnel only if their qualifications, abilities, and relevant experience are substantially equal to or better than those of the personnel initially employed by the Contractor and approved by the Engineer.

9.2. The Contractor shall make his own arrangements for the engagement of all staff and labour, local or other, and for their payment, housing, feeding and transport.

9.3. The Contractor shall provide all necessary superintendence during the execution of the Works and as long there after as the Engineer may consider necessary for the proper fulfilling of the Contractor's obligations under the contract. The Contractor shall nominate a competent and authorised representative (Contractor's Representative) approved of by the Engineer, which approval may at any time be withdrawn. The Contractor's Representative shall give his whole time to the superintendence of the works. The Contractor's Representative shall receive, on behalf of the Contractor, instructions from the Engineer, which shall be deemed to have been received by the contractor.

9.4. If the Engineer withdraws approval of the Representative, the Contractor shall remove the representative from the Works within _____ days, and replace him by another representative approved by the Engineer.

9.5. The Contractor shall provide, on the Site in connection with the execution and completion of the Works and the remedying any defects therein:

- (i) only such technical assistants as are skilled and experienced in their respective callings and such foremen and leading hands as are competent to give proper superintendence and
- (ii) Such skilled, semi skilled and unskilled labour as is necessary for the proper and timely fulfilling of the contractor's obligations under the contract.

9.6. If the Engineer asks the Contractor to remove a person who is a member of the Contractor's staff or his work force stating the reasons the Contractor shall ensure that the person leaves the Site within _____ days and has no further connection with the work in the Contract.

10. OWNER'S AND CONTRACTOR'S RISKS

Owner carries the risks, which this Contract states are Owner's risks, and the Contractor carries the risks which this Contract states are Contractor's risks.

10.1. Owners Risk

The Owner is responsible for the excepted risks which are

- (a) in so far as they directly affect the execution of the Works in the Owner's country, the risks of war, hostilities, invasion, act of foreign enemies, rebellion, revolution, insurrection or military or usurped power, civil war, riot commotion or disorder (unless restricted to the Contractor's employees), and contamination from any nuclear fuel or nuclear waste or radioactive toxic explosive, or
- (b) a cause due solely to the design of the Works, other than the Contractor's design.

10.2. CONTRACTOR'S RISKS

All risks of loss or damage to physical property and of personal injury and death, which arise during and in consequence of the performance of the Contract other than the excepted risks, is the responsibility of the Contractor.

11. INSURANCE

11.1. The Contractor shall provide, in the joint names of the Owner and the Contractor, insurance cover from the Start Date to the end of the Defects Liability Period, in the amounts and deductibles stated in the Contract Data and shall indemnify the Owner against all losses and claims in respect of the following events which are due to the Contractor's risks:

- (i) loss of or damage to the Works, Plant and Materials;
- (ii) loss of or damage to Equipment;
- (iii) loss of or damage of property (except the Works, Plant, Materials and Equipment) in connection with the Contract; and
- (iv) personal injury or death.

And which may arise out of or in consequence of the execution of the Works, and against all claims, proceedings, damages, cross charges and expenses whatsoever in respect thereof or in relation thereto, subject to the following exceptions:

- (i) the permanent use or occupation of land by the Owner
- (ii) the right of the Owner to execute the works, or any part thereof; on, over, under in or through any land.
- (iii) Death of or injury to persons or loss of or damage to property resulting from any act or neglect of the Owner, his agents, servants or other contractors, not being employed by the Contractor, or in respect of any claims, proceedings, damages, costs charges and expenses in respect thereof or in relation thereto or, where the injury or damage was contributed to by the Contractor, his servants or agents, such part of the said injury or damage as may be just and equitable having regard to the extent of the responsibility of the Owner, his servants or agents or other contractors for the injury or damage.

The Owner shall indemnify the Contractor against all claims, proceedings damages costs charges and expenses in respect of the matters referred to in the exceptions defined above,

11.2. Insurance premiums shall be paid by the Contractor from time to time and the Contractor shall also deliver policies and certificates for insurance to the Engineer for the Engineer's approval before the Start Date. All such insurance shall provide for compensation to be payable in the types and proportions of currencies required to rectify the loss or damage incurred.

11.3. If the Contractor does not provide any of the policies and certificates required, the Owner may effect the insurance which the Contractor should have provided and recover the premiums the Owner has paid from payments otherwise due to the Contractor or, if no payment is due, the payment of the premiums shall be a debt due. There shall be no obligation for the insurance to include loss or damage caused by Force Majeure events.

11.4. Alterations to the terms of insurance shall not be made without the approval of the Engineer.

11.5. 13.5 Both Parties shall comply with any conditions of the insurance policies.

11.6. Third Party Insurance: The Contractor shall, without limiting his or the Owner's obligations and responsibilities under any clause, insure, in the joint names of the Contractor and the Owner, against liabilities for death of or injury to any person or loss of or damage to any property arising out of the performance of the Contract other than the exceptions defined in paragraph above.

11.7. Cross Liabilities: The insurance policy shall include a cross liability clause such that the insurance shall apply to the Contractor and to the Owner as separate insured.

11.8. The Owner shall not be liable for or respect of any damages or compensation payable to any workman or other than death or injury resulting from any act or default of the owner, his agents or servants. The Contractor shall indemnify and keep indemnified the Owner against all such damages and compensation, other than those for which the Owner is liable as aforesaid, and against all claims, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto.

11.9. The Contractor shall insure against such liability and shall continue such insurance during the whole of the time that he employs any persons on the Facility. Provided that, in respect of any persons employed by any Sub contractor, the Contractor's obligations to insure as aforesaid under this Sub-Clause shall be satisfied if the Subcontractor shall have insured against the liability in respect of such persons in such manner that the owner is indemnified under the policy, but the Contractor shall require such Subcontractor to produce to the Owner, when required, such policy of insurance and the receipt for the payment of the current premium.

11.10. The Contractor shall provide evidence to the Owner prior to the start of work at the Site that the insurances required under the Contract have been effected and shall, within _____ days of the Commencement Date, provide the insurance policies to the owner. The Contractor shall effect all insurance for which he is responsible with insurance and in terms approved by the Owner.

11.11. The Contractor shall notify the insurers of changes in the nature, extent or Programme for the execution of the Works and ensure the adequacy of the insurance at all times in accordance with the terms of this Contract and shall, when required, produce to the Owner the insurance policies in force and the receipts for payment of the current premiums.

11.12. If the Contractor fails to effect and keep in force any of the insurance required under this Contract or fails to provide the policies to Owner within a reasonable period as determined by the Engineer, then the Owner may treat the same as a default of the Contractor, and

11.13. In the event that the Contractor or the Owner fails to comply with conditions imposed by the insurance policies effected pursuant to the Contract, each shall indemnify the other against all losses and claims arising from such failure.

12. SITE INVESTIGATION REPORTS

The Contractor, in preparing the Bid, shall rely on any Site Investigation Reports referred to in the Contract Data, supplemented by any information available to the Bidder.

13. QUERIES ABOUT THE CONTRACT DATA

The Engineer will clarify queries on the Contract Data.

14. CONTRACTOR TO CONSTRUCT THE WORKS

14.1. The Contractor shall construct and install the Works in accordance with the Specification and Drawings. A copy of all Drawings shall be maintained by the Contractor on the Site and the same shall, at all reasonable times, be available for inspection and use by the Engineer and by any other person authorised by the Engineer.

14.2. The Contractor shall with due care and diligence execute and complete the Works and remedy any defects therein accordance with the provision of the Contract. The Contractor shall provide all superintendence, labour, materials, plant, equipment and all other things whether of a temporary or permanent nature, required in and for such execution, completion and remedying of any defects, so far as the necessity for providing the same is specified in or is reasonably be inferred from the Contract.

14.3. Site Operation: The Contractor shall take full responsibility for the adequacy, stability and safety of all site operation.

14.4. Work to be in accordance with Contract: unless it is legally or physically impossible, the Contractor shall execute and complete the works and remedy any defects therein in strict accordance with the Contract to the satisfaction of the Engineer. Any approval by the Engineer shall not relieve the Contractor of any of his responsibilities under the Contract.

14.5. All operations necessary for the execution and completion of the Works, the remedying of any defects therein, so far as compliance with the requirements of the Contract permits, be carried on so as not to interfere unnecessarily or improperly with:

- (i) the convenience of the public, or
- (ii) the access to. Use and occupation of public or private roads and footpaths to or of properties.

The Contractor shall save, harmless and indemnify the Owner in respect of all claims proceedings, damages, costs , charges and expenses whatsoever arising out of, or in relation to any such matters in so far as the Contractor is responsible thereof.

14.6. The Contractor shall use every reasonable means to prevent any of the roads or bridges communicating with or on the routes to the Site from being damaged or injured by any traffic of the Contractor or any of his Subcontractors and, in particular, shall select routes. Choose and use vehicles and restrict and distribute loads so that any such extraordinary traffic as will inevitably arise from the moving of materials. Plant, Contractor's Equipment or Temporary Works from and to the Site shall be limited, as far as reasonably possible and so that unnecessary damage or injury may be occasioned to such roads and bridges.

14.7. Save insofar as the Contract otherwise provides, the Contractor shall be responsible for and shall pay the cost of strengthening any bridges or altering or improving any road communicating with or on the routes to the Site to facilitate the movement of Contractor's Equipment or Temporary Works and the Contractor shall indemnify and keep indemnified the Owner against all claims for damage to any such road or bridge caused by such movement, including such claims as may be made directly against the Owner, and shall negotiate and pay all claims arising solely out of such damage.

14.8. If any damage occurs to any bridge or road communicating with or on the routes to the site, or any damage occurs to any other property from the transport of materials or Plant by the Contractor, the Contractor shall notify the Engineer, as soon as he becomes aware of such damage or soon as he receives any claim from the authority entitled to make such claim.

The Contractor shall be fully responsible to settle any such claims, including such claims as may be made directly against the Owner, and shall negotiate and pay all claims arising solely out of such damage and shall indemnify the Owner against any such claims.

14.9. The Contractor shall, in accordance with the requirements of the Owner, afford all opportunities for carrying their work to the workmen of any duly constituted authorities who may be employed in the execution on or near the Site.

14.10. All materials, Plant and workmanship shall be:

- (i) of the respective kinds described in the Contract and in accordance with the Specifications and
- (ii) Subjected from time to time to such tests as the Engineer may require

The Contractor shall provide such assistance, labour, electricity, fuels, stores, apparatus and instruments as are normally required for examining, measuring testing any materials or Plant and shall supply samples of materials for testing as may be selected and required by the Engineer.

14.11. In case of default on the part of the Contractor in carrying out such instruction within a reasonable time specified by the Engineer, it shall be treated as a default of the Contractor and the Owner shall be entitled to employ and pay other persons to carry out the same and all costs consequent thereon or incidental thereto shall after due consultation with the Owner and the Contractor be determined by the Engineer and shall be recoverable from the Contractor by the Owner.

14.12. All Contractor's Equipment Temporary Works and materials provided by the Contractor shall, when brought on to the site, be deemed as exclusively intended for use in the Construction Works.

14.13. The Owner shall not at any time be liable for the loss of or damage to any of the said Contractor's Equipment, Temporary works or materials.

14.14. If, by reason of any accident or failure or other event occurring to, in or in connection with the Works or any part thereof any remedial or other work is in the opinion of the Engineer, urgently necessary for the safety or operation of the Works and the Contractor is unable or unwilling at once to do such work, the Owner shall be entitled to employ and pay other persons to carry out such work as the Engineer may consider necessary. All costs consequent thereon or incidental thereto shall be determined by the Engineer and shall be recoverable from the Contractor by the Owner.

15. THE WORKS TO BE COMPLETED BY THE INTENDED COMPLETION DATE

The Contractor may commence execution of the Works on the Start Date and shall carry out the works in accordance with the program submitted by the Contractor, as updated with the approval of the Engineer, and complete them by the Intended Completion Date.

16. APPROVAL BY THE ENGINEER

16.1. The Contractor shall submit Specifications and Drawings showing the proposed Temporary Works to the Engineer, who is to approve them if they comply with the Specifications and Drawings.

16.2. The Contractor shall be responsible for design of Temporary Works.

16.3. The Engineer's approval shall not alter the Contractor's responsibility for design of the Temporary Works.

16.4. The Contractor shall obtain approval of third parties to the design of the Temporary Works where required.

16.5. All Drawings prepared by the Contractor for the execution of the temporary or permanent Works, are subject to prior approval by the Engineer before their use.

17. SAFETY

17.1. The Contractor shall be responsible for the safety of all activities on the Site.

The Contractor shall throughout the Contract Period:

- (i) have full regard for the safety of all persons entitled to be upon the Site and keep the Site in an orderly state appropriate to the avoidance of danger to such persons and
- (ii) provide and maintain at his own cost all lights guards, fencing warning signs and watching when and where necessary or required by the Engineer or by any duly constituted authority, for the protection of the Site or for the safety and convenience of the public or others and
- (iii) take all reasonable steps to protect the environment on and off the site and to avoid damage or nuisance to persons or to property of the public or others resulting from pollution, noise or other causes arising as a consequence of his methods of operation.

17.2. During the Contract Period the Contractor shall, subject to the requirements of the Works keep the Site reasonably free from all unnecessary obstruction and shall store or depose of any Contractor's Equipment and surplus materials and clear away and remove from the Site and wreckage, rubbish or Temporary Works no longer required.

18. DISCOVERIES

18.1. Anything of historical or other interest or of significant value unexpectedly discovered on the Site is the property of the Owner. The Contractor is to notify the Engineer of such discoveries and carry out the Engineer's instructions for dealing with them.

18.2. All Fossils, coins, articles of value or antiquity and structures and other remains or things of geological or archaeological interest discovered on the Site shall, as between the Owner and the Contractor, be deemed to be the absolute property of the Owner.

19. POSSESSION OF THE SITE

The Owner shall give possession of all parts of the Site to the Contractor. If possession of a part is not given by the date stated in the Contract Data the Owner is deemed to have delayed the start of the relevant activities and this will be Compensation Event.

20. ACCESS TO THE SITE

20.1. The Contractor shall allow the Engineer and any person authorised by the Engineer access to the Site and to any place where work in connection with the Contract is being carried out or is intended to be carried out.

20.2. The Contractor shall be responsible for:

- (i) the accurate setting out of the works and

- (ii) the correctness, subject as above mentioned of the position levels dimensions and alignment of all parts of the works and
- (iii) the provision of all necessary instruments, appliances and labour in connection with the foregoing responsibilities.

20.3. If, at any time during the execution of the works, any error appears in the position, levels dimensions or alignment of any part of the works, the Contractor, on being required so to do by the Engineer, shall at his own cost, rectify such error.

21. INSTRUCTIONS

21.1. The Contractor shall carry out all instructions of the Engineer, which comply with the applicable laws Site is located.

The Contractor shall conform in all respects, including by the giving of all notices and the paying of all fees, with the provisions of:

- (i) any National or Statute, Ordinance or other Law, or any regulation, or bye-law of any local or other duly constituted authority in relation to the execution and completion of the Works and the remedying of any defects therein, its operation and maintenance and
- (ii) the rules and regulations of all public bodies and companies whose property or rights are affected or may be affected in any way by the Works.

And the Contractor shall keep the Owner indemnified against all penalties and liability of every kind for breach of any such provision. Provided always that the Owner shall be responsible for obtaining any planning zoning or other similar permission required for the Works to proceed.

All Drawings and details required for such permissions shall be furnished by the Contractor and the Owner shall not be responsible for any delay on this account. The Contractor shall take necessary follow up action to get the approvals in time.

22. PROCEDURE FOR DISPUTES

The Procedure for disputes shall be as set out in **Clause 8** of Contract Covenants.

B - TIME CONTROL

23. PROGRAM

23.1. Within the time stated in the Contract Data the Contractor shall submit to the Engineer for approval a Program showing the general methods, arrangements, order, and timing for all the activities in the Works.

23.2. An update of the Program shall be a program showing the actual progress achieved on each activity and the effect of the progress achieved on the timing of the remaining work including any changes to the sequence of the activities.

23.3. The Contractor shall submit to the Engineer, for approval, an updated Program at intervals no longer than the period stated in the Contract Data. If the Contractor does not submit an updated Program within this period, the Engineer may withhold the amount

stated in the Contract Data from the next payment certificate and continue to withhold this amount until the next payment after the date on which the overdue Program has been submitted.

23.4. The Engineer's approval of the Program shall not alter the Contractor's obligations. The Contractor may revise the Program and submit it to the Engineer again at any time. A revised Program is to show the effect of Variations and Compensation Events.

24. EXTENSION OF THE INTENDED COMPLETION DATE

24.1. The Engineer shall extend the Intended Completion Date if a Compensation Event occurs or a Variation is issued which makes it impossible for Completion to be achieved by the Intended Completion Date without the Contractor taking steps to accelerate the remaining work and which would cause the Contractor to incur additional cost.

24.2. The Engineer shall decide whether and by how much to extend the Intended Completion Date within _____ days of the Contractor asking the Engineer for a decision upon the effect of a Compensation Event or Variation and submitting full supporting information, If the Contractor has failed to give early warning of a delay or has failed to co-operate in dealing with a delay, the delay by this failure shall not be considered in assessing the new Intended Completion Date.

24.3. Provided also that where an event has a continuing effect such that it is not practicable for the Contractor to submit detailed particulars within the period of _____ days, he shall nevertheless be entitled to an extension of time provided that he has submitted to the Engineer interim particulars at intervals of not more than _____ days and final particulars within _____ days of the end of the effects resulting from the event. On receipt of such interim particulars, the Engineer shall without undue delay make an interim determination of extension of time and on receipt of the final particulars the Engineer shall review all the circumstances and shall determine an overall extension of time in regard to the event In both such cases the Engineer shall make his determination after due consultation with the Contractor and shall notify the Contractor of the determination. No final review shall result in a decrease of any extension of time already determined by the Engineer.

24.4. If for any reason, which does not entitle the Contractor to an extension of time, the rate of progress of the work is at any time, in the opinion of the Engineer, too slow to comply with the Time for Completion, the Engineer shall so notify the Contractor who shall thereupon take such steps as are necessary, subject to the consent of the Engineer, to expedite progress so as to comply with the Time for Completion. The Contractor shall not be entitled to any additional payment for taking such steps.

24.5. the Contractor shall, on the instructions of the Engineer, suspend the progress of the work or any part thereof for such time and in such manner as the Engineer may consider necessary and shall during such suspension , properly protect and secure the work or such part thereof so far as is necessary in the opinion of the Engineer. If such suspension is not:

- (i) necessary by reason of some default of or breach of Contract by the Contractor or for which he is responsible, or

- (ii) necessary for the proper execution of the Works or for the safety of the Works or any part thereof; then

The Engineer shall determine an appropriate extension of time under **Clause 24.1**

25. DELAYS ORDERED BY THE ENGINEER

The Engineer may instruct the Contractor to delay the start or progress of any activity within the Works.

26. MANAGEMENT MEETINGS

26.1. Either the Engineer or the Contractor may require the other to attend a management meeting. The business of a management meeting shall be to review the plans for remaining work and to deal with matters raised in accordance with the early warning procedure.

26.2. The Engineer shall record the business of management meetings and is to provide copies of his record to those attending the meeting and to the Owner. The responsibility of the Parties for actions to be taken is to be decided by the Engineer either at the management meeting or after the management meeting and stated in writing to all who attended the meeting.

27. EARLY WARNING

27.1. The Contractor is to warn the Engineer at the earliest opportunity of specific Likely future events or circumstances that may adversely affect the quality of the work, increase the Construction Contract Price or delay the execution of works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future event or circumstance on the Construction Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonably possible and as mutually agreed to by the Contractor and Engineer.

27.2. The Contractor shall co-operate with the Engineer in making and considering bids for how the effect of such an event or circumstance can be avoided or reduced by anyone involved in the work and in carrying out any resulting instruction of the Engineer.

C- QUALITY CONTROL

28. IDENTIFYING DEFECTS

The Engineer shall check the Contractor's work and notify the Contractor of any Defects that are found. Such checking shall not affect the Contractor's responsibilities. The Engineer may instruct the Contractor to search for a Defect and to uncover and test any work that the Engineer consider may have a Defect

29. TESTS

29.1. If the Engineer instructs the Contractor to carry out a test not specified in the Specification to check whether any work has a Defect and the test shows that it does, the Contractor shall pay for the test and any samples. If there is no Defect the test shall be a Compensation Event.

29.2. The Contractor at his own cost shall supply all samples. The cost of making any test shall be borne by the Contractor.

29.3. The Engineer and any Person authorised by him, shall at all reasonable times have access to the Site and the Contractor shall afford every facility of and every assistance in carrying out their inspections.

29.4. The Engineer shall be entitled, during construction, operations and maintenance, to inspect and test the materials, Plant and process material under this Contract. Such inspection or testing shall not release the Contractor from any obligation under the Contract.

29.5. The Contractor shall agree with the Engineer on the time and place for inspection or testing of any materials, process material and Plant under the Contract. The Engineer shall give Contractor not less than ____ hours notice of his intention to carry out the inspection or attend the tests. If the Engineer, or his duly authorised representative, does not attend on the date agreed, the Contractor may unless instructed by the Engineer, proceed with the tests, which shall be deemed to have been made in the presence of the Engineer. The Contractor shall forthwith forward to the Engineer duly certified copies of the test readings. If the Engineer has not attended the tests, he shall accept the said readings as accurate.

29.6. If at the time and place agreed in accordance with **Sub-Clause 29.5**, the materials, Plant or process material are not ready for inspection or testing or if as a result of the inspection or testing referred to in this Clause the Engineer determines that the materials, Plant or process materials are defective or otherwise not in accordance with the Contract, he may reject the same and shall notify the Contractor shall thereof immediately. The notice shall state the Engineer's objections with reasons. The Contractor shall then promptly make good the defect or ensure that rejected materials, Plant or process material comply with the Contract. If the Engineer so requests, the tests of rejected materials of Plant shall be made or repeated under the same terms and conditions. All costs incurred by the Owner by the repetition of the tests shall after due consultation with the Owner and the Contractor, be determined by the Engineer and shall be recoverable from the Contractor by the Owner and may be deducted any moneys due or to become due to the Contractor and the Engineer shall notify the Contractor accordingly.

29.7. The measurement and inspection clauses of this Contract Part are for the sole purpose of checking adherence to specifications. Measurements and Inspections shall not constitute approval, certification of work, part assessment or part fulfillment of Contractor's obligations, nor shall approval or the absence of disapproval relieve the Contractor of his obligations under the Contract.

29.8. The Engineer shall, when he requires any part of the work to be measured, give reasonable notice to the Contractor's authorised agent, who shall:

- (i) forthwith attend or send a qualified representative to assist the Engineer in making such measurement and
- (ii) Supply all particulars required by the Engineer.

29.9. The Contractor shall submit to the Engineer after the end of each month three copies of the statement, in such form as the Engineer may from time to time prescribe, showing such details as the Engineer may require, regarding the progress of the Works.

29.10. Not later than _____ days after the Works is complete, the Contractor shall submit to the Engineer a statement at completion with supporting documents showing in detail, in the form approved by the Engineer, including the final value of all work done in accordance with the Contract.

30. CORRECTION OF DEFECTS

30.1. The Engineer shall give notice to the Contractor of any Defects before the end of the Defects Liability Period, which begins at Completion and is defined in the Contract Data. The Defects Liability Period shall be extended for as long as Defects remain to be corrected.

30.2. Every time notice of a Defect is given, the Contractor shall correct the notified Defect within the length of time specified by the Engineer's notice.

31. UNCORRECTED DEFECTS

If the Contractor has not corrected a Defect within the time specified in the Engineer's notice, the Engineer will assess the cost of having the Defect corrected, and the Contractor will pay this amount

D- COST CONTROL

32. BILL OF QUANTITIES

32.1. The Bill of Quantities shall contain items for the construction, installation, testing, and commissioning work to be done by the Contractor.

32.2. The Bill of Quantities is used to calculate the Construction Contract Price. The Contractor is paid for the quantity of the work done at the rate in the Bill of Quantities for each item.

33. CHANGES IN THE QUANTITIES

33.1. If the final quantity of the work done differs from the quantity in the Bill of Quantities for the particular item by more than _____ percent provided the change exceeds ____% of initial Construction Contract Price, the Engineer shall adjust the rate to allow for the change.

33.2. The Engineer shall not adjust rates from changes in quantities if thereby the Initial Construction Contract Price is exceeded by more than _____ percent, except with the Prior approval of the Owner.

33.3. If requested by the Engineer, the Contractor shall provide the Engineer with a detailed cost breakdown of any rate in the Bill of Quantities.

34. CLAIMS

34.1. If the Contractor requires any variations to be made:

- (i) in the form, quality or quantity of the works or any part thereof; or
- (ii) increase or decrease the quantity of any work included in the Contract
- (iii) omit any such work
- (iv) change the character or quality or kind of any such work
- (v) change the levels, lines, position and dimensions of any part of the works
- (vi) execute additional work of any kind necessary
- (vii) change any specified sequence or timing of construction;

that may in his opinion, be necessary and appropriate, he shall have to seek the approval of the Engineer. Unless such work is carried out after obtaining the Engineer's approval any such variation shall be treated as a default of the Contractor and the Owner shall be entitled to proceed under **Clause 51**

Any additional cost attribute to such variation shall be borne by the Contractor. Unless specifically approved by the Engineer and the owner.

34.2. Notwithstanding any other provision of the Contract, if the Contractor intends to prefer any claim pursuant to any clause of these conditions or otherwise, he shall give notice of his intention to the Engineer within ____ days after the event giving rise to the claim has first arisen.

34.3. Upon the happening of the event referred to in **Sub-Clause 34.1**, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Owner's liability the Engineer shall, on receipt of a notice under **Sub-clause 34.1** inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records keep pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer so instructs.

34.4. Within ____ days or such other reasonable time as may be agreed by the Engineer, of giving notice under **Sub-Clause 34.1** the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the ground upon which the claim is based. Where the event giving rise to the claim has continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Engineer may reasonably require, send further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the Contractor shall send a final account within ____ days of the end of the effects resulting from the event.

34.5. If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim that he seeks to make, he shall not be entitled to any compensation for his claim

34.6. Pursuant to any claims made and deemed necessary by the Engineer and Owner any amounts to which the Contractor is due shall be discharged only after approval of the amounts by the Engineer based on his own estimates.

35. PAYMENTS FOR VARIATIONS

35.1. The Contractor shall provide the Engineer with a quotation for carrying out the Variation when requested to do so by the Engineer. The Engineer shall assess the quotation, which shall be given within ____ days of the request or within any longer period stated by the Engineer and before the Variation is ordered.

35.2. If the work in the Variation corresponds with an item description in the Bill of Quantities and if, in the opinion of the Engineer, the quantity of work above the limit stated in **Sub Clause 33.1** or the timing of its execution do not cause the cost per unit of quantity to change, the rate in the Bill of Quantities shall be used to calculate the value of the Variation. If the cost per unit of quantity changes, or if the nature or timing of the work in the Variation does not correspond with items in the Bill of Quantities, the quotation by the Contractor shall be in the form of new rates for the relevant items of work.

35.3. If the Contractor's quotation is unreasonable, the Engineer may order the Variation and make a change to the Construction Contract Price which shall be based on Engineer's own forecast of the effects of the Variation on the Contractor's costs.

35.4. If the Engineer decides that the urgency of varying the work would prevent a quotation being given and considered without delaying the work, no quotation shall be given and the Variation shall be treated as a Compensation Event

35.5. The Contractor shall not be entitled to additional payment for costs, which could have been avoided by giving early warning.

36. CASH FLOW FORECASTS

When the Program is updated, the contractor is to provide the Engineer with an updated cash flow forecast.

37. PAYMENT CERTIFICATES

37.1. The Contractor shall submit to the Engineer monthly statements of the estimated value of the work completed less the cumulative amount certified previously.

37.2. The Engineer shall check the Contractor's monthly statement within ____ days and certify the amount to be paid to the Contractor after taking into account any credit or debit for the month in question in respect of materials for the works in the relevant amounts and under conditions set forth in **Sub-clause 44.4** and as indicated in the **Schedules C 1.15 & C 1.17** of the Construction Contract.

37.3. The value of work executed shall be determined by the Engineer.

37.4. The value of work executed shall comprise the value of the quantities of the items in the Bill of Quantities completed.

37.5. The value of work executed shall include the valuation of Variations and Compensation Events.

37.6. The Engineer may exclude any item certified in a previous certificate or reduce the proportion of any item previously certified in any certificate in the light of later information.

38. PAYMENTS

38.1. All payments to the Contractor under this Part of the Contract, shall be made in accordance with **Schedule C 1.12** of the Construction Contract.

38.2. Payments shall be adjusted for deductions for advance payments and retention. The Owner shall pay the Contractor the amounts certified by the Engineer within ____ days of the date of each certificate. If the Owner makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made upto the date when the late payment is made at a rate of ____%⁹ per annum.

38.3. If an amount certified is increased in a later certificate as a result of an award by the Adjudicator or an Arbitrator, the Contractor shall be paid interest upon the delayed payment as set out in this clause. Interest shall be calculated from the date upon which the increased amount would have been certified in the absence of dispute.

38.4. Items of the Works for which no rate or price has been entered in will not be paid for by the Owner and shall be deemed covered by other rates and prices in the Contract.

39. COMPENSATION EVENTS

39.1. The following are Compensation Events unless the Contractor causes them:

- (a) The Owner does not give access to a part of the Site by the Site Possession Date stated in the Contract Data.
- (b) The Owner modifies the schedule of other contractors in a way, which affects the work of the Contractor under the contract.
- (c) The Engineer orders a delay or does not issue drawings, specifications or instructions required for execution of works on time.
- (d) The Engineer instructs the Contractor to uncover or to carry out additional tests upon work, which is then found to have no Defects.
- (e) The Engineer unreasonably does not approve for a subcontract to be let
- (f) Ground conditions are substantially more adverse than could reasonably have been assumed before issuance of Notification of Award from the information issued to Bidders (including the Site Investigation Reports), from information available publicly and from a visual inspection of the Site.
- (g) The Engineer gives an instruction for dealing with an unforeseen condition, caused by the Owner, or additional work required for safety or other reasons.

⁹ Standard rates such as SBI prime lending rate can also be mentioned.

- (h) Other contractors, public authorities, utilities or the Owner does not work within the dates and other constraints stated in the Contract, and they cause delay or extra cost to the Contractor.
- i. The advance payment is delayed.
 - ii. The effect on the Contractor of any of the Owner's Risks.
 - iii. The Engineer unreasonably delays issuing a Certificate of Completion.
 - iv. Other Compensation Events listed in the **Contract Data** or mentioned in the Contract.

39.2. If a Compensation Event would cause additional cost or would prevent the work being completed before the Intended Completion Date, the Construction Contract Price shall be increased and/or the Intended Completion Date is extended. The Engineer shall decide whether and by how much the Construction Contract Price shall be increased and whether and by how much the Intended Completion Date shall be extended.

39.3. As soon as information demonstrating the effect of each Compensation Event upon the Contractor's forecast the Contractor has provided cost, it is to be assessed by the Engineer and the Construction Contract Price shall be adjusted accordingly. If the Contractor's forecast is deemed unreasonable, the Engineer shall adjust the Construction Contract price based on Engineer's own forecast. The Engineer will assume that the Contractor will react competently and promptly to the event.

39.4. The Contractor shall not be entitled to compensation to the extent that the Owner's interests are adversely affected by the Contractor not having given early warning or not having co-operated with the Owner.

40. TAX

40.1. The rates quoted by the Contractor shall be deemed to be inclusive of the sales and other taxes on all materials that the Contractor will have to purchase for performance of this Contract.

40.2. The rates quoted by the Contractor shall also be deemed to be inclusive of any central or state sales and other taxes on completed items of work.

40.3. No additional payment shall be made for variations in tax during the contract period.

41. CURRENCIES

All payments shall be made in Indian Rupees.

42. RETENTION

42.1. The Owner shall retain from each payment due to the Contractor the proportion stated in the Contract Data until Completion of the whole of the Works.

42.2. On Completion of the whole of the Works half¹⁰ the total amount retained is repaid to the Contractor and half when the Defects Liability Period has passed and the Engineer has certified that all Defects notified by the Engineer to the Contractor before the end of this period have been contacted.

42.3. On completion of the whole works, the Contractor may substitute retention money with an “On-demand” bank guarantee.

43. LIQUIDATED DAMAGES

43.1. The Contractor shall pay liquidated damages to the owner at the rate per day stated in the Contract Data for each day that the Completion Date is later than the Intended Completion Date. The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Owner may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages does not affect the Contractor’s liabilities.

43.2. If the Intended Completion Date is extended after liquidated damages have been paid, the Engineer shall correct any overpayment of liquidated damages by the Contractor by adjusting the next payment certificate. The Contractor shall be paid interest on the over payment calculated from the date of payment to the date of repayment at the rates specified in **Sub Clause 38.1.**

44. ADVANCE PAYMENT

44.1. The Owner shall make advance payment to the Contractor of the amounts stated in the Contract Data by the date stated in the Contract Data, against provision by the Contractor of an Unconditional Bank Guarantee in a form and by a bank acceptable to the Owner in amounts and currencies equal to the advance payment. The guarantee shall remain effective until the advance payment has been repaid, but the amount of the guarantee shall be progressively reduced by the amounts repaid by the Contractor. Interest will not be charged on the advance payment.

44.2. The Contractor is to use the advance payment only to pay for Equipment, Plant and Mobilisation expenses required specifically for execution of the Works. The Contractor shall demonstrate that advance payment has been used in this way by supplying copies of invoices or other documents to the Engineer.

44.3. The advance payment shall be repaid by deducting proportionate amounts from payments otherwise due to the Contractor, following the schedule of completed percentages of the Works on a payment basis. No account shall be taken of the advance payment or its repayment in assessing valuations of work done, Variations, price adjustments, Compensation Events, or Liquidated Damages.

44.4. **Secured Advance:** The Engineer shall make advance payment in respect of materials intended for but not yet incorporated in the Works in accordance with conditions stipulated in the Contract Data.

¹⁰ Make changes according to the payment of retention money decided for the project.

45. SECURITIES

45.1. The Performance Security shall be provided to the Owner no later than the date specified in the Notification of Award and shall be issued in an amount and form and by a bank or surety acceptable to the Owner, and denominated in Indian Rupees. The Performance Security shall be valid until a date _____ days from the date of expiry of Defects Liability Period. The Performance Bank Guarantee of a JV shall be in the name of the JV.

46. COST OF REPAIRS

Loss or damage to the Works or Materials to be incorporated in the Works between the Start Date and the end of the Defects Correction periods shall be remedied by the Contractor at the Contractor's cost if the loss or damage arises from the Contractor's acts or omissions.

E- FINISHING THE CONTRACT

47. COMPLETION

The Contractor shall request the Engineer to issue a Certificate of Completion of the Works and the Engineer will do so upon deciding that the Work is completed.

48. TAKING OVER

The Owner shall take over the Site and the Works within _____ days of the Engineer issuing a certificate of Completion.

49. FINAL ACCOUNT

The Contractor shall supply to the Engineer a detailed account of the total amount that the Contractor considers payable under the Contract before the end of the Defects Liability Period. The Engineer shall issue a Defect liability Certificate and certify any final payment that is due to the Contractor within _____ days of receiving the Contractor's account if it is correct and complete. If it is not, the Engineer shall issue within _____ days a schedule that states the scope of the corrections or additions that are necessary. If the Final Account is still unsatisfactory after it has been resubmitted, the Engineer shall decide on the amount payable to the Contractor and issue a payment certificate.

50. OPERATING AND MAINTENANCE MANUALS

50.1. If "as built" Drawings and/or operating and maintenance manuals are required, the Contractor shall supply them by the dates stated in the Contract Data.

50.2. If the Contractor does not supply the Drawings and/or manuals by the dates stated in the Contract Data, or they do not receive the Engineer's approval, the Engineer shall withhold the amount stated in the Contract Data from payments due to the Contractor.

51. TERMINATION

51.1. The Owner or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract.

51.2. Fundamental breaches of Contract include, but shall not be limited to the following:

- (a) the Contractor stops work for ____ days when no stoppage of work is shown on the current Program and the stoppage has not been authorised by the Engineer;
- (b) the Engineer instructs the Contractor to delay the progress of the Works and the instruction is not withdrawn within ____ days;
- (c) the Owner or the Contractor is made bankrupt or goes into liquidation other than for a reconstruction or amalgamation;
- (d) a payment certified by the Engineer is not paid by the Owner to the Contractor within ____ days of the date of the Engineer's certificate;
- (e) the Engineer gives Notice that failure to correct a particular Defect is a fundamental breach of Contract and the Contractor fails to correct it within a reasonable period of time determined by the Engineer,
- (f) the Contractor does not maintain a security which is required;
- (g) the Contractor has delayed the completion of works by the number of days for which the maximum amount of liquidated damages can be paid as damages in the Contract Data; and
- (h) if the Contractor, in the judgment of the Owner has engaged in corrupt or fraudulent practices in competing for or in the executing the Contract.

For the purpose of this paragraph: "corrupt practice" means the offering, giving, receiving or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution. "Fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the owner, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial noncompetitive levels and to deprive the owner of the benefits of free and open competition."

- (i) The Contractor (in case of a joint venture) has modified the composition of the JV and/or the responsibility of each member of the JV from what is stated in the JV Agreement without prior approval of the Owner.

51.3. When either party to the Contract gives notice of a breach of contract to the Engineer for a cause other than those listed under **Sub Clause 51.2** above, the Engineer shall decide whether the breach is fundamental or not.

51.4. Notwithstanding the above, the Owner may terminate the Contract for convenience.

51.5. If the Contract is terminated the Contractor shall stop work immediately, make the Site safe and secure and leave the Site as soon as reasonably possible.

52. PAYMENT UPON TERMINATION

52.1. If the Contract is terminated because of a fundamental breach of Contract by the Contractor, the Engineer shall issue a certificate for the value of the work done less advance payments received up to the date of the issue of the certificate, less other recoveries due in terms of the Contract, less Taxes due to be deducted at source as per applicable law, and less the percentage to apply to the work not completed as indicated in the **Contract Data**. Additional Liquidated Damages shall not apply. If the total amount due to the Owner exceeds any payment due to the Contractor the difference shall be a debt payable to the Owner.

52.2. If the Contract is terminated at the Owner's convenience or because of a fundamental breach of Contract by the Owner, the Engineer shall issue a certificate for the value of the work done, the reasonable cost of removal of Equipment, repatriation of the Contractor's personnel employed solely on the Works, and the Contractor's costs of protecting and securing the Works and less advance payments received up to the date of the certificate, less other recoveries due in terms of the Contract, less Taxes due to be deducted at source as per applicable law.

53. PROPERTY

53.1. All materials on the Site, Plant, Equipment Temporary Works and Works are deemed to be the property of the Owner, if the Contract is terminated because of a Contractor's default.

54. FORCE MAJEURE AND RELEASE FROM PERFORMANCE

54.1. Definition of Force Majeure

"**Force Majeure**" means an event which is beyond the reasonable control of a Party and which makes a Party's performance under this Contract impossible or so impractical as to be considered impossible under the circumstances, including but not limited to:

- (i) act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
- (ii) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
- (iii) rebellion, revolution, insurrection, or military or usurped power, or civil war or terrorist attack or sabotage;
- (iv) contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly; or
- (v) riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to (i) employees of the contractor (ii) excluding local body Employees; and (iii) any local body staff who are part of a local body /state wide strike who are not engaged under this Contract but are required to provide essential services to the local body/state Employees or of any of its sub-contractors, engaged on operating and maintaining the Facilities.

54.2. Effect of Force Majeure Event

Subject to right to terminate the Contract contained in **Clause 51**, no Party to this Contract shall be considered in default or in contractual breach to the extent that performance of obligations is prevented by a Force Majeure event.

54.3. Contractors Responsibility

Upon occurrence of any Force Majeure event which may affect performance of the contractors' obligations, it shall promptly notify the owner, and shall endeavor to continue to perform its obligations as far as reasonably practicable. The contractor shall also notify the owner of any proposals to overcome the constraints caused by an event, including any reasonable alternative means for performance, but shall not effect such proposals without the consent of the owner.

54.4. Owners Responsibility

Upon occurrence of an event considered by the owner to constitute Force Majeure and which may affect performance of the obligations of the owner, the owner shall promptly notify the contractor and shall endeavour continuance of such obligations by itself or by any other agency decided at that time, as far as reasonably practicable.

54.5. Extension of Time

Any period within which a Party shall, pursuant to this Contract, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

54.6. Payments

During the period of their inability to perform the Services as a result of an event of Force Majeure, the contractor shall be entitled to continue to be paid under the terms of this Contract, as well as to be reimbursed for additional costs reasonably and necessarily incurred by it during such period for the purposes of the Services and in reactivating the Service after the end of such period.

IV. SEWAGE TREATMENT PLANT CONCESSION CONTRACT

1. SCOPE OF WORK

The Contractor shall finance¹¹, construct, maintain and operate a STP at the STP Site given on Concession by the Owner. The STP shall be integrated with the sewerage system constructed by the Contractor, and shall treat the sewage flows from the said sewerage system in accordance with the treatment norms and specifications, and discharge the treated sewage as directed. Solid Wastes and sludge generated at the STP shall be disposed off safely and as per the requirements of the Pollution Control Board.

2. OWNER COVENANTS

The Owner hereby covenants with the Contractor as under:

- (i) That it shall hand over the STP Site on the Commencement Date, on an as-is-where-is basis;
- (ii) That it shall secure all necessary plan approvals to enable the Contractor to construct the Facility;
- (iii) That it shall obtain all required permissions, sanctions, clearances and permits from the Pollution Control Board in order to commence construction of the STP
- (iv) That there are no litigation claims, demands or any proceedings pending before any authority in respect of acquisition of land constituting the STP Site and the Contractor shall have control and use of the STP Site during the Concession Period.
- (v) The Owner shall not terminate this Concession, except in accordance with the terms of this Contract, and after discharge of all the valid claims of the Contractors, if any.
- (vi) The Owner, henceforth, covenants to provide only the STP Site and it is the look out of the contractor to have any amenities on the site.
- (vii) The Owner shall pay the treatment charges at the rates and terms as stipulated in the **Schedule STP-4**.

3. CONTRACTOR'S COVENANTS

The Contractor hereby covenants with the owner as follows:

- (i) That it shall take over the site on an as-is-where-is basis on the Commencement Date;

¹¹ If it is concession contract then finance may be the responsibility of the contractor, if it is only management contract then the component of finance may be the responsibility of the contractor, accordingly the conditions on payments may change. This document is written with a view that the contractor is responsible for capital expenditure of the treatment plant and payment will be made on the per MLD treatment of sewage.

- (ii) That it shall carry out the necessary site clearing, dismantling and demolition, including transport and stacking of released materials;
- (iii) That the Contractor shall be fully responsible towards designing, financing, constructing, operating and maintaining the STP and effluent disposal system in a safe and secure manner, consistent with the law of the land, laws and regulations, and directives of any Competent Authority and planning permissions;
- (iv) That it shall provide all Drawings, Designs, etc. to the Owner for obtaining necessary clearances from the engineer, Owner and concerned Statutory Authorities;
- (v) That the Contractor shall design construct, operate and maintain the STP entirely at his cost, and the only payments from the Owner shall be by way of treatment charges for the sewage;
- (vi) That it shall pay all expenses, dues, charges due to any Person, such as electricity, water charges, telephone and such charges for which the Contractor shall be completely responsible;
- (vii) That it shall obtain all required permissions, sanctions, clearances and permits (other than Owner Clearances) for the construction, operation and maintenance of the STP;
- (viii) That it shall construct the STP in accordance with this Contract, special conditions and specifications, planning permissions and all other permissions, sanctions, clearances and permits required for a STP of this nature;
- (ix) That it shall maintain the STP in good repair during the Concession Period;
- (x) That it shall not dispose of any by-product or waste or effluent in or around the STP Site, which could harm the environment;
- (xi) That prior to the end of the Concession Period, the STP shall be brought into good repair;
- (xii) The STP and effluent disposal arrangement of ____ MLD capacity shall be handed back to the Owner at the end of the Concession Period, free from occupation and any encumbrances, attachments, or lien of any sort, including payment of all statutory and other expenses such as electricity, water, sewerage charges and any such charges due to any Person;
- (xiii) That the Owner shall at all times be indemnified from any liability for loss or damage arising out of any cause whatsoever (except where expressly arising out of a breach of Owner's covenants), from the Contractor's construction, maintenance or operation;
- (xiv) That it shall observe and perform all terms, covenants, conditions and stipulations of this Contract;
- (xv) That it shall not use the demised premises for any other use than as agreed under this Contract.

- (xvi) The contractor shall maintain the right to construct, on the demised the property, in-order to accommodate Office Storage Space, Water tank and other super structures necessary for the functioning of the system at the cost of the Contractor himself, and shall take full responsibilities in arranging for the aforesaid facilities.
- (xvii) That the aforesaid facilities shall be constructed with due permission of the appropriate authorities, and the construction shall be carried out on condition that the appropriate authorities receive consent from the Owner to enable the same.
- (xviii) That the Contractor shall operate the STP after obtaining necessary permission and clearances from the Pollution Control Board and carry out the same in strict consonance with norms and guidelines issued by the Pollution Control Board.
- (xix) That it shall, in accordance with the aforesaid clause, be obliged to maintain the treatment site and its surroundings clean, neat and in sanitary conditions without polluting the surrounding vicinity.
- (xx) The Contractor shall operate the facility in consonance with the Pollution Control Board Guidelines, various Labour Laws, and other rules and regulations framed there under.
- (xxi) That in violation of any of the aforesaid rules and guidelines, the Contractor shall be held liable in terms of the penalty contemplated under the relevant acts.

4. STATUS OF STP SITE

The STP Site is being vested with the Contractor, on an as-is-where-is basis. It shall be the responsibility of the Contractor to clear the site, including safeguarding trees and utilities. The Contractor shall stack all released material at site as directed by the Engineer, and such stacking shall be at the Contractors cost. The released materials shall be the property of the Owner.

5. RETENTION RIGHTS

The STP Site is being vested with the Contractor under this Contract to construct the STP including financing, constructing, operating and maintaining the same, but the title of the land shall always vest with the Owner. The Contractor shall have no sights to mortgage, transfer assign or otherwise encumber the STP site.

6. ENVIRONMENTAL OBLIGATIONS

The Contractor shall be fully responsible for all environmental obligations during the Concession Period. Proper sanitary, plumbing and sludge disposal plans should be laid and executed to ensure compliance to the Prudent Utility Practices and requirements of local authority, and the Pollution Control Boards. Untreated effluent shall not be let into the public utility service lines, any natural or man-made body or land.

The Contractor is not permitted to cut any tree in the STP Site, without express sanction of the Owner and any other authority concerned. In case such cutting is unavoidable, the

Contractor shall ensure plantation of trees to three times the number of trees cut, and also their maintenance and subsistence.

7. GENERAL STIPULATIONS

7.1 Headings and Marginal Notes

The headings and marginal notes in this Contract shall not be deemed part thereof or be taken into consideration in the interpretation or construction thereof or of the Contract.

7.2 Interpretation

Words importing persons or parties shall include firms and corporations and any organisation having legal capacity. Words importing the singular only also include the plural and vice versa where the context requires. Words importing one gender shall include the other genders.

7.3 Notices, Consents, Approvals, Certificates and Determinations

Wherever in the Contract provision is made for the giving or issue of any notice, consent, approval, certificate or determination by any person, unless otherwise specified, such notice, consent, approval, certificate or determination shall be in writing and the words "notify", "certify" or "determine" shall be construed accordingly. Any such consent, approval, certificates or determination shall not be given to the Contractor by the Owner or vice-versa under the terms of the Contract shall be sent by post, cable telex or facsimile transmission to the address given in the Schedules.

Either party may change a nominated address to another address in the Country, by prior notice to the other party.

8. ENGINEER

8.1. Engineer's Duties

The Engineer shall carry out the duties specified in the Contract, including exercising the authority specified in or necessarily to be implied from the Contract. However the Engineer shall have no authority to relieve the Contractor of any of its obligations under the Contract.

8.2. Engineer's Representative

The Engineer's Representative shall be appointed by and be responsible to the Engineer and shall carry out such duties and exercise such authority as may be delegated to him by the Engineer.

8.3. Engineer's Authority to Delegate

The Engineer may from time to time delegate to the Engineer's Representative any of the duties and authorities vested in the Engineer and he may at any time revoke such delegation.

8.4. Instructions in Writing

Instructions given by the Engineer shall be in writing, provided that if for any reason the Engineer considers it necessary to give any such instruction orally, the Contractor shall

comply with such instruction after seeking confirmation in writing of such oral instruction given by the Engineer.

8.5. Engineer to Act Impartially

Wherever, under the Contract, the Engineer is required to exercise his discretion by:

- (a) giving his decision, opinion or consent, or
- (b) expressing his satisfaction or approval, or
- (c) determining value, or
- (d) otherwise taking action which may affect the rights and obligations of Owner or the Contractor

He shall exercise such discretion impartially within the terms of the Contract and having regard to all the circumstances. Any such decision, opinion, consent, expression of satisfaction, or approval determination of value or action may be opened up, reviewed or revised as provided in **Clause 21** of the STP concession contract.

9. ASSIGNMENT AND SUBCONTRACTING

9.1. Assignment of Contract

The Contractor shall not, without the prior consent of the Engineer (which consent shall be at the sole discretion of the Engineer), assign the Contract or any part thereof, or any benefit or interest therein or there-under, otherwise than by:

a charge in favour of the Contractor's bankers of any moneys due or to become due under the Contract, or assignment to the Contractor's insurers (in cases where the insurers have discharged the Contractor's loss or liability) of the Contractor's right to obtain relief against any other party liable.

9.2. Subcontracting

The Contractor shall not subcontract the whole of the Works or a substantial part thereof. Except where otherwise provided by the Contract, the Contractor shall not subcontract any part of the Works without the prior consent of the Engineer. Any such consent shall not relieve the Contractor from any liability or obligation under the Contract and he shall be responsible for the acts, defaults and neglects of any Subcontractor, his agents, servants or workmen as fully as if they were the acts, defaults or neglects of the Contractor, his agents, servants or workmen.

Provided that the Contractor shall not be required to obtain such consent for:

- (a) the provision of Labour, or
- (b) the purchase of materials which are in accordance with the standards specified in the Contract.

9.3. Assignment of Subcontractors Obligations

In the event of a Subcontractor having undertaken towards the Contractor in respect of the work executed, or the goods, materials, Plant or services supplied by such Subcontractor, any continuing obligation extending for a period exceeding that of the

Lease Period under the Contract, the Contractor shall at any time, after the expiration of such period, assign to the Owner, at the Owner's request and cost, the benefit of such obligation for the unexpired duration thereof.

10. CONTRACT DOCUMENTS

10.1. Language & Law

All the documents and drawings constituting the Contract shall be in English. The Law governing the Contract shall be the law of India.

10.2. Priority of Contract Documents

The several documents forming the Contract are to be taken as mutually explanatory of one another, but in case of ambiguities or discrepancies the same shall be explained and adjudicated by the Engineer in consonance with the precedence of contract documents in the Contract Covenants.

10.3. Custody and Supply of Drawings

The Contractor shall supply to the Engineer three copies of all Drawings, Designs, Specification and other documents required for the Works. In addition the Contractor shall supply such further copies of such Drawings, Designs, Specification and other documents as the Engineer may request in writing for the use of the Owner, who shall pay the cost thereof.

10.4. One Copy of Drawings to be kept on Site

One copy of the Drawings, provided to or supplied by the Contractor as aforesaid, shall be kept by the Contractor on the Site and the same shall at all reasonable times be available for inspection and use by the Engineer and by any other person authorised by the Engineer in writing.

10.5. Responsibility Unaffected by Approval

Any approval by the Engineer shall not relieve the Contractor of any of his responsibilities under the Contract.

11. GENERAL OBLIGATIONS

11.1. Contractor's General Responsibilities

The Contractor shall, with due care and diligence, design, execute and complete the Works, operate and remedy any defects therein in accordance with the provisions of the Contract. The Contractor shall provide all superintendence, labour, materials, Plant, Equipment and all other things, whether of a temporary or permanent nature, required in and for such design, execution, completion and remedying of any defects, so far as the necessity for providing the same is specified in or is reasonably be inferred from the Contract.

11.2. Site Operations

The Contractor shall take full responsibility for the adequacy, stability and safety of all site operations. Provided that the Contractor shall not be responsible (except as stated hereunder or as may be otherwise agreed) for the design or specification of Permanent works, or for the design or specification of any Temporary Works not prepared by the Contractor.

11.3. Work to be in Accordance with Contract.

Unless it is legally or physically impossible, the Contractor shall execute and complete the works and remedy and defects therein in strict accordance with the Contract to the satisfaction of the Engineer.

11.4. Programme to be submitted

The Contractor shall, before commencement of work, submit to the Engineer for his consent a programme in such form and detail as the Engineer shall reasonably prescribe, for the execution of the works. The Contractor shall, whenever required by the Engineer, also provide in writing for his information a general description of the arrangements and methods, which the Contractor proposes to adopt for the execution of the works.

11.5. Setting out

The Contractor shall be responsible for:

- (a) the accurate setting-out of the works, and
- (b) the correctness, subject as above mentioned, of the position, levels dimensions and alignment of all parts of the works, and
- (c) the provision of all necessary instruments, appliances and labour in connection with the foregoing responsibilities.

If at any time during the execution of the works, any error appears in the position, levels dimensions or alignment of any part of the works, the Contractor, on being required so to do by the Engineer, shall at his own cost, rectify such error

11.6. Care of STP

The Contractor shall take full responsibility for the STP and materials and Plant for incorporation therein from the Commencement Date until the end of the Concession Period.

11.7. Responsibility to Rectify Loss or Damage

If any loss or damage happens to the STP, or any part thereof, or materials or Plant for incorporation therein, during the Concession Period, from any cause whatsoever, the Contractor shall, at his own cost, rectify such loss or damage so that the STP conforms in every respect with the provisions and requirements of the Contract.

11.8. Compliance with Statutes & Regulations

The Contractor shall conform in all respects, including by the giving of all notices and the paying of all fees, with the provisions of:

- (i) any National or State Statute, Ordinance, or other Law, or any regulation, or bye-law of any local or other duly constituted authority in relation to the execution and completion of the STP and the remedying of any defects therein, its operation and maintenance and
- (ii) the rules and regulations of all public bodies and companies whose property or rights are affected or may be affected in anyway by the STP, and the Contractor shall keep the Owner indemnified against all penalties and liability

of every kind for breach of any such provision. Provided always that the Owner shall be responsible for obtaining any planning zoning or other similar permission required for the Facility to proceed.

11.9. Fossils

All Fossils, coins, articles of value or antiquity and structures and other remains or things of geological or archaeological interest discovered on the STP Site as between the Owner and the Contractor, be deemed to be the absolute property of the Owner. The Contractor shall take reasonable precautions to prevent his workmen or any other persons from removing or damaging any such article or thing and shall, immediately upon discovery thereof and before removal, acquaint the Engineer of such discovery and carry out the Engineer instructions for dealing with the same.

11.10. Patent Rights

The Contractor shall save, harmless and indemnify the Owner from and against all claims and proceedings for or on account of infringement of any patent right, design trademark or name or other protected rights in respect of any Contractor's Equipment, materials or Plant used for or in connection with or for incorporation in the STP and from and against all damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto.

11.11. Interference with Traffic and Adjoining Properties

All operations necessary for the execution and completion of the STP, the remedying of any defects therein, its operation and maintenance shall, so far as compliance with the requirements of the Contract permits, be carried on so as not to interfere unnecessarily or improperly with:

- (i) the convenience of the public, or
- (ii) the access to, use and occupation of public or private roads and footpaths to or of properties.

The Contractor shall save, harmless and indemnify the Owner in respect of all claims; proceedings, damages, costs, charges and expenses whatsoever arising out of, or in relation to any such matters insofar as the Contractor is responsible therefor.

11.12. Avoidance of Damage to Roads

The Contractor shall use even reasonable means to prevent any of the roads or bridges communicating with or on the routes to the STP Site from being damaged or injured by any traffic of the Contractor or any of his Subcontractors and, in particular, shall select routes, choose and use vehicles and restrict and distribute loads so that any such extraordinary traffic as will inevitably arise from the moving of materials, Plant, Contractor's Equipment or Temporary Works from and to the Site shall be limited, as far as reasonably possible, and so that unnecessary damage or injury may be occasioned to such roads and bridges.

11.13. Transport of Contractor's Equipment or Temporary Works

Save insofar as the Contract otherwise provides, the Contractor shall be responsible for and shall pay the cost of strengthening any bridges or altering or improving any road communicating with or on the routes to the STP Site to facilitate the movement of Contractor's Equipment or Temporary Works and the Contractor shall indemnify and

keep indemnified the Owner against all claims for damage to any such road or bridge caused by such movement, including such claims as may be made directly against the Owner, and shall negotiate and pay all claims arising solely out of such damage.

11.14. Transport of Materials or Plant

If any damage occurs to any bridge or road communicating with or on the routes to the site, or any damage occurs to any other property, arising from the transport of materials or Plant by the Contractor, the Contractor shall notify the Engineer, as soon as he becomes aware of such damage or soon as he receives any claim from the authority entitled to make such claim.

The Contractor shall be fully responsible to settle any claims including such claims as may be made directly against the owner, and shall negotiate and pay all claims arising solely out of such damage and shall indemnify the Owner against any such claims.

11.15. Opportunities for Other Workers

The Contractor shall in accordance with the requirements of the owner, afford all opportunities for carrying out their work to the workmen of any duly constituted authorities who may be employed in the execution on or near the STP.

12. STAFF

12.1. Engagement of Staff and Labour

The Contractor shall make his own arrangements for the engagement of all staff and labour, local or other, and for their payment, housing, feeding and transport.

12.2. Contractor's Superintendence

The Contractor shall provide all necessary superintendence during the execution of the Works and as long thereafter as the Engineer may consider necessary for the proper fulfilling of the Contractor obligations under the Contract. The Contractor shall nominate a competent and authorised representative ("Contractor's Representative") approved of by the Engineer, which approval may at any time be withdrawn. The Contractor's Representative shall give his whole time to the superintendence of the works. The Contractor's Representative shall receive, on behalf of the Contractor, instructions from the Engineer, which shall be deemed to have been received by the Contractor.

If the Engineer withdraws approval of the Representative, the Contractor shall remove the representative from the Works within ____ days, and replace him by another representative approved by the Engineer.

12.3. Contractor's Employees

The Contractor shall provide, on the STP Site in connection with the execution and completion of the STP and the remedying of any defects therein, its operation and maintenance:

- (a) only such technical assistants as are skilled and experienced in their respective callings and such foremen and leading hands as are competent to give proper superintendence, and
- (b) such skilled, semi-skilled and unskilled labour as is necessary for the proper and timely fulfilling of the Contractor's obligations under the Contract

13. ENVIRONMENTAL OBLIGATIONS

13.1. Safety, Security and Protection

The Contractor shall, throughout the Concession Period:

- (a) have full regard for the safety of all persons entitled to be upon the STP Site and keep the STP in an orderly state appropriate to the avoidance of danger to such persons, and
- (b) provide and maintain at his own cost all lights, guards, fencing, warning signs and watching, when and where necessary or required by the Engineer or by any duly constituted authority, for the protection of the STP or for the safety and convenience of the public or others, and take all reasonable steps.
- (c) to protect the environment on and off the Site and to avoid damage or nuisance to persons or to property of the public or others resulting from pollution, noise or other causes arising as a consequence of his methods of operation.

13.2. Contractor to Keep Site Clear

During the Concession Period, including the time when construction works are in progress, the Contractor shall, subject to the requirements of the works, keep the STP Site reasonably free from all unnecessary obstruction and shall store or depose of any Contractor's Equipment and surplus materials and clear away and remove from the STP Site any wreckage, rubbish or Temporary Works no longer required.

14. INSURANCE & INDEMNITY

14.1. Scope

The Contractor shall, without limiting his or the Owner's obligations and responsibilities, insure, in the joint names of the Contractor and the Owner:

- (i) the STP, together with materials and Plant for incorporation therein, to the full replacement cost;
- (ii) an additional sum of _____ percent of such replacement cost, to cover any additional costs of and incidental to the rectification of loss or damage including professional fees and the cost of demolishing and removing any part of the STP and of removing debris of whatsoever nature;
- (iii) the Contractor's Equipment and other things brought onto the STP Site by the Contractor, for a sum sufficient to provide for their replacement.

14.2. Terms of Cover

All insurances in this clause shall be in the joint names of the Contractor and the Owner and shall cover the Owner and the Contractor against all loss or damage from whatsoever cause arising, other than as provided in specific exceptions from the Commencement Date until the end of the Concession Period.

14.3. Responsibility for Amounts not recovered

Any amounts not insured or not recovered from the insurers shall be borne by the Contractor. There shall be no obligation for the insurance to include loss or damage caused by Force Majeure events.

14.4. Damage to Persons and Property

The Contractor shall, indemnify the Owner against all losses and claims in respect of:

- (i) death of injury to any person, or
- (ii) loss of or damage to any property

which may arise out of or in consequence of the execution and maintenance of the STP, and against all claims, proceedings, damages, cross charges and expenses whatsoever in respect thereof or in relation thereto, subject to the exceptions defined below.

14.5. Exceptions

The “exceptions” referred to in sub-clause above are:

- (i) The permanent use or occupation of land by the Owner
- (ii) the right of the Owner to execute the works, or any part thereof, on, over, under, in or through any land,

death of or injury to persons or loss of or damage to property resulting from any act or neglect of the Owner, his agents, servants or other contractors, not being employed by the Contractor, or in respect of any claims, proceedings, damages, costs charges and expenses in respect thereof or in relation thereto or, where the injury or damage was contributed to by the contractor, his servants or agents, such part of the said injury or damage as may be just and equitable having regard to the extent of the responsibility of the Owner, his servants or agents or other contractors for the injury or damage.

The Owner shall indemnify the Contractor against all claims, proceedings damages, costs, charges and expenses in respect of the mailers referred to in the exceptions defined above.

14.6. Third Party Insurance (including Owner's Property)

The Contractor shall, without limiting his or the Owner's obligations and responsibilities under any clause, insure, in the joint names of the Contractor and the Owner, against liabilities for death of or injury to any person or loss of or damage to any property arising out of the performance of the Contract, other than the exceptions defined in paragraphs above.

14.7. Cross Liabilities

The insurance policy shall include a cross liability clause such that the insurance shall apply to the Contractor and to the Owner as separate insured.

14.8. Accident or injury to Workmen

The Owner shall not be liable for or respect of any damages or compensation payable to any workman or other than death or injury resulting from any act or default of the Owner, his agents or servants. The Contractor shall indemnify and keep indemnified the Owner

against all such damages and compensation, other than those for which the Owner is liable as aforesaid, and against all claims, proceedings, damages, costs, charges, and expenses whatsoever in respect thereof or in relation thereto.

14.9. Insurance against Accident to Workmen

The Contractor shall insure against such liability and shall continue such insurance during the whole of the time that he employs any persons on the Facility. Provided that, in respect of any persons employed by any Subcontractor, the Contractor's obligations to insure as aforesaid under this Sub-Clause shall be satisfied if the Subcontractor shall have insured against the liability in respect of such persons in such manner that the Owner is indemnified under the policy, but the Contractor shall require such Subcontractor to produce to the Owner, when required, such policy of insurance and the receipt for the payment of the current premium.

14.10. Evidence and Terms of Insurance

The Contractor shall provide evidence to the Owner prior to the start of work at the STP Site that the insurances required under the Contract have been effected and shall, within _____ days of the Commencement Date, provide the insurance policies to the Owner. The Contractor shall effect all insurance for which he is responsible with insurers and in terms approved by the Owner.

14.11. Adequacy of Insurance

The Contractor shall notify the insurers of changes in the nature, extent or programme for the execution of the STP and ensure the adequacy of the insurance at all times in accordance with the terms of this Contract and shall, when required, produce to the Owner the insurance policies in force and the receipts for payment of the current premiums.

14.12. Remedy on Contractor's Failure to Insure

If the Contractor fails to effect and keep in force any of the insurance required under this Contract, or fails to provide the policies to Owner within a reasonable period as determined by the Engineer, then the Owner may treat the same as a default of the Contractor, and proceed under **Clause 19.**

14.13. Compliance with Policy Conditions

In the event that the Contractor or the Owner fails to comply with conditions imposed by the insurance policies effected pursuant to the Contract, each shall indemnify the owner against all losses and claims arising from such failure.

15. MATERIALS, PLANT AND WORKMANSHIP

15.1. Quality of Materials, Plant and Workmanship

All materials, Plant and workmanship (during construction), and treated effluent, waste and process (during O&M) shall be:

- (i) of the respective kinds described in the contract and in accordance with the specifications, and
- (ii) subjected from time to time to such tests as the Engineer may require.

The Contractor shall provide such assistance, labour, electricity, fuels stores, apparatus and instruments as are normally required for examining, measuring testing any materials or Plant and shall samples of materials (including effluent) for testing as may be selected and required by the Engineer.

15.2. Cost of Samples & Tests

The Contractor at his own cost shall supply all samples. The cost of making any test shall be borne by the Contractor.

15.3. Inspection of Operations

The Engineer and any Person authorised by him, shall at all reasonable times have access to the STP, and the Contractor shall afford every facility of and every assistance in carrying out their inspections.

15.4. Inspection and Testing

The Engineer shall be entitled, during construction, operations and maintenance, to inspect and test the materials, Plant, and process material under this Contract. Such inspection or testing shall not release the Contractor from any obligation under the Contract.

15.5. Dates for Inspection and Testing

The Contractor shall agree with the Engineer on the time and place for inspection or testing of any materials, process material, and Plant under the Contract. The Engineer shall give Contractor not less than _____ hours notice of his intention to carry out the inspection or attend the tests. If the Engineer, or his duly authorised representative, does not attend on the date agreed, the Contractor may unless otherwise instructed by the Engineer, proceed with the tests, which shall be deemed to have been made in the presence of the Engineer. The Contractor shall forthwith forward to the Engineer duly certified copies of the test readings. If the Engineer has not attended the tests, he shall accept the said readings as accurate.

15.6. Rejection

If, at the time and place agreed in accordance with **Sub-Clause 15.5**, the materials, Plant, or process material are not ready for inspection or testing or if, as a result of the inspection or testing referred to in this Clause, the Engineer determines that the materials, Plant, or process materials are defective or otherwise not in accordance with the Contract, he may reject the same and shall notify the Contractor thereof immediately. The notice shall state the Engineer's objections with reasons. The Contractor shall then promptly make good the defect or ensure that rejected materials, Plant, or process material comply with the Contract. If the Engineer so requests, the tests of rejected materials of Plant shall be made or repeated under the same terms and conditions. All costs incurred by the Owner by the repetition of the tests shall, after due consultation with the Owner and the Contractor, be determined by the Engineer and shall be recoverable from the Contractor by the Owner and may be deducted any moneys due or to become due to the Contractor and the Engineer shall notify the Contractor accordingly.

15.7. Default of Contractor in Compliance

In case of default on the part of the Contractor in carrying out such instruction within a reasonable time specified by the Engineer, it shall be treated as a default of the

Contractor, and the Owner shall be entitled to employ and pay other persons to carry out the same and all costs consequent thereon or incidental thereto shall, after due consultation with the Owner and the Contractor, be determined by the Engineer and shall be recoverable from the Contractor by the Owner.

15.8. Contractor's Equipment

All Contractor's Equipment Temporary Works and materials provided by the Contractor shall, when brought on to the STP Site, be deemed as exclusively intended for use in the STP.

15.9. Owner not Liable for Damage

The Owner shall not at any time be liable for the loss of or damage to any of the said Contractor's Equipment Temporary Works or materials

15.10. Urgent Remedial Works

If by reason of any accident, or failure, or other event occurring to, in or in connection with the STP or any part thereof, any remedial or other work is in the opinion of the Engineer, urgently necessary for the safety or operation of the STP, and the Contractor is unable or unwilling at once to do such work, the Owner shall be entitled to employ and pay other persons to carry out such work as the Engineer may consider necessary. All costs consequent thereon or incidental thereto shall be determined by the Engineer and shall be recoverable from the Contractor by the Owner.

16. COMMENCEMENT AND DELAYS

16.1. Commencement of Works

The Contractor shall commence work on the Commencement Date.

16.2. Possession of Site and Access Thereto

The Contractor shall be put in possession of the STP Site on the Commencement Date

16.3. Way-leave and facilities

The Contractor shall bear all costs and charges for special or temporary way-leave required by him in connection with access to the STP Site. The Contractor shall also provide at his own cost any additional facilities outside the STP Site required by him for the purposes of the work.

16.4. Time for Completion

The whole of the Works shall be completed, within the time stated in the Schedules, calculated from the Commencement Date, or such extended time as may be allowed.

16.5. Extension of Time for Completion

In the event of

- (i) exceptionally adverse climatic conditions, or
- (ii) any delay, impediment or prevention by the Owner, or
- (iii) other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible.

being such as fairly to entitle the Contractor to an extension of the time for completion of the Works, the Engineer shall determine the amount of such extension and shall notify the Contractor accordingly.

Provided that the Engineer is not bound to make any determination unless the Contractor has:

within _____ days after such event has first arisen notified the Engineer, and within _____ days, or such other reasonable time as may be agreed by the Engineer, after such notification submitted to the Engineer detailed particulars of any extension of time to which he may consider himself entitled in order that such submission may be investigated at the time.

16.6. Interim Determination of Extension

Provided also that where an event has a continuing effect such that it is not practicable for the Contractor to submit detailed particulars within the period of _____ days, he shall nevertheless be entitled to an extension of time provided that he has submitted to the Engineer interim particulars at intervals of not more than _____ days and final particulars within _____ days of the end of the effects resulting from the event. On receipt of such interim particulars, the Engineer shall, without undue delay, make an interim determination of extension of time and on receipt of the final particulars, the Engineer shall review all the circumstances and shall determine an overall extension of time in regard to the event. In both such cases the Engineer shall make his determination after due consultation with the Contractor and shall notify the Contractor of the determination. No final review shall result in a decrease of any extension of time already determined by the Engineer.

16.7. Rate of Progress

If for any reason, which does not entitle the Contractor to an extension of time, the rate of progress of the work is at any time, in the opinion of the Engineer, too slow to comply with the Time for Completion, the Engineer shall so notify the Contractor who shall thereupon take such steps as are necessary, subject to the consent of the Engineer, to expedite progress so as to comply with the Time for Completion. The Contractor shall not be entitled to any additional payment for taking such steps.

16.8. Suspension of Work

The Contractor shall, on the instructions of the Engineer, suspend the progress of the work or any part thereof for such time and in such manner as the Engineer may consider necessary and shall, during such suspension, properly protect and secure the work or such part thereof so far as is necessary in the opinion of the Engineer, If such suspension is not:

- (i) necessary by reason of some default of or breach of Contract by the Contractor or for which he is responsible, or
- (ii) necessary for the proper execution of the Works or for the safety of the Works or any part thereof; then

The Engineer shall determine an appropriate extension of time under **Clause 16.5.**

16.9. Cost of Remedying Defects & Maintenance

All defects shall be remedied and the STP maintained by the Contractor at his own cost.

16.10. Contractor's failure to carry out instructions

In case of default on the part of the Contractor in carrying out instructions within a reasonable time, the Owner shall be entitled to employ and pay other persons to carry out the same and if such work is work which, in the opinion of the Engineer, the Contractor was liable to do at his own cost under the Contract, then all costs consequent thereon or incidental thereto shall, after due consultation with the Contractor, be determined by the Engineer and shall be recoverable from the Contractor by the Owner.

17. VARIATIONS AND CLAIMS

17.1. Owner's Approval

If the Contractor requires any variations to be made:

- (i) in the form, quality or quantity of the works or any part thereof; or
- (ii) increase or decrease the quantity of any work included in the Contract
- (iii) omit any such work
- (iv) change the character or quality or kind of any such work
- (v) change the levels, lines, position and dimensions of any part of the works.
- (vi) execute additional work of any kind necessary
- (vii) change any specified sequence or timing of construction;

that may, in his opinion, be necessary and appropriate, he shall have to seek the approval of the Engineer. Unless such work is carried out after obtaining the Engineer's approval, any such variation shall be treated as a default of the contractor and the owner shall be entitled to proceed under **Clause 19.**

Any additional cost attributable to such variation shall be borne by the Contractor.

17.2. Payment

In the Contract there is no provision for any payment being made to the contractor for the construction work, The Contractor is due for payments only at the rates prescribed for treating the effluent, as set out in **Schedule STP-4**

17.3. Passing of Risk¹²

Payments in this Contract shall be regulated by **Schedule STP - 4.** This Schedule specifies the forecast quantity of effluent expected in the system, against which the Contractor shall be paid as per the rates set out therein for effluent treatment per Million Liters per Day¹³ (MLD). The Owner accepts the risks for an inexact forecast, whereas the Contractor accepts the risks associated with improper design and construction. The system shall be monitored by means of flow measuring devices installed to the STP. The

¹² Risk Clause on STP may be changed according to the risk allocation while structuring the project

¹³ Change according to the payment clause decided for the project

Contractor shall account for the installation, maintenance and monitoring of the said devices under his quoted rates.

- (i) In case the measuring devices indicate that the flow anticipated is not reaching the STP on account of inadequate connections, or insufficient discharge at the service connections, and this discharge is lower than that forecast in **Schedule STP 4**, the Owner shall still make a payment on the forecast MLD at the rates stipulated therein;
- (ii) In case the flow reaching the STP is higher than forecast, the Contractor shall be paid as per the MLD rate in **Schedule STP - 4**
- (iii) In case the measuring devices indicate that the flow anticipated is not reaching the STP on account of improper design or construction, the Contractor shall be paid for the actual quantity of effluent treated as per the (per) MLD rate in **Schedule STP - 4**. Notwithstanding any such payment, the Contractor shall continue to be liable to the Owner under the defects liability and performance guarantee clauses of the Construction Contract Part.

17.4. Notice of Claims

Notwithstanding any other provision of the Contract, if the Contractor intends to prefer any claim pursuant to any clause of these conditions or otherwise, he shall give notice of his intention to the Engineer within _____ days after the event giving rise to the claim has first arisen.

17.5. Contemporary Records

Upon the happening of the event referred to in **Sub-Clause 17.3** the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Owner's liability, the Engineer shall, on receipt of a notice under **Sub-Clause 17.3**, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub- Clause and shall supply him with copies thereof as and when the Engineer so instructs.

17.6. Substantiation of Claims

Within ___ days, or such other reasonable time as may be agreed by the Engineer, of giving notice under **Sub Clause 17.3**, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the round upon which the claim is based. Where the event giving rise to the claim has continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Engineer may reasonably require, send further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the Contractor shall send a final account within ___ days of the end of the effects resulting from the event.

17.7. Failure to Comply

If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim that he seeks to make, he shall not be entitled to any compensation for his claim.

17.8. Settlement of Claims

Pursuant to **Clause 17.2**, any amounts to which the Contractor is due shall be discharged only by way of an adjustment in the Concession Period.

18. MEASUREMENT AND INSPECTION

18.1. Quantities

The measurement and inspection clauses of this Contract part are for the sole purpose of checking adherence to specifications. Measurements and Inspections shall not constitute approval, certification of work, price assessment or part fulfillments of Contractor's obligations, nor shall approval or the absence of disapproval relieve the Contractor of his obligations under the Contract.

18.2. Works to be Measured or Inspected

The Engineer shall, when he requires any part of the work to be measured, give reasonable notice to the Contractor's authorised agent, who shall:

- (i) forthwith attend or send a qualified representative to assist the Engineer in making such measurement, and
- (ii) supply all particulars required by the Engineer.

18.3. Monthly Statements during Construction

The Contractor shall submit to the Engineer after the end of each month three copies of the statement, in such form as the Engineer may from time to time prescribe, showing such details as the Engineer may require, regarding the progress and operation of the STP.

18.4. Statement at Completion of Construction

Not later than _____ days after the construction of the STP is complete, the Contractor shall submit to the Engineer a statement at completion with supporting documents showing in detail, in the form approved by the Engineer, including the final value of all work done in accordance with the Contract.

19. DEFAULT OF CONTRACTOR

19.1. Events of Default

If the Contractor:

- 1) enters into voluntary or involuntary bankruptcy, or liquidation; or
- 2) becomes insolvent; or
- 3) if a receiver, administrator, trustee or liquidator is appointed over any substantial part of his assets; or
- 4) if any act is done or event occurs with respect to the Contractor or his assets which, under any applicable law has substantially similar effect to any of the foregoing acts or events; or
- 5) if the Contractor has contravened **Clause 3** of this Part of the Contract; or

- 6) if any covenant on the Contractor's part herein contained shall not be performed or observed; or
- 7) The Engineer certifies to the Owner, with a copy to the Contractor, that, in his opinion, the Contractor:
 - a. has repudiated the Contract, or
 - b. without reasonable excuse has failed
 - i. to commence the works in accordance with this Contract, or
 - ii. to proceed with the works, within _____ days after receiving notice pursuant to this Contract, or
 - iii. to complete the works within the time stipulated for completion;
 - c. despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract,or
- d. has contravened **Clause 4** of this Part of the Contract;
- 8) If the Contractor is in breach of any law or statute governing the construction or use of the STP; or
- 9) If the Contractor fails to obtain or keep in force the insurance requirements under this Contract; or
- 10) If the Contractor changes the use to which the STP/ STP Site is put, or initiates a variation without the required approval of the Engineer;

then the Owner may, after giving _____ days notice to the Contractor, enter upon the STP Site and the works and terminate the Concession granted to the Contractor without thereby releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Owner by the Contract. The Owner may use so much of the Contractor's Equipment, Temporary Works and materials as he or they may think proper.

19.2. Defaults of Performance

At any time after the Commencement Date, the Engineer may investigate each case where the Contractor has failed to properly perform the services in accordance with this Contract. In case such non-performance is caused by reasons specifically ascribed to a default of the Contractor, the Engineer shall issue a notice to the Contractor, instructing him to rectify the failure within a reasonable time (Rectification Notice). Where the default is recurring or serious, (in the opinion of the Engineer) the Engineer may issue an immediate action notice (Immediate Action Notice). Further continued default of the Contractor may lead to the issue of a Default Notice, and then a Continuing Default Notice. Provided that the issue of any notice need not follow the sequence set out above, and each notice may require the Contractor to remedy the deficiency within a certain period, provided also that this clause does not supersede default events under **Clause 19.1.**

Without prejudice to the generality of the following, the following matters shall be included in the type of service deficiencies:

- (i) Failure to treat sewage for three days;
- (ii) Unsafe working practices;
- (iii) Failure to meet sewage treatment and disposal norms;
- (iv) Misuse of STP/ STP Site;
- (v) Failure to make reports

19.3. Assignment of Benefit of Contract

Unless prohibited by law, the Contractor shall, if so instructed by the Engineer within _____ days of such entry and termination referred to in **Sub-Clause 19.1**, assign to the Owner the benefit of any Contract for the supply of any goods or materials or services and/or for the execution of any work for the purposes of the Contract, which Contractor may have entered into.

20. FORCE MAJEURE AND RELEASE FROM PERFORMANCE

20.1. Definition of Force Majeure

"**Force Majeure**" means an event which is beyond the reasonable control of a Party and which makes a Party's performance under this Contract impossible or so impractical as to be considered impossible under the circumstances, including but not limited to:

- (vi) act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
- (vii) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
- (viii) rebellion, revolution, insurrection, or military or usurped power, or civil war or terrorist attack or sabotage;
- (ix) contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly; or
- (x) riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to (i) employees of the contractor (ii) excluding local body Employees; and (iii) any local body staff who are part of a local body /state wide strike who are not engaged under this Contract but are required to provide essential services to the local body/state Employees or of any of its sub-contractors, engaged on operating and maintaining the Facilities.

20.2. Contractors Responsibility

Upon occurrence of any Force Majeure event which may affect performance of the contractors' obligations, it shall promptly notify the owner, and shall endeavor to continue to perform its obligations as far as reasonably practicable. The contractor shall also notify the owner of any proposals to overcome the constraints caused by an event,

including any reasonable alternative means for performance, but shall not effect such proposals without the consent of the owner.

20.3. Owners Responsibility

Upon occurrence of an event considered by the owner to constitute Force Majeure and which may affect performance of the obligations of the owner, the owner shall promptly notify the contractor and shall endeavour continuance of such obligations by itself or by any other agency decided at that time, as far as reasonably practicable.

20.4. Extension of Time

Any period within which a Party shall, pursuant to this Contract, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

20.5. Payments

During the period of their inability to perform the Services as a result of an event of Force Majeure, the contractor shall be entitled to continue to be paid under the terms of this Contract, as well as to be reimbursed for additional costs reasonably and necessarily incurred by it during such period for the purposes of the Services and in reactivating the Service after the end of such period.

21. DISPUTES

The Procedure for disputes shall be as set out in **Clause 8** of Contract Covenants.

22. LENDER'S RIGHTS FOR STP

The Owner takes cognisance of the fact that the Contractor can take recourse to debt to finance the construction of the STP. The Owner hereby agrees that to the extent indicated herein:

The "Prime Lender" for the purpose of this clause shall be defined as:

A Company registered under the Indian Companies Act, 1956, for the past 5 years, or a body incorporated by Statute; and

Which has disbursed the largest part of the debt component for the financing of the project under this Contract Part; and

In support whereof the Contractor submits documentation in the detail required by Owner, with a specific request to nominate the Prime Lender under this Clause.

The Owner agrees as follows:

- (i) That any act of levy of penalty, or notice to terminate under this Contract shall be done only after giving reasonable notice (not subject to confirmation) to the Prime Lender;
- (ii) That at the specific request of the Contractor, the Owner shall pay any amounts due to the Contractor, directly to the Prime Lender;
- (iii) That in the event the Contract with the Contractor is terminated as a result of the Contractor's Default under **Clause 19**, the Owner shall give a time period

of ____ days to the Prime Lender, to step-in and nominate an alternate "Substitute Entity," after obtaining express approval of the Owner. In such event the Owner agrees to novate the Contract with the "Substitute Entity" on the subsisting terms and conditions. Provided that if the Prime Lender is not able to establish an acceptable alternative Contractor within the stipulated time, the Owner shall no longer be bound by this Clause. The Owner shall pay any amounts due to the Prime Lender from the Contractor but shall not include amounts due as a result of previous defaults.

- (iv) That in the event the Contract is terminated as a result of a Force Majeure event, the Owner shall value the works under the Contract and take over the STP. The Owner shall also pay any amounts due to the Prime Lender first, and subsequent balance payments to the Contractor.

23. LENDER'S OBLIGATIONS

The Prime Lender in turn shall inform the Owner, within ____ days of sanction of financial assistance to the Contractor, the members constituting the consortium financing the Contractor to undertake the STP Concession Contract. The Prime Lender shall undertake to lead the consortium and shall produce documentary evidence of other members of the consortium having consented to such nomination as Leader. The Prime Lender shall inform the Owner of the extent and tenor of financial assistance to the Contractor.

24. TRANSFER OF FACILITIES

The facilities, including the designs and drawings, reports, accounts, and all other documents shall be transferred to the Owner at the expiry of the Concession Period, free of all charges, liens, encumbrances whatsoever, in good condition (normal wear and tear accepted) and shall have duly discharge all its dues and outstanding in respect of the Contract including those of the sub-lessees, if any.

The transfer of Facility shall be treated as a transfer on a going concern basis. The transfer of immovable property in the Facility shall be deemed to be an accession to the Owner's immovable property in the sites. The movable property shall be deemed to be transferred by delivery and possession.

At the time of transfer of the Facility, the Facility shall be in such condition as is reasonable in all the circumstances, taking into account their age, the design, materials used, and maintenance carried out.

Until the Transfer Date, all risks shall lie with the Contractor for loss or damage to the whole or any part of the Facility, unless the loss or damage is due to an act of omission of the Owner in violation of its obligations under this Contract.

The Owner shall provide fair and just compensation to such employees as required under the applicable laws and this Contract, and shall indemnify the Owner against any and all such claims such employees may make for loss of office, redundancy, loss of employment or otherwise. The Owner shall accept absolutely no liability on account of any matter pertaining to the Contractor's employees, staff and labour.

The Owner shall be responsible for the costs and expenses, including stamp duties, taxes and legal fees and expenses, incurred in connection with the Transfer of the

Facility to the Owner. The Owner shall at its own cost obtain or effect all clearances and take such other actions as may be necessary for such Transfer, and the Contractor shall provide all assistance in this matter.

From the date of Transfer, the contractor shall rectify in Defects occurring in the STP for a period as indicated in the contract data referred to as the defects Liability period. On completion of the Defects Liability Period all obligations and the rights of the Contractor under this Contract shall terminate, and the Owner or its Nominated Agency shall take over the operation of the STP and any other rights or obligations arising out of the terms of this Contract.

IN WITNESS WHEREOF the Parties have executed this Contract on the date, which appears on page 1.

SIGNED by)

for and on behalf of)

[Contracting Authority])

in the presence of)

SIGNED by)

for and on behalf of)

[Contractor])

in the presence of)

V. SCHEDULES: CONSTRUCTION CONTRACT

C 1 Contract Data for Construction of Sewerage System (Excluding STP)

[Give details such as who is the owner, borrower, contractor, adjudicator/arbitrator and their payment mode, etc.,]

C 1.1 Work Summary

C 1.2 Important Dates (including mile stone dates)

C 1.3 Programme

C 1.4 Site details

C 1.5 Defects Liability

C 1.6 insurance

C 1.7 Programme Update

C 1.8 Language

Cl.9 Law

C 1.10 Currency

C 1.11 Appointing Authority

C 1.12 Price adjustment

C 1.13 Retention Money

C. 1.14 Liquated Damages

C 1.15 Advance Payments

C 1.16 Repayment of advance payment for mobilisation and equipment

C 1.17 Repayment of secured advance:

C 1.18 Performance Security

C 1.19 Other Defaults

VI. SCHEDULES: STP CONCESSION CONTRACT

STP 1: CONTRACT DATA FOR FINANCING, CONSTRUCTION, OPERATION & MAINTENANCE OF STP

STP 1.1 Dates

STP 1.2 Programme

STP 1.3 Insurance

STP 1.4 Programme Update

STP 1.5 Language

STP 1.6 Law

STP 1.7 Currency

STP 1.8 Appointing authority

STP 1.10 Performance Security

STP2: THE STP SITE

STP2.1 Detailed Site Map

STP 2.2 Site Description

STP 2.3 STP Layout Drawings

STP 3 SCOPE OF WORK FOR STP

STP3.1 Brief Scope of Work in the construction phase

STP 3.2 Scope of work in detail – Project Requirements

STP4 CONCESSION PERIOD AND PAYMENTS

VII. ANNEXURE: BOQ OF CONSTRUCTION CONTRACT

Summary and detailed BOQ of construction contract

SOLID WASTE MANAGEMENT FOR _____ LOCAL BODY

AGREEMENT BETWEEN

[Private Operator]
&
[Contracting Authority]

SIGNED ON *[Date of Agreement]*

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DRAFT AGREEMENT

This **AGREEMENT** entered into on this the *[Insert date]* day of *[Insert Month]*, Two Thousand and *[Insert Year]* at *[Insert Place]* for a period of *[insert number of years]* years;

BETWEEN

[Name of the local body] acting through Commissioner¹, _____ Local body, (hereinafter referred to as “**ULB**” which expression shall unless excluded by or repugnant to the context, be deemed to include its successors and permitted assigns); OF THE ONE PART

AND

[Insert name and registered office address of the selected bidder], (hereinafter referred to as “**the Service Provider**” which expression shall unless excluded by or repugnant to the context, be deemed to include its successors and permitted assigns), OF THE OTHER PART

WHEREAS:

- A. Management of Municipal Solid Waste (MSW) is an obligatory function of ULB, and the ULB is presently carrying out these functions.
- B. The ULB invited competitive proposals from eligible bidders vide Tender Notice No._____. dated _____ to carry out primary collection, source segregation, secondary collection, processing and disposal of MSW at the designated locations in accordance with the Municipal Solid Waste (Management and Handling) Rules, 2000 (hereinafter referred to as “**the Project**”).
- C. In response thereto, the ULB has received proposals from several bidders and after evaluation thereof, has accepted the proposal submitted by the Service Provider.
- D. ULB hereby grants and authorises the Service Provider to implement the Project in accordance with the terms and conditions of this Agreement.

¹ Change the designation according to the state/local body/other contracting authority

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

“Agreement”	means this Agreement, and includes any amendments hereto made in accordance with the provisions hereof.
“Applicable Law”	means all laws including Municipal Solid Waste (Management & Handling) Rules, 2000, Minimum Wages Act 1948, Workmen’s Compensation Act 1923, Contract Labour (Regulation & Abolition) Act, 1970, Child Labour (Prohibition and Regulation) Act, 1986 in force and effect as of the date hereof and which may be promulgated or brought into force and effect hereinafter in India including judgments, decrees, injunctions, writs or orders of any court, as may be in force and effect during the subsistence of this Agreement and applicable to the Project/the Service Provider.
“Applicable Permits”	means all clearances, permits, authorisations, consents and approvals required to be obtained or maintained by the Service Provider under Applicable Law, in connection with the Project during the subsistence of this Agreement.
“Compliance Certificate”	means the certificate to be obtained by the Service Provider in the format set out in <u>Schedule 4</u> of this agreement.
“Contract Value”	shall mean the Service Fee payable by ULB to the Service Provider during the Agreement Period.
“Force Majeure”	means an act, event, condition or occurrence as specified in <u>Clause 8</u> .
“Letter of Commencement”	of the letter issued by the ULB to the Service Provider to commence the work envisaged under the Agreement
“Management Plan”	means the plan for the implementation of the Project, duly signed by the ULB in token of its approval.
“Material Adverse Effect”	means a material adverse effect on (a) the ability of the Service Provider to exercise any of its rights or perform/discharge any of its duties/obligations under and in accordance with the provisions of this Agreement and/or (b) the legality, validity, binding nature or enforceability of this Agreement.
“Parties”	means the parties to this Agreement and

“Party”	means either of them, as the context may admit or require.
“Termination Date”	means the date specified in the Termination Notice as the date on which Termination occurs.
“Termination Notice”	means the notice of Termination by either Party to the other Party, in accordance with the applicable provisions of this Agreement.
“Termination”	means early termination of this Agreement pursuant to Termination Notice or otherwise in accordance with the provisions of this Agreement but shall not, unless the context otherwise requires, include expiry of the Agreement by efflux of time at the end of <i>[total no of years]</i> years from the date of this Agreement.

1.2 Interpretation

In this Agreement, unless the context otherwise requires,

- (a) any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies to, or is capable of being applied to any transactions entered into hereunder;
- (b) references to Applicable Law shall include the laws, acts, ordinances, rules, regulations, notifications, guidelines or bylaws which have the force of law;
- (c) the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organisations or other entities (whether or not having a separate legal entity);
- (d) the headings 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;
- (f) any reference to day, month or year shall mean a reference to a calendar day, calendar month or calendar year respectively;
- (g) the Schedules to this Agreement form an integral part of this Agreement as though they were expressly set out in the body of this Agreement;
- (h) 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;
- (i) references to recitals, Articles, sub-articles, clauses, or Schedules in this Agreement shall, except where the context otherwise requires, be deemed to be

references to recitals, Articles, sub-articles, clauses and Schedules of or to this Agreement;

- (j) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effectual only if it is in writing under the hands of duly authorised representative of such Party in this behalf and not otherwise;
- (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;

2 OBLIGATIONS OF THE SERVICE PROVIDER

2.1 In addition to and not in derogation or substitution of any of its other obligations under this Agreement, the Service Provider shall have the following obligations

- (a) The Service provider undertakes to handle all activities and responsibilities as given under **Schedule 1** Scope of Work of this agreement.
- (b) The Service Provider shall within ____ days of the date of signing of the Agreement, obtain license under the provisions of Contract Labour (Regulation & Abolition) Act, 1970, for works to be carried out in accordance with this Agreement. Upon issue of such license by the Department of Labour, submit a copy thereof to the ULB. ULB shall then issue the Letter of Commencement of work to the Service Provider.
- (c) The Service Provider shall provide an indemnity bond² as per **Schedule 3** of Rs. [insert amount] [Rupees (____)] for the equipment and vehicles provided by the ULB.
- (d) The Service Provider shall create a grievance redress cell, where in the public and official should be easily accessible to give complaints.
- (e) The Service Provider shall obtain Compliance Certificate from a committee formed in each ward comprising designated citizens belonging to the respective Resident Welfare Associations (RWA)³ or the Commissioner and Head of the sanitary department of the ULB in the absence of RWA on a [insert period] basis in respect of its obligations to collect and deposit MSW at designated locations in accordance with this Agreement as per the format set out in **Schedule 4**.
- (f) Upon termination of this Agreement, deliver to the ULB, the equipment and vehicles in good and operable condition, normal wear and tear excepted. The service provider shall provide a monthly report on the maintenance activities undertaken on the equipment/vehicles provided by the ULB. A format for the monthly report is given in **Schedule 5**

² This condition applies only when the equipment/vehicles were provided by the ULB, else this can be removed

³ Include this condition of getting certificate from RWA only if it is practically possible in the project area

2.2 Performance Security

- (a) The Service Provider shall, for due and punctual performance of its obligations relating to the Project, deliver to ULB, simultaneously with the execution of this Agreement, a bank guarantee from a scheduled bank acceptable to ULB, in the form as set forth in **Schedule 2**, ("Performance Security") for a sum of Rs. *[insert amount] [Rupees (insert amount in words)]*
- (b) The Performance Security shall be kept valid for the contract period and ____ months thereafter.

2.3 General Obligations

The Service Provider shall:

- (a) procure all Applicable Permits under Applicable Laws for the purpose of carrying out its obligations at its own cost and expense, and be in compliance thereof at all times during the period of this Agreement.
- (b) comply with Applicable Laws at all times during the period of this Agreement, including the Contract Labour as mentioned in the **clause 7** of this contract
- (c) ensure that all aspects of the Project shall conform to the laws pertaining to environment (as per **clause 4** of the contract), health and safety;
- (d) not sub-contract any part or whole of its obligations without express approval from the ULB.

2.4 Performance Targets

During the contract period, the service provider must meet all the following Performance Targets:

[Some of the sample performance targets are listed below, include/remove relevant performance indicator specific to the project:

- (i) The service provider has to achieve 100% door to door collection in ____ months
- (ii) The service provider has to achieve 80% source segregation within ____ months and have to achieve 100%⁴ with in ____ months
- (iii) The service provider has to address the complaints logged within ____ hours. If the service provider is not in a position to address the grievance, then an interim solution has to be provided and the same has to be intimated to the local body officials.
- (iv) The service provider has to collect all the waste before ____ am in a day.

]

3 THE ULB's OBLIGATIONS

- 3.1 In addition to and not in derogation or substitution of any of its other obligations under this Agreement, the ULB shall have the following obligations:

⁴ In most of the cases achieving 100% source segregation is not possible hence it is always better to fix an achievable performance indicators.

- (a) Provide the necessary support to the Service Provider as outlined in **Schedule 1** Scope of work of this agreement.
- (b) Approve plan provided to the Service Provider once the Service provider incorporates all the points discussed/agreed upon at the time of negotiation.
- (c) Provide equipment and vehicles to the Service Provider as per guidelines outlined in **Schedule 1**. – Scope of work
- (d) Provide support the service provider in its IEC campaigns for segregation of MSW at household level into organic and inorganic waste

3.2 General Obligations

ULB shall:

- (a) where appropriate, provide necessary assistance to the Service Provider in securing Applicable Permits;
- (b) Register with the local office of the Labour Department and obtain certificate of registration;
- (c) observe and comply with all its obligations set forth in this Agreement;
- (d) resolve disputes, if any, between the Service Provider and the generators of MSW in the Project Area through amicable means or arbitration.

4. ENVIRONMENT

4.1 Protection of the Environment

The service provider shall take all reasonable steps to protect the environment in the project area and to limit damage and nuisance to people and property resulting from pollution, noise and other results of the Services. The service provider shall ensure that air emissions and surface discharges from the project area shall not exceed the values prescribed by Applicable Law and the Environment Management Plan⁵. This includes Municipal solid waste management and handling rules 2000.

4.2 Indemnification by the service provider

The service provider shall indemnify and hold harmless the local body/government departments against any fines or penalties imposed under the Applicable Law in respect of environmental laws.

5 PAYMENT TERMS

5.1 Payment of service fee

- (a) Subject to the provisions of this Agreement and in consideration of the Service Provider undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, the ULB agrees

⁵ If given as schedule please mention the schedule

and undertakes to pay to the Service Provider a service fee of Rs. [Insert amount][Rupees (insert amount in words)] per month ("Service Fee")⁶.

- (b) The Service Provider shall be required to submit bills and Compliance Certificate by the _____ day of every month along with a Vehicle maintenance report. ULB upon verification of the same shall release payments to the Service Provider after taking into account any deductions / fine / penalties imposed by the ULB within _____ days. In case of dispute, the undisputed amount will be paid and the disputed amount will be verified and if found in order shall be paid along with the bills for the following month.
- (c) All payments to the Service Provider shall be made by way of account payee cheque drawn in favour of the Service Provider, and payable at _____

6 INTELLECTUAL PROPERTY

6.1 The service provider shall make available to and hereby licenses the ULB to use free of charge all Intellectual Property owned by the service provider (or to the extent they are legally able to do so licensed to the service provider by third parties) which is required in connection with the performance of the service provider's obligations under this Contract (the "**Service provider Intellectual Property**"). This license is for the purposes of providing the Services but no other purpose. Such license shall terminate _____ years after the termination of this Contract but shall otherwise be irrevocable, shall be royalty free, shall not be transferable and shall not carry the right to grant sub-licenses. Notwithstanding anything contained herein, any Intellectual Property that is created specifically in connection with the Services by the service provider during the Term of this Contract, shall be owned by the ULB for whom the Service was carried out and the service provider hereby assigns all its rights in such Intellectual Property, including all copyrights, patent and moral rights arising there from and related thereto, to the ULB. The service provider shall execute all necessary and appropriate documents and deeds as the ULB may require in order to perfect the title of the ULB to the Intellectual Property.

6.2 The ULB shall, to the extent it is legally able to do so, grant the service provider during the term of this Contract a royalty free, non-exclusive, irrevocable personal and non-transferable license to use Intellectual Property which is owned by or licensed to the ULB by third parties (the "**ULB Intellectual Property**") only to the extent necessary to enable the service provider to perform its obligations under this Contract. Such licenses shall not carry the right to grant sub-licenses.

6.3 The service provider shall indemnify the ULB in full in respect of all loss, damage and expense of whatever kind and nature arising out of the use by the ULB of the service provider Intellectual Property in accordance with its terms which infringes the rights of any third party.

6.4 The ULB shall indemnify the service provider in full in respect of all loss, damage and expense of whatever kind and nature arising out of the use by the service provider of any ULB Intellectual Property in accordance with its terms which infringes the rights of any third party.

⁶ If fixed and variable payment method is adopted, then include a separate schedule and explain the components of fixed and variable payments. Also refer the schedule in this clause.

6.5 The service provider shall use reasonable efforts:

- (a) to ensure that Intellectual Property owned or developed by third parties and utilised by the service provider in connection with the performance of its obligations under this Contract is licensed to the service provider on reasonable terms for the purposes of the operations and maintenance or repair of the Facilities and otherwise for the purposes of the Contract but for no other purpose; and
- (b) to ensure that no Intellectual Property of a third party is otherwise used in the performance of the service provider's obligations under this Contract without the prior written approval of the ULB.

7 LABOUR AND LABOUR REGULATIONS

7.1 Labour

The Service provider shall, unless otherwise provided in the Contract, make his own arrangement for all staff and labour, local or other, and for their payment, housing, feeding and transport.

The Service provider shall, if required by the ULB, deliver to the ULB a return in detail, in such form and at such intervals as the ULB may prescribe, showing the staff and numbers of the several classes of labour from time-to-time employed by the Service provider on the Site and such other information as the ULB may require.

7.2 Compliance with Labour Regulations

During continuance of the Contract, the Service provider and his sub-service providers shall abide at all times by all existing labour enactment and rules made there under, regulations, notifications and bye-laws of the State or Central Government or local authority and any other labour law (including rules), regulations, bye-laws that may be passed or notification that may be issued under any labour law in future either by the State or the Central Government or the local authority. The Service provider shall keep the ULB indemnified in case any action is taken against the ULB by the competent authority on account of contravention of any of the provisions of any Act or rules made there under, regulations or notifications including amendments.

If the ULB is caused to pay or reimburse, such amounts as may be necessary to cause or observe, or for non-observance of the provisions stipulated in the notifications! bye-laws/Acts/Rules/regulations including amendments if any, on the part of the Service provider, the ULB shall have the right to deduct any money due to the Service provider including his amount of performance security. The ULB shall also have the right to recover from the Service provider any sum required or estimated to be required for making good the loss or damage suffered by the ULB.

8 FORCE MAJEURE

8.1 Definition of Force Majeure

"**Force Majeure**" means an event which is beyond the reasonable control of a Party and which makes a Party's performance under this Contract impossible or so impractical as to be considered impossible under the circumstances, including but not limited to:

- (i) act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
- (ii) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
- (iii) rebellion, revolution, insurrection, or military or usurped power, or civil war or terrorist attack or sabotage;
- (iv) contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly; or
- (v) riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to (i) employees of the Service provider (ii) excluding local body Employees; and (iii) any local body staff who are part of a local body /state wide strike who are not engaged under this Contract but are required to provide essential services to the local body/state Employees or of any of its sub-contractors, engaged on operating and maintaining the Facilities.

8.2 Effect of Force Majeure Event

Subject to right to terminate the Contract contained in **Clause 9.3**, no Party to this Contract shall be considered in default or in contractual breach to the extent that performance of obligations is prevented by a Force Majeure event.

8.3 Service providers Responsibility

Upon occurrence of any Force Majeure event which may affect performance of the Service providers' obligations, it shall promptly notify the owner, and shall endeavor to continue to perform its obligations as far as reasonably practicable. The Service provider shall also notify the owner of any proposals to overcome the constraints caused by an event, including any reasonable alternative means for performance, but shall not effect such proposals without the consent of the owner.

8.4 Owners Responsibility

Upon occurrence of an event considered by the owner to constitute Force Majeure and which may affect performance of the obligations of the owner, the owner shall promptly notify the Service provider and shall endeavour continuance of such obligations by itself or by any other agency decided at that time, as far as reasonably practicable.

8.5 Extension of Time

Any period within which a Party shall, pursuant to this Contract, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

8.6 Payments

During the period of their inability to perform the Services as a result of an event of Force Majeure, the Service provider shall be entitled to continue to be paid under the terms of this Contract, as well as to be reimbursed for additional costs reasonably and

necessarily incurred by it during such period for the purposes of the Services and in reactivating the Service after the end of such period.

9 EVENTS OF DEFAULT AND TERMINATION

9.1 Events of Default

Event of Default means either Service Provider Event of Default or ULB Event of Default or both as the context may admit or require.

a. Service Provider Event of Default

Any of the following events shall constitute an event of default by the Service Provider ("**Service Provider Event of Default**")

- (i) The Service Provider has stopped door-to-door collection of organic MSW from the generators of MSW for any day and failed to collect the inorganic MSW as per the Management Plan, except where performance has been prevented by a Force Majeure Event;
- (ii) The Service Provider has failed to adhere to any other performance obligations under the Agreement; and the same has not been remedied for more than *[insert number of days]*;
- (iii) Penalty amounts as payable by the Service Provider is equal to or greater than ____% of the Contract Value;
- (iv) The Service Provider has repudiated or abandoned the Project;

b. ULB Event of Default

Any of the following events shall constitute an event of default by the ULB ("**ULB Event of Default**"), unless caused by a Service Provider Event of Default or a Force Majeure Event:

- (i) The ULB has failed to make any payments due to the Service Provider and more than ____ days have elapsed since such default;
- (ii) The ULB has failed to adhere to any other performance obligations under the Agreement; and the same has not been remedied for more than ____ days of receipt of notice thereof issued by the Service Provider;

9.2 Penalties

In case of a Service Provider Event of Default or non - performance of its obligations or not meeting the performance targets set out in **Clause 2.4**, then the ULB shall deduct penalty amounts as set out in **Schedule 6** from the monthly payments due to the Service provider.

9.3 Termination due to Event of Default

a. Termination for Service Provider Event of Default

Without prejudice to any other right or remedy which the ULB may have in respect thereof under this Agreement, upon the occurrence of a Service Provider Event of Default, the ULB may terminate this Agreement by issuing a termination notice setting

out the underlying Event of Default and the termination date. The Service Provider shall continue to perform its obligations under the Agreement till Termination Date.

b. Termination Payments

Upon Termination of this Agreement on account of Service Provider Event of Default, the Service Provider would not be entitled to any compensation from the ULB and the Performance Security shall be forfeited.

Upon Termination of this Agreement on account of ULB Event of Default, the Service Provider would be entitled to the payments due from the ULB and the Performance Security shall be released. In addition, ULB shall pay an additional compensation of ___% per month of the amount due to Service Provider till the date of payment.

10 DISPUTE RESOLUTION

10.1 Amicable Settlement

The Parties shall use their best efforts to settle amicably all Disputes arising out of or in connection with the Contract or its interpretation.

10.2 Reference to Adjudicator.

If any dispute arises between the owner and the Service provider in connection with, or arising out of, the Contract or the provision of the Services, whether during carrying out the Services or after their completion, the matter shall be referred to the Adjudicator within [____] days of the notification of disagreement of one Party to the other.

The Adjudicator shall give a decision in writing within [____] days of receipt of a notification of a dispute.

The Adjudicator shall be paid by the hour at the rate specified in the Request for Proposal, together with reimbursable expenses of the types specified in Request for Proposal, and the cost shall be divided equally between the owner and the Service provider, whatever decision is reached by the Adjudicator.

10.3 Replacement or Adjudicator

Should the Adjudicator resign or die, or should the Owner and the Service provider agree that the Adjudicator is not fulfilling his functions in accordance with the provisions of the Contract, a new Adjudicator will be jointly appointed by the Owner and the Service provider. In case of disagreement between the Owner and the Service provider, within _____ days, the Adjudicator shall be designated by the appointing authority designated in the contract data at the request of either party.

10.4 Notice for Arbitration

Either Party may refer a decision of the Adjudicator to an Arbitrator within _____ days of the Adjudicator's written decision. If neither Party refers the dispute to arbitration within the above _____ days, the Adjudicator's decision will be final and binding.

10.5 Arbitration

- (i) In case of dispute or difference arising between the Owner and a domestic Service provider relating to any matter arising out of or connecting with this

Contract, such dispute or difference shall be settled in accordance with the Arbitration and Conciliation Act 1996. The Arbitral Tribunal shall consist of three arbitrators, one each to be appointed by the Owner and Service provider. The third arbitrator shall be chosen by the two arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two arbitrators appointed to reach upon a consensus within a period of _____ days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of the Institution of Engineers (India).

- (ii) If one of the Parties fails to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above within _____ days after receipt of the notice of the appointment of its arbitrator by the other Party, then the President of the Institution of Engineers (India), both in cases of foreign Service provider as well as Indian Service provider, shall appoint the arbitrator. A certified copy of the order of the president of the Institution of Engineers (India), making such an appointment shall be furnished to each of the Parties.
- (iii) Arbitration proceedings shall be held at _____, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.
- (iv) The decision of the majority of arbitrators shall be final and binding upon both Parties. The cost and expenses of the arbitration proceedings will be paid as determined by the Arbitral Tribunal. However, the expenses incurred by each Party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the Arbitrator appointed by such party or on its behalf shall be borne by each party itself.
- (v) Performance under the Contract shall continue during the arbitration proceedings and payments due to time Service provider by the Owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.
- (vi) Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Adjudicator for the purpose of obtaining his said decision pursuant to **Sub-Clause 10.2**. No such decision shall disqualify the owner representative (most of the cases project engineer) from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

10.6 Failure to comply with Adjudicator's Decision

Wherever either Party has not given notice of intention to commence arbitration of a dispute within the period slated in **Sub-Clause 10.4** and the related decision has become final and binding, either Party may, if the other Party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with **Sub-Clause 10.5**.

10.7 Failure to comply with Decision by Arbitral Tribunal

Either Party may refer a decision of the arbitration to a court in [respective state] of competent jurisdiction, within [_____] days of the decision of the tribunal. If neither Party refers the dispute to court within the above [_____] days, the decision of the Arbitral tribunal will be final and binding.

10.8 Performance to Continue During Dispute

Performance of this Contract and all obligations hereunder shall continue during any Disputes or any Dispute resolution mechanism. However, payment due or payable by Owner to the Service provider shall be withheld on account of a pending reference to any Dispute resolution mechanism, to the extent that such amount of the payment is subject of such Dispute. All undisputed amounts must continue to be paid in the manner specified.

11 GENERAL

11.1 Governing Law and Jurisdiction

This Agreement shall be governed by the laws of India and courts of the district head quarters will have jurisdiction relating to all matters arising from this Agreement.

11.2 Amendments

This Agreement and the Schedules together constitute a complete and exclusive understanding 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 agreed to by all the Parties hereto and evidenced in writing.

11.3 Intent and Effect

Each of the Parties hereto undertakes to fully and promptly observe and comply with the provisions of this Agreement.

11.4 Non-Waiver

No omission or delay on the part of any Party in requiring a due and punctual fulfillment by any other Party of its obligations hereunder shall constitute, or be deemed to constitute, a waiver of any of such Party's rights to require such due and punctual fulfillment and in any event shall not constitute or be construed as a continuing waiver and/or as a waiver of other or subsequent breaches of the same or other (similar or otherwise) obligations of such other Party hereunder or as a waiver of any remedy.

11.5 Binding Effect

Subject to the terms and conditions hereof, this Agreement is binding upon and shall ensure to the benefit of the Parties and their respective successors and permitted assigns.

11.6 Invalid Provisions

If any provision of this Agreement is held to be illegal, invalid, or unenforceable under any present or future Law, and if the rights or obligations under this Agreement shall not be materially and adversely affected thereby, (a) such provision shall be fully severable; (b) this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof; (c) the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance here from.

11.7 Additional Documents

Each Party hereto shall promptly execute and deliver such additional documents and Agreements as are envisaged in this Agreement and any other Agreement or document as may be reasonably required for the purpose of implementing this Agreement, provided that no such document or Agreement shall be inconsistent with the spirit and intent of this Agreement

11.8 Counterparts

This Agreement may be executed simultaneously in two counterparts, each of which shall be deemed an original, but both of these shall together constitute one and the same instrument.

11.9 Notices

All notices, requests, demands and other communications made or given under the terms of this Agreement or in connection herewith shall be in writing and shall be either personally delivered, transmitted by postage prepaid registered mail (confirmed and writing by postage prepaid registered mail), and shall be addressed to the appropriate party at the following address or to such other address or place as such Party may from time to time designate:

To the ULB at:

To the Service Provider at:

Unless another address has been specified by a Party hereto by written notice thereof to the other Party, any notice, request, demand or other communication given or made pursuant to this Agreement shall be deemed to have been received (i) in the case of personal delivery, on the date of delivery, (ii) in the case of mail delivery, on the date which is ____ days after the mailing thereof and (iii) in the case of a telex or cable, the date of dispatch thereof.

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

SIGNED SEALED AND DELIVERED

For and on behalf of THE ULB by

(Signature)

(Name)

(Designation)

SIGNED, SEALED AND DELIVERED

For and on behalf of the Service Provider by:

In the presence of.

1)

2)

SCHEDULES

SCHEDULE 1 SCOPE OF WORK

[SAMPLE SCOPE OF WORK IS GIVEN BELOW. THIS SCOPE OF WORK HAS TO BE MODIFIED ACCORDING TO THE LOCAL CONDITION AND ACCORDING TO THE DECISION ON COMPONENTS]

Scope of Work

The scope of work covers the following:

1. **IEC activities** for awareness generation on a) 'reduce, re-use, recycle' philosophy, b) eliminating littering and c) door-to-door collection and source segregation with the aim of making the town 'garbage-free'.
2. **Primary collection:** Undertake door-to-door collection and source segregation of municipal solid waste.
3. **Secondary collection and transfer:** adopting a completely 'bin-free' approach for segregation, collection and transfer of waste from collection points to disposal/processing locations.
4. **Safe Disposal** – covering creation of temporary composting facilities for processing biodegradable waste and safe disposal of non bio-degradable waste as per statutory guidelines including MSW guidelines prescribed by the Supreme Court and Pollution Control Board.

The geographical scope of the project covers the _____ wards/areas coming under the jurisdiction _____ local body

DETAILED SCOPE OF WORK, TASKS AND ACTIVITIES AND SUPPORT FROM THE ULB

Finalisation and agreement on the Technical Plan

5. The Technical Plan provided by the successful bidder as part of Part I-Technical offer of his proposal would be reviewed by the ULB during negotiations. The Bidder is expected to incorporate the points emerging from these discussions and submit a revised Technical Plan to the ULB covering the following within 2 weeks of signing of the contract. The Technical plan should include the following:
 - (a) should give numbers of waste generators such as Households, Commercial establishments and Others, if any to be served. (A hard copy showing ward-wise details can be collected from _____ Municipality)
 - (b) should plan and disseminate Timings within which service is to be provided (for eg., 7-11am for households; 9am-1pm for commercial establishments)
 - (c) should give methods of collection to be adopted: (e.g. door to door collection using containerised tricycle/handcart/motorised pick up van with /whistle/horn device for announcing the arrival of sanitation worker in his/her operational area; and depositing the waste at designated location within 500 meters from the collection area in case of handcarts and tricycles and 3 km in case of motorised vehicles)
 - (d) The timings and location of the vehicles used for undertaking secondary collection to be carried out shall be mentioned by the bidder in his detailed technical plan.
 - (e) should give number of units:
 - Size of one unit of operation - 250 households/shops/establishment with one part-time sanitation worker using tricycle/handcart (or)
 - one motorised vehicle for 1000 households/shops/establishments
 - (f) should provide details of manpower and equipment that the bidder intends that the bidder intends to deploy

- (g) Systems and processes for capturing and reporting information on the SWM activities to the ULB and public at large.
6. While the ULB would support the successful bidder by providing the necessary information available at its disposal, the successful bidder is expected to use his experience to make an independent assessment of the town to ensure that the Technical Plan is complete in all aspects with respect to ensuring the final objective of the contract of ensuring a garbage-free town and safe disposal of waste.

IEC activities

7. The primary objective of engaging a private service provider is to realise the vision of _____ local body of becoming 'garbage-free' by adopting best practices in Solid Waste Management. The _____ ULB believes that an effective Information, Education and Communication (IEC) campaign is critical to realise this vision. The IEC activities should focus on:
- Training waste generators including households, commercial establishments and other public / private institutions in the town on 'reduce, re-use, recycle' philosophy.
 - Adequate training on the waste management practices adopted by the bidder including primary, secondary collection and disposal to minimise and progressively eliminate littering.
 - Training on Door-to-door collection and source segregation with the aim of making the town 'garbage-free'.
8. As part of IEC activities, the bidder should undertake the following mandatory requirements
- Awareness creation on door-to-door collection, two-bin source segregation of biodegradable and non-biodegradable waste and elimination of littering on road side through educational brochures/pamphlets to each household. The private service provider shall also disseminate information on timing and frequency of waste collection
 - Hold consultative sessions with commercial establishments on source segregation including providing them adequate guidelines on the timing and frequency of waste collection
 - The private bidder representatives should hold meetings and public consultations at a ward level once every 3 months in the presence of the Council member from the ward
9. The bidder should achieve the following outcomes in his IEC initiatives:
- 100% compliance of the two bin (Bins shall be provided by _____ Municipality to the house holds and commercial establishments) system, involving proper source segregation.
 - Educating 100% of the households on the merits of source segregation through direct interactions, leaflets and community education on all weekends
 - Providing the contact details of the designated Liaisoning Officer to the respective house holds for registering complaints.

Primary collection, Secondary collection and transfer

10. The bidder is expected to recruit, train and deploy manpower for all the activities indicated in the scope of work.
11. The bidder shall be responsible for planning and ensuring timely collection of waste from various waste generators including households, commercial establishments and others. The bidder should ensure 100% door-to-door collection and source segregation (including implementation of two-bin system).
12. _____ Municipality insists on "zero bins" in the secondary collection and transfer of MSW.
13. The bidder would be responsible for streamlining primary and secondary collection to ensure that collection efficiency is maximised. The bidder is responsible for identifying, maintaining and litter-free collection points in each ward of the town for enabling smooth transition from primary collection to secondary collection and transfer. The bidder may also identify large waste generating areas such as commercial establishments which would require direct transfer from the generation point to the processing/disposal area.

14. Spillage of MSW during collection and transfer of waste to designated locations would be avoided
15. The service provider has to purchase necessary bins and other equipments to collect and transfer the waste.

Disposal

16. The service provider have to carry all the wastes collected to the treatment and disposal site situated at _____. While entering into the site the waste has to be segregated as per MSW 2000 rules [if the rules updated during contract period, then the updated rules will apply]_____
17. The collected MSW shall not be burnt or disposed off in any manner whatsoever.

Manpower

18. The bidder is responsible for recruiting, training and deploying manpower to manage all the activities listed above. _____ municipality employs sanitary workers on its rolls, who will be responsible for undertaking street and road sweeping apart from drain de-silting. While these activities are outside the scope of work for the bidder, the bidder shall be responsible for collection of wastes generated from these activities for secondary transfer and further processing/disposal⁷.
19. The bidder shall appoint liaisoning officers (one for every ten units) who will update and attend to the clarifications and issues raised by the designated sanitary supervisors of the Municipality. The name, contact details, of these liaisoning officers shall be provided by the bidder in his detailed technical plan.
20. The bidder shall ensure that:
 - (a) if any sanitation worker remains absent, a substitute worker is provided.
 - (b) the employees of the Service Provider do not collect payment for the service provided from the waste generators in the Project Area.
 - (c) adequate measures are adopted to meet health and safety standards of its employees by providing safety gear
 - (d) the employees of the Service Provider should maintain cordial relations with the waste generators.

Grievance re-dressal and periodic reporting

21. Apart from handling the scope of work indicated above, the successful bidder should establish processes, system and accountability for
 - (a) Reporting non-compliance of MSW management practices by waste generators to the ULB and recommending/facilitating necessary action.
 - (b) Establish processes and accountability for addressing and resolving grievances of the waste generators and other stakeholders including maintenance of complaint register recording complaints and action taken
 - (c) Maintain proper documentation and establish mechanisms for disseminating information on vehicle movements, quantity of waste disposed, quantity of manure produced, fuel expenses, maintenance expenses and labour records to the ULB
 - (d) Calibrate and maintain calibration status of weighing equipment used for recording quantity of waste at various disposal/processing points and to compute the total tonnage handled for the purpose of payment to be made to the bidder.

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⁷ If the street sweeping is also part of scope of the service provider then this point may be modified accordingly

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CONCESSION AGREEMENT

This Agreement is entered into on this the day of, 199..... BETWEEN

1. **NATIONAL HIGHWAYS AUTHORITY OF INDIA**, a statutory body constituted under the provisions of the National Highways Authority of India Act, 1988, and having its principal office at No.1, Eastern Avenue, Maharani Bagh, New Delhi 110 065 (hereinafter referred to as “NHA” which expression shall unless repugnant to the context or meaning thereof include its administrators, successors and assigns) of One Part,

AND

2. [..... **LIMITED**], a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at (hereinafter referred to as the “Concessionaire” or “Company” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted substitutes) of the Other Part.

WHEREAS

- A. The Government of India in the Ministry of Surface Transport (hereinafter referred to as “MOST”) had authorised NHA for the strengthening of existing 2-Lanes from Km. 273/500 to 366/200 on the Jaipur-Kishangarh Section of the National Highway No.8 (“NH-8”) in Rajasthan, India and construction and widening thereof to six lanes and its operation and maintenance through a concession on build, operate and transfer (“BOT”) basis and has by its Notification No..... dated issued pursuant to Section 11 of the National Highways Authority of India Act, 1988 vested the said stretch of NH-8 in NHA as set forth in the said Notification dated
- B. NHA had accordingly invited Proposals for shortlisting of bidders for the aforesaid under its Notice inviting Proposals No..... dated (“the Tender Notice”), inter alia, for the design, engineering, financing, procurement, construction, operation and maintenance of the above section of NH-8 on BOT basis subject to and on the terms and conditions contained in the Tender Notice and had pursuant thereto shortlisted certain bidders including, inter alia, the consortium comprising, and (collectively the “Consortium”) with as its Leader.
- C. NHA had, pursuant to the Tender Notice, laid down and prescribed the technical and commercial terms and conditions and had invited Bids from the bidders shortlisted pursuant to the Tender Notice for undertaking, inter alia, the work referred to in Recital

'A' above on BOT basis.

- D. After evaluation of the Bids so received NHAI accepted the Bid of the Consortium and issued its Letter of Acceptance No..... dated ("LOA") to the Consortium requiring, inter alia, the execution of this Concession Agreement within 45 (forty-five) days of the date thereof.
- E. The Consortium has promoted and incorporated the Concessionaire as a limited liability company to enter into this Concession Agreement pursuant to the LOA for undertaking, inter alia, the design, engineering, financing, procurement, construction, operation and maintenance of the Project Highway, as defined hereinafter on BOT basis as referred to in Recital 'A' and to fulfill other obligations of the Concessionaire pursuant to the LOA and has requested NHAI to accept the Concessionaire as the entity which shall undertake and fulfill and perform the obligations and exercise the rights of the Consortium under the LOA, including the obligation to enter into this Concession Agreement for the design, engineering, financing, procurement, construction, operation and maintenance of the Project Highway on BOT basis.
- F. NHAI has agreed to the said request of the Consortium and has accordingly agreed to enter into this Concession Agreement with the Concessionaire pursuant to the LOA for, inter alia, the design, engineering, financing, procurement, construction, operation and maintenance of the said Project Highway on BOT basis.
- G. It is deemed necessary and expedient to enter into this Agreement to record the terms of the said Agreement between the Parties.

NOW THEREFORE IN CONSIDERATION OF THE PREMISES AND THE MUTUAL COVENANTS HEREINAFTER CONTAINED, THE PARTIES HERETO HEREBY AGREE AND THIS AGREEMENT WITNESSETH AS FOLLOWS:

I DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

“Accounting Year” means the financial year commencing from 1st April of any calendar year and ending on 31st March of the next calendar year.

“Additional Facilities” means the facilities which the Concessionaire may provide or procure for the benefit of the users of the Project Highway and which are (i) in addition to the Project Facilities, and (ii) not situated on the Site.

“Affected Party” shall have the meaning set out in Clause 29.1.

“Agreement” means this Agreement, the Schedules ‘A’ through ‘X’ hereto and any amendments thereto made in accordance with the provisions contained in this Agreement.

“Applicable Laws” means all laws, promulgated or brought into force and effect by GOI or GOR including regulations and rules made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, as may be in force and effect during the subsistence of this Agreement.

“Applicable Permits” means all clearances, permits, authorisations, consents and approvals required to be obtained or maintained under Applicable Laws in connection with the design, engineering, financing, procurement, construction, operation and maintenance of the Project Highway during the subsistence of this Agreement.

“Appointed Date” means the date on which Financial Close is achieved in accordance with Article XXII and shall be deemed to be the date of commencement of the Concession Period.

“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.

“Associates” means in relation to either Party and/or Consortium Members, a person who controls, is controlled by, or is under the common control with such Party or Consortium Member. As used in this definition, the expression “control” means with respect to a person which is a corporation, the ownership, directly or indirectly, of more than 50% of the voting shares of such person, and with respect to a person which is not

a corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise.

“Bank” means a bank incorporated in India and having a minimum net worth of Rs.10,000 million (Rupees ten thousand million) and having a branch in the proximity of the Project or at any other place acceptable to NHAI.

“Bid” means the documents in their entirety comprised in the bid submitted by the Bidder in response to the Tender Notice in accordance with the provisions thereof.

“Bid Security” means the security provided by the Bidder to NHAI along with the Bid in the sum of Rs.50 million (Rupees fifty million) in accordance with the Tender Notice and which is to remain in force until substituted by the Performance Security.

“Bidder” means the Consortium referred to in Recital ‘D’ above.

“COD” means the commercial operations date of the Project Highway and shall be the date on which the Independent Consultant has issued the Completion Certificate or the Provisional Certificate upon completion of six-laning of the Project Highway in accordance with the Agreement.

“Change in Law” means the occurrence of any of the following after the date of this Agreement:

- i. the enactment of any new Indian law;
- ii. the repeal, modification or re-enactment of any existing Indian law;
- iii. the commencement of any Indian law which has not entered into effect until the date of this Agreement;
- iv. a change in the interpretation or application of any Indian law by a court of record as compared to such interpretation or application by a court of record prior to the date of this Agreement; or
- v. any change in the rates of any of the Taxes.

“Change of Scope” shall have the meaning ascribed thereto in Clause 17.1.

“Company” means the Company acting as the Concessionaire under this Agreement.

“Completion Certificate” means the Certificate issued by the Independent Consultant pursuant to Clause 16.4.

“Concession” shall have the meaning ascribed thereto in Article III.

“Concession Fee” shall have the meaning ascribed thereto in Article VII.

“Concession Period” means the period beginning from the Appointed Date and ending on the Termination Date.

“Concessionaire” means and its successors and substitutes expressly approved in writing by NHAI.

“Consortium” shall have the meaning set forth in Recital ‘B’ above.

“Consortium Members” means,, and

“Construction Period” means the period beginning from the Appointed Date and ending on the COD.

“Construction Works” means all works and things necessary to complete the Project Highway for use of the traffic and other users thereof in accordance with this Agreement.

“Contractor” means the contractor or contractors, if any, with whom the Concessionaire has entered into all or any of the Project Agreements.

“Cure Period” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default and upon failing of which the Agreement may be terminated by the other Party.

“Damages” shall have the meaning ascribed thereto in Clause 1.2(p).

“Debt Due” means the aggregate of the following sums expressed in Indian Rupees or in the currency of debt, as the case may be, outstanding and payable to the Senior Lenders under the Financing Documents:

- (i) the principal amount of the debt provided by the Senior Lenders under the Financing Documents for financing the Project (the “principal”) which is outstanding as on the Termination Date but excluding any part of the principal that had fallen due for repayment one year prior to the Termination Date unless such repayment had been rescheduled with the prior consent of NHAI; and
- (ii) all accrued interest, financing fees and charges payable on or in respect of the debt referred to in sub-clause (i) above upto the date preceding the Termination

Date but excluding (a) any interest, fees or charges that had fallen due one year prior to the Termination Date, and (b) penal interest or charges, payable under the Financing Documents to any Senior Lender.

“Debt Service Payments” means the sum of all principal and interest payments due and payable in an Accounting Year to the Senior Lenders under the Financing Documents.

“Development Period” means the period from the date of this Agreement until the Appointed Date.

“Dispute” shall have the meaning set forth in Clause 39.1(a).

“Dispute Resolution Procedure” means the procedure for Dispute resolution set forth in Article XXXIX.

“Divestment Requirements” means the obligations of the Concessionaire and NHA for and in respect of the Termination of this Agreement as set forth in Article XXXIII.

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

“Drawings” means all the drawings, calculations and documents pertaining to the Project Highway as set forth in Schedule ‘I’ and shall include “as built” drawings of the Project Highway.

“EPC Contract” means contract or contracts entered into by the Concessionaire with one or more Contractors for the design, engineering, procurement of materials and equipment, construction, and completion of the Project Highway in accordance with the provisions of this Agreement.

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

“Encumbrances” means 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 without limitation any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project Highway, physical encumbrances and encroachments on the Site where applicable herein.

“Equity” means the sum expressed in Indian Rupees representing the equity share capital of the Company and shall include the funds advanced by any Member of the Consortium or by any of its shareholders to the Concessionaire company for meeting the equity component of the Total Project Cost. Provided, however, that for purposes of computing Termination Payments under this Agreement, Equity shall be reckoned as an amount that is arrived at after excluding from the equity share capital of the Company the following viz. (a) Equity Support, if any, and (b) the sum by which the capital cost of the Project Highway as stated by the Concessionaire for purposes of claiming Termination Payments exceeded the Total Project Cost.

“Equity Support” shall have the meaning ascribed thereto in Clause 23.3.

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

“Escrow Agreement” shall have the meaning ascribed thereto in Clause 25.2.

“Exempted Vehicles” means vehicles that shall be exempted from payment of Fees and include, ambulances, fire tenders, and official vehicles transporting and accompanying the President of India, the Vice-President of India, the Prime Minister of India, Ministers of the Government of India, Governors, Lt. Governors, Chief Ministers, Presiding Officers of Central and the State legislatures having jurisdiction, leaders of opposition in Lok Sabha, Rajya Sabha and the State legislatures having jurisdiction, Ministers of the GOR, judges of the Supreme Court of India and of the High Courts having jurisdiction, Secretaries and Commissioners of GOR, Foreign Dignitaries on State visit to India, Heads of Foreign Missions stationed in India using cars with CD symbol, executive magistrates, officers of MOST and NHAI, persons required to use the Project Highway for discharging their statutory obligations in relation to the Site, Independent Consultant, and Central and State forces in uniform including armed forces, para military forces and police.

“Fee” means the charge levied on and payable for a vehicle using the Project Highway in accordance with the Fee Notification and this Agreement.

“Fee Notification” means the Notification No..... dated..... issued by GOI in exercise of the powers conferred by Section of the Act, 19.... in respect of the levy and collection of the Fees and a copy of which is at Schedule “G” and includes any such subsequent notifications issued from time to time to give effect to the provisions of this Agreement.

“Financial Close” means the date on which the Financing Documents providing for funding by the Senior Lenders have become effective and the Concessionaire has immediate access to such funding under the Financing Documents.

“Financing Documents” means the documents executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Project and includes amendments or modifications made in accordance with Clause 9.1(iv).

“Financing Package” means the financing package of the Project furnished by the Concessionaire along with its Bid indicating the Total Project Cost and the means of financing thereof and shall be deemed to have been modified to the extent as submitted to the Senior Lenders and as approved by the Senior Lenders for the purposes of funding of the Project.

“Force Majeure” or “Force Majeure Event” shall mean an act, event, condition or occurrence specified in Article XXIX.

“GOI” means the Government of India.

“GOR” means the Government of the State of Rajasthan.

“Good Industry Practice” means those practices, methods, techniques, standards, skills, diligence and prudence which are generally and reasonably expected of and accepted internationally from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and acting generally in accordance with the provisions of the NHAI Act, and would mean good engineering practices in the design, engineering, construction and project management and which would be expected to result in the performance of its obligations by the Concessionaire and in the operation and maintenance of the Project Highway in accordance with this Agreement, Applicable Laws, Applicable Permits, reliability, safety, environment protection, economy and efficiency.

“Governmental Agency” means GOI, GOR or any ministry, department, commission, board, authority, instrumentality or agency, under the control of GOI or GOR having jurisdiction over all or any part of the Project Highway or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement.

“Grant” shall have the meaning ascribed thereto in Clause 23.1.

“Indemnifying Party” means the Party obligated to indemnify the other Party pursuant to Article XXXVII.

“Independent Consultant” shall have the meaning ascribed thereto in Clause 20.1.

“Indirect Political Event” shall have the meaning ascribed thereto in Clause 29.3.

“Lenders’ Representative” means the person(s) duly authorised by the Senior Lenders to deal with the Parties to the Agreement with regard to the issues arising out of and contained in this Agreement.

“Local Commercial Traffic” means any commercial vehicle including buses, trucks, light motor vehicles or taxis engaged in carrying goods and passengers registered with the Concessionaire as plying routinely on the project highway without crossing more than one of the Toll Plazas.

“Local Personal Traffic” means and includes a personal vehicle which is registered with the Concessionaire by any person who normally resides or works at a place that can normally be approached only by using a part of the Project Highway and such person is, therefore, required to use such vehicle for commuting on a part of the Project Highway, without crossing more than one of the Toll Plazas, in the course of normal travel to and from his place of work or residence.

“Maintenance Manual” shall have the meaning ascribed to it in Clause 18.2.

“Maintenance Programme” shall have the meaning ascribed to it in Clause 18.3.

“Material Adverse Effect” means material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement

“Material Breach” means a breach by either Party of any of its obligations in this Agreement which shall be deemed to have a Material Adverse Effect on the Project and which it shall have failed to cure within the Cure Period.

“NHAI Representative” means such person or persons as may be authorised in writing by NHAI to act on its behalf under this Agreement and shall include any person or persons having authority to exercise any rights or perform and fulfill any obligations of NHAI under this Agreement.

“Net Cash Flow” means in any Accounting Year revenue income less tax payments,

O&M Expense, Concession Fee, Negative Grant and Debt Service Payments to Senior Lenders.

“Non Political Event” shall have the meaning ascribed thereto in Clause 29.2.

“O&M” means the operation and maintenance of the Project Highway during the Operations Period and includes but is not limited to functions of maintenance, collection and appropriation of Fees and performance of other services incidental thereto.

“O&M Contract” means the Operation and Maintenance Contract that may be entered into between the Concessionaire and the O&M Contractor for O&M of the Project Highway. .

“O&M Contractor” means the person or entity with whom the Concessionaire has entered into an O&M Contract for discharging O&M functions for and on behalf of the Concessionaire.

“O&M Expense” means expenses incurred by or on behalf of the Concessionaire duly certified by its Statutory Auditors or by NHAI, as the case may be, for all regularly scheduled and reasonably anticipated O&M during Operations Period, including, without limitation (a) all cost of salaries and other employee compensation and contract fee payable to the O&M Contractor, if any (b) cost of materials, supplies, utilities and other services (c) premia for insurance (d) all franchise, excise, property and other similar taxes and all costs and fees incurred in order to obtain and maintain all Applicable Permits necessary for the O&M of the Project Highway at its full design capacity, (e) all repair, replacement and maintenance costs of the Project Highway, and (f) all other expenditures required to be incurred under Applicable Law or under Applicable Permits necessary for the operation and maintenance of the Project Highway according to the Specifications and Standards at its full design capacity.

“O&M Support” shall have the meaning ascribed thereto in Clause 23.5.

“O&M Works” means all works necessary to keep the Project Highway in operation during the Operations Period.

“Operations Period” means the period commencing from COD and ending on the Termination Date.

“PCU” shall have the meaning ascribed to the passenger car unit in the ‘Indian Roads Congress’, Publication No.IRC-64, 1990, a true copy of which is at Schedule ‘W’, and for the purposes of this Agreement refers only to such PCUs which pay Fees in accordance with the Fee Notification.

“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 ascribed thereto in Clause 5.1

“Political Event” shall have the meaning ascribed thereto in Clause 29.4.

“Preliminary Notice” shall have the meaning attributed thereto in Clause 32.1.2.

“Project” means the development, design, financing, procurement, engineering and construction, operation and maintenance of the Project Highway in accordance with the provisions of this Agreement and shall include all works relating to or in respect of the Project Highway as described in Article II.

“Project Agreements” means this Agreement, the Financing Documents, the EPC Contract, if any, the O&M Contract, if any, the Tolling Contract, if any, and any other agreements or contracts entered into by the Concessionaire with NHAI or others relating to the Project during the subsistence of this Agreement.

“Project Assets” means all physical and other assets relating to and forming part of the Project Highway including but not limited to (i) rights over the Site in the form of license, right of way or otherwise, (ii) tangible assets such as civil works including the foundation, embankments, pavements, road surface, interchanges, bridges, approaches to bridges and flyovers, road overbridges, drainage works, lighting facilities, traffic signals, sign boards, milestones, toll plazas, equipment for the collection of tolls or relating to regulation of traffic, electrical works for lighting on the Project Highway, telephone and other communication systems and equipment for the Project, rest areas, administration and maintenance depots, relief centers, service facilities etc. (iii) Project Facilities situated on the Site (iv) the rights of the Concessionaire under the Project Agreements, (v) financial assets, such as security deposits for electricity supply, telephone etc. (vi) insurance proceeds and (vii) Applicable Permits and authorisations relating to or in respect of the Project Highway, but does not include Additional Facilities.

“Project Completion” shall have the meaning ascribed thereto in Clause 15.1.

“Project Completion Schedule” means the progressive Project milestone set forth in Schedule ‘H’ for the realization of the Project Highway complete in all respects by the Scheduled Project Completion Date.

“Project Facilities” means all the amenities and facilities situated on the Site, as described in Schedule ‘C’.

“Project Highway” means the strengthening and maintenance of the existing two lanes of NH-8 from Km 273/5 to Km 366/2 and addition of 4 (four) more lanes thereto so as to have six lanes and shall include the Project Assets and the Project Facilities to be designed, engineered and built on Site and to be operated and maintained during the Concession Period in accordance with the provisions of this Agreement.

“Provisional Certificate” shall have the meaning ascribed to it in Clause 16.5.

“Punch List” shall have the meaning ascribed to it in Clause 16.5.

“RBI” means the Reserve Bank of India as constituted and existing under the Reserve Bank of India Act, 1946 including any statutory modification or replacement thereof, and its successors etc.

“Realisable Fee” means all the Fees due and realisable under this Agreement but does not include Fees that the Concessionaire has not been able to realise after due diligence and best efforts.

“Revenue Shortfall Loan” shall have the meaning ascribed to it in Clause 24.1.

“Rs.” Or “Rupees” means the lawful currency of the Republic of India.

“SBI PLR” means the prime lending rate per annum for loans with 1(one) year maturity as fixed from time to time by the State Bank of India, and in the absence of such rate, the average of the prime lending rates for loans with 1(one) year maturity fixed by the Bank of India and the Bank of Baroda and failing that any other arrangement that substitutes such prime lending rate as mutually agreed between the Parties.

“Scheduled Project Completion Date” shall have the meaning set forth in Clause 15.3.

“Senior Lenders” means the financial institutions, banks, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Documents for meeting costs of all or any part of the Project and who hold pari passu charge on the Concession granted by this Agreement.

“Site” means the real estate licensed by NHAI to the Concessionaire under and in accordance with this Agreement on which the Project Highway is situated.

“Specifications and Standards” means the specifications and standards relating to the quality, capacity and other requirements for the Project Highway as set forth in Schedule ‘D’ and any modifications thereof, or additions as included in the design and engineering

for the Project Highway submitted by the Concessionaire to and expressly approved by NHAI.

“State Support Agreement” means the agreement to be entered into between the GOR, NHAI and the Concessionaire substantially in the form set forth in Schedule ‘R’ for provision of support, backup and services required from GOR for the performance of Concessionaire’s obligations under this Agreement.

“Statutory Auditors” means an independent, recognized and reputable firm of Chartered Accountants duly licensed to practice in India acting as independent statutory auditors of the Concessionaire under the provisions of the Companies Act, 1956 including any statutory modification or re-enactment or replacement thereof, for the time being in force, and appointed in accordance with Clause 28.2.

“Subordinated Debt” means any borrowings by the Concessionaire subordinated to the financial assistance provided by the Senior Lenders for meeting the Total Project Cost but does not include any interest thereon.

“Subsistence Revenue Level” means the total amount of Fee revenue that is required by the Concessionaire in an Accounting Year to meet the sum of (a) the O&M Expense subject to an annual ceiling of 1.5% (one and a half percent) of the Total Project Cost in the first operations year, to be revised each year to reflect the variations in the WPI in each subsequent years and (b) Debt Service Payments due to the Senior Lenders in an Accounting Year.

“Substitution Agreement” means the agreement referred to in Article XXXV and to be entered into among the Concessionaire, NHAI and the Senior Lenders in the form set forth in Schedule ‘U’ providing, inter alia, for the substitution of the Concessionaire by any other person subject to and in accordance with the provisions of this Agreement and the Substitution Agreement.

“Taxes” means any Indian taxes on corporate income, Sales tax, excise duties, customs duties and local taxes and any impost of like nature (whether Central, State or local) charged, levied or imposed on the goods, materials, equipment and services incorporated in and forming part of the Project Highway, on the construction, operation and maintenance thereof and on the Project Assets, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever.

“Termination” means the expiry or termination of this Agreement and the Concession hereunder.

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

“Termination Notice” means the communication issued in accordance with this Agreement by any one Party to the other Party terminating this Agreement.

“Termination Payment” means the amounts payable by NHAI to the Concessionaire under this Agreement upon the Termination of this Agreement and shall consist of payments relating to Debt Due, Subordinated Debt and Equity, as the case may be, and such other amounts as are expressly provided for under this Agreement. Provided, however, that for purposes of determining Termination Payments to be made by NHAI under this Agreement, the capital cost of the Project Highway shall at all times be reckoned as an amount not exceeding the Total Project Cost and the liability of NHAI to make such Termination Payments relating to Debt Due, Subordinated Debt and Equity shall be determined as if such capital cost was restricted to Total Project Cost.

“Tests” mean the tests to be carried out as set forth in and in accordance with Schedule ‘J’ to determine the Project Completion and its certification by the Independent Consultant for commencement of commercial operation of the Project Highway.

“Toll Plaza” means the structures and barriers erected on the Project Highway for the purpose of regulating the entry/exit of vehicles in accordance with the provisions of this Agreement.

“Tolling Contract” means the contract, if any, entered into by the Concessionaire with the Tolling Contractor for operation of the Toll Plazas including collection of Fees for and on behalf of the Concessionaire.

“Tolling Contractor” means the person, if any, with whom the Concessionaire has entered into a Tolling Contract for operation of Toll Plazas and collection of Fees for and on behalf of the Concessionaire.

“Total Project Cost” means the lowest of the following:

- a. a sum of Rs.5,800 million;
- b. actual capital cost of the Project upon completion of the Project Highway as certified by the Statutory Auditors; or
- c. total project cost as set forth in Financing Documents.

Provided further that if part of the Total Project Cost is funded in foreign currency, in accordance with the Financing Package, then the rate of exchange shall be determined as on the date of Bid, and the Total Project Cost shall be computed as if such foreign

currency were converted with reference to such exchange rate. In the event of Termination of this Agreement requiring NHAI to make Termination Payments, the liability of NHAI shall be determined on basis of the rate of exchange prevailing on the date of Termination Notice and the amounts payable by NHAI for Debt Due and Subordinated Debt , as the case may be, shall be computed accordingly.

“Vesting Certificate” shall have the meaning attributed to it in Clause 33.4.

“WPI” means the wholesale price index published by the Ministry of Industry, GOI and shall include any index, which substitutes the WPI.

1.2 In this Agreement, unless the context otherwise requires,

- (a) any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- (b) references to Indian law shall include the laws, acts, ordinances, rules, regulations, or bye laws which have the force of law in any State or Union Territory forming part of the Union of India;
- (c) the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organizations or other entities (whether or not having a separate legal entity);
- (d) the headings are for convenience of reference only and shall not be used in and shall not affect the construction or interpretation of this Agreement;
- (e) terms and words beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein and the terms and words defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules;
- (f) the words “include” and “including” are to be construed without limitation;
- (g) references to “construction” include, unless the context otherwise requires, investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction;

- (h) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (i) any reference to day shall mean a reference to a calendar day;
- (j) any reference to month shall mean a reference to a calendar month;
- (k) the Schedules 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;
- (l) any reference at any time to any agreement, deed, instrument, licence 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 clause shall not operate so as to increase liabilities or obligations of NHAI hereunder or pursuant hereto in any manner whatsoever;
- (m) references to Recitals, Articles, Clauses, Sub-clauses, Paragraphs, or Schedules in this Agreement shall, except where the context otherwise requires, be deemed to be references to Recitals, Articles, Clauses, Sub-clauses, paragraphs, and Schedules of or to this Agreement;
- (n) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Consultant shall be valid and effectual only if it is in writing under the hands of duly authorised representative of such Party or the Independent Consultant, as the case may be, in this behalf and not otherwise;
- (o) 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;
- (p) the damages payable by either Party to the other of them as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty or liquidated damages (the “Damages”); and
- (q) unless otherwise expressly provided in this Agreement any Documentation required to be provided or furnished by the Concessionaire to NHAI and/or the Independent Consultant shall be provided free of cost and in three copies and if NHAI and/or the Independent Consultant are required to return any such

Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.

1.3 Measurements and Arithmetic Conventions

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

1.4 Priority of contract documents and errors/discrepancies

1.4.1 The several documents forming this Agreement are to be taken as mutually explanatory to one another and, unless otherwise expressly provided elsewhere in this Agreement, the priority of the following documents shall in the event of any conflict between them be in the order they are set out:

- (i) this Agreement
- (ii) all other documents forming part of this Agreement

i.e. document at (i) above shall prevail over the documents at (ii) above.

1.4.2 In case of ambiguities or discrepancies within this Agreement the following shall apply:

- (i) between two Clauses of this Agreement, the provisions of the specific clause relevant to the issue under consideration shall prevail over those in other Clauses;
- (ii) Between the Clauses and the Schedules, the Clauses shall prevail save as otherwise expressly set forth in Clause 1.4.1;
- (iii) Between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- (iv) Between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail;
- (v) Between any value written in numerals and that in words, the latter shall prevail.

II SCOPE OF PROJECT

- 2.1 The Project shall be executed on the Site, which is described in Schedule 'A' of this Agreement. The scope of the Project shall include performance and execution by the Concessionaire of all design, engineering, financing, procurement, construction, completion, operation and maintenance of the Project Highway as described in Schedule 'B' and Schedule 'C' of this Agreement. It shall include strengthening of the existing two lanes of NH-8 from Km. 273/500 to Km. 366/200, six-laning thereof in accordance with the Specifications and Standards set forth in Schedule 'D' and operation and maintenance thereof in accordance with Schedule 'L'. It shall also include the performance and fulfillment of other obligations by the Concessionaire under this Agreement.

The Concessionaire shall undertake its obligations at its own cost and risk.

CHAPTER – II

GRANT OF CONCESSION

III. GRANT OF CONCESSION

- 3.1 Subject to and in accordance with the terms and conditions set forth in this Agreement, NHAI hereby grants to the Concessionaire and the Concessionaire hereby accepts the Concession for a period of 15 (fifteen) years commencing from the Appointed Date, including the exclusive right, licence and authority during the subsistence of this Agreement to implement the Project and the Concession in respect of the Project Highway.
- 3.2 Subject to and in accordance with the terms and conditions set forth in this Agreement, the Concession hereby granted shall entitle the Concessionaire to enjoy, and oblige the Concessionaire to undertake the following in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits:
- i to develop, design, engineer, finance, procure, construct, operate and maintain the Project Highway during the Concession Period;
 - ii upon completion of the Project Highway and during the Operations Period to manage, operate & maintain the Project Highway and regulate the use thereof by third parties;
 - iii levy, demand, collect and appropriate the Fees from vehicles and persons liable to payment of Fees for using the Project Highway or any part thereof and refuse entry of any vehicle to the Project Highway if the due Fee is not paid;
 - iv perform and fulfill all of the Concessionaire's obligations under this Agreement;
 - v bear and pay all expenses, costs and charges incurred in the fulfillment of all the Concessionaire's obligations under this Agreement ;and
 - vi not assign or create any lien or Encumbrance on the Concession hereby granted or on the whole or any part of the Project Highway nor transfer, lease or part possession therewith save and except as expressly permitted by this Agreement or the Substitution Agreement.
- 3.3. The Concession Period shall commence on the Appointed Date and shall end on the Termination Date.

IV. CONDITIONS PRECEDENT

4.1 Conditions Precedent

Save and except as provided in Articles IV, V and XXII, the rights and obligations of the Concessionaire under this Agreement are subject to the satisfaction in full of the following conditions precedent to be fulfilled on or before Financial Close unless any such condition has been waived as provided in Clause 4.2:

- (a) Concessionaire shall have obtained all such Applicable Permits as listed in Schedule 'E' unconditionally or if subject to conditions then all such conditions have been satisfied in full and such Applicable Permits are and shall be kept in full force and effect for the relevant period during the subsistence of this Agreement;
- (b) the Concessionaire shall have been granted way leaves required in connection with the Project including:
 - (i) rights of way for the alignment of the Project Highway free from all Encumbrances;
 - (ii) rights of way from public roads to the Site; and
 - (iii) permission/licence to enter upon and utilise the Site for the construction pursuant to and in accordance with this Agreement.
- (c) the Concessionaire shall have been granted all Central Government clearances and permits under the Applicable Laws relating to environmental protection and conservation from the Ministry of Environment and Forests;
- (d) the Concessionaire shall have entered into the State Support Agreement with NHAI and the GOR;
- (e) certified true copies of all Project Agreements, in particular, the Financing Documents, the EPC Contract, O&M Contract, if any and the Tolling Contract, if any, as well as the shareholders funding agreement have been delivered by the Concessionaire to NHAI;
- (f) the Performance Security in full has been provided by the Concessionaire to NHAI in accordance with Clause 5.1;
- (g) all of the representations and warranties of the Concessionaire set forth in Article XI are true and correct as on date of this Agreement and as on the Appointed

Date;

- (h) NHAI shall have received from the Concessionaire copies (certified as true copies by an authorised officer of the Concessionaire) of the constitutional documents of the Concessionaire;
 - (i) NHAI shall have received copies (certified as true copies by a Director of the Concessionaire) of all resolutions adopted by the Board of Directors of the Concessionaire authorising the execution, delivery and performance by the Concessionaire of this Agreement and each of the Project Agreements;
 - (j) NHAI shall have received from the Indian legal counsel of the Concessionaire a legal opinion with respect to the authority of the Concessionaire to enter into this Agreement and the Project Agreements and the Financing Documents and the enforceability of the provisions thereof; and
 - (k) MoST shall have issued a Fee Notification substantially in the form at Schedule 'G'.
- 4.2 Any of the conditions precedent set forth in Clause 4.1, save and except condition of Sub-clause (b) and (c) thereof, may be waived fully or partially by NHAI at anytime in its sole discretion.
- 4.3 Obligation to Satisfy the Conditions Precedent.

The Concessionaire shall make all reasonable endeavours to procure the satisfaction in full of the Conditions Precedent set out in Clause 4.1 above and NHAI shall make all reasonable endeavours to procure fulfillment of the conditions set forth in Sub-clauses (b), (c), (d) and (k) of Clause 4.1. Each Party shall bear its respective cost and expense of satisfying such Condition Precedent.

- 4.4 If the Conditions Precedent set forth in Clause 4.1 have not been satisfied on or before the Financial Close and the NHAI has not waived, fully or partially, such conditions under Clause 4.1, NHAI may, notwithstanding anything to the contrary contained in this Agreement, terminate this Agreement in accordance with provisions of Clause 32.2 without being liable in any manner whatsoever to the Concessionaire and forfeit the Bid Security and/or the Performance Security by way of Damages, provided that where NHAI does not fulfill its obligations under Clause 4.3 and terminates this Agreement under this Clause 4.4, it shall refund in full Bid Security or the Performance Security, as the case may be.

V. PERFORMANCE SECURITY

- 5.1 The Concessionaire shall for due and faithful performance of its obligations during the Construction Period provide to NHAI a bank guarantee from any Bank in the form set forth in Schedule 'F' (the "Performance Security") for a sum equivalent to Rs.100 million (Rupees one hundred million) within 120 (one hundred twenty) days of the date of this Agreement. Till such time the Concessionaire provides to NHAI the Performance Security pursuant hereto, the Bid Security shall remain in full force and effect. Failure of the Concessionaire to provide the Performance Security in accordance with this Clause 5.1, shall entitle NHAI to terminate this Agreement in accordance with the provisions of Clause 32.2 without being liable in any manner whatsoever to the Concessionaire and to appropriate the Bid Security as Damages.
- 5.2 The Performance Security shall be released by NHAI to the Concessionaire upon contribution of the Equity (excluding Equity Support, if any) by the shareholders of the Concessionaire to the extent of 100% and upon the Concessionaire having expended on the Project and paid out an aggregate sum of not less than 20% (twenty percent) of the Total Project Cost as certified by the Statutory Auditors of the Concessionaire and provided the Concessionaire is not in breach of this Agreement. If the Concessionaire is in breach of this Agreement, the Performance Security shall be continued till the COD or until the breach is cured; whichever is earlier.
- 5.3 In the event of the Concessionaire being in default in the due and faithful performance of its obligations under this Agreement and failing to remedy such default within the Cure Period, the NHAI shall without prejudice to its other rights and remedies hereunder be entitled to encash and appropriate the Performance Security as Damages for such default. Upon such encashment and appropriation of the Performance Security, NHAI shall grant a period of 15 (fifteen) days to the Concessionaire to provide fresh Performance Security and the Concessionaire shall within the time so granted furnish to NHAI such Performance Security failing which NHAI shall be entitled to Terminate this Agreement under clause 32.2. The provision set forth in Clause 5.2 and this Clause 5.3 shall apply mutatis-mutandis to such fresh Performance Security.
- 5.4 Notwithstanding anything to the contrary contained in clause 5.3, upon furnishing of fresh Performance Security in accordance with clause 5.3, the Concessionaire shall be granted an additional period of 60 (Sixty) days as Cure Period for remedying the defaults and complying with his obligations under this Agreement. In the event of the Concessionaire continuing to be in breach of the provisions of this Agreement after such Cure Period, NHAI shall be entitled to terminate this Agreement under the provisions of Clause 32.2.

VI. FEES

- 6.1 The Concessionaire shall be entitled during the Operations Period to levy and collect the Fees from the users of the Project Highway pursuant to and in accordance with the Fee Notification set forth in Schedule 'G' and this Agreement. Provided, however, that such Fee shall be rounded off to the nearest five rupees for ensuring ease of payment and collection.
- 6.2 The Concessionaire acknowledges that the Fee Notification, inter alia, provides for annual revision in the Fees linked to the extent of variation in WPI as per the Fee Notification, and hereby confirms that save and except as provided in the Fee Notification, the Concessionaire is not entitled to and shall not seek any relief whatsoever from NHAI, GOI or GOR on account of increase or otherwise in WPI or on any other account except in accordance with the express provisions of this Agreement.
- 6.3 The Concessionaire shall not collect any Fees from Local Personal Traffic and Local Commercial Traffic in excess of the following discounted rates:
- Local Personal Traffic : 25% of the applicable fees for the specific category of vehicle.
 - Local Commercial Traffic : 50% of the applicable fees for the specific category of vehicle.
- It shall issue appropriate passes or make refunds in a manner that minimises the inconvenience to Local Traffic consistent with the Concessionaire's need to prevent any leakage of Fees. For carrying out provisions of this Clause, the Concessionaire shall formulate, publish and implement an appropriate scheme and carry out such modifications and improvements to such scheme as may reasonably be suggested by NHAI or required by local circumstances from time to time in conformity with the objectives of this Agreement. Provided, however, that if a separate service lane is opened for free use by Local Traffic, the Concessionaire shall levy and collect Fees from such Local Traffic if they use the six-lane Highway.
- 6.4 The Concessionaire shall not collect any Fees in relation to Exempted Vehicles.
- 6.5 The Fees collected by the Concessionaire or NHAI or NHAI's nominee pursuant hereto shall be deposited in the Escrow Account and appropriated in accordance with the provisions of Article XXV.
- 6.6 The Concessionaire may delegate its right to collect Fees to the O&M Contractor or the Tolling Contractor or to any other person provided, however, that notwithstanding such delegation, the Concessionaire shall be and remain solely liable and responsible for the collection of Fees in accordance with this Agreement and its deposit into the Escrow Account.

VII. CONCESSION FEE

- 7.1 In consideration of the grant of Concession under this Agreement, the Concession Fee payable by the Concessionaire to the NHAI shall be Re.1.00 (Rupee One) per year during the term of this Agreement.
- 7.2 The Concession Fee shall be paid in advance within 90 (ninety) days of the commencement of the year for which it is due and payable.

VIII. ADDITIONAL TOLLWAY

- 8.1 Notwithstanding anything to the contrary contained in this Agreement, any of NHAI, GOI or GOR may construct and operate either itself or have the same, inter alia, built and operated on BOT basis or otherwise any Expressway or other toll road, not being a bye-pass, between, inter alia, Jaipur and Ajmer (the "Additional Tollway") provided that such Additional Tollway shall not be opened to traffic before expiry of 8 (eight) years from the Appointed Date.
- 8.2 In the event of NHAI, GOI or GOR, as the case may be, constructing or permitting construction of any Additional Tollway as set forth in this Clause 8.2, and the Additional Tollway is commissioned at any time after 8 (eight) years from the Appointed Date, then the Concession Period shall be increased by half the number of years by which such commissioning precedes the expiry of the Concession Period. For example, if the commissioning of the Additional Tollway occurs after 10 (ten) years from the Appointed Date, the Concession Period shall be increased to 17.5 (Seventeen and a half) years.
- 8.3 Upon commissioning of the Additional Tollway, the Concessionaire shall continue to levy and collect the Fee under this Agreement and shall not offer any discounts or reductions in such Fee except with the prior written consent of NHAI. Provided, however, that any such discounts or reductions that the Concessionaire had offered to any general or special class of users or vehicles for a continuous period of three years prior to the commissioning of the Additional Tollway may continue in the same form and manner after the commissioning of such Additional Tollway.
- 8.4 NHAI shall ensure that the per kilometer fee to be levied and collected from any vehicle or class of vehicles using the Additional Tollway shall at no time be less than an amount which is 133% of the per kilometer Fee levied and collected from similar vehicles or class of vehicles using the Project Highway.

CHAPTER –III

OBLIGATIONS AND UNDERTAKINGS

IX. OBLIGATIONS OF THE CONCESSIONAIRE

9.1 The Concessionaire shall at its own cost and expense observe, undertake, comply with and perform, in addition to and not in derogation of its obligations elsewhere setout in this Agreement, the following:

- (i) make, or cause to be made, necessary applications to the relevant Governmental Agencies with such particulars and details, as may be necessary for obtaining all Applicable Permits, and obtain such Applicable Permits in conformity with the Applicable Laws;
- (ii) notify to NHAI forthwith the occurrence of Financial Close;
- (iii) submit to NHAI certified true copies of each of the Project Agreements within 7 (seven) days of their execution;
- (iv) not make any replacement, amendment or modifications to any of the Project Agreements without the prior written consent of NHAI, where such replacement, amendment or modification has or may have the effect of increasing or imposing any financial liability or obligation on NHAI in any manner, and where such amendment or modification is made without such consent, not to enforce such amendment or modification nor permit enforcement thereof against NHAI in any manner whatsoever;
- (v) give NHAI not less than 30 (thirty) days written notice prior to entering into, amending or replacing any Project Agreement so as to enable NHAI to provide its consent or offer its comments, if any thereon which, if made, shall be duly considered and given effect to by the Concessionaire before entering into, amending or replacing such Project Agreement;
- (vi) remove promptly from the Project Highway all surplus construction machinery and materials, waste materials (including, without limitation, hazardous materials and waste water), rubbish and other debris (including without limitation accident debris) and shall keep the Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable Permits;
- (vii) procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project Highway;

- (viii) provide all assistance to the Independent Consultant as it may require for the performance of its duties and services;
- (ix) provide to NHAI reports on regular basis during the Construction Period and the Operations Period in the form and manner set forth in this Agreement and Schedule 'X';
- (x) obtain and maintain in force on and from the Appointed Date all insurance in accordance with the provisions of this Agreement and Good Industry Practice;
- (xi) acquire such real estate, as the Concessionaire may deem appropriate for the Additional Facilities and to indemnify and save harmless and defend GOI, NHAI, and GOR from and against all proceedings, claims, demands, costs, expenses, losses and damages arising out of or relating to the securing of rights to use such real estate by the Concessionaire or any person claiming through or under the Concessionaire;
- (xii) undertake Debt Service Payments in accordance with the Financing Documents;
- (xiii) levy and collect Fees from users of the Project Highway at the rates set forth in the Fee Notification and in accordance with this Agreement and regulate the traffic on the Project Highway in accordance with the Applicable Laws;
- (xiv) ensure and procure that each Project Agreement contains provisions that entitle NHAI to step into such agreement in its discretion in place and substitution of the Concessionaire in the event of Termination of this Agreement on account of default or breach by the Concessionaire;
- (xv) appoint, supervise, monitor and control the activities of Contractors under their respective Project Agreements as may be necessary;
- (xvi) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire's obligations under this Agreement;
- (xvii) comply with all Applicable Permits and Applicable Laws in the performance of the Concessionaire's obligations under this Agreement including those being performed by any of the Contractors;
- (xviii) develop, implement and administer a surveillance and safety program for the Project Highway, the users thereof, and the Contractors personnel engaged in

the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Schedule 'S', Applicable Laws and Good Industry Practice;

- (xix) take all reasonable precautions for the prevention of accidents on or about the Project Highway and provide all reasonable assistance and emergency medical aid to accident victims;
- (xx) not to place or create and nor permit any Contractor or other person claiming through or under the Concessionaire to create or place any Encumbrance or security interest over all or any part of Site or the Project Assets, or on any rights of the Concessionaire therein or under this Agreement, save and except as expressly set forth in this Agreement;
- (xxi) make its own arrangements for quarrying, and observe and fulfill the environmental and other requirements under the Applicable Laws and Applicable Permits at Concessionaire's own cost and expense;
- (xxii) be responsible for safety, soundness and durability of the Project Highway including other structures forming part thereof and their compliance with the Specifications and Standards;
- (xxiii) not claim or demand possession or control of any roads, structures or real estate which do not form part of the Project Highway;
- (xxiv) after receiving vacant possession of the Site or part thereof, ensure that such Site remains free from all encroachments and take all steps necessary to remove encroachments, if any
- (xxv) make payment to Police department or any Government Agency, if required, for provision of such services as are not provided in the normal course or are available on payment;
- (xxvi) indemnify the NHAI against all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be suffered by them on account of anything done or omitted to be done by the Concessionaire in connection with the performance of its obligations under this Agreement; and
- (xxvii) comply with the Divestment Requirements and hand over the Project Highway to NHAI upon Termination of the Agreement.

9.2 Subject to the terms and conditions of this Agreement the Concessionaire shall at its cost and expense:

- (i) undertake the design, engineering, procurement and construction and financing of the Project Highway in accordance with this Agreement;
- (ii) operate and maintain the Project Highway at all times in conformity with this Agreement including but not limited to the Specifications and Standards set forth in Schedule 'D', Schedule 'L', the Maintenance Programme and Good Industry Practice.

9.3 The Concessionaire shall, before commencement of construction of the Project Highway:

- (i) submit to NHAI with due regard to Project Completion Schedule as set forth in Schedule 'H' and Scheduled Project Completion Date, its design, engineering and construction time schedule and shall formulate and provide CPM/PERT charts for the completion of the said activities;
- (ii) finalise the design and detailed engineering basis;
- (iii) have requisite organisation and designate and appoint a Project manager and such other managers, officers and representatives as it may deem appropriate to supervise the Project and to deal with the NHAI Representative and be responsible for all necessary exchanges of information required pursuant to this Agreement; and
- (iv) undertake, do and perform such acts, deeds and things as may be necessary or required for construction and Project completion under and in accordance with this Agreement.

9.4 In respect of the Concessionaire's obligations with respect to the Drawings of the Project Highway as set forth in Schedule 'I', the following shall apply:

- (i) The Concessionaire shall prepare and submit with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of all Drawings to NHAI and the Independent Consultant for review and comments.
- (ii) By forwarding the Drawings for review and comment to NHAI, the Concessionaire represents that it has determined and verified that the design

and engineering including field construction criteria related thereto is in conformity with the Specifications, Standards and quality set forth in this Agreement for and in respect of the Project Highway.

- (iii) Within 30 (thirty) days of the receipt of the Drawings, NHAI shall review the same and convey its comments/observations to the Concessionaire with particular reference to the conformity or otherwise with the Specifications and Standards set forth in this Agreement. It is expressly agreed that notwithstanding any review and comment/observations of NHAI on any Drawings or failure of NHAI to provide comments/ observations thereon, NHAI shall not be liable for the same in any manner whatsoever and the Concessionaire shall remain solely responsible for and shall not be relieved or absolved in any manner whatsoever of its obligations, duties and liabilities as set forth in this Agreement. The Concessionaire shall not be obliged to await the comments/observations of NHAI on the Drawings submitted pursuant hereto beyond the period set forth hereinabove.
 - (iv) If the comments/observations of NHAI indicate that the Drawings are not in conformity with the Specifications and Standards set forth in this Agreement, such Drawings shall be revised by the Concessionaire to the extent necessary and resubmitted to NHAI for review, observations and comments. NHAI shall give its observations and comments, if any, within 15 (fifteen) days of the receipt of such revised Drawings provided, however, that any observations or comments of NHAI or failure of NHAI to give any observations or comments on such revised drawings shall not relieve or absolve the Concessionaire of its obligation to conform to such Specifications and Standards.
 - (v) The Concessionaire shall be responsible for delays in Project Completion Schedule caused by reasons of any Drawings not being in conformity with the Specifications and Standards, and the Concession Period shall not be extended in any manner whatsoever on account of submission or revision of any Drawings.
 - (vi) Within 90 (ninety) days of the COD, the Concessionaire shall furnish NHAI with “as built” Drawings reflecting the Project Highway as actually designed, engineered and constructed, including without limitation an “as built” survey illustrating the layout of the Project Highway and setback lines, if any, of the buildings and structures forming part of Project Facilities.
- 9.5 The Concessionaire shall submit to NHAI the drafts of the Project Agreements including in particular the EPC Contract, the Financing Documents, the O&M Contract and the Tolling Contract for its review. NHAI shall have the right but not the obligation to provide its comments and observations, if any, in respect of the Project Agreements within 30

(thirty) days of the receipt thereof by NHAI and the Concessionaire shall consider all such comments/observations. Any such comments/observations by NHAI on any Project Agreements or the failure to provide such comments shall not relieve or absolve in any manner whatsoever the Concessionaire of its obligations, duties and liabilities under this Agreement nor shall it make NHAI and/or Independent Consultant liable to the Concessionaire in any manner whatsoever and shall be without prejudice to the rights of NHAI hereunder.

- 9.6 During the Construction Period, the Concessionaire shall be responsible for maintaining the Site including the existing two lanes of the Project Highway at its own cost and expense. During this period, the Concessionaire shall modify, repair or otherwise make improvements to the existing two lanes before expiry of six months from the Appointed Date so that the existing two lanes comply with requirements provided in Schedule 'L' and at least 2 (two) lanes of the Project Highway are ordinarily open to traffic at all times. The Concessionaire shall promptly undertake all such repairs and maintenance works as may be necessary to keep the Project Highway traffic-worthy and safe during the Construction Period.
- 9.7 The Concessionaire shall, at all times, afford access to the Site to the authorised representatives of NHAI, Senior Lenders, and the Independent Consultant and to the persons duly authorised by any Governmental Agency having jurisdiction over the Project, including those concerned with safety, security or environmental protection to inspect the Project Highway and to investigate any matter within their authority and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions with minimum disruption to the construction, operation and maintenance of the Project Highway consistent with the purpose for which such persons have gained such access to the Site.

X. OBLIGATIONS OF NHAI

- 10.1 NHAI agrees to observe, comply and perform the following:
- (i) enable access to the Site, free from Encumbrances, in accordance with this Agreement;
 - (ii) permit peaceful use of the Site by the Concessionaire as licensee under and in accordance with the provisions of this Agreement without any let or hindrance from NHAI or persons claiming through or under it;
 - (iii) assist and provide all reasonable support to the Concessionaire in obtaining Applicable Permits;

- (iv) upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
- (v) procure that no barriers are erected or placed by GOR or any Governmental Agency on the Project Highway except on account of any law and order situation or upon national security considerations;
- (vi) enter into the State Support Agreement with the Concessionaire and the GOR;
- (vii) assist the Concessionaire in obtaining necessary assistance to regulate traffic on the Project Highway subject to and in accordance with the Applicable Laws;
- (viii) assist the Concessionaire in obtaining Police assistance from GOR against payment of prescribed costs and charges, if any, for traffic regulation, patrolling and provision of security on the Project Highway;
- (ix) operate and maintain the Project Highway during the Development Period, at its own cost and expense, in a manner that the level of service is at no time inferior to the level prevailing on the date when bids were received for this Concession; and
- (x) Observe and comply with its obligations set forth in this Agreement.

XI. REPRESENTATIONS AND WARRANTIES

11.1 Representations and Warranties of the Concessionaire

The Concessionaire represents and warrants to NHAI that:

- (i) It is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;
- (ii) It has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (iii) It has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement;

- (iv) It has the financial standing and capacity to undertake the Project;
- (v) This Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (vi) It is subject to civil and commercial laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
- (vii) All the information furnished in the Bid is, and shall be, true and correct as on the Appointed Date and COD and the Balance Sheet and Profit and Loss Account of the Concessionaire for each of its Accounting Years after the Appointed Date furnished to NHAI shall give true and fair view of the affairs of the Concessionaire;
- (viii) It shall furnish a copy of the audited accounts of the Company within 120 (one hundred twenty) days of the close of its each Accounting Year after the Appointed Date and any material change subsequent to the date of such accounts shall be notified to NHAI by the Concessionaire within 30 (thirty) days of its occurrence and warrants that the accounts and the information furnished as aforesaid shall be true and correct;
- (ix) 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 the Memorandum and Articles of Association of the Concessionaire or any Member of the Consortium or any Applicable Laws or any covenant, agreement, 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;
- (x) There are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's 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 or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect on its business, properties or assets or its condition, financial or otherwise, or in any impairment of its ability to perform its obligations and duties under this Agreement;
- (xi) 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 Governmental Agency which may result in any Material Adverse Effect or impairment of the Concessionaire's ability to perform its obligations and duties

under this Agreement;

- (xii) It has complied with all Applicable Laws 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 Material Adverse Effect on its financial condition or its ability to perform its obligations and duties under this Agreement;
- (xiii) The aggregate equity share holding of the Consortium Members and their Associates in the issued and paid up equity share capital of the Concessionaire shall not be less than (a) 51% (fifty one percent) during the Construction Period and for 3 (three) years following COD, and (b) 26% (twenty six per cent) during the balance remaining Operations Period;
- (xiv) Each Consortium Member was and is duly organised and existing under the laws of the jurisdiction of its incorporation and has full power and authority to consent to and has validly consented to and requested NHAI to enter into this Agreement with the Concessionaire pursuant to the LOA and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (xv) All rights and interests of the Concessionaire in and to the Project Highway shall pass to and vest in NHAI on the Termination Date free and clear of all liens, claims, and Encumbrances without any further act or deed on the part of the Concessionaire or NHAI and that none of Project Assets including materials, supplies or equipment forming part thereof shall be acquired by the Concessionaire subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person save and except as expressly provided in this Agreement;
- (xvi) No representation or warranty by the Concessionaire contained herein or in any other document furnished by it to NHAI, or to any Governmental Agency 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; and
- (xvii) It warrants that no sums, in cash or kind, have been paid or will be paid by or on behalf of the Concessionaire, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of NHAI, GOI or GOR in connection therewith.

11.2 Representations and Warranties of NHAI.

NHAI represents and warrants to the Concessionaire that:

- (i) NHAI is duly organised and validly existing under the laws of India;
- (ii) NHAI has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (iii) NHAI has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- (iv) This Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof; and
- (v) NHAI is subject to civil and commercial laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any sovereign immunity in any jurisdiction in regard to matters set forth in this Agreement.

XII. DISCLAIMER

- 12.1 The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has after a complete and careful examination made an independent evaluation of the traffic volumes, Specifications and Standards, Site and all the information provided by NHAI and has determined to the Concessionaire's satisfaction the nature and extent of such difficulties, risks and hazards as are likely to arise or may be faced by the Concessionaire in the course of performance of its obligations hereunder.
- 12.2 The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 12.1 above and hereby confirms that NHAI shall not be liable for the same in any manner whatsoever to the Concessionaire, the Consortium Members or their Associates.

CHAPTER – IV

PROJECT DEVELOPMENT AND OPERATIONS

XIII. USE AND DEVELOPMENT OF THE SITE

- 13.1 NHAI hereby grants to the Concessionaire for the Development Period access to the Site for carrying out such surveys, investigations and soil tests as the Concessionaire may deem necessary at the Concessionaire's cost, expense and risk without causing disruption in the traffic on the existing lanes of the Project Highway.
- 13.2 NHAI hereby grants to the Concessionaire for the Concession Period the right and licence to enter upon all real estate comprised in the Site as briefly described in Schedule 'A' and to survey design, engineer, procure, construct, operate and maintain the Project Highway including the Project Facilities in accordance with the provisions of this Agreement. Such right and licence of the Concessionaire to the use the Site shall be subject to:
- 13.2.1 Any existing utilities on, under or above the Site are kept in continuous satisfactory use, if necessary by the use of suitable temporary or permanent diversions with the authority of the controlling body of that utility;
- 13.2.2 Any existing roads or right of ways are kept in continuous satisfactory use, if necessary, by the use of suitable temporary or permanent diversions with the authority of the controlling body of that road or right of way. For any diversion or construction, of temporary roads, NHAI will assist the Concessionaire in acquiring the right of way;
- 13.2.3 The rights of the road users to use the road in accordance with this Agreement;
- 13.2.4 A right of access by the NHAI itself and any of its agents to perform their obligations and rights under the Concession Agreement or any other functions that they have, and to conduct any study or trial for the purpose of research;
- 13.3 The license and the right to use the Site shall be granted for the purpose of carrying out the functions placed upon the Concessionaire under the Agreement and not for any other purposes;
- 13.4 The Concessionaire shall bear all costs and charges for special and temporary rights of way required by it in connection with access to the Site. The Concessionaire shall obtain at its cost such facilities on or outside the Site as may be required by it for the purposes of the Project Highway and the performance of its obligations under this Agreement.

- 13.5 The Site shall be made available to the Concessionaire pursuant hereto by NHAI free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to NHAI on account of any costs, expenses and charges for the use of such Site for the duration of the Concession Period save and except as otherwise expressly provided in this Agreement. NHAI shall procure for the Concessionaire access to the Site, free of Encumbrances, not later than 150 (one hundred and fifty) days from the date of this Agreement. Provided, however, that if NHAI does not enable such access to any part or parts of the Site for any reason other than a Force Majeure Event or breach of this Agreement by the Concessionaire, NHAI shall pay to the Concessionaire Damages at the rate of Rs.1000 (Rupees one thousand) per month per 1000 (one thousand) sq. meters or part thereof if such area is required by the Concessionaire for Construction Works. Such Damages shall be raised to Rs.2000 (Rupees two thousand) per month after COD if such area is essential for the smooth and efficient operation of the Project Highway. Provided further that the Completion Certificate or the Provisional Certificate, as the case may be, for the Project Highway shall not be affected or delayed as a consequence of such parts of the Site remaining under construction even after the Scheduled Project Completion Date.
- 13.6 On or after the Appointed Date, the Concessionaire shall commence, undertake and complete all Construction Works on the Project Highway in accordance with this Agreement.
- 13.7 Construction of the Project Highway shall be undertaken by the Concessionaire in conformity with the Project Completion Schedule 'H' and the Project milestones set forth in Schedule 'H' for completion of the Project Highway on or before the Scheduled Project Completion Date. If the Concessionaire fails to achieve any such Project milestone other than Project Completion, within a period of 90 (ninety) days from the date set forth in Schedule 'H' then it shall pay Damages to NHAI at the rate of Rs.1,000,000 (Rs. One million) per day until such milestone is achieved. NHAI may either recover such Damages from the Performance Security or demand payment thereof from the Concessionaire. The Concessionaire shall make such payment within 7 (seven) days of receiving such demand from NHAI and any delay in making such payment shall attract interest @ SBI PLR plus two per cent. If the Concessionaire fails to achieve Project completion as per the Scheduled Project Completion Date as set forth in Schedule 'H', then it shall pay damages to NHAI as per Article XV.

XIV. MONITORING AND SUPERVISION OF CONSTRUCTION

- 14.1 During the Construction Period, the Concessionaire shall furnish to NHAI and the Independent Consultant monthly progress reports of actual progress of the Construction Works comprised in the Project Highway and shall give all such other relevant

information as may be required by NHAI and/or the Independent Consultant.

- 14.2 The Independent Consultant shall inspect the Construction Works and the Project Highway at least once a month during the Construction Period and make out an Inspection Report of such inspection (the "Inspection Report"). It shall send a copy of its Inspection Report to NHAI and the Concessionaire. The Concessionaire shall take necessary action to remedy the lapses, if any, stated in the Inspection Report for ensuring compliance with the provisions of this Agreement. Such inspection or submission of Inspection Report by the Independent Consultant shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.
- 14.3 For the purposes of determining that Construction Works are being undertaken in accordance with Specifications and Standards and Good Industry Practice, the Independent Consultant shall require the Concessionaire to carry out such Tests at such time and frequency and in such manner as may be necessary in accordance with Good Industry Practice for quality assurance. The Concessionaire shall with due diligence carry out, or cause to be carried out, all such tests in accordance with the instructions of the Independent Consultant and furnish the results of such tests forthwith to the Independent Consultant. The Concessionaire shall promptly carry out such remedial measures as may be necessary to cure the defects or deficiencies, if any, indicated in such test results and furnish a report to the Independent Consultant in this behalf.
- 14.4 If the Independent Consultant or NHAI shall reasonably determine that the rate of progress of the Construction of the Project Highway is such that the Project Completion is not feasible on or before the Scheduled Project Completion Date by the Concessionaire, it shall so notify the Concessionaire about the same and the Concessionaire shall within 15 (fifteen) days thereof notify the NHAI and the Independent Consultant about the steps it proposes to take to expedite progress and the period within which it shall achieve COD.
- 14.5 (a) Upon recommendation of the Independent Consultant or suo-moto, NHAI may by written notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if in the reasonable opinion of the NHAI such work is being carried on in a manner which threatens the safety of the works or of the users of the Project Highway.
- (b) The Concessionaire, shall upon instructions of the NHAI pursuant to sub-clause (a) above suspend the Construction Works or any part thereof for such time and in such manner as may be specified by NHAI and subject to sub-clause (c) below, the costs incurred during such suspension to properly protect and secure the Construction Works or such part thereof as is necessary in the opinion of the

Independent Consultant ("Preservation Costs"), shall be borne by the Concessionaire.

- (c) If the suspension pursuant to Sub-clause (a) above, is caused by:
 - (i) any reason other than default or breach of this Agreement by the Concessionaire including breach of any of the obligations of the Concessionaire under this Agreement, the Preservation Costs shall be borne by NHAI;
 - (ii) reason of default or breach of this Agreement by NHAI the Preservation Costs shall be borne by NHAI; or
 - (iii) reason of any Force Majeure Event, the Preservation Costs shall be borne by the Concessionaire save and except to the extent otherwise expressly provided in Article XXIX.
- (d) If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Consultant shall determine any extension to the Project Completion Schedule, the Scheduled Project Completion Date and the Concession Period, to which the Concessionaire is reasonably entitled and shall notify NHAI accordingly. NHAI shall extend the Project Completion Schedule, the Scheduled Project Completion Date and the Concession Period in accordance with the recommendations of the Independent Consultant.

XV. COMPLETION

- 15.1 The Project shall be deemed to be complete and open to traffic only when the Completion Certificate or the Provisional Certificate is issued in accordance with the provisions of Article XVI (the "Project Completion").
- 15.2 COD of the Project shall be the date on which the Independent Consultant has issued the Completion Certificate or the Provisional Certificate, as the case may be, under this Agreement and the Concessionaire shall not levy and collect any Fee until it has received such Completion Certificate or the Provisional Certificate.
- 15.3 The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the provisions of this Agreement on a date not later than 30 (thirty) months from the Appointed Date ("Scheduled Project Completion Date").
- 15.4 If the Project Completion is not achieved by the Scheduled Project Completion Date for any reason other than conditions constituting Force Majeure or for reasons attributable to NHAI or any Governmental Agency, the Concessionaire shall pay to NHAI as weekly Damages for delay in the achievement of the COD, an amount calculated at the rate of

0.01% (point zero one per cent) of the Total Project Cost per week or part thereof.

- 15.5 If the COD does not occur within 12 (twelve) months from the Scheduled Project Completion Date, NHAI shall be entitled to Terminate this Agreement in accordance with the provisions of Clause 32.2.

XVI. TESTS

- 16.1 All Tests shall be conducted in accordance with Schedule 'J' and the Applicable Laws and Applicable Permits. NHAI shall designate a NHAI Representative to witness and observe the Tests. All Tests shall be held in accordance with the schedule notified by the Concessionaire to the Independent Consultant and the NHAI Representative who may either witness the Tests themselves or designate their representatives for this purpose, if they choose.
- 16.2 The Independent Consultant shall monitor the results of the Tests to determine the compliance of the Project Highway with the Specifications and Standards. The Concessionaire shall provide to the Independent Consultant and the NHAI with copies of all Test data including detailed Test results.
- 16.3 At least 30 (thirty) days prior to the likely completion of the Project Highway, the Concessionaire shall notify the Independent Consultant and NHAI of the same and shall give notice of its intent to conduct any final Tests. The Concessionaire shall give to NHAI and the Independent Consultant at least 10 (ten) days' prior notice of the actual date on which it intends to commence the Tests and at least 7 (seven) days' prior notice of the commencement date of any subsequent Tests. The Independent Consultant shall have the right to suspend or delay any Test if it is reasonably anticipated or determined during the course of the Test that the performance of the Project Highway or any part thereof does not meet the Specifications and Standards.
- 16.4 Upon the Independent Consultant determining the Tests to be successful and all parts of the Project Highway to have been completed and the Project Highway can be legally, safely and reliably placed in commercial operations, the Independent Consultant shall forthwith issue to the Concessionaire and NHAI a Certificate substantially in the form set forth in Schedule 'K' (the "Completion Certificate").
- 16.5 Independent Consultant may at the request of the Concessionaire issue a provisional certificate of completion ("Provisional Certificate") if the Tests are successful and all parts of Project Highway can be legally, safely and reliably placed in commercial operation though certain works or things forming part thereof are not yet complete. In such an event such Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Consultant and the Concessionaire ("Punch List"). All Punch List items shall be completed by the Concessionaire within 120

(one hundred twenty) days of the date of issue of such Provisional Certificate. Subject to payment of Damages equal to Rs.200,000 (Rs. Two hundred thousand) per week or part thereof on account of any delay beyond the aforesaid period of 120 (one hundred twenty) days, the Concessionaire shall be entitled to a further period of upto 180 (one hundred eighty) days for completion of Punch List items. Upon completion of all Punch List items to the satisfaction of the Independent Consultant, the Independent Consultant shall issue the Completion Certificate to the Concessionaire. Failure to complete the Punch List items in the manner set forth in this Clause 16.5 shall entitle NHAI to Terminate this Agreement in accordance with the provisions of Clause 32.2.

- 16.6 If the Independent Consultant certifies to NHAI and the Concessionaire that it is unable to issue the Completion Certificate or Provisional Certificate because of events or circumstances which excuse the performance of the Concessionaire's obligations in accordance with this Agreement and as a consequence thereof the Tests could not be held or had to be suspended, the Concessionaire shall re-schedule the Tests and hold the same as soon as reasonably practicable.
- 16.7 Upon receipt of a report from the Independent Consultant or after conducting its own review or inspection, if NHAI is not satisfied with the results of any Tests, it shall within 7 (seven) days thereof notify the Concessionaire of its reasons to conclude that the Completion Certificate should not be issued, in which case the Concessionaire shall promptly take such action as will achieve such satisfaction. Such procedure shall be repeated as necessary after rectification and remedy of reasons/ causes by the Concessionaire on account of which the Tests were unsuccessful, until the Completion Certificate or Provisional Certificate has been issued in accordance with this Agreement by the Independent Consultant.
- 16.8 The Concessionaire shall bear all the expenses relating to Tests under this Agreement. Provided, however, that if the NHAI Representative requires any Test to be conducted which is not specified in this Agreement and such Test is not necessary in the opinion of the Independent Consultant, then the expenses on such Test shall be reimbursed by NHAI to the Concessionaire.

XVII. CHANGE OF SCOPE

- 17.1** NHAI may, notwithstanding anything to the contrary contained in this Agreement, require provision of such additional works and services on or about the Project Highway which are beyond the scope of the Project as contemplated by this Agreement ("Change of Scope"), provided such changes do not require expenditure exceeding 5% (five per cent) of the Total Project Cost and do not adversely affect the COD. All such changes shall be made by NHAI by an order (the "Change of Scope Order") issued in accordance with

the procedure set forth in this Article XVII.

17.2 Procedure for Change of Scope

- (a) NHAI shall whenever it desires provision of additional works and services referred to in Clause 17.1, issue to the Concessionaire a notice of change of scope (the "Change of Scope Notice").
- (b) upon receipt of such Change of Scope Notice, the Concessionaire shall provide to NHAI and the Independent Consultant such information as is necessary and reasonable together with preliminary documentation in support of the following:
 - (i) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the work is required to be carried out before COD, and
 - (ii) the cost to the Concessionaire of complying with such Change of Scope Notice (including, without limitation, material and labour cost information furnished in accordance with the current schedule of rates applicable to the works assigned by NHAI to its contractors, including the premium on such rates).
 - (iii) the options suggested for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time for the implementation thereof including a detailed breakdown by work classifications. Provided, however, that the costs of providing such information shall be reimbursed to the Concessionaire by NHAI to the extent such costs are certified to be reasonable by the Independent Consultant.
- (c) If NHAI desires, after receipt of information set forth in sub-clause (b) to proceed with the Change of Scope, it shall convey the desired option to the Concessionaire by issuing a Change of Scope Order and thereupon the Parties shall make good faith efforts to mutually agree upon the costs and time for implementing of the same. Upon reaching an agreement relating to such costs and time, NHAI shall issue a written confirmation of the Change of Scope Order and thereupon the Concessionaire shall proceed with performance of such order. In the event, the Parties are unable to agree, NHAI may, by issuing a confirmation in writing of such Change of Scope Order, require the Concessionaire to proceed with the performance of the Change in Scope Order pending resolution of such dispute.

- 17.3 A change of Scope Order will be effective and binding upon issuance of a confirmation of such Change of Scope Order by NHAI. Notwithstanding a dispute regarding cost and time for implementation of such Change of Scope Order, the Concessionaire shall proceed with the performance of such Change of Scope Order promptly following NHAI's confirmation pursuant to Clause 17.2(c). Pending resolution of such dispute, NHAI shall pay to the Concessionaire an amount equal to the costs that are certified by the Independent Consultant to be reasonable plus one-half the difference between the amount certified by the Independent Consultant and the amount claimed by the Concessionaire with final adjustments to be made in accordance with the resolution of dispute under the Dispute Resolution Procedure.
- 17.4 All claims by the Concessionaire pursuant to this Article XVII shall be supported by such documentation as is reasonably sufficient for NHAI to determine the accuracy thereof, including invoices from Contractors and subcontractors and certification of such claims by the Statutory Auditors.

XVIII. OPERATION AND MAINTENANCE

- 18.1 The Concessionaire shall operate and maintain the Project Highway by itself, or through O&M Contractors and if required, modify, repair or otherwise make improvements to the Project Highway to comply with Specifications and Standards, and other requirements set forth in this Agreement, Good Industry Practice, Applicable laws and Applicable Permits and manufacturer's guidelines and instructions with respect to toll systems, and more specifically:
- (i) permitting safe, smooth and uninterrupted flow of traffic during normal operating conditions;
 - (ii) charging, collecting and retaining the Fees in accordance with this Agreement;
 - (iii) minimizing disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Highway by providing a rapid and effective response and maintaining liaison procedures with emergency services;
 - (iv) undertaking routine maintenance including prompt repairs of potholes, cracks, concrete joints, drains, line marking, lighting and signage;
 - (v) undertaking major maintenance such as resurfacing of pavements, repairs to structures, repairs and refurbishment of tolling system and hardware and other equipment;

- (vi) carrying out periodic preventive maintenance to Project Highway including tolling system;
 - (vii) preventing with the assistance of concerned law enforcement agencies unauthorised entry to and exit from the Project Highway;
 - (viii) preventing with the assistance of the concerned law enforcement agencies encroachments on the Project Highway including Site and preserve the right of way of the Project Highway;
 - (ix) maintaining a public relations unit to interface with and attend to suggestions from users of the Project Highway, the media, Government Agencies, and other external agencies; and
 - (x) adherence to the safety standards set out in Schedule 'S'.
- 18.2 The Concessionaire shall in consultation with the Independent Consultant prepare not later than 180 (one hundred and eighty) days before the Scheduled Project Completion Date, the repair and maintenance manual (the "Maintenance Manual") for the regular and periodic maintenance, and shall ensure and procure that at all times during the Operations Period, the Project Highway is maintained in a manner that it complies with the Specifications and Standards and the minimum maintenance requirements set forth in Schedule L. The Concessionaire shall supply, at least two months before the COD, 10 (ten) copies of the Maintenance Manual to NHAI and 3 (three) copies each to the GOI, GOR and Independent Consultant. Copies of the Maintenance Manual shall also be made available by the Concessionaire for public inspection during office hours at a conspicuous place adjacent to each Toll Plaza on the Project Highway.
- 18.3 Not later than forty five (45) days before the beginning of each Accounting Year, the Concessionaire, shall in consultation with the Independent Consultant prepare and provide to NHAI, its proposed programme of preventive and other scheduled maintenance of the Project Highway subject to the minimum maintenance requirements set forth in Maintenance Manual and in Schedule 'L' necessary to maintain the Project Highway at all times in conformity with the Specifications and Standards (the "Maintenance Programme"). Such Maintenance Programme shall include but not be limited to the following:
- (i) intervals and procedures for the carrying out of inspection of all elements of the Project Highway;
 - (ii) criteria to be adopted for deciding maintenance needs;
 - (iii) preventive maintenance schedule;
 - (iv) intervals at which the Concessionaire shall carry out periodic maintenance;

- (v) intervals for major maintenance and the scope thereof; and
 - (vi) lane closures schedule for each type of maintenance (length and time).
- 18.4 Maintenance shall include replacement of equipment/consumables, horticultural maintenance and upkeep of all Project Assets in good order and working condition. Maintenance shall not include the extension of any existing pavements, bridges, structures and other civil works unless part of the Project.
- 18.5 The Concessionaire shall keep the carriageways, rest areas and other Project Facilities and Toll Plazas in a clean, tidy and orderly condition free of litter and debris.
- 18.6 During the Operations Period, the Concessionaire shall not carry out any material modifications to the Project Highway save and except where such (i) modification is required by Good Industry Practice; or (ii) modification is necessary for the Project Highway to operate in conformity with the Specifications and Standards prescribed under this Agreement. Provided that the Concessionaire shall notify NHAI of the proposed modifications along with details thereof at least fifteen days before commencing work on such modifications and shall reasonably consider such suggestions as NHAI may make within 15 (fifteen) days of receipt of such details by NHAI.
- 18.7 The Concessionaire shall be responsible for the maintenance of the approach roads to and underpasses and overpasses upto 100 mtrs from the Project Highway in accordance with Good Industry Practice.
- 18.8 Safety, Vehicle Breakdown and Accident
- 18.8.1 In the case of unsafe conditions, vehicle breakdowns and accidents, the Concessionaire shall follow the relevant operating procedures, which shall include the setting up of temporary traffic cones and lights as well as the removal of obstruction and debris expeditiously. Such procedures shall be in accordance with Applicable Laws, Applicable Permits and provisions of this Agreement.
- 18.8.2 The Concessionaire shall ensure that any diversion or interruption of traffic is remedied without delay. The Concessionaire's responsibility for rescue operations on the Project Highway shall be limited to the removal of vehicles or debris or any other obstruction, which may endanger or interrupt the smooth traffic flow on the Project Highway.
- 18.8.3 The Concessionaire shall ensure that safety standards specified in Schedule 'S' are strictly complied with in the event of any lane closure or diversion of traffic. Compliance with Schedule 'S' will be monitored by the Independent Consultant and a breach by the Concessionaire of its obligations in respect of this Schedule identified by the

Independent Consultant shall be notified immediately and is required to be cured within 24 hours of its notification notwithstanding inspection, reporting procedures outlined elsewhere in this Agreement. In addition, each notified breach shall lead to the award of a penalty point to the Concessionaire. A total of five penalty points in any continuous period of 365 days shall constitute a Material Breach of this Agreement.

18.9 Emergency De-commissioning

- 18.9.1 If, in the reasonable opinion of the Concessionaire there exists an emergency which warrants decommissioning and closure to traffic of whole or any part of the Project Highway, the Concessionaire shall be entitled to de-commission and close the whole or the relevant part of the Project Highway to traffic for so long as such emergency and the consequences thereof warrant, provided however that such emergency decommissioning will be notified to NHAI promptly. NHAI may issue directions to the Concessionaire for dealing with such situations and the Concessionaire shall abide by such directions.
- 18.9.2 The Concessionaire shall re-commission the Project Highway or the affected part thereof as quickly as practicable after the circumstances leading to its de-commissioning and closure have ceased to exist.
- 18.10 The Concessionaire shall not close any lane of the Project Highway for undertaking maintenance or repair works except with the prior written approval of the NHAI which may delegate its authority to the Independent Consultant. Such approval shall be sought by the Concessionaire through a written request to be made at least 7 (seven) days before the proposed closure of lane and shall be accompanied by particulars indicating the nature and extent of repair works, the length and section required to be closed and the period of closure. The Concessionaire shall also furnish particulars indicating the minimum time required for completing such repair works. Within 5 (five) days of receiving such request, NHAI or the Independent Consultant, as the case may be, shall grant permission with such modifications as it may deem necessary. Upon receiving such permission, the Concessionaire shall be entitled to close the lane in accordance with such permission and re-open it within the period stipulated in such permission. For any delay in re-opening such lane during the first Operations Year, the Concessionaire shall pay Damages to NHAI calculated at the rate of Rs.10,000 (Rs. Ten thousand), per day or part thereof for every stretch of 100 (one hundred) meters or part thereof in each lane until such time the stretch has been re-opened for traffic. These damages of Rs.10,000 (Rupees ten thousand) shall be applicable in the first Operations year and shall be revised by WPI in each subsequent Operations year. Provided, however, that these provisions shall not apply to Emergency decommissioning under Clause 18.9.

- 18.11 Save and except as otherwise be expressly provided in this Agreement, if the Project Highway including Construction Works or any part thereof shall suffer any loss or damage during the Concession Period, from any cause whatsoever, the Concessionaire shall, at its cost and expense rectify and remedy such loss or damage forthwith in a manner so as to make the Project Highway conform in every respect to the Specifications and Standards, quality and performance as prescribed by this Agreement.
- 18.12 In the event the Concessionaire does not maintain and/ or repair the Project Highway or a part thereof upto and in accordance with the Specifications and Standards and/or in accordance with the Maintenance Programme or the Maintenance Manual, and shall have failed to commence remedial works within 30 (thirty) days of receipt of notice in this behalf from NHAI or the Independent Consultant, or the O&M Inspection Report, as the case may be, NHAI shall, without prejudice to its rights under this Agreement, including Termination thereof, be entitled to undertake the repair and maintenance of the Project Highway at the risk and cost of the Concessionaire and to recover the same from the Concessionaire. In addition to recovery of the aforesaid cost of repair and maintenance by NHAI, a sum equal to 25% (twenty five per cent) of such cost shall also be recovered by NHAI from the Concessionaire as Damages. NHAI shall have the right and the Concessionaire hereby expressly grants to NHAI the right to recover the same directly from the Escrow Account and for that purpose the Concessionaire hereby expressly authorises NHAI and hereby gives irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of NHAI under this Clause.
- 18.13 In the event NHAI does not exercise its option to undertake the required repair and maintenance after expiry of the 30 (thirty) days period stipulated in Clause 18.12 it shall recover Damages from the Concessionaire for default in operating and maintaining the Project Highway in conformity with this Agreement. Such Damages shall be payable after the aforesaid period of 30 (thirty) days and until the default is cured. The amount of Damages shall be calculated for each day of default at the higher of the following, namely (a) Rs.10,000 (Rs. Ten thousand), and (b) 0.1% (zero point one per cent) of the cost of such repair as estimated by the Independent Consultant. Recovery of such Damages shall be without prejudice to the rights of NHAI under this Agreement, including Termination thereof.
- 18.14 If the Concessionaire commences any works for curing any defects or deficiencies in the Project Highway, it shall complete such works expeditiously in accordance with Good Industry Practice. If such works are carried out in a manner that results in a delay of more than 30 (thirty) days as compared to the time required in accordance with Good Industry Practice, NHAI shall recover Damages from the Concessionaire as if a default had occurred under Clause 18.13.

18.15 The Concessionaire shall not be considered in breach of its obligations under this Agreement if any part of the Project Highway is not available to traffic after the COD on account of any of the following for the duration thereof:

- (i) an event of Force Majeure;
- (ii) measures taken to ensure the safe use of the Project Highway except when unsafe conditions on the road occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
- (iii) compliance with a request from NHAI or the directions of any Governmental Agency the effect of which is to close all or any part of the Project Highway.

Notwithstanding the above, the Concessionaire shall keep all unaffected parts of the Project Highway open to traffic and use provided they can be safely operated and kept open to traffic.

XIX MONITORING AND SUPERVISION DURING OPERATION

19.1 The Concessionaire shall undertake periodic (at least once every calendar month but once every week during monsoons) inspection of the Project Highway to determine the condition of the Project Highway including its compliance or otherwise with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and the maintenance required and shall submit reports of such inspection ("Maintenance Reports") to NHAI and the Independent Consultant.

19.2 **The Independent Consultant shall review the Maintenance Reports and inspect the Project Highway at least once a month during the Operations Period and make out an Inspection Report of such inspection (the "O&M Inspection Report"). The Independent Consultant shall send a copy of its O&M Inspection Report to NHAI and the Concessionaire. The Concessionaire shall within 30 (thirty) days of the receipt of the O&M Inspection Report remedy the defects and deficiencies, if any, set forth in such O&M Inspection Report and submit its report in respect thereof to the Independent Consultant and NHAI within the said 30 (thirty) days period. Where the remedying of such defects or deficiencies is likely to take more than 30 (thirty) days in accordance with Good Industry Practice, the Concessionaire shall undertake the works in accordance with such practice and submit progress reports of such works every fortnight. The O&M Inspection Report may also require the Concessionaire to undertake such tests as may be specified by the Independent Consultant for the purpose of determining that the Project Highway is at all times in conformity with the Specifications and Standards. The Concessionaire shall undertake such Tests without any delay and furnish a copy**

of the results thereof to the Independent Consultant and NHAI along with a written statement specifying in reasonable detail the measures, if any, that it proposes to undertake for curing the defaults or deficiencies indicated in such results. Such inspection or submission of O&M Inspection Report by the Independent Consultant or submission of O&M Inspection Compliance Report by the Concessionaire shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.

- 19.3 NHAI may inspect the Project Highway at any time for a review of the compliance by the Concessionaire with its maintenance obligations under this Agreement.
- 19.4 The Concessionaire shall furnish to NHAI within 7 (seven) days of completion of each calendar month during the Operations Period, a statement of Fees in the form set forth in Schedule 'M' (the "Monthly Fee Statement").

XX. INDEPENDENT CONSULTANT

- 20.1 NHAI shall appoint a consulting engineering firm or body corporate out of the 3 (three) names proposed by the Concessionaire from the panel of 5 (five) consultants selected by NHAI in accordance with the selection process set forth in Schedule 'N' to be the Independent Consultant to undertake and perform the duties, work, services and activities set forth in Schedule 'O'.
- 20.2 The appointment of the Independent Consultant pursuant to Clause 20.1 shall initially be for a period of four years from the date of its appointment. The date of such appointment shall be no later than 120 (one hundred twenty) days from the date of this Agreement. After the expiry of the aforesaid appointment, NHAI shall appoint for a term of 3 (three) years as Independent Consultant such person as it may deem appropriate from the list drawn in accordance with Schedule 'N' as amended from time to time by mutual consent of NHAI and the Concessionaire and who may or may not be the same person, who was Independent Consultant during the initial term. NHAI may in its discretion thereafter renew such appointment or appoint another person out of the list determined pursuant to Schedule 'N', as NHAI may deem appropriate to be the Independent Consultant for a term of three years at a time.
- 20.3 The Independent Consultant shall report to NHAI about their work, services, and activities pursuant hereto through regular periodic reports (at least once every month) as the situation may warrant. Such report of Independent Consultant shall include but not be limited to the matters and things set forth in said Schedule 'O'.
- 20.4 The remuneration, cost and expenses of the Independent Consultant shall be paid by NHAI. One-half of such remuneration, cost and expenses shall be reimbursed by the

Concessionaire to NHAI within 15 (fifteen) days of receiving a statement of expenditure from NHAI.

- 20.5 NHAI may terminate the appointment of the Independent Consultant at any time subject to appointment of their replacement by another Independent Consultant in accordance with this Article XXII.
- 20.6 If the Concessionaire has reason to believe that the Independent Consultant is not discharging its duties in a fair, efficient and diligent manner, it may make a written representation to NHAI, stating its reasons in detail, seeking termination of the appointment of the Independent Consultant. Upon receipt of such representation, NHAI shall hold a tripartite meeting with the Concessionaire and Independent Consultant for amicable resolution of the dispute. If the dispute remains unresolved, it shall be resolved in accordance with the Dispute Resolution Procedure. In case the appointment of Independent Consultant is terminated under this Clause, it shall be replaced by another Independent Consultant in accordance with this Article XX.
- 20.7 If either party disputes any advice, instruction or award of the Independent Consultant, the dispute shall be resolved in accordance with the Dispute Resolution Procedure.

XXI. TRAFFIC SAMPLING

- 21.1 For the purpose of determination and/or verification of the actual traffic on the Project Highway, NHAI shall, in addition to inspection of Concessionaire's records, be entitled to undertake traffic sampling at such frequency and in such manner as NHAI may deem appropriate including in the manner as set forth in Schedule 'P' hereto. The Concessionaire shall provide all facilities and assistance as NHAI may reasonably require for undertaking such traffic sampling.
- 21.2 If the data collected from traffic sampling undertaken pursuant to Clause 21.1 demonstrates that actual traffic is more than the traffic according to the records of the Concessionaire, the actual traffic for the purposes of this Agreement shall be deemed to be the traffic as determined by such NHAI traffic sampling pursuant to this Article XXI.
- 21.3 The Concessionaire may, in consultation with NHAI, commission an independent agency to conduct traffic sampling under this Article. The report of such agency shall be furnished to NHAI for such use as it may deem fit.
- 21.4 In the event of any dispute arising as to the actual traffic on the Project Highway the same shall be resolved in accordance with the Dispute Resolution Procedure under this Agreement.

CHAPTER - V

FINANCING ARRANGEMENTS

XXII. FINANCIAL CLOSE

- 22.1 The Concessionaire shall provide to NHAI, a copy of the Financing Package furnished by it to the prospective Senior Lenders. As and when such Financing Package is approved by the Senior Lenders, with or without modifications, a copy of the same shall be furnished by the Concessionaire to NHAI forthwith.
- 22.2 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire covenants with NHAI that it shall achieve Financial Close within 180 (one hundred eighty) days from the date of this Agreement. If the Concessionaire shall fail to achieve Financial Close within the said 180 (one hundred eighty) days period, the Concessionaire shall be entitled to a further period of 90 (ninety) days subject to an advance weekly payment by the Concessionaire to NHAI of a sum of Rs.100,000 (Rupees one hundred thousand) per week or part thereof for any delay beyond the said 180 (one hundred eighty) day period, as Damages on account of such delay in achieving Financial Close within the said 180 (one hundred eighty) day period by the Concessionaire.
- 22.3 Notwithstanding anything to the contrary contained in this Agreement, NHAI shall be entitled to terminate this Agreement forthwith, without being liable in any manner whatsoever to the Concessionaire, by a communication in writing to the Concessionaire pursuant to Clause 32.2 if the Concessionaire shall have failed to pay in advance the Damages to NHAI under and in accordance with Clause 22.2 above.
- 22.4 Notwithstanding anything to the contrary contained in this Agreement, if the Financial Close shall not occur within 270 (two hundred seventy) days as set forth in Clause 22.2 above, all rights, privileges, claims and entitlements, if any, of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties.
- 22.5 Upon Termination of this Agreement under Clauses 22.2 and 22.3, NHAI shall be entitled to encash the Bid Security or the Performance Security, as the case may be, and appropriate the proceeds thereof as Damages.

XXIII. NEGATIVE GRANT/ GRANTS

23.1 The Concessionaire agrees to provide to NHAI cash payment (the “Negative Grant”) or NHAI agrees to provide to the Concessionaire cash support by way of an outright Grant (the “Grant”) equal to the sum, if any, set forth in the Bid of the Bidder and accepted by NHAI namely, Rs. _____ million (Rupees _____ million) in accordance with the provisions of this Article XXIII.

23.2 The Concessionaire shall pay to NHAI the Negative Grant proposed in its Bid as set forth below:

Concession Year	1	2	3	-----	-----	14	15
Negative Grant							

Negative Grant shall be paid in advance within 90 (ninety) days of the commencement of the year for which it is due and payable.

23.3 Subject to provisions of the Clause 23.4, the Grant shall be applied by the Concessionaire for meeting the capital cost of the Project and shall be treated as part of the shareholders’ funds (the “Equity Support”).

23.4 The Equity Support shall:

- (a) not exceed 25% of the Total Project Cost; and
- (b) in no case be greater than total equity capital actually subscribed and paid in cash by the shareholders for meeting the Total Project Cost as set forth in the Financing Package.

23.5 The balance of the Grant (if any) available after deducting therefrom the amount of Equity Support shall be provided to the Concessionaire in accordance with this Article XXIII for meeting O&M Expenses of the Project (the “O&M Support”).

23.6 The whole or any part of the Grant shall be disbursed by NHAI to the Concessionaire if and only if

23.6.1 the Concessionaire is not in Material Breach of this Agreement at the time of such disbursement; and

23.6.2 the Concessionaire has contributed and spent on the Project at least 80% (eighty percent) of the total Equity (excluding Equity Support) required to be provided as part of the Total Project Cost.

23.7 The disbursement of the Equity Support pursuant to this Article XXIII shall be made by NHAI to the Concessionaire proportionately alongwith the balance loan funds to be

disbursed by the Senior Lenders under the Financing Documents for meeting the Total Project Cost. NHAI shall disburse each tranche of the Equity Support as aforesaid by credit to the Escrow Account within 15 (fifteen) days of the release of each loan installment by the Senior Lenders to the Concessionaire provided the Concessionaire has submitted to NHAI along with each disbursement request a certificate from its Statutory Auditors certifying the above particulars and has given at least 7 (seven) days to NHAI for processing such request.

- 23.8 The O&M Support shall be disbursed by NHAI to the Concessionaire by credit to the Escrow Account in quarterly instalments and the first such instalment shall be released within 30 (thirty) days of the COD. Each such instalment shall be a sum equal to 1 (one) per cent of the Total Project Cost and such instalments shall be paid by NHAI until the Grant is fully disbursed to the Concessionaire.
- 23.9 If NHAI shall fail to disburse any tranche of the Equity Support or the O&M Support within the periods set forth for the payment thereof to the Concessionaire, NHAI shall pay interest on such delayed tranche @ SBI PLR plus two per cent.

XXIV. REVENUE SHORTFALL LOAN

- 24.1 If the Realisable Fees in any Accounting Year during the Concession Period shall fall below the Subsistence Revenue Level as a result of an Indirect Political Event, or a Political Event as set forth in Article XXIX, NHAI agrees to provide to the Concessionaire such shortfall support, by way of a loan ("Revenue Shortfall Loan") with interest thereon @ SBI PLR per annum. Provided, however, that any reserves of the Concessionaire and any sums received or likely to be received by the Concessionaire through insurance claims (except insurance payments for physical loss used to carry out requisite repairs) or payments by NHAI under Article XXIX shall first be deducted and only the balance remaining shall be disbursed as the Revenue Shortfall Loan.
- 24.2 For the purposes of claiming disbursements on account of Revenue Shortfall loan pursuant to Clause 24.1 above in any Accounting Year, the Concessionaire shall:
- (a) Submit a detailed account of the Indirect Political Event or the Political Event, as the case may be, and its impact on total revenues of the Concessionaire as soon as feasible and submit weekly reports thereafter;
 - (b) Provide to NHAI, the Schedule of Debt Service Payments under the Financing Documents for the Accounting year for which Revenue Shortfall Loan are claimed;
 - (c) Provide to NHAI the details of O&M Expense budget for such Accounting Year and the expenditure incurred in that year out of such budget;

- (d) Within 15 (fifteen) days of the close of each Accounting Year in which the shortfall in the referred to in Clause 24.1 shall occur, provide a certificate from the Statutory Auditors of the Concessionaire certifying the Subsistence Revenue Level, the Realisable Fees and the Revenue Shortfall Loan requirement after deducting reserves of the Concessionaire, if any; and
 - (e) Submit a written request to NHAI under the hands of a Director of the Concessionaire requesting for disbursement of the Revenue Shortfall Loan to the Concessionaire by payment thereof into the Escrow Account.
- 24.3 Upon the receipt of the request and documents as set forth in Clause 24.2 above and provided the same is not found by NHAI to be wrong or incorrect, NHAI shall disburse the Revenue Shortfall Loan within 30 days (thirty) thereof.
- 24.4 In the event Realisable Fees during the first six months of an Accounting Year shall fall as a result of an Indirect Political Event or a Political Event and the amount of such Realisable Fees is less than the Debt Service Payments due for the first six months of such Accounting Year, NHAI shall upon request provide an advance to the Concessionaire for meeting the shortfall in such Debt Service Payments. For claiming such advance, the Concessionaire shall make a demand to NHAI accompanied by a certificate from the Statutory Auditors setting forth the Realisable Fees during the first six months of the Accounting Year, the reserves of the Concessionaire and the outstanding amount on account of Debt Service Payments due in the first six months of such year. The Statutory Auditors shall also certify the amount of advance required by the Concessionaire from NHAI for meeting such Debt Service Payments after deducting such Realisable Fees and the reserves of the Concessionaire. Within 15 (fifteen) days of receiving such demand, NHAI shall disburse the advance due to the Concessionaire at an interest rate equal to SBI PLR. Not later than 15 (fifteen) days after completion of such Accounting Year, the Concessionaire shall either refund such advance with interest to NHAI or adjust it against such Revenue Shortfall Loan as may be due to the Concessionaire under this Article.
- 24.5 The Revenue Shortfall Loan disbursed by NHAI pursuant hereto and the interest thereon shall be repaid by the Concessionaire in a sum equal to 50% (fifty per cent) of the Net Cash flow of the Concessionaire as and when made and such repayments shall be made in one or more years as necessary.
- 24.6 Notwithstanding anything to the contrary contained in Clause 24.5, the Concessionaire shall repay the entire Revenue Shortfall Loan and interest thereon at least two years before the expiry of the Concession Period. If any sum remains due or outstanding from the Concessionaire under this Article XXIV at any time during a period of two years

preceding the Termination Date, it shall constitute a Concessionaire Event of Default under Article XXXII and NHAI shall be entitled to Terminate this Agreement under Clause 32.2.

XXV. ESCROW ACCOUNT

25.1 The Concessionaire shall within 60 days from the date of this Agreement open and establish the Escrow Account with a Bank (the “Escrow Bank”) and all funds constituting the Financing Package for meeting the Total Project Cost shall be credited to such Escrow Account. During Operations Period all Fees collected by the Concessionaire from the users of the Project Highway shall be exclusively deposited therein. In addition, all Fees collected by NHAI in exercise of its rights under this Agreement during the Concession Period and all disbursements or payments by NHAI pursuant hereto shall also, subject to the rights of deductions and appropriations therefrom of NHAI under this Agreement, be deposited by NHAI in the Escrow Account.

25.2 Disbursements from Escrow Account

25.2.1 The Concessionaire shall give, at the time of the opening of the Escrow Account, irrevocable instructions by way of an Escrow Agreement substantially in form set forth in Schedule ‘Q’ (the “Escrow Agreement”) to the Escrow Bank instructing, inter alia, that the deposits into the Escrow Account shall subject to Clause 25.2.3, be appropriated in the following order every month 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 unless otherwise expressly provided in the instruction letter:

- (a) All taxes due and payable by the Concessionaire;
- (b) All expenses in connection with and relevant to the Construction of Project Highway by way of payment to the EPC Contractor and such other persons as may be specified in the Financing Documents;
- (c) O&M Expenses including Fees collection expenses incurred by the Concessionaire directly or through O&M Contractor and/or Tolling Contractor, if any, subject to the items and ceiling in respect thereof as set forth in the Financing Documents but not exceeding 1/12 (one twelfth) of the annual liability on this account;
- (d) The whole or part of the expense on repair work or O&M Expense including Fees collection expenses incurred by NHAI on account of exercise of any of its rights under this Agreement provided NHAI certifies to the Escrow Bank that NHAI had incurred such expenses in accordance with the provisions of this Agreement;

- (e) All Concession Fees and any Negative Grant due to NHAI from the Concessionaire under this Agreement;
- (f) Monthly proportionate provision of Debt Service Payments due in an Accounting Year and payment of Debt Service Payments in the month when due;
- (g) Any payments and Damages due and payable by the Concessionaire to NHAI pursuant to this Agreement, including repayment of Revenue Shortfall Loans; and
- (h) Balance in accordance with the instructions of the Concessionaire.

25.2.2 The Concessionaire shall not in any manner modify the order of payment specified in this clause 25.2 except with the prior written approval of NHAI.

25.2.3 In the event the Grant, if any, to the Concessionaire shall exceed 10% of the Total Project Cost, all disbursements on account of Total Project Cost other than those to the EPC Contractor in accordance with the EPC Agreement, shall be made in accordance with the express provisions contained in that behalf in the Financing Documents. Provided, however, that if the total of such disbursements exceed 10% of the Total Project Cost, prior written consent of NHAI shall be required in respect of the disbursement arrangements for such excess amounts, and such consent shall not be unreasonably withheld by NHAI.

25.3 Notwithstanding anything to the contrary contained in the Escrow Agreement and subject to the provisions contained in Clauses 33.5 and Article XXXIV, upon Termination of this Agreement, all amounts standing to the credit of the Project Escrow Account shall be appropriated and dealt with in the following order:

- (a) all Taxes due and payable by the Concessionaire;
- (b) all Concession Fees (including Negative Grant) due and payable to NHAI under this Agreement;
- (c) all accrued Debt Service Payment;
- (d) any payments and Damages due and payable by the Concessionaire to NHAI pursuant to this Agreement, including Termination claims and repayment of Revenue Shortfall Loans;
- (e) all accrued O&M Expenses;

- (f) any other payments required to be made under this Agreement; and
- (g) balance, if any, on the instructions of the Concessionaire.

25.4 The instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 25.3 have been discharged.

XXVI. STATE SUPPORT AGREEMENT

26.1 The Concessionaire acknowledges that for the performance of its obligations under this Agreement, it requires support and certain services from GOR. The nature and scope of such support and services required by the Concessionaire from GOR are fully described in the draft State Support Agreement set forth at Schedule 'R'.

26.2 The Concessionaire acknowledges its obligation to enter into the State Support Agreement and accordingly the Concessionaire agrees and undertakes to enter into at its cost and expense the State Support Agreement with NHAI and GOR substantially in form and content as set forth in Schedule 'R'.

XXVII. INSURANCE

27.1 Insurance during the Construction Period: The Concessionaire shall effect and maintain, or cause to be effected and maintained, at no cost to NHAI during the Construction Period such insurances upto such maximum sums as may be required under and in accordance with the Financing Documents, Applicable Laws and such insurance as the Concessionaire may reasonably consider necessary or desirable in accordance with Good Industry Practice. The Concessionaire shall also effect and maintain such insurance as may be necessary for mitigating the risks that may devolve on NHAI as a consequence of any act of omission by the Concessionaire during the Construction Period.

27.2 Insurance during the Operations Period: Not later than 4 months prior to the anticipated Completion of the Project Highway, the Concessionaire shall obtain and maintain at no cost to NHAI during the Operations Period in respect of the Project Highway and its operations such insurance as may be required under any of the Financing Documents, Applicable Laws and such insurance as the Concessionaire may reasonably consider necessary or desirable in accordance with Good Industry Practice. Provided, however, the level of insurance to be maintained after satisfaction of Senior Lenders' dues in full, shall be determined on the same principles as applicable for determining the level of Insurance prior to such date. This level shall be agreed with NHAI within 120 days of date of this Agreement.

For the sake of brevity, the aggregate of the maximum sums insured under the insurance taken out by the Concessionaire pursuant to this Article XXVII are herein referred to as the "Insurance Cover".

- 27.3 Evidence of Insurance Cover: All insurance obtained by the Concessionaire in accordance with this Article XXVII shall be maintained with insurer or reinsurers, and on terms consistent with Good Industry Practice. Within thirty days of obtaining any insurance cover, the Concessionaire shall furnish to NHAI, copies of certificates of insurance, copies of the insurance policies signed by an authorised representative of the insurer and copies of all premia payment receipts in respect of such insurance received from each insurance carrier, and such insurance will not be cancelled, changed or not renewed until the expiration of at least 45 (forty five) days after written notice of such cancellation, change of non-renewal has been received by NHAI.
- 27.4 Remedy on Failure to Insure: If the Concessionaire shall fail to effect and keep in force the insurance for which it is responsible pursuant hereto, NHAI shall have the option to keep in force any such insurance, and pay such premia and recover the costs thereof from the Concessionaire, or for the purposes of computation of payments to the Concessionaire pursuant to Article XXIX treat the insurance cover i.e. the maximum sums which such insurance was providing for had it been in force and effect as being deemed to have been received by the Concessionaire.
- 27.5 Waiver of Subrogation: All insurance policies supplied by the Concessionaire shall include a waiver of any right of subrogation of the insurers thereunder against, inter alia, NHAI, and its assigns, subsidiaries, affiliates, employees, insurers and underwriters and of any right of the insurers of any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy.
- 27.6 Concessionaire Waiver: The Concessionaire hereby further releases, assigns and waives any and all rights of recovery against, inter alia, the NHAI, and its affiliates, subsidiaries, employees, successors, permitted assigns, insurers and underwriters, which the Concessionaire may otherwise have or acquire in or from or in any way connected with any loss covered by policies of insurance maintained or required to be maintained by the Concessionaire pursuant to this Agreement (other than third party liability insurance policies) or because of deductible clauses in or inadequacy of limits of any such policies of insurance.
- 27.7 Application of Insurance Proceeds: The proceeds from all insurance claims, except life and injury, shall be paid to the Concessionaire by credit to the Escrow Account (unless otherwise required by the Financing Documents) who shall, subject to its obligations under the Financing Documents, and notwithstanding anything contained in Article XXV, apply such proceeds for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project Highway.

XXVIII. ACCOUNTS AND AUDIT

- 28.1 The Concessionaire shall maintain full accounts of all Fees including Realisable Fees and other revenues derived/collected by it from and on account of use of the Project Highway and of O&M Expenses and other costs paid out of the Project Escrow Account and shall provide copies of the said accounts duly audited and certified by the Concessionaire's Statutory Auditors within 120 (one hundred twenty) days of the close of each Accounting Year to which they pertain, during the subsistence of this Agreement. Such audited accounts shall form the basis of various payments by either Party under this Agreement. The Concessionaire shall also furnish, within one week of its publication, a certified copy of the audited accounts and annual report published by the Company under the Applicable Laws.
- 28.2 The Concessionaire shall appoint and have during the subsistence of this Agreement as its Statutory Auditors a firm of Chartered Accountants duly licensed to practice in India out of the mutually agreed list of 10 (ten) independent and reputable firms of Chartered Accountants in India (the "List of Chartered Accountants"). The criteria for preparing the List of Chartered Accountants are set forth in Schedule 'T'. Subject to a 30 days notice to NHAI and the replacement Statutory Auditors being appointed from the List of Chartered Accountants, the Concessionaire may terminate the appointment of any Statutory Auditor appointed in accordance with this Article. The fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.
- 28.3 On or before the fifteenth day of April each Year, the Concessionaire shall provide for the preceding Accounting Year a statement duly audited by its Statutory Auditors giving summarised vehicle/user wise information on (i) the traffic count for each category of vehicles using the Project Highway and liable for payment of Fees therefore, and (ii) Fees charged and the amount of Fees received, Realizable Fees and other revenues derived from the Project Highway and such other information as NHAI may reasonably require.
- 28.4 Notwithstanding anything to the contrary contained in this Agreement, NHAI shall have the right but not the obligation to appoint at its cost another firm of chartered accountants from the List of Chartered Accountants (the "Additional Auditor") to audit and verify all those matters, expense, costs, realisations and things which the Statutory Auditors of the Concessionaire, are required to do, undertake or certify pursuant to this Agreement.
- 28.5 Where a Grant has been provided, NHAI shall have the right to appoint for the duration of the Construction Period as Concurrent Auditor a firm of Chartered Accountants from the List of Chartered Accountants (the "Concurrent Auditor") who shall undertake concurrent audit of the Concessionaire during the Construction Period. The charges and

expenses of such Concurrent Auditor shall be borne by the NHAI. After such Construction Period, NHAI may at its option have concurrent audit done at such time and for such period as NHAI may deem appropriate at its cost and expenses.

- 28.6 In the event of their being any difference between the finding of the Additional Auditor or the Concurrent Auditor, as the case may be, and the certification provided by the Statutory Auditors of the Concessionaire, such Auditors shall meet to resolve such differences and if they are unable to resolve the same such disputed certification shall be resolved by recourse to the Dispute Resolution Procedure.

CHAPTER – VI

FORCE MAJEURE

XXIX. FORCE MAJEURE

- 29.1 Force Majeure Event: As used in this Agreement, a Force Majeure Event shall mean occurrence in India of any or all of Non Political Event, Indirect Political Event and/or Political Event as defined in Clauses 29.2, 29.3, and 29.4 respectively hereinafter which prevent the Party claiming Force Majeure (the “Affected Party”) from performing its obligations under this Agreement and which act or event is (i) beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money and (iii) has a Material Adverse Effect on the Project.
- 29.2 Non Political Force Majeure Events: For purposes of Clause 29.1 Non-Political Events shall mean one or more of the following acts or events:
- (i) acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, exceptionally adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption or fire (to the extent originating from a source external to the Site or beyond design specifications for the Construction Works) or landslide;
 - (ii) radioactive contamination or ionizing radiation;
 - (iii) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/ representatives or attributable to any act or omission of any of them) interrupting supplies and services to the Project Highway for a period exceeding a continuous period of 7 (seven) days in an Accounting Year, and not being an Indirect Indian Political Event set forth in Clause 29.3 hereof;
 - (iv) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
 - (v) Any judgement or order of any court of competent jurisdiction or statutory authority in India made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or

enforcement of this Agreement or exercise of any of its rights under this Agreement by NHAI; or

- (vi) Any event or circumstance of a nature analogous to any of the foregoing.

29.3 Indirect Political Force Majeure Events: For purposes of Clause 29.1, Indirect Political Event shall mean one or more of the following acts or events:

- (i) 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 which prevents collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year;
- (ii) industry wide or state wide or India wide strikes or industrial action which prevent collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year; or
- (iii) any public agitation which prevents collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year.

29.4 Political Force Majeure Events: For purposes of Clause 29.1, Political Event shall mean one or more of the following acts or events by or on account GOI, NHAI, GOR or any other Governmental Agency:

- (i) Change in Law, only when provisions of Article XXXVI cannot be applied;
- (ii) expropriation or compulsory acquisition by any Governmental Agency of any Project Assets or rights of the Concessionaire or of the Contractors; or
- (iii) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is Condition Precedent) provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits.

29.5 Effect of Force Majeure Event before Financial Close: Upon the occurrence of any Force Majeure Event prior to Financial Close as set forth in Article XXII, the following shall apply:

- (a) There shall be no Termination except as provided in Clause 29.8;
- (b) The date for achieving Financial Close shall be extended by the period for which such Force Majeure event shall subsist; and
- (c) The Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs arising out of such Force Majeure Event.

29.6 Effect of Force Majeure Event after Financial Close: Upon occurrence of any Force Majeure Event after Financial Close, the following shall apply:

- (a) There shall be no Termination of this Agreement except as provided in Clause 29.8;
- (b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;
- (c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to collect Fees, but if he is unable to collect Fees during the subsistence of such Force Majeure Event, the Concession Period shall be extended by the period for which collection of Fees remains suspended on account thereof; and
- (d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of Clause 29.7.

29.7 Allocation of costs during subsistence of Force Majeure: Subject to the provisions of clause 29.6, upon occurrence of a Force Majeure Event after Financial Close, the costs arising out of such event shall be allocated as follows:

- (a) When the Force Majeure Event is a Non Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any costs arising out of any such Force Majeure Event;
- (b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the "Force Majeure Costs") shall be borne by the Concessionaire to the extent of the Insurance Claims, and to the extent such Force Majeure Costs exceed the Insurance Claims, one half of the same to the extent actually incurred and duly certified by the statutory Auditors of Concessionaire shall be reimbursed by NHAI to the Concessionaire in one lump sum or paid in three equal annual installments with interest @ SBI PLR plus two percent; and

- (c) Where the Force Majeure Event is a Political Event, the Force Majeure Costs to the extent actually incurred and certified by the Statutory Auditors of Concessionaire shall be reimbursed by NHAI to the Concessionaire in one lump sum or paid in three equal annual installments with interest @ SBI PLR plus two percent, provided that no Force Majeure Costs shall be payable by NHAI if the Concession Period is increased under Clause 29.6.

For avoidance of doubt, Force Majeure Costs shall not include loss of Fee revenues or any debt repayment obligations but shall include interest payments on such debt, O&M Expenses and all other costs directly attributable to the Force Majeure Event.

- 29.8 Termination Notice: If a Force Majeure Event subsists for a period of 180 (one hundred eighty) days or more within a continuous period of 365 (three hundred sixty five) days, either Party may in its sole discretion terminate this Agreement by giving 30 (thirty) days Termination Notice in writing to the other Party without being liable in any manner whatsoever, save as provided in Clause 29.9.
- 29.9 Termination Payment for Force Majeure Events: Upon Termination of this Agreement pursuant to Clause 29.8, Termination Payment to the Concessionaire shall be made in accordance with the following:
 - (a) If the Termination is on account of a Non Political Event, the Concessionaire shall be entitled to receive from NHAI by way of Termination Payment an amount equal to 90% of the Debt Due and the entire Subordinated Debt less due insurance claims, if any. Provided that in the event some insurance claims are not admitted, then 90% of such claims shall qualify for being included in the computation of Debt Due.
 - (b) If the Termination is on account of an Indirect Political Event, the Concessionaire shall be entitled to receive from NHAI by way of Termination Payment an amount equal to:
 - (i) the total Debt Due, less due insurance claims, if any. Provided, however, that if all or any of the insurance claims are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due, plus
 - (ii) the outstanding Subordinated Debt, plus
 - (iii) 110% (one hundred ten per cent) of the Equity (subscribed in cash and actually spent on the Project but excluding the amount of Equity Support

referred to in Article XXIII) if such Termination occurs at any time during three years commencing from the Appointed Date and for each successive years thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived at shall be reduced every year by 7.5% (seven and half per cent) per annum.

- (c) If the Termination of this Agreement is on account of a Political Event, the Concessionaire shall be entitled to receive from NHAI by way of Termination Payment an amount equal to:
- (i) the total Debt Due, plus
 - (ii) 120% (one hundred twenty per cent) of the Subordinated Debt plus
 - (iii) 150% (one hundred fifty per cent) of the Equity (subscribed in cash and actually spent on the project but excluding the amount of Equity Support referred to in Article XXIII) the if such Termination occurs at any time during three years commencing from the Appointed Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived at shall be reduced every year by 7.5% (seven and half per cent) per annum.
- 29.10 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, provided however 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.
- 29.11 Liability for other losses, damages etc: Save and except as expressly provided in this Article XXIX, neither Party hereto 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 to this Article XXIX.
- 29.12 Duty to Report: The Affected Party shall discharge the following obligations in relation to reporting the occurrence of a Force Majeure Event to the other Party:
- (a) The Affected Party shall not claim any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party in writing 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 the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

- (b) Any notice pursuant to this Clause 29.12 shall include full particulars of:
 - (i) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article XXIX with evidence in support thereof;
 - (ii) 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;
 - (iii) the measures which the Affected Party is taking or proposes to take, to alleviate the impact of such Force Majeure Event; and
 - (iv) any other information relevant to the Affected Party's claim.
- (c) For so long as the Affected Party continues to claim to be affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) written reports containing information as required by this Clause 29.12, and such other information as the other Party may reasonably request the Affected Party to provide.

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

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

CHAPTER – VII

SUSPENSION AND TERMINATION

XXX. MATERIAL BREACH AND SUSPENSION

- 30.1 If the Concessionaire shall be in Material Breach of this Agreement NHAI, shall be entitled in its sole discretion and without prejudice to its other rights and remedies under this Agreement including its right of Termination hereunder, to (i) suspend all or any of the rights of the Concessionaire under this Agreement including the Concessionaire's right to collect and appropriate all Fees and other revenues from the Project Highway, and (ii) exercise the rights of the Concessionaire under this Agreement itself or authorise any other person to exercise the same during such suspension. Such suspension by NHAI shall be by a communication in writing to the Concessionaire and shall be effective forthwith upon the issue thereof to the Concessionaire. Any Fees or revenues collected by or on behalf of NHAI during such suspension shall be deposited in the Escrow Account to the exclusion of the Concessionaire. Provided, however, that the period of such suspension under this Article XXX shall not exceed 120 (one hundred twenty) days.
- 30.2 Subject to clause 30.1, NHAI shall have the right to utilise the proceeds of Fees and other revenues for meeting the costs incurred by NHAI to remedy and rectify the cause of such suspension and for defraying the O&M Expenses during such suspension period. Provided, however, that if the Concessionaire is making diligent efforts to remedy and rectify such cause, then NHAI shall allow the Concessionaire reasonable time and opportunity for such remedy or rectification.
- 30.3 The suspension of the rights of the Concessionaire by NHAI pursuant to Clause 30.1 above shall be revoked by NHAI forthwith upon the Concessionaire having remedied the Material Breach during such suspension period to the satisfaction of NHAI unless in the meantime this Agreement has been terminated by NHAI in accordance with Article XXXII.
- 30.4 At any time during the period of suspension under this Article XXX, the Concessionaire may in writing notify to NHAI that it does not intend to cure the breach or default that had caused such suspension. Within 7 (seven) days of receipt of such notice, NHAI shall terminate this Agreement as if a Material Breach of this Agreement had occurred on account of a Concessionaire Event of Default.

XXXI. COMPENSATION FOR BREACH OF AGREEMENT

- 31.1 In the event of Concessionaire being in material default of this Agreement and such default is cured before Termination, the Concessionaire shall pay to NHAI as compensation, all direct additional costs suffered or incurred by NHAI arising out of such material default by the Concessionaire, in one lumpsum within 30 (thirty) days of receiving the demand or at the Concessionaire's option in 3 (three) equal semi-annual installments with interest @ SBI PLR plus 2% (two per cent).
- 31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI's option in 3 (three) equal semi-annual installments with interest @ SBI PLR plus 2% (two per cent).

XXXII. TERMINATION

32.1 Termination for the Concessionaire Event of Default.

32.1.1 Concessionaire Event of Default

The following events shall constitute an event of default by the Concessionaire (a "Concessionaire Event of Default") unless such Concessionaire Event of Default has occurred as a result of NHAI Event of Default or a Force Majeure Event;

- (1) The Concessionaire fails to achieve Financial Close in accordance with the provisions of Article XXII;
- (2) The Concessionaire fails to achieve any Project milestone other than Scheduled Project Completion Date within the period set forth in Schedule 'H' and fails to cure such default within a period of 180 (one hundred and eighty) days from the date of its occurrence.
- (3) The Concessionaire is in Material Breach of this Agreement;
- (4) The Concessionaire commits default in complying with any of the terms and conditions of this Agreement, save and except those defaults in respect of which Cure Period has been expressly provided in this Agreement and fails to remedy or rectify the same within the period provided in a notice in this behalf from NHAI which shall:
 - (i) require the Concessionaire to remedy the breach or breaches referred to in such notice within 1 (one) month (or such longer period as may be agreed by

the NHAI at its absolute discretion); or

- (ii) permit the Concessionaire to put forward within 15 days of such notice a reasonable programme for the remedying of the breach or breaches, such programme to specify in reasonable detail the manner in which such breach or breaches is or are proposed to be remedied and the latest date by which it is proposed that such breach or all such breaches shall be remedied.
- (5) The Concessionaire creates any Encumbrance, charges or lien in favour of any person save and except as otherwise expressly permitted under Clause 35.2;
 - (6) The shareholding of the Consortium Members falls below the minimum prescribed under Clause 11.1 (xii) and the Concessionaire does not suo moto cure such default within 90 (ninety) days of its occurrence;
 - (7) The transfer, pursuant to law of either (a) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or (b) all or material part of the assets or undertaking of the Concessionaire except where such transfer in the reasonable opinion of NHAI does not affect the ability of the Concessionaire to perform, and the Concessionaire has the financial and technical capability to perform, its material obligations under the Project Agreements;
 - (8) A resolution is passed by the shareholders of the Concessionaire for the voluntary winding up of the Concessionaire;
 - (9) The Concessionaire is adjudged bankrupt or insolvent or if a trustee or receiver is appointed for the Concessionaire or for any of its property that has a material bearing on the Project;
 - (10) Any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction provided that, as part of such amalgamation or reconstruction, the property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements, and provided that:
 - (i) the amalgamated or reconstructed entity has the technical capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;

- (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Financial Close; and
 - (iii) each of the Project Agreements remains in full force and effect;
- (11) The Concessionaire is in Material Breach of any of the Project Agreements;
 - (12) An event of default of the Concessionaire under any of the Financing Documents has occurred or any of the Senior Lenders has recalled its loan under any of the Financing Documents;
 - (13) The Concessionaire abandons the operations of the Project Highway for more than 15 (fifteen) consecutive days without the prior consent of NHAI, provided that the Concessionaire shall be deemed not to have abandoned such operation if such abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations by NHAI.
 - (14) The Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement;
 - (15) The Concessionaire suffers an execution being levied on any of its assets/ equipment causing a Material Adverse Effect on the Project and allows it to be continued for a period of 15 (fifteen) days;
 - (16) The Concessionaire has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days; or
 - (17) The Concessionaire is in breach of its obligation to repay the Revenue Shortfall Loans in accordance this Agreement.
- 32.1.2 Save and except as otherwise provided in Clause 32.2, and without prejudice to any other right or remedy which NHAI may have in respect thereof under this Agreement, upon the occurrence of any breach or default by the Concessionaire under this Agreement including any Concessionaire Event of Default, NHAI shall be entitled to terminate this Agreement by a communication in writing (the "Termination Notice") to the Concessionaire if the Concessionaire has failed to cure such breach or default within the period provided for the same in this Agreement provided that before issuing the Termination Notice, NHAI shall by a notice in writing inform the Concessionaire of its intention to issue the Termination Notice (the "Preliminary Notice") and grant 15 (fifteen)

days time to the Concessionaire to make its representation, if any, against such intended Termination Notice and shall after the expiry of said 15 (fifteen) day period whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

32.1.3 Subject to Clause 32.2, the following shall apply in respect of cure of any of the defaults and/or breaches of this Agreement.

- (i) The Cure Period shall commence from the date on which a notice in writing is delivered by NHAI to the Concessionaire asking the latter to cure the breach or default specified in such notice.
- (ii) The Cure Period provided in this Agreement shall not relieve the Concessionaire from liability for Damages caused by its breach or default;
- (iii) The Cure Period shall not in any way be extended by any period of suspension under this Agreement;
- (iv) If the cure of any breach by the Concessionaire requires any reasonable action by Concessionaire that must be approved by NHAI or the Independent Consultant hereunder the applicable Cure Period (and any liability of the Concessionaire for damages incurred) shall be extended by the period taken by NHAI or the Independent Consultant to accord their required approval.

32.2 Notwithstanding anything to the contrary contained in this Agreement, in the event of the Concessionaire being in default under any of the provisions hereof expressly providing for Termination under or in accordance with this Clause 32.2, NHAI shall be entitled to terminate this Agreement forthwith by issuing a Termination Notice to the Concessionaire and upon issue of such Termination Notice by NHAI this Agreement shall stand terminated forthwith. Provided, however, that prior to such Termination, NHAI shall by notice grant to the Concessionaire a Cure Period of one month for curing the relevant breach or default of the provisions of this Agreement.

32.3 Upon Termination by NHAI on account of occurrence of Concessionaire Event of Default during the Operations Period, the NHAI shall pay to the Concessionaire by way of Termination Payment an amount equal to 90% (ninety per cent) of the Debt Due less insurance claims, if any, provided, however, that if all or any of the insurance claims are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due.

32.4 Termination for NHAI Event of Default.

32.4.1 The Concessionaire may after giving 90 (ninety) days notice in writing to NHAI terminate this Agreement upon the occurrence and continuation of any of the following events (each a “NHA Event of Default”), unless any such NHA Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event.

- (1) NHAI is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and NHAI has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;
- (2) NHAI repudiates this Agreement or otherwise evidences an irrevocable intention not to be bound by this Agreement;
- (3) GoI or GOR or any Governmental Agency have by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligations by the Concessionaire and have failed to cure the same within 90 (ninety) days of receipt of notice by NHAI in this behalf from the Concessionaire;
- (4) NHAI has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days.

32.4.2 Upon Termination by the Concessionaire on account of an NHA Event of Default, the Concessionaire shall be entitled to receive from NHAI by way of Termination Payment a sum equal to:

- (i) the total Debt Due, plus
- (ii) 120% (one hundred twenty percent)the total Subordinated Debt, plus
- (iii) 150% (one hundred fifty per cent) of the Equity (subscribed in cash and actually spent on the Project but excluding the amount of Equity Support referred to in Article XXIII) if such Termination occurs at any time during three years commencing from the Appointed Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year and the adjusted amount so arrived at shall be reduced every year by 7.5% (seven and a half per cent) per annum.

32.5 Upon Termination of this Agreement for any reason whatsoever, NHAI shall:

- (i) take possession and control of Project Highway forthwith;

- (ii) take possession and control forthwith of any materials, construction plant, implements, stores etc. on or about the Site;
- (iii) restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project Highway; and/or
- (iv) succeed upon election by NHAI without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreement as NHAI may in its discretion deem appropriate and shall upon such election be required to compensate such contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date NHAI elects to succeed to the interests of the Concessionaire as aforesaid. All sums claimed by such Contractors as being due and owing for work and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors and NHAI shall in no way or manner be liable or responsible for such sums.

32.6 Termination Payments: The Termination Payment pursuant to this Agreement shall become due and payable to the Concessionaire by NHAI within thirty days of a demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If NHAI fails to disburse the full Termination Payment within 30 (thirty) days, the amount remaining unpaid shall be disbursed along with interest @ SBI PLR plus two per cent for the period of delay on such amount.

32.7 Mode of Payment: Payment of compensation of costs by NHAI pursuant to this Article XXXII shall be made by way of credit to the Escrow Account and such payment shall constitute valid discharge of NHAI's obligations for Termination Payment hereunder.

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

XXXIII. DIVESTMENT OF RIGHTS AND INTERESTS

33.1 Upon Termination of this Agreement, the Concessionaire shall comply with the following:

- (a) notify to NHAI forthwith the location and particulars of all Project Assets;
- (b) deliver forthwith actual or constructive possession of the Project Highway free and clear of all Encumbrances and execute such deeds, writings and documents as may be required by the NHAI for fully and effectively divesting the Concessionaire of all of the rights, title and interest of the Concessionaire in the Project Highway and conveying the Project Highway free of any charge or cost to NHAI; and
- (c) comply with the Divestment Requirements set out in Clause 33.2.

33.2 Upon Termination of this Agreement, the Concessionaire shall comply and conform to the following Divestment Requirements in respect of the Project Highway:

- (i) all Project Assets including the road, pavement, structure and equipment shall have been renewed and cured of all defects and deficiencies as necessary so that the Project Highway is compliant with the Specifications and Standards set forth in this Agreement;
- (ii) all sections of each traffic lane (the “Carriageway”) of the Project Highway shall have a roughness index of not more than 2500 mm per km and shall be free from defects in accordance with O&M requirements;
- (iii) all lamps shall be in working condition;
- (iv) the Concessionaire delivers relevant records and reports pertaining to the Project Highway and its design, engineering, construction, operation, and maintenance including all operation and maintenance records and programmes and manuals pertaining thereto and complete as built Drawings on the Divestment Date;
- (v) the Concessionaire executes such deeds of conveyance, documents and other writings as the NHAI may reasonably require to convey, divest and assign all the rights, title and interest of the Concessionaire in the Project Highway free from all Encumbrances absolutely and free of any charge or tax unto the NHAI or its Nominee; and
- (vi) the Concessionaire complies with all other requirements as may be prescribed under Applicable Laws to complete the divestment and assignment of all the rights, title and interest of the Concessionaire in the Project Highway free from all Encumbrances absolutely and free of any charge or tax to NHAI or its nominee.

- 33.3 Not earlier than 3 (three) months before the expiry of the Concession Period but not later than 30 (thirty) days before such expiry, or in the event of earlier Termination of this Agreement, immediately upon but not later than 15 (fifteen) days from the date of issue of Termination Notice, the Independent Consultant shall verify, in the presence of a representative of the Concessionaire, compliance by the Concessionaire with the Divestment Requirements set forth in Clause 33.2 in relation to the Project Highway and, if required, cause appropriate tests to be carried out at the Concessionaire's cost for determining the compliance therewith. If any shortcomings in the Divestment Requirements are found by either Party, it shall notify the other of the same and the Concessionaire shall rectify the same at its cost. The provisions of Article XXXIV shall apply mutatis mutandis in relation to repair or curing of defects under this Article XXXIII.
- 33.4 Upon the Concessionaire conforming to all Divestment Requirements and handing over actual or constructive possession of the Project Highway to NHAI or a person nominated by NHAI in this regard, NHAI shall issue a certificate substantially in the form set forth in Schedule 'V' (the "Vesting Certificate") which will have the effect of constituting evidence of divestment of all rights, title and lien in the Project Highway by the Concessionaire and their vesting in NHAI pursuant hereto. Issue of the Vesting Certificate shall not be unreasonably withheld by NHAI. The divestment of all rights, title and lien in the Project Highway shall be deemed to be complete on the date when all the Divestment Requirements have been fulfilled or the Vesting Certificate has been issued, whichever is earlier, it being expressly agreed that any defect or deficiency in any Divestment Requirement shall not in any manner be construed or interpreted as restricting the exercise of any rights by NHAI or its nominee on or in respect of the Project Highway on the footing as if all Divestment Requirements have been complied with by the Concessionaire.
- 33.5 Notwithstanding anything to the contrary contained in this Agreement, any Termination Payments made by NHAI into the Escrow Account shall not be withdrawn therefrom for any purpose whatsoever until the Vesting Certificate has been issued by NHAI under this Article. Provided, however, that the aforesaid restriction shall not apply to withdrawals from the Escrow Account in favour of the Senior Lenders to the extent of Debt Due.

CHAPTER – VIII MISCELLANEOUS

XXXIV.DEFECTS LIABILITY

- 34.1 Not less than 30 months nor more than 36 months prior to the expiry of the Concession Period, the Concessionaire and the Independent Consultant shall conduct a joint inspection (the “Initial Inspection”) of the Project Highway and all Project Facilities.
- 34.2 Within 90 days after the completion of the Initial Inspection, the Concessionaire shall provide to the Independent Consultant a report on the condition of the Project Highway and the Project Facilities and a notice setting out the Concessionaire’s proposals as to the renewal works required to comply with the Divestment Requirements.
- 34.3 The Independent Consultant may, within 90 days after receipt of the notice from the Concessionaire in accordance with Clause 34.2, by notice to the Concessionaire object to the proposals giving details of the grounds for such objection and shall give the Independent Consultant’s proposals in respect of the renewal works.
- 34.4 If no agreement is reached between the Concessionaire and the Independent Consultant within 30 days of receipt of such notice, then either the Concessionaire or the Independent Consultant may refer the matter to the Disputes Resolution Procedure.
- 34.5 Upon agreement or determination in accordance with the Disputes Resolution Procedure, the Concessionaire shall carry out the renewal works at its own cost.
- 34.6 Not less than 9 months nor more than 12 months prior to the expiry of the Concession Period, the Concessionaire and the Independent Consultant shall conduct a joint inspection (the “Second Inspection”) of all elements of the Project Highway and Project Facilities (whether or not the Renewal Works have been carried out).
- 34.7 Within 30 days after the completion of the Second Inspection, the Concessionaire shall provide to the Independent Consultant a report on the condition of the Project Highway and Project Facilities and a notice setting out any revisions or additions to the renewal works required in order to ensure compliance with the Divestment Requirements.
- 34.8 The Independent Consultant may, within 30 days after receipt of the notice from the Concessionaire in accordance with Clause 34.7, by notice to the Concessionaire object to the proposed revisions giving details of the grounds for such objection and shall give the Independent Consultant proposals in respect of such matters.

- 34.9 If no agreement is reached between the Concessionaire and the Independent Consultant within 30 days of receipt of such notice, then either the Concessionaire or the Independent Consultant may refer the matter to the Dispute Resolution Procedure.
- 34.10 Upon agreement or determination in accordance with the Disputes Resolution Procedure, the Concessionaire shall carry out the renewal works (as so revised) at its own cost.
- 34.11 From the date which is 2 years prior to the expiry of the Concession Period a sum equal to the Fees realisable during the last two years of the Concession Period for a traffic volume calculated at the rate of 10,000 (ten thousand) PCUs per day per year or a higher sum estimated by the Independent Consultant for Renewal Works, shall notwithstanding anything to the contrary contained in this Agreement, be retained in the Escrow Account provided that if a Bank Guarantee of an equivalent sum in the form and content acceptable to NHAI has been furnished by the Concessionaire to NHAI, no such retention shall be made.
- 34.12 If following the Second Inspection, it is agreed or determined that no renewal works are required, then within 14 days of such agreement, 50% of the sums retained in accordance with Clause 34.11 shall be released from the Escrow Account to the Concessionaire.
- 34.13 Within 14 days after the issue of the Vesting Certificate issued in accordance with Article XXXIII the sums retained in accordance with Clause 34.11 shall be released from the Escrow Account to the Concessionaire.

XXXV. ASSIGNMENTS AND CHARGES

- 35.1 Subject to Clauses 35.3 and 35.4, this Agreement shall not be assigned by the Concessionaire save and except with prior consent in writing of NHAI, which consent NHAI shall be entitled to decline without assigning any reason whatsoever.
- 35.2 Subject to Clause 35.3, the Concessionaire shall neither create nor permit to subsist any encumbrance over or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreements to which Concessionaire is a party except with prior consent in writing of NHAI, which consent NHAI shall be entitled to decline without assigning any reason whatsoever.
- 35.3 Restraint set forth in Clauses 35.1 and 35.2 shall not apply to:

- (i) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project Highway;
- (ii) mortgages/pledges/hypothecation of goods/assets other than Project Assets, and those covered by the Substitution Agreement and their related documents of title arising or created in the ordinary course of business of the Project Highway and as security only for indebtedness to the Senior Lenders under the Financing Documents and/or for working capital arrangements for the Project Highway;
- (iii) assignment of rights, title and interest to or in favour of the Lenders pursuant to and in accordance with the Substitution Agreement in respect of financing by the Senior Lenders under the Financing Documents for the Project; and
- (iv) liens or encumbrances required by any Applicable Law.

35.4 Senior Lenders may exercise the rights of step-in or substitution as provided in the Substitution Agreement to be entered into among the Concessionaire, NHAI and Senior Lenders in the form set forth in Schedule 'U' provided that the person substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations under this Agreement as if it were the Concessionaire. Provided, however, that in the event of such step-in or substitution, an additional Cure Period of 90 (ninety) days shall be provided by NHAI to enable the Concessionaire to cure any breach or default subsisting on the day of such step-in or substitution. Provided further that if the Senior Lenders step in to operate and manage the Concession for a period not exceeding 90 (ninety) days, their liabilities shall be restricted to the obligations relating to and arising during such 90 (ninety) days period.

35.5 Notwithstanding anything to the contrary contained in this Agreement NHAI may assign any of its rights and benefits and/or obligations under this Agreement pursuant to any direction of GOI or by operation of law or in the course of its own business.

XXXVI.CHANGE IN LAW

36.1 If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after tax return or other financial burden, the aggregate financial effect of which exceeds Rs.10 million (Rupees ten million) in any Accounting Year, the Concessionaire may notify NHAI and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. Upon notification by the Concessionaire as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30

(thirty) days and either agree on amendments to this Agreement or on alternative arrangements to implement the foregoing.

Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 36.1, the Concessionaire may by notice in writing require NHAI to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been so such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the Statutory Auditors of the Concessionaire. NHAI shall make payment of such compensation within 15 (fifteen) days of receiving such notice or with interest @ SBI PLR if the payment thereof is delayed beyond such 15 (fifteen) days. If NHAI shall dispute the quantum of such compensation claim of the Concessionaire, the same shall be finally settled in accordance with the Dispute Resolution Procedure.

- 36.2 If as a result of Change in Law, the Concessionaire enjoys a reduction in costs or increase in net after tax return or other financial benefit, the aggregate financial effect of which exceeds Rs.10 million (Rupees ten million) in any Accounting Year, NHAI may so notify the Concessionaire and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been so such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Upon notification by the NHAI as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days and either agree on such amendments to this Agreement or on alternative arrangements to implement the foregoing.

Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 36.2, NHAI may by notice in writing require the Concessionaire to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the NHAI Representative. The Concessionaire shall make such payment within 15 (fifteen) days of receiving such notice or with interest @ SBI PLR if the payment is delayed beyond such 15 (fifteen) days. If the Concessionaire shall dispute such claim of NHAI, the same shall be finally settled in accordance with the Dispute Resolution Procedure.

- 36.3 Notwithstanding anything to the contrary contained in this Agreement, NHAI shall not be liable to reimburse to the Concessionaire any sums on account of any Change in Taxes if the same are recoverable from the users of the Project Highway or if the aggregate

financial effect of such changes in any Accounting Year is less than or equal to Rs.10 million (Rupees ten million).

XXXVII. LIABILITY AND INDEMNITY

37.1 General Indemnity

- (i) The Concessionaire will indemnify, defend and hold NHAI harmless against any and all proceedings, actions and, third party claims (other than a claim by NHAI or GOI for loss, damage and expense of whatever kind and nature arising out of the design, engineering, construction, procurement, Operation and Maintenance of the Project Highway or arising out of a breach by Concessionaire of any of its obligations under this Agreement except to the extent that any such claim has arisen due to NHAI Event of Default).
- (ii) NHAI will, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of defect in title and/or the rights of NHAI in the land comprised in the Site adversely affecting the performance of the Concessionaire's obligations under this Agreement and/or arising out of acts done in discharge of their lawful functions by NHAI, its Officers, servants, agents, subsidiaries and contractors ("NHA I Indemnified Persons") including NHAI Events of Default except to the extent that any such claim has arisen due to a negligent act or omission, breach of contract or breach of statutory duty on the part of the Concessionaire, its Subsidiaries, affiliates, contractors, servants or agents including due to Concessionaire Event of Default.

37.2 Without limiting the generality of Clause 37.1 the Concessionaire shall fully indemnify, save harmless and defend NHAI including its officers, servants, agents and subsidiaries from and against any and all loss and damages arising out of or with respect to (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits, (b) payments of taxes relating to the Concessionaire contractors, suppliers and representatives, income or other taxes required to be paid by the Concessionaire without reimbursement hereunder, or (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its Contractors which are payable by the Concessionaire or any of its contractors.

37.3 Without limiting the generality of the provisions of this Article XXXVII, the Concessionaire shall fully indemnify, save harmless and defend the NHAI indemnified Person from and against any and all damages which the NHAI Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual

property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the suspension of the injunction or restraint order. If, in any such suit claim or proceedings, the Project, or any part, thereof or comprised therein is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for NHAI a licence, at no cost to NHAI, authoring continued use of the infringing work. If the Concessionaire is unable to secure such licence within a reasonable time, the Concessionaire shall, at its own expense and without impairing the specifications and standards either replace the affected work, or part, or process thereof with non-infringing work or parts or process, or modify the same so that it becomes non-infringing.

37.4 In the event that either Party receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this Article XXXVII (the 'Indemnified Party') it shall notify the other Party ("Indemnifying Party") within 14 (fourteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim it may conduct the proceedings in the name of the Indemnified Party subject the Indemnified Party being secured against any costs involved to its reasonable satisfaction.

37.5 Defence of Claims

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

hereunder to the extent so compromised or settled.

37.5.2 If the Indemnifying Party has exercised its rights under Clause 37.4, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

37.5.3 If the Indemnifying Party exercises its rights under Clause 37.4 then the Indemnified Party shall nevertheless have the right to employ its own counsel and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of such Indemnified Party, when and as incurred, unless:

- (i) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or
- (ii) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
- (iii) the Indemnifying Party shall not in fact have employed independent counsel reasonably satisfactory to the Indemnified Party to assume the defence of such action and shall have been so notified by the Indemnified Party; or
- (iv) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
 - (a) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
 - (b) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement;

provided that if clauses (ii), (iii) or (iv) shall be applicable, counsel for the Indemnified Party shall have the right to direct the defence of such claim, action, suit or proceeding on behalf of the Indemnified Party and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

XXXVIII. RIGHTS AND TITLE OVER THE SITE

- 38.1 The Concessionaire shall have exclusive rights to the use of the Site in accordance with the provisions of this Agreement and for this purpose it may regulate the entry and use of the Project Highway by third parties.
- 38.2 The Concessionaire shall allow access to, and use of the Site for telegraph lines, electric lines or such other public purposes as NHAI may specify. Where such access or use causes any damage to the Project Highway and consequent financial loss to the Concessionaire, it may seek compensation or damages from such user of the Site as per Applicable Laws.
- 38.3 The Concessionaire shall not be liable to pay any property taxes for the Site.
- 38.4 For the purposes of claiming tax depreciation, the property representing the capital investment made by the Concessionaire shall be deemed to be acquired and owned by the Concessionaire.
- 38.5 The Concessionaire shall not sublet the whole or any part of the Site save and except as may be expressly set forth in this Agreement provided however that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project Highway including Project Facilities.

XXXIX.DISPUTE RESOLUTION

39.1 Amicable Resolution

- (a) Save where expressly stated to the contrary in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including incompleteness of the Project Highway between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Sub-clause (b) below.
- (b) In the event of any Dispute between the Parties, either Party may call upon the Independent Consultant to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Consultant or without the intervention of the Independent Consultant, either Party may require such Dispute to be referred to the Chairman of NHAI and the Chairman of the Board or Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the said two Chairmen shall meet not later than 7 (seven) days of the date of such request to discuss and attempt to

amicably resolve the Dispute. If such meeting does not take place within the said period or the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the said two Chairmen, either Party may refer the dispute to arbitration in accordance with the provisions of Clause 39.2.

- (c) If the Dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty) working days of the aforesaid notice in writing or such longer period as may be mutually agreed by the Parties then the provisions of Clause 42.2 shall apply.

39.2 Arbitration

39.2.1 Any Dispute, which is not resolved amicably as provided in Clause 39.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2 sub clause (b) below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration Act.

39.2.2 There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

39.2.3 The arbitrators shall issue a reasoned Award.

39.2.4 The venue of such arbitration shall be New Delhi, India.

39.3 Arbitration Awards to be Binding

39.3.1 The Concessionaire and NHAI undertake to carry out any decision or award of the arbitrators (the "Award") without delay. Awards relating to any Dispute shall be final and binding on the Parties as from the date they are made.

39.3.2 The Concessionaire and NHAI agree that an Award may be enforced against the Concessionaire and/or NHAI, as the case may be and their respective assets wherever situated.

39.3.3 This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder.

XL. DISCLOSURE

- 40.1 The Concessionaire shall make available for inspection by members of public free of charge during normal business hours on all working days copies of this Concession Agreement, the O&M Contract, the Tolling Contract and the State Support Agreement (hereinafter collectively referred to as "Public Documents") at the Concessionaire's Site office during the subsistence of this Agreement. The Concessionaire shall prominently display at the Toll Plazas public notices about the availability of the Public Documents for inspection and shall make available upon request and payment in advance of copying charges on no profit no loss basis to members of public copies of the said Public Documents.

XLI. REDRESSAL OF PUBLIC GRIEVANCES

- 41.1 The Concessionaire shall maintain a public relations office adjacent to each Toll Plaza and keep it open to public access at all times. At each such office, the Concessionaire shall open and maintain a register (the "Complaints Register") for recording of complaints by any person (the Complainant") at any time of the day. The availability of and access to such office and the Complaints Register shall be prominently displayed by the concessionaire at each Toll Plaza so as to bring it to the attention of all persons who are entering and exiting the Project Highway.
- 41.2 The Complaints Register shall be securely bound and kept in proper custody at the public relations office. Each page of the Register shall be duly numbered and each complaint recorded therein shall also be duly numbered. Soon after a complaint is registered the Complainant shall be given a receipt by such office stating the date and complaint number, which the Complainant may refer to in any subsequent correspondence or claim. The Complaints Register shall have appropriate columns including but not limited to the complaint number and date, name and address of the Complainant, the complaint and the action taken by the Concessionaire thereon.
- 41.3 The Concessionaire shall inspect the Complaints Register at reasonable intervals and take prompt steps for redressal of the grievances stated in each complaint. The action so taken by the Concessionaire shall be briefly noted in the 'Action taken' column of the Complaints Register and a suitable reply shall also be sent to the Complainant by post under a certificate of posting.

- 41.4 Within one week following the close of each calendar month, the Concessionaire shall send to NHAI a true photocopy of such pages of the Complaints Register on which any entries have been recorded of any Complaint on the Concessionaire during the course of such month. NHAI may in its discretion direct the concessionaire to take such further reasonable action as NHAI may deem appropriate for a fair and just redressal of any grievance. Where NHAI is of the opinion that the Complainant is entitled to any further redressal or compensation beyond what the Concessionaire is willing to provide, NHAI may refer the matter to the Consumer Redressal Forum having jurisdiction for its disposal in accordance with the provisions of the Consumer Protection Act, 1986.

XLII. ADVERTISING ON THE SITE

- 42.1 The Concessionaire shall not undertake or permit any form of Commercial advertising, display or hoarding at any place on the Site if such advertising, display or hoarding shall be visible to a user of the Project Highway while driving on such Highway.

XLIII. GOVERNING LAW AND JURISDICTION

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

XLIV. MISCELLANEOUS

44.1 Video Recording

During the Construction Period, the Concessionaire shall provide a video recording to NHAI every calendar quarter which will be compiled into a 3 (three) hour cassette, covering the construction of the Project Highway in that quarter. Such video recording shall be provided no later than fifteen days after the close of each quarter.

44.2 Waiver

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

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

44.3 Survival

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

All obligations surviving the cancellation, expiration or Termination of this Agreement shall only survive for a period of 5 (five) years following the date of such Termination or expiry of this Agreement.

44.4 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 expressly previously approved in writing by NHAI and executed by the person expressly authorised by a resolution of NHAI in this behalf.

44.5 Notices

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

- (a) in the case of the Concessionaire, be given by letter delivered by hand to the address given and marked for the attention of the person set out opposite the

corresponding signature below or to such other address marked for such other attention as the Concessionaire may from time to time designate by notice to NHAI, provided that notices or other communications to be given to an address outside New Delhi may (if they are subsequently confirmed by sending a copy thereof by first class registered airmail or by courier) be sent by facsimile to the number as the Concessionaire may from time to time designate by notice to NHAI; and

- (b) in the case of NHAI, be given by letter delivered by hand and be addressed to the Chairman, NHAI

Copies of all notices shall also be sent by facsimile and by registered acknowledgement due pre-paid post or courier.

Copies of all notices shall also be sent to the NHAI Representative.

44.6 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 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 this Agreement or otherwise.

44.7 No Partnership

Nothing contained in this Agreement shall be construed or interpreted as constituting a partnership between the Parties. Neither Party shall have any authority to bind the other in any manner whatsoever.

44.8 Language

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

44.9 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.

44.10 Counterparts

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

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

SIGNED SEALED AND DELIVERED

For and on behalf of

NATIONAL HIGHWAYS AUTHORITY OF INDIA

By

_____ (Signature)

_____ (Name)

_____ (Designation)

SIGNED, SEALED AND DELIVERED

For and on behalf of

CONCESSIONAIRE by:

_____ (Signature)

_____ (Name)

_____ (Designation)

In the presence of:

1.

2.

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CONCESSION AGREEMENT

THIS CONCESSION AGREEMENT is entered into on this the ----- day of ----- (Month) ----- (Year) at -----.

BETWEEN,

THE PRESIDENT OF INDIA in his executive capacity for the Government of India, represented by the Ministry of Surface Transport, Government of India, hereinafter referred to as "**GOI**" (which expression shall include its successors and assigns),

AND

M/s XXXX Limited, a company incorporated under the Companies Act, 1956, having its registered office at ----- hereinafter referred to as the "**Concessionaire**" (which expression shall include its permitted successors and assigns).

WHEREAS,

- A. GOI is keen to implement a project envisaging construction, operation and maintenance of ----- (more particularly described in Schedule 'A' and hereinafter referred to as "the Project") with private sector participation on Build, Operate and Transfer (BOT) basis and has carried out feasibility study for the Project;
- B. The Ministry of Surface Transport, Government of India (MOST) is responsible for development and maintenance of National Highways in India;
- C. For and on behalf of MOST, the Roads and Buildings Department¹ of Government of ----- invited tenders from eligible persons for implementing the Project;
- D. In response to the aforesaid invitation for tenders, MOST received bids from several persons including the Concessionaire/the Consortium² (as hereinafter defined) for implementing the Project;
- E. MOST, after evaluating the aforesaid bids, accepted the bid submitted by the Concessionaire/the Consortium and issued the Letter of Acceptance dated ----- (LOA) to the Concessionaire/the Consortium;
- F. ³In accordance with the requirements of the said tender/bid submitted by the Consortium, the Consortium has incorporated the Concessionaire as a special purpose vehicle to implement the Project on BOT basis, and GOI has agreed to grant to the Concessionaire, the Concession (as hereinafter defined) on the terms, conditions and covenants hereinafter set forth in this Agreement.

NOW THEREFORE THIS AGREEMENT WITNESSETH AS FOLLOWS:

¹ This recital would need changes depending on who invites tender.

² Reference to Consortium and the related provisions would be relevant only if the successful bidder was a Consortium.

³ This recital is Project specific – would be relevant only where the successful bidder being a consortium of bidders has floated SPV to implement the Project in accordance with bid conditions.

ARTICLE 1**DEFINITIONS AND INTERPRETATION****1.1 Definitions**

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

"Accounting Year" means the financial year commencing from 1st April of any calendar year and ending on 31st March of the next calendar year.

"Agreement" means this agreement including Schedules 'A' through 'U' hereto, and any amendments thereto made in accordance with the provisions of this Agreement.

"Applicable Laws" means all laws, promulgated or brought into force and effect by GOI or STG including regulations and rules made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, as may be in force and effect during the subsistence of this Agreement.

"Applicable Permits" means all clearances, permits, authorisations, consents and approvals under or pursuant to Applicable Laws, required to be obtained and maintained by the Concessionaire, in order to implement the Project and to provide Project Facility in accordance with this Agreement.

"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.

"Bill of Quantities" means bill of quantities set forth in Schedule 'E'.

"Cashflow Projections" means the estimates of cashflows of the Project as set out in Schedule 'H'.

"Change in Law" means the occurrence of any of the following after the date of this Agreement :

- a. the enactment of any new Indian law;
- b. the repeal, modification or re-enactment of any existing Indian law;
- c. the commencement of any Indian law which has not entered into effect until the date of this Agreement;
- d. a change in the interpretation or application of any Indian law by a court of record as compared to such interpretation or application by a court of record prior to the date of this Agreement; or
- e. any change in the rates of any of the Taxes.

"COD" means the commercial operations date of the Project which shall be the date on which the Independent Engineer has issued the Completion Certificate or the Provisional Certificate upon completion of construction of the Project and which shall, subject to the provisions of this Agreement, be not later than -----.

"Commencement Date" means the date on which the physical possession of the Project Site is delivered by GOI to the Concessionaire, which shall not be later than 30 days from the date of this Agreement.

"Completion Certificate" means the certificate issued by the Independent Engineer pursuant to Article 9.3(d).

"Concession" shall have the meaning ascribed thereto in Article 2.1.

"Concession Period" means the period as applicable specified in Article 2.2.

"Concessionaire" means M/s. XXXX and shall include its successors and permitted assigns expressly approved by GOI.

"Consortium"⁴ means the consortium consisting of (i) AAAA (ii) BBBB and (iii) CCCC formed/ acting pursuant to the Memorandum of Understanding dated ----- (Schedule 'U') entered into by them, for the purpose of bidding for the Project and in the event of being successful to implement the Project through a special purpose vehicle to be formed and incorporated by them in India.

"Construction Works" means all works and things necessary to achieve commercial operation of the Project in accordance with this Agreement.

"Contractor" means Person with whom the Concessionaire has entered into/ may enter into all or any of the Project Agreements.

"Cure Period" means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default.

"Debt Due" means the aggregate of the following sums expressed in Rupees outstanding and payable to the Lenders under the Financing Documents:

- (i) the principal amount of the debt provided by the Lenders under the Financing Documents for financing the Project (the "principal") which is outstanding as on the Termination Date but excluding any part of the principal that had fallen due for repayment one year prior to the Termination Date unless such repayment had been rescheduled with the prior consent of GOI; and
- (ii) all accrued interest, financing fees and charges payable on or in respect of the debt referred to in sub-clause (i) above up to the date preceding the Termination Date but excluding (a) any interest, fees or charges that had fallen due one year prior to the Termination Date, and (b) penal interest or charges payable under the Financing Documents to the Lenders.

"Dispute" shall have the meaning ascribed thereto in Article 19.1.

"Dispute Resolution Procedure" means the procedure for resolution of Dispute set forth in Article 19.

"Drawings" means all of the drawings, designs, calculations and documents pertaining to the Project as set forth in Schedule 'K' and shall include "as built" drawings of the Project.

"Emergency" means a condition or situation that is likely to endanger the security of the individuals on or about the Project including users thereof or which poses an immediate threat of material damage to any of the Project Assets.

"Encumbrance" means any encumbrance 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 without limitation any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances and encroachments on the Project Site.

"Equity" means the sum expressed in Rupees representing the equity share capital of the Concessionaire and shall include the funds advanced by any member of the Consortium or by any of its shareholders to the Concessionaire for meeting equity component of the Total

⁴ This definition is project specific – would be required only where a consortium is the successful bidder and not otherwise.

Project Cost. Provided, however, that for purposes of computing Termination Payment under this Agreement, Equity shall be reckoned as an amount that is arrived at after excluding from the equity share capital of the Concessionaire the sum by which the capital cost of the Project as stated by the Concessionaire for purposes of claiming Termination Payment exceeded the Total Project Cost unless such excess cost has been incurred with the approval of the Lenders and GOI.⁵ Provided further, any equity brought in after COD shall not be considered or taken into account for the purpose of Termination Payment.

"Exempted Vehicles" means vehicles specified as such in the Fee Notification.

"Fee" means the fee chargeable for a vehicle using the Project Facility in accordance with the Fee Notification.

"Fee Notification" means the notification as per draft appended hereto as Schedule 'F' to be published by GOI in the Extra Ordinary Gazettee of India, in exercise of the powers conferred by the relevant provisions of the National Highways Act, 1956 (the NH Act) and the rules framed thereunder, authorising the levy and collection of the Fee by the Concessionaire in accordance with the provisions of this Agreement and includes a revised Fee Notification, if any, issued pursuant to Article 4.2..

"Financing Documents" means the documents executed by the Concessionaire in respect of financial assistance (including refinancing) for the Project to be provided by the Lenders by way of loans, advances, subscription to debentures and other debt instruments and guarantees, risk participation, take-out financing or any other form of credit enhancement and shall include loan agreements, guarantee agreements, subscription agreements, notes and any documents providing security for such financial assistance, and includes amendments or modifications made thereto.

"Financial Close" means the date on which the Financing Documents providing for funding by the Lenders have become effective and the Concessionaire has immediate access to such funding under the Financing Documents.

"Force Majeure Event" shall have meaning ascribed thereto in Article 15.1.

"GOI" means the Government of India.

"Good Industry Practice" means those practices, methods, techniques, standards, skills, diligence and prudence which are generally and reasonably expected of and accepted internationally from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and acting generally in accordance with the provisions of the NH Act, and would mean good engineering practices in the design, engineering, construction and project management and which would be expected to result in the performance of its obligations by the Concessionaire and in the operation and maintenance of the Project in accordance with this Agreement, Applicable laws, Applicable Permits, reliability, safety, environment protection, economy and efficiency.

"Government Agency" means GOI, STG or any state government or governmental, department, commission, board, body, bureau, agency, authority, instrumentality, court or other judicial or administrative body, central, state, or local, having jurisdiction over the Concessionaire, the Project Assets or any portion thereof, or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement.

⁶"Implementation Period" means the period beginning from the Commencement Date and ending on the COD

⁵ This would ensure that only genuine cost overrun funded by equity is included in the term 'Equity'. We recommend that this Agreement should recognise and address the issue of genuine cost overruns.

⁶ Implementation Period shall be estimated construction period plus a reasonable time of say 4-6 months required for the Concessionaire for all preconstruction activities such as investigation/study, designing, obtaining necessary approvals and arrangement of finance.

"Independent Engineer" means the Independent Engineer appointed pursuant to Article 6.1.

"Indirect Political Event" shall have the meaning ascribed thereto in Article 15.3.

"Initial Investment" shall have the meaning ascribed thereto in Schedule 'H'

"Internal Rate of Return" shall have the meaning ascribed thereto in Schedule 'H'.

"Lenders" means financial institutions, banks, funds, trusts or trustees of the holders of debentures or other securities their successors and assigns, who provide financial assistance to the Concessionaire under any of the Financing Documents.

"Maintenance Manual" shall have the meaning ascribed to it in Article 9.5.

"Maintenance Programme" shall have the meaning ascribed to it in Article 9.6.

"Material Adverse Effect" means material adverse effect on (a) the ability of the Concessionaire to observe and perform any of its rights and obligations under and in accordance with the provisions of this Agreement and/or (b) the legality, validity, binding nature or enforceability of this Agreement.

"Material Breach" means a breach by either Party of any of its obligations under this Agreement which has/ likely to have a Material Adverse Effect on the Project and which such Party shall have failed to cure within the Cure Period.

"Minimum Maintenance Requirements" means minimum maintenance requirements for the maintenance of the Project as set forth in Schedule 'O'.

"Non Political Event" shall have the meaning ascribed thereto in Article 15.2.

"O&M" means the operation and maintenance of the Project during Operations Period including but not limited to functions of maintenance, collection and retention of Fees and performance of other services incidental thereto.

"O&M Contract" means the Operation and Maintenance Contract that may be entered into between the Concessionaire and the O&M Contractor for O&M of the Project/Project Facility.

"O&M Contractor" means the person or entity with whom the Concessionaire has entered into an O&M Contract for discharging O&M functions for and on behalf of the Concessionaire.

"O&M Expense" means expenses incurred by or on behalf of the Concessionaire, duly certified by its Statutory Auditors for all regularly scheduled and reasonably anticipated O&M during Operations Period, including, without limitation (a) all cost of salaries and other employee compensation and contract fee payable to the O&M Contractor, if any, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all franchise, excise, property and other similar taxes and all costs and fees incurred in order to obtain and maintain all Applicable Permits necessary for the O&M of the Project/Project Facility at its full design capacity, (e) all repair, replacement and maintenance costs of the Project/Project Facility, and (f) all other expenditures required to be incurred under Applicable Law or under Applicable Permits necessary for the operation and maintenance of the Project according to the Specifications and Standards at its full design capacity.

"Operations Period" means the period commencing from COD and ending at the expiry of the Concession Period.

"Parties" means the parties to this Agreement collectively and "Party" shall mean either of the Parties to this Agreement individually.

"Performance Security" means the Performance Security for construction or Performance Security for operation and maintenance as applicable in terms of Article 3.

"Person" means any individual, company, corporation, partnership, joint venture, trust, unincorporated organisation, government or Government Agency or any other legal entity.

"Political Event" shall have the meaning ascribed thereto in Article 15.4.

"Project" means the project described in Schedule 'A' which the Concessionaire is required to design, engineer, procure, finance, construct, operate, maintain and transfer in accordance with the provisions of this Agreement.

"Project Agreements" means collectively this Agreement, any contract for the design, engineering, procurement and construction of the Project, O&M Contract and any other material contract (other than the Financing Documents) entered into or may hereafter be entered into by the Concessionaire in connection with the Project.

"Project Assets"⁷ means all physical and other assets relating to and forming part of the Project including but not limited to (i) rights over the Project Site in the form of license, right of way or otherwise, (ii) tangible assets such as civil works including foundations, embankments, pavements, road surface, interchanges, bridges, approaches to bridges and flyovers, road overbridges, drainage works, lighting facilities, traffic signals, sign boards, milestones, Toll Plaza, equipment for the collection of tolls or relating to regulation of traffic, electrical works for lighting on the Project, telephone and other communication systems and equipment for the Project, rest areas, wayside amenities, administration and maintenance depots, relief centers, service facilities etc. (iii) Project Facility situate on the Project Site, (iv) the rights of the Concessionaire under any Project Agreements, (v) financial assets, such as security deposits for electricity supply, telephone and other utilities, etc., (vi) insurance proceeds subject to Lenders' rights thereto and (vii) Applicable Permits and authorisations relating to or in respect of the Project.

"Project Completion" shall have the meaning ascribed thereto in Article 9.2.

"Project Completion Schedule" means the progressive Project milestones set forth in Schedule 'D' for the implementation of the Project.

"Project Facility" means collectively the facilities on the Project Site to be constructed, built, installed, erected or provided by the Concessionaire for use of the traffic by implementing the Project and more specifically set out in Schedule 'C'.

"Project Site" means the real estate particulars whereof are set out in Schedule 'B' on which the Project is to be implemented and the Project Facility is to be provided in accordance with this Agreement.

"Provisional Certificate" shall have the meaning ascribed to it in Article 9.3(e).

"Punch List" shall have the meaning ascribed thereto in Article 9.3(e).

"PWD Engineer" means the Engineer in the Public Works Department/ Roads and Building Department of STG designated by GOI under written communication to the Concessionaire, to undertake, perform, carry out such functions, duties, responsibilities, services and activities set forth in Part 'B' of Schedule 'J' hereto and elsewhere in this Agreement.

"Rs." or "Rupees" refers to the lawful currency of the Republic of India.

"SBI PLR" means the prime lending rate per annum for loans with 1 (one) year maturity as fixed from time to time by the State Bank of India, and in the absence of such rate, the

⁷ Some of the assets mentioned here may or may not be relevant to a specific project, hence suitable deletion/addition which are project specific needs to be made.

average of the prime lending rates for loans with 1 (one) year maturity fixed by the Bank of India and the Bank of Baroda and failing that any other arrangement that substitutes such prime lending rate as mutually agreed between the Parties.

"Scheduled Project Completion Date" shall have the meaning set forth in Article 9.2(c).

"Specifications and Standards" means the specifications and standards relating to the quality, capacity and other requirements for the Project as set forth in Schedule 'L' and any modifications thereof, or additions thereto as included in the design and engineering for the Project submitted by the Concessionaire to, and expressly approved by GOI.

"Sponsors" shall mean (i) ----- (ii) ----- (iii) ----- and (iv) -----.

"STG" means the government of the State of -----.

"State Support Agreement" means the agreement substantially in the form set out in Schedule 'I' to be entered into amongst STG, GOI and the Concessionaire.

"Statutory Auditors" means a reputed firm of Chartered Accountants duly licensed to practice in India acting as statutory auditors of the Concessionaire.

"Steering Group" means the Steering Group constituted pursuant to Article 7.1.

"Substitution Agreement" means the agreement to be entered into among the Concessionaire, GOI, STG and the Lenders in the form set forth in Schedule 'T' providing, inter alia, for the substitution of the Concessionaire by another Person subject to and in accordance with the provisions of this Agreement and the Substitution Agreement.

"Termination" means termination of this Agreement and the Concession hereunder pursuant to a Termination Notice or otherwise in accordance with the provisions of this Agreement but shall not, unless the context otherwise requires, include the expiry of this Agreement/Concession due to expiry to the Concession Period in the normal course.

"Termination Date" means the date on which the Termination occurs which shall be the date on which Termination Notice has been delivered or deemed to have been delivered by a Party issuing the same to the other Party in accordance with the provisions of this Agreement.

"Termination Notice" means a communication in writing by a Party to the other Party regarding Termination in accordance with the applicable provisions of this Agreement.

"Termination Payment" means the aggregate of the amounts payable by GOI to the Concessionaire under this Agreement upon Termination including Termination Payment receivable by the Concessionaire pursuant to Article 14.1.

"Tests" means the tests to be carried out as set forth in and in accordance with Schedule 'M' to determine the Project Completion and its certification by the Independent Engineer prior to commencement of commercial operation of the Project.

"Toll Plaza" means collectively the structures, equipment, system or mechanism and barriers erected or installed for the purpose of regulating the entry/exit of vehicles using the Project and for collection of Fee in accordance with the provisions of this Agreement.

"Total Project Cost" means the lowest of the following :

- (a) a sum of Rs. [] millions⁸;
- (b) actual capital cost of the Project upon completion of the Project as certified by the Statutory Auditors; or
- (c) total project cost as set forth in Financing Documents.

⁸ A very conservative estimation of this amount would considerably impact the bankability of this Agreement. It is rather recommended that the definition be modified by omitting reference to project cost specified in the bid. In the alternative a realistic estimation of the sum to be specified in (a) should be ensured.

“WPI” means the wholesale price index published monthly by the Ministry of Industry, GOI and shall include any index which substitutes the WPI.

1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

- (a) any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- (b) references to Indian law shall include the laws, acts, ordinances, rules, regulations, guidelines or byelaws which have the force of law in any State or Union Territory forming part of the Union of India;
- (c) the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organisations or other entities (whether or not having a separate legal entity);
- (d) the headings are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (e) terms and words beginning with capital letters and defined in this Agreement including the Schedules;
- (f) the words "include" and "including" are to be construed without limitation;
- (g) references to "construction" include, unless the context otherwise requires investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction;
- (h) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (i) any reference to day shall mean a reference to a calendar day;
- (j) any reference to month shall mean a reference to a calendar month;
- (k) the Schedules 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;
- (l) 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;
- (m) references to recitals, Articles, sub-articles, clauses, or Schedules in this Agreement shall, except where the context otherwise requires, be deemed to be references to recitals, Articles, sub-articles, clauses and Schedules of or to this Agreement;
- (n) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effectual only if it is in writing under the hands of duly authorised representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;

- (o) 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; and
- (p) the damages payable by either Party to the other of them as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty or liquidated damages;
- (q) unless otherwise expressly provided in this Agreement, any documentation required to be provided or furnished by the Concessionaire to GOI/Steering Group and/or the Independent Engineer shall be provided free of cost and in three copies and if GOI/Steering Group and/or the Independent Engineer is required to return any such documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.

1.2.2 Measurements and Arithmetic Conventions

All measurements and calculations shall be in metric system and calculations done to 2 decimal places, with the third digit of 5 or above being rounded up and below 5 being rounded down except in Fee calculation which shall be rounded off to nearest rupee.

1.2.3 In case of ambiguities or discrepancies within this Agreement, the following shall apply:

- (i) between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;
- (ii) between the Articles and the Schedules, the Articles shall prevail;
- (iii) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- (iv) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail;
- (v) between any value written in numerals and that in words, the latter shall prevail.

ARTICLE 2 CONCESSION AND PROJECT SITE

2.1 Grant of Concession

Subject to and in accordance with the terms and conditions set forth in this Agreement, GOI hereby grants and authorises the Concessionaire to investigate, study, design, engineer, procure, finance, construct, operate and maintain the Project/Project Facility and to exercise and/or enjoy the rights, powers, privileges, authorisations and entitlements as set forth in this Agreement, including but not limited to the right to levy, demand, collect and appropriate Fee from vehicles and Persons liable to payment of Fee for using the Project/ Project Facility or any part thereof (collectively "the Concession").

2.2 Concession Period

The Concession hereby granted is for a period of ----- years --- months and ----- days commencing from the Commencement Date (the Concession Period) during which the Concessionaire is authorised to implement the Project and to operate Project Facility in accordance with the provisions hereof.

Provided that ;

- (a) in the event of the Concession being extended by GOI beyond the said period of ---- years ---- months and ----- days in accordance with the provisions of this Agreement, the

Concession Period shall include the period/aggregate period by which the Concession is so extended, and

- (b) in the event of Termination, the Concession Period shall mean and be limited to the period commencing from the Commencement Date and ending with the Termination.

2.3 Acceptance of the Concession

The Concessionaire hereby accepts the Concession and agrees and undertakes to implement the Project/provide Project Facility, and to perform/discharge all of its obligations in accordance with the terms and conditions set forth in this Agreement.

2.4 Project Site

- (a) GOI hereby undertakes to handover to the Concessionaire physical possession of the Project Site free from Encumbrance within 30 days from the date of this Agreement together with the necessary rights of way/way leaves for the purpose of implementing the Project in accordance with this Agreement.
- (b) GOI confirms that upon the Project Site being handed over pursuant to the preceding sub-article (a) the Concessionaire shall have the exclusive right to enter upon, occupy and use the Project Site and to make at its costs, charges and expenses such development and improvements in the Project Site as may be necessary or appropriate to implement the Project and to provide Project Facility subject to and in accordance with the provisions of this Agreement.

2.5 Use of the Project Site

The Concessionaire shall not without prior written consent or approval of GOI use the Project Site for any purpose other than for the purposes of the Project/the Project Facility and purposes incidental thereto as permitted under this Agreement or as may otherwise be approved by GOI.

2.6 Information about the Project Site

The information about the Project Site set out in Schedule 'B' is provided by GOI in good faith and with due regard to the matters for which such information is required by the Concessionaire. GOI agrees to provide to the Concessionaire, upon a reasonable request, any further information relating to the Project Site, which GOI may now possess or may hereafter come to possess. Subject to this GOI makes no representation and gives no warranty to the Concessionaire in respect of the condition of the Project Site.

2.7 Peaceful Possession

GOI warrants that :

- (a) the Project Site together with the necessary right of way/ way leaves having been acquired through the due process of law belongs to and vested in GOI, and that GOI has full powers to hold, dispose of and deal with the same consistent, inter alia, with the provisions of this Agreement;
- (b) the Concessionaire shall have no obligation/liability as to payment of any compensation whatsoever to or the rehabilitation and resettlement of any Person from whom the Project Site or any part thereof had been acquired and that the same shall be the sole responsibility of GOI; and
- (c) the Concessionaire shall, subject to complying with the terms and conditions of this Agreement, remain in peaceful possession and enjoyment of the Project Site during the Concession Period. In the event the Concessionaire is obstructed by any Person claiming any right, title or interest in or over the Project Site or any part thereof or in the event of

any enforcement action including any attachment, distraint, appointment of receiver or liquidator being initiated by any Person claiming to have any interest in/ charge on the Project Site or any part thereof, GOI shall, if called upon by the Concessionaire, defend such claims and proceedings and also keep the Concessionaire indemnified against any direct or consequential loss or damages which the Concessionaire may suffer, on account of any such right, title, interest or charge.

2.8 Rights and Title over the Project Site

- (a) The Concessionaire shall have exclusive rights to the use of the Project Site in accordance with the provisions of this Agreement and for this purpose it may regulate the entry and use of the same by third parties.
- (b) The Concessionaire shall allow access to, and use of the Project Site/ Project Facility for telegraph lines, electric lines or such other public purposes as GOI may specify, provided that such access or use does not result in a Material Adverse Effect or closure of Project Facility for a period exceeding 120 days and that GOI undertakes to ensure that the Project Facility is restored at the cost and expenses of GOI as per the Specifications and Standards. Where such access or use causes any loss of Fee to the Concessionaire, GOI shall compensate the Concessionaire for such loss of Fee by increasing the Concession Period suitably.
- (c) The Concessionaire shall not part with or create any Encumbrance on the whole or any part of the Project Site save and except as set forth and permitted under this Agreement provided however that nothing contained herein shall be construed or interpreted as restriction on the right of the Concessionaire to appoint any Contractor for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project / Project Facility.

2.9 Environmental Clearance

GOI confirms that the Project/Project Site has been granted clearances relating to environmental protection and conservation as listed in Schedule 'G'⁹. The Concessionaire shall, however, apply for and obtain any other Applicable Permits related to environmental matters that may be necessary or required for the Project under any Applicable Laws.

ARTICLE 3 PERFORMANCE SECURITY

3.1 Performance Security

- (a) The Concessionaire shall, for due and punctual performance of its obligations during the Implementation Period, deliver to GOI, simultaneously with the execution of this Agreement a bank guarantee from a scheduled bank acceptable to GOI, in the form set forth in Schedule 'Q', (the "Performance Security for construction") for a sum of Rs. -----¹⁰.
- (b) The Concessionaire shall for due and punctual performance of obligations during the Operations Period deliver to GOI, on or before the COD, the bank guarantee from a scheduled bank acceptable to GOI in form set forth in Schedule 'R' (Performance Security for operation and maintenance) for a sum of Rs. -----¹¹.

3.2 Fresh Performance Security

In the event of the encashment of the Performance Security by GoI pursuant to Encashment Notice issued in accordance with the provisions of Article 16 the Concessionaire shall within

⁹ The environmental clearances required for the Project.

¹⁰ 3% of estimated project cost, to be indicated in the Bid Document

¹¹ 1% of estimated project cost, to be indicated in the Bid Document.

30 (thirty) days of the Encashment Notice furnish to GOI fresh Performance Security failing which GOI shall be entitled to terminate this Agreement in accordance with the provisions of Article 16. The provisions set forth in Article 3.1 above shall apply mutatis mutandis to such fresh Performance Security.

ARTICLE 4 FEE

4.1 Levy, Collection and appropriation of Fee

- (a) Subject to the provisions of this Agreement, the Concessionaire shall during Operations Period be entitled to levy, demand and collect Fee in accordance with the Fee Notification¹² and to appropriate the same.
- (b) GOI undertakes to publish the Fee Notification as per Schedule 'F' within 180 days from the Scheduled Project Commencement Date.
- (c) ¹³Subject to the Fee Notification, the Concessionaire may formulate, publish and implement appropriate scheme(s) for frequent users as may reasonably be required by local circumstances from time to time.
- (d) The Concessionaire shall not levy and collect any Fee until it has received Completion Certificate or the Provisional Certificate.
- (e) The Concessionaire shall not collect any Fee in relation to Exempted Vehicles.
- (f) The Concessionaire shall conspicuously display the Fee at the Toll Plazas and also at a distance about 200 meters ahead of Toll Plazas on either side of Project Facility.

4.2 Revision of Fee

In the event of extension in Concession Period in accordance with provisions of this Agreement, GOI shall issue revised Fee Notification(s) taking into account increase in Fee @ 10% every two years.

ARTICLE 5 OBLIGATIONS AND UNDERTAKINGS

In addition to and not in derogation or substitution of any of the obligations set out elsewhere in this Agreement, the Parties agree and undertake as under :

5.1 General Obligations of the Concessionaire

The Concessionaire shall at its own cost and expense :

- (i) investigate, study, design, construct, operate and maintain the Project Assets/Project Facility in accordance with the provisions of this Agreement, Good Industry Practice and Applicable Laws;
- (ii) obtain all Applicable Permits in conformity with the Applicable Laws and be in compliance with thereof at all times during the Concession Period;

¹² Besides the initial fee, this would take into account increase in Fee biannually at 10% of the prevailing Fee – Revised Fee calculated and rounded off to nearest rupee shall be indicated for each 2 year period commencing from 2 years after COD.

¹³ Depending on the feasibility study for a specific project, it might be possible to stipulate a special toll regime for frequent users of the Project Facility and the same could be specified in the bid document.

- (iii) procure and maintain in full force and effect, as necessary, appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used in or incorporated into the Project;
- (iv) ensure and procure that each Project Agreement contains provisions that would entitle GOI or a nominee of GOI to step into such agreement at GOI's discretion, in place and substitution of the Concessionaire in the event of Termination pursuant to the provisions of this Agreement;
- (v) provide all assistance to the Independent Engineer/PWD Engineer and Steering Group as they may reasonably require for the performance of their duties and services under this Agreement;
- (vi) provide to the Steering Group reports on a regular basis during the Implementation Period and the Operations Period in accordance with the provisions of this Agreement;
- (vii) appoint, supervise, monitor and control the activities of Contractors under their respective Project Agreements as may be necessary;
- (viii) make efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire's obligations under this Agreement;
- (ix) develop, implement and administer a surveillance and safety program for the Project/Project Facility and the users thereof and the Contractors personnel engaged in the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Applicable Laws and Good Industry Practice;
- (x) take all reasonable precautions for the prevention of accidents on or about the Project Site/Project Facility and provide all reasonable assistance and emergency medical aid to accident victims;
- (xi) not to place or create nor to permit any Contractor or other person claiming through or under the Concessionaire to create or place any Encumbrance over all or any part of the Project Assets, or on any rights of the Concessionaire therein, save and except as expressly set forth in this Agreement;
- (xii) make its own arrangements for quarrying, if necessary, and observe and fulfill the environmental and other requirements under the Applicable Laws and Applicable Permits;
- (xiii) be responsible for safety, soundness and durability of the Project Facility including all structures forming part thereof and their compliance with the Specifications and Standards;
- (xiv) ensure that the Project Site remains free from all encroachments and take all steps necessary to remove encroachments, if any;
- (xv) make payment to Police Department or any Government Agency, if required, for provision of such services as are not provided in the normal course or are available only on payment;
- (xvi) operate and maintain the Project at all times during the Operations Period in conformity with this Agreement including but not limited to the Specifications and Standards, the Maintenance Programme and Good Industry Practice;

- (xvii) remove promptly according to Good Industry Practice, from the Project Site, all surplus construction machinery and materials, waste materials (including, without limitation, hazardous materials and waste water), rubbish and other debris (including without limitation accident debris) and keep the Project Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable Permits.

5.2 Obligations of the Concessionaire during Implementation Period

- (a) The Concessionaire shall, before commencement of construction of the Project;
 - (i) submit to the Independent Engineer with due regard to Project Completion Schedule and Scheduled Project Completion Date, its design, engineering and construction time schedule and shall formulate and provide Critical Path Method (CPM)/ Project Evaluation and Review Technique (PERT) charts for the completion of the said activities;
 - (ii) have requisite organisation and designate and appoint suitable officers/ representatives as it may deem appropriate to supervise the Project and to deal with the Independent Engineer/the Steering Group and to be responsible for all necessary exchange of information required pursuant to this Agreement;
 - (iii) undertake, do and perform all such acts, deeds and things as may be necessary or required to adhere to the Project Completion Schedule and to achieve Project Completion under and in accordance with this Agreement;
 - (iv) construct, provide and maintain a furnished site office accommodation for the Independent Engineer at the Project Site; and
 - (v) provide and maintain an adequately equipped field laboratory as required for the Project Site control on the quality of materials and the Construction Works.
- (b) The Concessionaire shall, at all times, afford access to the Project Site, to the Steering Group, the authorised representatives of GOI, the Independent Engineer and officer of any Government Agency having jurisdiction over the Project, including those concerned with safety, security or environmental protection to inspect the Project and to investigate any matter within their authority and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.
- (c) ¹⁴The Concessionaire shall:
 - (i) apply for and obtain all necessary clearances and/or approvals for the construction of Road Over Bridge (ROB)/ Road Under Bridge (RUB) from the Ministry of Railways;
 - (ii) shall apply for and obtain all necessary approvals of the General Arrangement Drawing (GAD), detailed designs and all construction drawings for the construction of ROB from the concerned zone of Railways;
 - (iii) make payments, if any, to Railways for (a) for approval of designs, (b) shifting of utilities, (c) safety features, (d) supervision of construction and (e) maintenance during the Concession Period;
 - (vi) shall also make arrangements for entering into an agreement with the concerned State Government and/or railway zone for construction of the ROB/RUB as per the requirements of the Ministry of Railway. A model agreement is provided at Schedule 'S'.

¹⁴ This would be project specific where construction of road over bridge across a rail line or rail under pass would be involved.

- (d) The Concessionaire shall be responsible for ensuring that any existing utility on, under or above the Project Site is kept in continuous satisfactory use, if necessary, by the use of suitable temporary or permanent diversions.
- (e) The Concessionaire shall bear all costs and charges for special or temporary rights of way required by it in connection with access to the Project Site. The Concessionaire shall obtain at its cost such facilities on or outside the Project Site as may be required by it for the purposes of the Project and the performance of its obligations under this Agreement .

5.3 Obligations of GOI.

GOI shall:

- (i) hand over the physical possession of Project Site together with necessary right of way/ way leaves to the Concessionaire within 30 days from the date of this Agreement, free from any Encumbrance;
- (ii) procure execution of the State Support Agreement within 30 days from the date of this Agreement;
- (iii) grant or where appropriate provide necessary assistance to the Concessionaire in securing Applicable Permits;
- (iv) grant in a timely manner all such approvals, permissions and authorisations which the Concessionaire may require or is obliged to seek from GOI in connection with implementation of the Project and the performance of the Concessionaire's obligations under this Agreement;
- (v) subscribe to the Substitution Agreement within 15 days of intimation by the Concessionaire regarding Financial Close;
- (vi) not include any additional category of vehicles in the list of Exempted Vehicles during the Concession Period;
- (vii) ensure peaceful use of the Project Site by the Concessionaire under and in accordance with the provisions of this Agreement without any let or hindrance from GOI or persons claiming through or under it;
- (viii) upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent facilities/utilities;
- (ix) procure that no barriers are erected or placed by GOI or any Governmental Agency on the Project Facility/Project Site, except on account of any law and order situation or upon national security considerations;
- (x) assist the Concessionaire in obtaining necessary authority to regulate traffic on the Project Site/Project Facility subject to and in accordance with the Applicable Laws;
- (xi) assist the Concessionaire in obtaining police assistance against payment of prescribed costs and charges, if any, for traffic regulation, patrolling and provision of security on the Project Site/Project Facility and implementing this Agreement in accordance with the provisions hereof;
- (xii) observe and comply with all its obligations set forth in this Agreement.

ARTICLE 6 INDEPENDENT ENGINEER

6.1 Appointment of Independent Engineer

- (a) The Concessionaire shall within 30 days from the date hereof submit to GOI a panel consisting of atleast three reputed firms or companies or body corporates or a combination thereof, having necessary expertise for appointment of the Independent Engineer, to undertake, perform, carry out the duties, responsibilities, services and activities set forth in Part A of Schedule 'J' and elsewhere in this Agreement.
- (b) GOI shall within 30 days from the date of receipt of such panel, appoint the Independent Engineer from out of such panel, and communicate the same to the Concessionaire. The tenure and the scope of work and the reports to be submitted by the Independent Engineer shall be as set out in Part A of Schedule 'J'.
- (c) The Independent Engineer shall submit to the Steering Group reports at least once every month or more frequently as the situation may warrant on the progress of implementation of the Project. Such reports of Independent Engineer shall include but not be limited to the matters and things set forth in said Schedule 'J'.
- (d) The Independent Engineer shall submit bills for periodic payment in accordance with terms of its appointment to GOI. Upon certification of such bills being intimated in writing by GOI, the Concessionaire shall within 15 days of such intimation, pay to GOI 50% of the amount of bills certified by GOI.
- (e) If either party disputes any advice, instruction or decision of the Independent Engineer, the same shall be resolved in accordance with the Dispute Resolution Procedure.

6.2 Termination and Fresh Appointment

If GOI or the Concessionaire have reason to believe that the Independent Engineer is not discharging its duties in a fair, appropriate and diligent manner, GOI may terminate the appointment of the Independent Engineer and appoint another Independent Engineer in accordance with the preceding sub - articles (a) and (b) of Article 6.1 above.

ARTICLE 7 STEERING GROUP

7.1 Constitution

GOI shall through an office order, constitute a Steering Group comprising of a representative each of the GOI, STG and the Concessionaire within 60 days of this Agreement.

7.2 Functions

The Steering Group shall hold meetings atleast once every three months to review the progress during the Implementation Period and every six months during the Operations Period. The Steering Group shall carry out such functions and exercise such powers as are prescribed/conferred under this Agreement.

ARTICLE 8

DRAWINGS

8.1 Preparation of Drawings.

The Concessionaire shall, at its cost, charges and expenses, cause Drawings to be prepared in accordance with the Specification and Standards. The Concessionaire may, for this purpose, adopt with or without any modifications the Drawings, if any, made available by GOI, provided, notwithstanding such adoption, the Concessionaire shall be solely responsible for the adequacy of the Drawings.

8.2 Review and Approval of Drawings.

- (a) The Concessionaire shall promptly and in such sequence as is consistent with the Project Completion Schedule, submit a copy each of all Drawings to the Independent Engineer and the Steering Group .
- (b) By forwarding the Drawings to the Independent Engineer and the Steering Group pursuant to sub-article (a) above, the Concessionaire represents that it has determined and verified that the design and engineering including field construction criteria related thereto are in conformity with the Specifications and Standards.
- (c) Within 15 (fifteen) days of the receipt of the Drawings, Independent Engineer shall review the same taking into account, inter alia, comments of the Steering Group, if any, on such Drawings made available to the Independent Engineer, and convey its comments/observations, if any, thereon to the Concessionaire with particular reference to the conformity or otherwise with the Specifications and Standards. It is expressly agreed that notwithstanding any review or failure to review by the Independent Engineer or the Steering Group or any comments/observations of the Independent Engineer/ Steering Group, GOI shall not be liable for the adequacy of the Drawings and that the Concessionaire shall solely be responsible therefor and shall not be relieved or absolved in any manner whatsoever of its obligations, duties and liabilities as set forth in this Agreement.
- (d) If the comments/observations of Independent Engineer indicate that the Drawings are not in conformity with the Specifications and Standards, such Drawings shall be revised by the Concessionaire to the extent necessary and resubmitted to Independent Engineer for further review. Independent Engineer shall give its observations and comments, if any, within 15 (fifteen) days of the receipt of such revised Drawings. Provided, however, that any observations or comments of Independent Engineer or failure of Independent Engineer to give any observations or comments on such revised Drawings shall not relieve or absolve the Concessionaire of its obligation to conform to such Specifications and Standards.
- (e) If the Independent Engineer does not object to the Drawings submitted to it by the Concessionaire within a period stipulated in above sub-article (c) or (d) as applicable, the Concessionaire shall be entitled to proceed with the Project accordingly.
- (f) The Concessionaire shall be responsible for delays in Project Completion and consequences thereof caused by reason of any Drawings not being in conformity with the Specifications and Standards and shall not be entitled to seek any relief in this regard from GOI.
- (g) Within 90 (ninety) days of the COD, the Concessionaire shall furnish to GOI three copies of "as built" Drawings duly vetted by the Independent Engineer reflecting the Project as actually designed, engineered and constructed, including without limitation an "as built" survey illustrating the layout of the Project and setback lines, if any, of the buildings and structures forming part of Project Facility.

ARTICLE 9

PROJECT IMPLEMENTATION AND OPERATIONS

9.1 Monitoring and Supervision during Implementation

- (a) During the Implementation Period, the Concessionaire shall furnish to the Steering Group quarterly reports on actual progress of the Construction Works and furnish any other relevant information as may reasonably be required by the Steering Group.
- (b) For the purposes of determining that Construction Works are being undertaken in accordance with Specifications and Standards and Good Industry Practice and for quality assurance, the Concessionaire shall carry out such Tests at such time and frequency and in such manner as may be required by the Independent Engineer or as may be necessary in accordance with Good Industry Practice. The Concessionaire shall with due diligence carry out all such Tests in accordance with the instructions and under the supervision of the Independent Engineer. The Concessionaire shall promptly carry out such remedial measures as may be necessary to cure the defects or deficiencies, if any, indicated in such Test results. The Independent Engineer shall furnish the results of such Tests to the Steering Group within seven days thereof and also promptly report to the Steering Group the remedial measures taken by the Concessionaire to cure the defects/deficiencies if any indicated in the Test results.
- (c) If the Independent Engineer reasonably determines that the rate of progress of the construction of the Project is such that the Project Completion is not feasible on or before the Scheduled Project Completion Date, it shall so notify the Concessionaire and the Steering Group. Thereupon, the Concessionaire shall within 15 (fifteen) days thereof notify the Steering Group and the Independent Engineer about the steps it proposes to take to expedite progress and the period within which it shall achieve COD.
- (d) Upon recommendation of the Independent Engineer, Steering Group may, by written notice, require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if in the reasonable opinion of the Steering Group such work is being carried on in a manner which threatens the safety of the Construction Works or the users of the Project.
- (e) The Concessionaire shall upon, instructions of the Steering Group pursuant to sub-article (d) above suspend the Construction Works or any part thereof as the case may be, for such time and in such manner as may be specified by Steering Group and the costs if any incurred by GOI during such suspension to properly protect and secure the Construction Works or such part thereof as is necessary in the opinion of the Steering Group ("Preservation Costs"), shall be borne by the Concessionaire.
- (f) If the Steering Group issues any instructions requiring suspension of Construction Works for any reason other than default or breach of this Agreement by the Concessionaire –
 - (i) the Project Completion Schedule and the Scheduled Project Completion Date shall be extended by the period of suspension, and
 - (ii) the Concession Period shall be extended in accordance with the recommendations of the Independent Engineer pursuant to and in accordance with sub-article (g) below.
- (g) Independent Engineer shall add the Preservation Costs if any incurred by the Concessionaire to the Initial Investment in the Cashflow Projections taking into account the resultant loss of revenue due to suspension of Construction Works and determine extension to the Concession Period in order to maintain the Internal Rate of Return. Provided, that the projections for years beyond the Concession Period shall be average of three years immediately preceding the last year of the original Cashflow Projections. Thereupon the Independent Engineer shall communicate its recommendation to the Steering Group.

9.2 Project Completion

- (a) The Project shall be deemed to be complete and open to traffic only when the Completion Certificate or the Provisional Certificate is issued by the Independent Engineer in accordance with the provisions of Article 9.3 (the "Project Completion").
- (b) The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the provisions of this Agreement on a date not later than ----- months from the Commencement Date ("the Scheduled Project Completion Date").
- (c) If the Project Completion is not achieved by the Scheduled Project Completion Date for any reason other than Force Majeure or reasons attributable to GOI, the Concessionaire shall be liable to pay liquidated damages for delay beyond the Scheduled Project Completion Date, to the extent of Rs. ----- per day for every day of delay. Provided that such liquidated damages do not exceed in aggregate ¹⁵Rs. ----- . Provided further that nothing contained in this sub-article (d) shall be deemed or construed to authorise any delay in achieving Project Completion.
- (d) If the COD does not occur within 180 days from the Scheduled Project Completion Date, GOI shall subject to the provisions of this Agreement relating to excuse from performance of the Concessionaire's obligations hereunder, be entitled to Terminate this Agreement in accordance with the provisions of Article 16.2.

9.3 Tests

- (a) At least 30 (thirty) days prior to the likely completion of the Project, the Concessionaire shall notify the Independent Engineer and the Steering Group of the same and shall give notice to them of its intent to conduct Tests. The Concessionaire shall give the Independent Engineer and the Steering Group at least 10 (ten) days prior notice of the actual date on which it intends to commence the Tests and at least 7 (seven) days prior notice of the commencement date of any subsequent Tests.
- (b) All Tests shall be conducted in accordance with Schedule 'M' and the Applicable Laws and Applicable Permits. The Steering Group shall have the right to suspend or postpone any Test if it is reasonably anticipated or determined during the course of the Test that the performance of the Project or any part thereof does not meet the Specifications and Standards. The Steering Group may designate a representative with suitable qualifications and experience to witness and observe the Tests.
- (c) The Independent Engineer shall monitor the results of the Tests to determine the compliance of the Project with the Specifications and Standards and shall provide to the Steering Group copies of all Test data including detailed Test results.
- (d) Upon the Independent Engineer determining the Tests to be successful, it shall forthwith issue to the Concessionaire a certificate substantially in the form set forth in Schedule 'N' (the "Completion Certificate").
- (e) The Independent Engineer may at the request of the Concessionaire issue a provisional certificate of completion ("Provisional Certificate") if the Tests are successful and all parts of Project can be legally, safely and reliably opened commercial operation though certain works or things forming part thereof are not yet complete. In such an event, Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire ("Punch List"). All Punch List items shall be completed by the Concessionaire within 120 (one hundred twenty) days of the date of issue of such Provisional Certificate. Upon completion of all Punch List items to the satisfaction of the Independent Engineer, it shall issue the Completion Certificate to the Concessionaire with a copy each marked to GOI and STG. In the event of the Concessionaire's failure to complete the Punch List items within the said period of 120

¹⁵ Maximum 5% of the estimated project cost evenly spread over 180 day period.

days, GOI may, without prejudice to any other rights or remedy available to it under this Agreement, have such items completed at the risk and costs of the Concessionaire. The Concessionaire shall reimburse to GOI on demand the entire costs incurred by GOI in completing the Punch List items.

- (f) If the Independent Engineer certifies that it is unable to issue the Completion Certificate or Provisional Certificate because of events or circumstances which excuse the performance of the Concessionaire's obligations in accordance with this Agreement and as a consequence thereof the Tests could not be held or had to be suspended, the Concessionaire shall re-schedule the Tests and hold the same as soon as reasonably practicable.
- (g) The Concessionaire shall bear all the expenses relating to Tests under this Agreement.

9.4 Operation and Maintenance

The Concessionaire shall operate and maintain the Project/Project Facility by itself, or through a Contractor and if required, modify, repair or otherwise make improvements to the Project/Project Facility to comply with Specifications and Standards, and other requirements set forth in this Agreement, Good Industry Practice, Applicable Laws and Applicable Permits and manufacturer's guidelines and instructions with respect to Toll Plaza. More specifically, the Concessionaire shall be responsible for :

- (i) ensuring smooth and uninterrupted flow of traffic during normal operating conditions;
- (ii) charging, collecting and appropriating Fee in accordance with the Fee Notification and this Agreement;
- (iii) minimizing disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project/ Project Facility by providing a rapid and effective response and for this purpose maintaining liaison with emergency services;
- (iv) undertaking routine maintenance including prompt repairs of potholes, cracks, concrete joints, drains, line marking, lighting and signage;
- (v) undertaking maintenance works in accordance with Maintenance Manual and the Maintenance Programme;
- (vi) preventing with the assistance of concerned law enforcement agencies where necessary, any unauthorised entry to and exit from the Project;
- (vii) preventing with the assistance of the concerned law enforcement agencies where necessary, any encroachments on the Project/Project Site and preserving the right of way of the Project;
- (viii) adherence to the Safety Standards set out in Schedule 'P'.

9.5 Maintenance Manual

The Concessionaire shall in consultation with the Steering Group evolve not later than 120 (one hundred twenty) days before the Scheduled Project Completion Date, a manual for the regular and preventive maintenance (the "Maintenance Manual"), and shall ensure and procure that at all times during the Operations Period, the Project is maintained in a manner that it complies with the Specifications and Standards. The Concessionaire shall supply, at least two months before the COD, 10 (ten) copies of the Maintenance Manual to the Steering Group.

9.6 Maintenance Programme

- (a) Not later than forty five (45) days before the beginning of each Accounting Year, the Concessionaire shall provide to PWD Engineer, its proposed programme of preventive and other scheduled maintenance of the Project subject to the Minimum Maintenance Requirements set forth in Schedule 'O' necessary to maintain the Project at all times in conformity with the Specifications and Standards (the "Maintenance Programme"). Such Maintenance Programme shall include but not be limited to the following:
- (i) intervals and procedures for the carrying out of inspection of all elements of the Project;
 - (ii) criteria to be adopted for deciding maintenance needs;
 - (iii) preventive maintenance schedule;
 - (iv) intervals at which the Concessionaire shall carry out periodic maintenance; and
 - (v) intervals for major maintenance and the scope thereof.
- (b) Maintenance shall include replacement of equipment, consumables, horticultural maintenance and repairs to equipment, pavements, bridges, structures and other civil works which are part of the Project/Project Facility.
- (c) The Concessionaire shall keep the Project Facility in a clean, tidy and orderly condition free of litter and debris.
- (d) The Concessionaire shall be responsible for the maintenance of the approach roads to and underpasses, overpasses and drainages within the Project Site in accordance with Good Industry Practice.

9.7 Vehicle Breakdown and Accident

- (a) In the case of unsafe conditions, vehicle breakdowns and accidents, the Concessionaire shall follow the relevant operating procedures, which shall include the setting up of temporary traffic cones and lights as well as the removal of obstruction and debris expeditiously. Such procedures shall be in accordance with Applicable Laws, Applicable Permits and the provisions of this Agreement.
- (b) The Concessionaire shall ensure that any diversion or interruption of traffic is remedied without delay. The Concessionaire's responsibility for rescue operations on the Project shall be limited to the removal of vehicles or debris or any other obstruction, which may endanger or interrupt the smooth traffic flow on the Project.

9.8 Emergency De-commissioning

- (a) If, in the reasonable opinion of the Concessionaire there exists an Emergency which warrants decommissioning and closure to traffic of whole or any part of the Project/Project Facility, the Concessionaire shall be entitled to de-commission and close the whole or the relevant part of the Project to traffic for so long as such Emergency and the consequences thereof warrant. Provided, however, that such decommissioning will be notified to the PWD Engineer promptly. The PWD Engineer may issue such directions as it may deem appropriate to the Concessionaire for dealing with such Emergency and the Concessionaire shall abide by the same.
- (b) The Concessionaire shall re-commission the Project/Project Facility or the affected part thereof as quickly as practicable after the Emergency leading to its de-commissioning and closure has ceased to exist.
- (c) The Concessionaire shall not close any part/ lane of the Project/Project Facility for undertaking maintenance or repair works except with the prior written approval of the

PWD Engineer. Such approval shall be sought by the Concessionaire through a written request to be made at least 7 (seven) days before the proposed closure of part / lane and shall be accompanied by particulars indicating the nature and extent of repair works and the arrangements made for safe movement of traffic, the length and section required to be closed and the period of closure. The Concessionaire shall also furnish particulars indicating the minimum time required for completing such repair works. Within 5 (five) days of receiving such request, the PWD Engineer shall grant permission with such modifications as he may deem necessary. Upon receiving such permission, the Concessionaire shall be entitled to close the part / lane in accordance with such permission and re-open it within the period stipulated in such permission.

- (d) Save and except as otherwise expressly provided in this Agreement, if the Project or any part thereof shall suffer any loss or damage during the Concession Period, from any cause whatsoever, the Concessionaire shall, at its cost and expense rectify and remedy such loss or damage in a manner so as to make the Project conform in every respect to the Specifications and Standards, quality and performance as prescribed by this Agreement.
- (e) In the event the Concessionaire does not maintain and/ or repair the Project or part thereof upto and in accordance with the Specifications and Standards and / or in accordance with the Maintenance Programme or the Maintenance Manual or the O&M Inspection Report, as the case may be, and shall have failed to commence remedial works within (30) thirty days of notice in this behalf from the PWD Engineer, GOI shall, without prejudice to its rights/remedies under this Agreement, including Termination, be entitled to undertake to cause the repair and maintenance of the Project at the risk and cost of the Concessionaire. The Concessionaire shall, reimburse to GOI within seven days of demand the costs and expenses incurred for undertaking such repairs and maintenance. .
- (f) If the Concessionaire commences any works for curing any defects or deficiencies in the Project, it shall complete such works expeditiously in accordance with Good Industry Practice.
- (g) The Concessionaire shall not be considered in breach of its obligations under this Agreement if any part of the Project is not available to traffic on account of any of the following for the duration thereof:
 - (i) Force Majeure Event;
 - (ii) measures taken to ensure the safe use of the Project except when unsafe conditions on the road occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
 - (iii) compliance with a request from GOI/STG or the directions of any Government Agency the effect of which is to close all or any part of the Project.

Notwithstanding the above, the Concessionaire shall keep all unaffected parts of the Project open to traffic and use provided they can be safely operated and kept open to traffic.

9.9 Monitoring and Supervision during Operations

- (a) The Concessionaire shall undertake periodic inspection of the Project in accordance with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and this Agreement and shall submit reports of such inspection ("Maintenance Reports") to the Steering Group and the PWD Engineer.
- (b) The PWD Engineer shall undertake periodic (at least once every calendar quarter but once every week during monsoon) inspection of the Project jointly with the Concessionaire to determine the condition of the Project including its compliance or

otherwise with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and this Agreement and make out a report of such inspection (the "O&M Inspection Report") and forward it to the Concessionaire with a copy thereof to the Steering Group. The O&M Inspection Report shall set forth defects and deficiencies, if any, and may also require the Concessionaire to undertake such tests as may be specified by the PWD Engineer for the purpose of determining that the Project is at all times in conformity with the Specifications and Standards. The Concessionaire shall within 30 (thirty) days of the receipt of the O&M Inspection Report from the PWD Engineer remedy the defects and deficiencies and undertake such tests, if any, set forth therein, without any delay and furnish compliance thereto and/or results thereof to the PWD Engineer along with a report (O&M Inspection Compliance Report) with a copy to the Steering Group specifying in reasonable detail the measures, if any, that have been undertaken for curing the defects or deficiencies indicated in such results. Such inspection or submission of O&M Inspection Compliance Report by the Concessionaire shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever. Where the remedying of such defects or deficiencies and/or undertaking such tests is likely to take more than 30 (thirty) days in accordance with Good Industry Practice, the Concessionaire shall undertake the works in accordance with such practice and submit progress reports of such works every fortnight and finally the O&M Inspection Compliance Report.

ARTICLE 10

FINANCING ARRANGEMENT

10.1 Financing Arrangement

- (a) The Concessionaire shall at its cost, expenses and risk make such financing arrangement as would be necessary to finance the Project and to meet its obligations under this Agreement in a timely manner.
- (b) In the event of the Concessionaire employing the funds borrowed from the Lenders to finance the Project, the provisions relating to Lenders including those relating to Financial Close and Substitution Agreement shall apply.
- (c) The Concessionaire shall within 7 days of achieving Financial Close submit to GOI one set of Financing Documents evidencing Financial Close.

10.2 Amendments to Financing Documents

For the avoidance of doubt the Parties agree that no amendment made to the Financing Documents without express consent of GOI shall have the effect of enlarging in any manner, the obligation of GOI in respect of Termination Payment under this Agreement.

ARTICLE 11

SUPERVISION CHARGES

11.1 Supervision Charges

- (a) All works under or in course of execution/ or executed in pursuance of this Agreement shall at all times be open to the inspection and supervision by the authorised representatives of GOI/STG. The Concessionaire shall at all the times during the usual

working hours and at all other times at which reasonable notice of the intention of the representatives of STG and/or GOI to visit the work shall have been given to the Concessionaire, have a responsible agent/representative present at the Project for that purpose.

- (b) The Concessionaire shall pay supervision charges not exceeding in aggregate Rs. XX¹⁶ Lakh (Rupees ----- Lakh) towards supervision contemplated by the preceding sub-article (a). The supervision charges may be paid in equal annual instalments over the original Concession Period with the first instalment being paid on the Commencement Date and every subsequent instalment on the date of respective anniversary of the Commencement Date by way of a cheque/demand draft(s) drawn in favour of -----
--.

11.2 Project Monitoring Expenses

The Concessionaire shall also pay towards Project monitoring and co-ordination expenses of GOI a sum of Rs. ¹⁷ZZ Lakh (Rupees ----- Lakh) per annum by way of cheque/demand draft(s) drawn/issued in favour of ----- The amounts paid by the Concessionaire pursuant to this Article shall be held in a separate account and appropriated /utilised as per instructions of GOI.

ARTICLE 12

INSURANCES

12.1 Insurance during the Implementation Period

The Concessionaire shall, at its cost and expense, purchase and maintain during the Implementation Period such insurances as are necessary, including but not limited to the following:

- (a) builders' all risk insurance;
- (b) comprehensive third party liability insurance including injury or death to personnel of Persons who may enter the Project Site;
- (c) workmen's compensation insurance;
- (d) any other insurance that may be necessary to protect the Concessionaire, its employees and its assets (against loss, damage or destruction at replacement value) including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (d).

12.2 Insurance during the Operations Period

The Concessionaire shall, at its cost and expense, purchase and maintain during the Operations Period insurance to cover against:

- (a) loss, damage or destruction of the Project Facility, at replacement value;
- (b) the Concessionaire's general liability arising out of the Concession;
- (c) liability to third parties; and
- (d) any other insurance that may be necessary to protect the Concessionaire and its employees, including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (c).

¹⁶ 1.5% of the estimated project cost is recommended – The amount shall be specified in the bid document.

¹⁷ Total payout to be capped at 0.5% of the estimated project cost.

12.3 Insurance Companies

The Concessionaire shall insure all insurable assets comprised in the Project Assets and/or the Project Facility through Indian insurance companies and if so permitted by GOI, through foreign insurance companies, to the extent that insurances are necessary to be effected through them.

12.4 Evidence of Insurance Cover

The Concessionaire shall, from time to time, provide to GOI copies of all insurance policies (or appropriate endorsements, certifications or other satisfactory evidence of insurance) obtained by the Concessionaire in accordance with this Agreement.

12.5 Application of Insurance Proceeds

Subject to the provisions of the Financing Documents, all moneys received under insurance policies shall be promptly applied by the Concessionaire towards repair or renovation or restoration or substitution of the Project Facility or any part thereof which may have been damaged or destroyed. The Concessionaire may designate the Lenders as the loss payees under the insurance policies/assign the insurance policies in their favour as security for the financial assistance. The Concessionaire shall carry out such repair or renovation or restoration or substitution to the extent possible in such manner that the Project Facility or any part thereof, shall, after such repair or renovation or restoration or substitution be as far as possible in the same condition as they were before such damage or destruction, normal wear and tear excepted.

12.6 Validity of the Insurance Cover

The Concessionaire shall pay the premium payable on such insurance policy(ies) so as to keep the policy(ies) in force and valid throughout the Concession Period and furnish copies of the same to GOI. Each insurance policy shall provide that the same shall not be cancelled or terminated unless 10 Days' clear notice of cancellation is provided to GOI in writing. If at any time the Concessionaire fails to purchase and maintain in full force and effect any and all of the insurances required under this Agreement, GOI may at its option purchase and maintain such insurance and all sums incurred by the GOI therefor shall be reimbursed by the Concessionaire forthwith on demand, failing which the same shall be recovered by the GOI by exercising right of set off or otherwise.

ARTICLE 13**CHANGE OF SCOPE****13.1 Change of Scope**

GOI may, notwithstanding anything to the contrary contained in this Agreement, require provision of such addition/deletion to the works and services on or about the Project which are beyond the scope of the Project as contemplated by this Agreement ("Change of Scope"), Provided such changes do not require expenditure exceeding ¹⁸Rs. ----- and do not adversely affect the Scheduled Project Completion Date. All such changes shall be made by GOI by an order (the "Change of Scope Order") issued in accordance with the procedure set forth in Article 13.2.

13.2 Procedure for Change of Scope

- (a) GOI shall whenever it desires provision of addition/deletion of works and services referred to in Article 13.1 above, issue to the Concessionaire a notice of Change of Scope (the "Change of Scope Notice") through the Independent Engineer.

¹⁸ 5% of estimated project cost.

- (b) Upon receipt of Change of Scope Notice, the Concessionaire shall, within a period of 15 (fifteen) days, provide to the Independent Engineer such information as is necessary and reasonable together with preliminary documentation in support of the following:
- (i) the impact which the Change of Scope is likely to have on the Project Completion Schedule if the work is required to be carried out before COD, and
 - (ii) the cost to the Concessionaire of complying with such Change of Scope Notice on account of increases in quantities of items of work mentioned in the Bill of Quantities at the rate mentioned therein. In case the Bill of Quantities does not carry certain items of work required under the Change of Scope, the Concessionaire shall provide the analysis of rates for carrying out such items of work.
- (c) Independent Engineer shall review the information provided by the Concessionaire, assess the change in quantities of items of work, verify the analysis of rates if required, determine the additional cost to the Concessionaire as a result of such Change of Scope, add such additional cost to Initial Investment in the Cashflow Projections and determine the extension, if any, to the Concession Period in order to maintain the Internal Rate of Return. Provided, that the projections for years beyond the Concession Period shall be average of three years immediately preceding the last year of the original Cashflow Projections. The Independent Engineer shall communicate its recommendation to the Steering Group within a period of 15(fifteen) days from the receipt of information from the Concessionaire.
- (d) GOI shall issue the Change of Scope Order within a period of 15 (fifteen) days from the date of recommendation made by the Independent Engineer in accordance with preceding sub-article (c) above.
- (e) The Change of Scope Order shall be effective and binding upon receipt thereof by the Concessionaire. Notwithstanding a Dispute regarding cost and time for implementation of such order, the Concessionaire shall proceed with the performance of such order promptly following receipt thereof. Any Dispute regarding the extension in the Concession Period recommended by the Independent Engineer shall be resolved in accordance with the Dispute Resolution Procedure.
- (f) All claims by the Concessionaire pursuant to this Article 13.2 shall be supported by such documentation as is reasonably sufficient for Independent Engineer to determine the accuracy thereof, including invoices from Contractors and certification of such claims by the Statutory Auditors.

ARTICLE 14

CAPACITY AUGMENTATION AND ADDITIONAL FACILITY

14.1 Capacity Augmentation of the Project

- (a) The GOI may following a detailed traffic study conducted by it, at any time after COD decide to augment/increase the capacity of the Project (Capacity Augmentation) with a view to provide the desired level of service to the users of the Project Facility.
- (b) The GOI shall invite proposals from eligible Persons for Capacity Augmentation. The Concessionaire shall have option to submit its proposal for Capacity Augmentation.
- (c) The bid document for Capacity Augmentation shall specify a Termination Payment to be made to the Concessionaire in case the Concessionaire chooses not to submit its

proposal or fails or declines to match the preferred offer as mentioned in sub-article (e) below.

- (d) In case the Concessionaire, after participating in the bidding procedure, fails to give the lowest offer, the Concessionaire shall be given the first right of refusal to match the preferred offer. If the Concessionaire matches the preferred offer the Parties shall enter into a suitable agreement supplemental to this Agreement to give effect to the changes in scope of the Project, Concession Period and all other necessary and consequential changes. In such an event the Concessionaire shall pay to the bidder who had made the lowest offer sum of Rs.¹⁹ ----- towards bidding costs incurred by such bidder.
- (e) In case the Concessionaire (i) chooses not to submit its proposal for Capacity Augmentation or (ii) is not the preferred bidder and also fails or declines to match the preferred offer, GOI shall be entitled to terminate this Agreement upon payment to the Concessionaire of the Termination Payment.
- (f) The Termination Payment referred to in the preceding sub-articles (c) and (e) above shall be the amount equivalent to the amount of Termination Payment set out in Article 16.2(b).

14.2 Additional Facility

GOI shall not construct and operate either itself or have the same, interalia, built and operated on BOT basis or otherwise a competing facility, either toll free or otherwise during the Concession Period Provided, GOI may build and operate such a facility subject to the fee charged for vehicles using such facility being at any not less than 133% of Fee for the time being charged for the vehicles using the Project Facility.

ARTICLE 15

FORCE MAJEURE

15.1 Force Majeure Event

As used in this Agreement, a Force Majeure Event shall mean occurrence in India of any or all of Non Political Event, Indirect Political Event and/or Political Event as defined in Article 15.2, 15.3 and 15.4 respectively which prevent the Party claiming Force Majeure (the "Affected Party") from performing its obligations under this Agreement and which act or event (i) is beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, and (iii) has a Material Adverse Effect on the Project.

15.2 Non Political Event.

For purposes of Article 15.1 hereinabove, Non-Political Event shall mean one or more of the following acts or events:

- (i) acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, exceptionally adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption or fire (to the extent originating from a source external to the Project Site or beyond design specifications for the Construction Works) or landslide;
- (ii) radioactive contamination or ionizing radiation;

¹⁹ 0.1% of the estimated project cost subject to maximum of Rs. 10 Lacs which shall be indicated in the bid document.

- (iii) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives or attributable to any act or omission of any of them) interrupting supplies and services to the Project for a period exceeding 7 (seven) days in an Accounting Year, and not being an Indirect Political Event set forth in Article 15.3;
- (iv) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (v) any judgement or order of any court of competent jurisdiction or statutory authority in India made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or enforcement of this Agreement or exercise of any of its rights under this Agreement by GOI;
- (vi) any event or circumstances of a nature analogous to any of the foregoing.

15.3 Indirect Political Event

For purposes of Article 15.1 hereinabove, Indirect Political Event shall mean one or more of the following acts or events :

- (i) 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 which prevents collection of Fee by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year;
- (ii) Industry wide or state wide or India wide strikes or industrial action which prevent collection of Fees by the Concessionaire for a period exceeding a continuous period of 7(seven) days in an Accounting Year; or
- (iii) Any public agitation which prevents collection of Fee by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year.

15.4 Political Event

For purposes of Article 15.1 hereinabove, Political Event shall mean one or more of the following acts or events by or on account of GOI, STG or any other Government Agency:

- (i) Change in Law, only when provisions of Article 17 cannot be applied;
- (ii) Expropriation or compulsory acquisition by any Government Agency of any Project Assets or rights of the Concessionaire or of the Contractors; or
- (iii) Any unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is condition precedent) provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits.

15.5 Effect of Force Majeure Event.

Upon occurrence of any Force Majeure Event, the following shall apply:

- (a) There shall be no Termination of this Agreement except as provided in Article 15.7 hereinafter;

- (b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;
- (c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to operate the Project and/or to collect Fee, but if it is unable or prevented from doing so, the Concession Period shall, having due regard to the extent of the impact thereof as determined by the Steering Group, be extended by the period for which collection of Fee remains affected on account thereof; and
- (d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of the Article_15.6 hereinafter.

15.6 Allocation of costs during subsistence of Force Majeure

Subject to the provisions of Article 15.5 hereinabove, upon occurrence of a Force Majeure Event, the costs arising out of such event shall be allocated as follows:

- (a) When the Force Majeure Event is a Non Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any costs arising out of any such Force Majeure Event;
- (b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the "Force Majeure Costs") shall be borne by the Concessionaire to the extent of the Insurance Cover, and to the extent Force Majeure Costs as duly certified by the Statutory Auditors exceed the Insurance Cover, one half of the same shall be reimbursed by GOI to the Concessionaire within 90 days from the date of receipt of Concessionaire's claim therefor;
- (c) Where the Force Majeure Event is a Political Event, the Force Majeure Costs to the extent actually incurred and certified by the statutory Auditors of Concessionaire shall be reimbursed by GOI to the Concessionaire within 90 days from the date of receipt of Concessionaire's claim therefor; and
- (d) GOI may at its option reimburse the Force Majeure Costs to the Concessionaire in cash or compensate the Concessionaire for such costs by appropriate extension of the Concession Period, which extension shall also be given effect within the period of 90 days specified in preceding sub-article (b) or (c) as the case may be.

For avoidance of doubt, Force Majeure Costs shall not include loss of Fee revenues or any debt repayment obligations but shall include interest payments on such debt, O&M Expenses and all other costs directly attributable to the Force Majeure Event.

15.7 Termination.

If a Force Majeure Event continues or is in the reasonable judgement of the Parties is likely to continue beyond a period 120 days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 days, be entitled to terminate this Agreement by issuing Termination Notice.

15.8 Termination Payment for Force Majeure Events

Upon Termination of this Agreement pursuant to Article 15.7 hereinabove, Termination Payment to the Concessionaire shall be made in accordance with the following:

- (a) If the Termination is on account of a Non Political Event, the Concessionaire shall be entitled to receive from GOI by way of Termination Payment an amount equal to 90% of the Debt Due less pending insurance claims, if any. Provided that in the event such insurance claims or any part thereof are not admitted and paid, the Concessionaire shall be entitled to receive from GOI further sum equal to 90% of amount of such claims not admitted.
- (b) If the Termination is on account of an Indirect Political Event, the Concessionaire shall be entitled to receive from GOI by way of Termination Payment an amount equal to:
 - (i) the total Debt Due, less pending Insurance claims, if any. Provided, however, that if any of such insurance claims are not admitted and paid, the Concessionaire shall be entitled to receive from GOI further sum equal to 80%(eighty percent) of such claims not admitted, plus
 - (ii) 110% (one hundred ten percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived shall be reduced every year by 7.5%(seven and half percent) per annum.
- (c) If the Termination of this Agreement is on account of a Political Event, the Concessionaire shall be entitled to receive from GOI by way of Termination Payment an amount equal to:
 - (i) the total Debt Due, plus
 - (ii) 150% (one hundred fifty percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived at shall be reduced by 7.5% (seven and half percent) per annum.

15.9 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, provided however 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.

15.10 Liability for other losses, damages etc.

Save and except as expressly provided in this Article 15, neither Party hereto 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 to this Article 15.

15.11 Duty to Report

The Affected Party shall discharge the following obligations in relation to reporting the occurrence of a Force Majeure Event to the other Party:

- (a) The Affected Party shall not claim any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party in writing 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 the probable material affect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

- (b) Any notice pursuant to this Article 15.11 shall include full particulars of:
 - (i) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 15 with evidence in support thereof;
 - (ii) 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;
 - (iii) the measures which the Affected Party is taking, or proposes to take, to alleviate the impact of such Force Majeure Event; and
 - (iv) any other information relevant to the Affected Party's claim.
- (c) For so long as the Affected Party continues to claim to be affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) written reports containing information as required by this Article 15.11 and such other information as the other Party may reasonably request the Affected Party to provide.

15.12 Excuse from performance of obligations

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

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

ARTICLE 16

EVENTS OF DEFAULT AND TERMINATION

16.1 Event of Default

Event of Default means the Concessionaire Event of Default or the GOI Event of Default or both as the context may admit or require.

a) Concessionaire Event of Default

Any of the following events shall constitute an event of default by the Concessionaire ("Concessionaire Event of Default") unless such event has occurred as a result of GOI Event of Default or a Force Majeure Event;

- (1) The Concessionaire fails to commence the Construction Works within 30 days from the Commencement Date.

- (2) The Concessionaire fails to achieve COD within 180 days from the Scheduled Project Completion Date.
- (3) Any representation made or warranties given by the Concessionaire under this Agreement is found to be false or misleading.
- (4) The Concessionaire creates any Encumbrance on the Project Site/ Project Facility in favour of any Person save and except as otherwise expressly permitted under Article 21.1.
- (5) The aggregate shareholding of the members of the Consortium/Sponsors falls below the minimum prescribed under Article 20.1 (xi).
- (6) The transfer, pursuant to law of either (a) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or (b) all or material part of the Concessionaire except where such transfer in the reasonable opinion of GOI does not affect the ability of the Concessionaire to perform, and the Concessionaire has the financial and technical capability to perform, its material obligations under the Project Agreements.
- (7) A resolution is passed by the shareholders of the Concessionaire for the voluntary winding up of the Concessionaire.
- (8) Any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction, provided that, as part of such amalgamation or reconstruction, the property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements, and provided that:
 - (i) the amalgamated or reconstructed entity has the technical capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
 - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at Commencement Date; and
 - (iii) each of the Project Agreements remains in full force and effect.
- (9) A default has occurred under any of the Financing Documents and any of the Lenders has recalled its financial assistance and demanded payment of the amounts outstanding under the Financing Documents or any of them as applicable.
- (10) The Concessionaire suspends or abandons the operations of the Project without the prior consent of GOI, provided that the Concessionaire shall be deemed not to have suspended/ abandoned operation if such suspension/ abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations under this Agreement by GOI or of STG under the State Support Agreement.
- (11) The Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.
- (12) The Concessionaire suffers an attachment being levied on any of its assets causing a Material Adverse Affect on the Project and such attachment continues for a period exceeding 45 days.

- (13) The Concessionaire has delayed any payment that has fallen due under this Agreement and if such delay exceeds 90(ninety) days.
- (14) The Concessionaire is otherwise in Material Breach of this Agreement.

(b) GOI Event of Default.

The following events shall constitute events of default by GOI (each a "GOI Event of Default"), unless any such GOI Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event:

- (1) GOI is in breach of this Agreement and has failed to cure such breach within 60 (sixty) days of receipt of notice in that behalf from the Concessionaire;
- (2) GOI repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.
- (3) GOI is in breach of any of its obligations under the State Support Agreement, and such breach has not been cured within 30 days from the date of written notice thereof by the Concessionaire.
- (4) GOI or STG or any Governmental Agency has by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligations by the Concessionaire and has failed to cure the same within 60 days of notice thereof by the Concessionaire.
- (5) GOI has delayed payment of any amount that has fallen due in terms of this Agreement beyond 90 (ninety) days.
- (6) Any representation made or warranties given by the GOI under this Agreement is found to be false or misleading

16.2 Termination due to Event of Default

(a) Termination for Concessionaire Event of Default

- (1) Without prejudice to any other right or remedy which GOI may have in respect thereof under this Agreement, upon the occurrence of a Concessionaire Event of Default, GOI shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire, provided that before issuing the Termination Notice, GOI shall by a notice in writing inform the Concessionaire of its intention to issue the Termination Notice (the "Preliminary Notice"). In case the underlying breach/default is not cured within a period of 60(sixty) days from the date of the Preliminary Notice (Cure Period) GOI shall be entitled, to terminate this Agreement by issuing the Termination Notice. Provided further, that
 - (a) if the default is not cured within 30(thirty) days of the Preliminary Notice, GOI shall be entitled to encash the Performance Security with a notice to the Concessionaire (Encashment Notice),
 - (b) if the default is not cured within 30(thirty) days of the Encashment Notice and a fresh Performance Security is not furnished within the same period in accordance with Article 3.2, GOI shall subject to the provisions of the Substitution Agreement be entitled to issue the Termination Notice.
- (2) The following shall apply in respect of cure of any of the defaults and/or breaches of this Agreement :

- (i) The Cure Period provided in this Agreement shall not relieve the Concessionaire from liability for damages caused by its breach or default;
 - (ii) The Cure Period shall not in any way be extended by any period of suspension under this Agreement;
 - (iii) If the cure of any breach by the Concessionaire requires any reasonable action by Concessionaire that must be approved by GOI or the Government Agency hereunder the applicable Cure Period shall be extended by the period taken by GOI or the Government Agency to accord the required approval.
- (3) Upon Termination by GOI on account of occurrence of a Concessionaire Event of Default during the Operations Period, the GOI shall pay to the Concessionaire by way of Termination Payment an amount equal to 90% of the Debt Due less pending insurance claims, if any. Provided, however, that in the event of such insurance claims or any part thereof are not admitted and paid, the Concessionaire shall be entitled to receive from GOI further sum equal to 80%(eighty percent) of amount of such claims not admitted.

(b) Termination for GOI Events of Default

- (1) The Concessionaire may, upon the occurrence and continuation of any of GOI Event of Default terminate this Agreement by issuing Termination Notice to GOI.
- (2) Upon Termination of this Agreement by the Concessionaire due to a GOI Event of Default, the Concessionaire shall be entitled to receive from GOI, by way of Termination Payment a sum equal to:
 - (i) the total Debt Due, plus
 - (ii) 150% (one hundred fifty percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year and the adjusted amount so arrived at shall be reduced by 7.5% (seven and half percent) per annum.

16.3 Rights of GOI on Termination

Upon Termination of this Agreement for any reason whatsoever, GOI shall have the power and authority to

- (i) take possession and control of Project Assets forthwith;
- (ii) prohibit the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Project Assets/dealing with or any part thereof;
- (iii) step in and succeed upon election by GOI without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as GOI may in its discretion deem appropriate with effect from the date of communication of such election to the counter party to the relative Project Agreements. Provided any sums claimed by such counter party as being due and owing for work and services performed or accruing on account of any act, omission or event prior to such date of election shall and shall always constitute debt between the Concessionaire and such counter party and GOI shall in no way or manner be liable or responsible for such sums. The Concessionaire shall ensure that the Project

Agreements contain provisions necessary to give effect to the provision of this Article 16.3.

16.4 Termination Payments

The Termination Payment pursuant to Article 15 or 16 as the case may be, shall be payable to the Concessionaire by GOI within thirty days of demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If GOI fails to pay Termination Payment in full within the said period of 60 days, the amount remaining unpaid shall be paid along with interest @ SBI PLR plus two percent from the Termination Date till payment.

16.5 Mode of Payment

Notwithstanding any instructions to the contrary issued or any dispute raised by the Concessionaire, the Termination Payment, and all other payments that would become payable by GOI under any of the provisions of this Agreement shall, so long as the Debt Due is remaining outstanding, be made only by way of credit directly to a bank account designated therefor by the Lenders and advised to GOI and the Concessionaire in writing. Any payment so made shall to the extent of such payment constitute a valid discharge to GOI of its obligations towards the Concessionaire with regard to the Termination Payment and payment of any other monies due hereunder.

- 16.6 Notwithstanding anything to the contrary contained in this Agreement, any Termination pursuant to the provisions of this Agreement shall be without prejudice to accrued rights of either Party including its right to claim and recover money damages and other rights and remedies which it may have in law or contract. All rights and obligations of either Party under this Agreement, including without limitation Termination Payment, shall survive the Termination of this Agreement to the extent such survival is necessary for giving effect to such rights and obligations.

ARTICLE 17

CHANGE IN LAW

17.1 Change in Law

If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after tax return or other financial burden, the aggregate financial effect of which exceeds Rs. ²⁰----- (Rupees -----) in any Accounting year, the Concessionaire may notify the same to GOI/the Steering Group and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid.

17.2 Extension of Concession Period

The Steering Group shall upon being notified by the Concessionaire of the Change in Law and the proposed amendments to this Agreement, assess the change in the financial position as a result of such Change of Law and determine the extension to the Concession Period so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law and recommend the same to GOI. GOI shall, within 30 days of receipt of such recommendation, extend the Concession Period by such period as has been recommended by the Steering Group.

ARTICLE 18

²⁰ Rs. 2-3 million recommended.

HANDOVER AND DEFECT LIABILITY PERIOD

18.1 Handing Over of the Project Assets

Upon the expiry of the Concession by efflux of time and in the normal course, the Concessionaire shall at the end of the Concession Period, hand over vacant and peaceful possession of the Project Assets including Project Site/Facility at no cost to GOI.

18.2 Joint Inspection and Removal of Deficiency

The handing over process shall be initiated atleast ²¹12 months before the actual date of expiry of the Concession Period by a joint inspection by the PWD Engineer and the Concessionaire. The PWD Engineer shall, within 15 days of such inspection prepare and furnish to the Concessionaire a list of works/jobs/additions/alterations, if any, to be carried out to bring the Project to the prescribed level of service condition at least two months prior to the date of expiry of the Concession Period. In case the Concessionaire fails to carry out the above works, within the stipulated time period the GOI shall be at liberty to have these works executed by any other Person at the risk and cost of the Concessionaire and any cost incurred by GOI in this regard shall be reimbursed by the Concessionaire to GOI within 7 days of receipt of demand. For this purpose, GOI shall without prejudice to any other right/remedy available to it, under this Agreement, have the right to appropriate the Performance Security and/or to set off any amounts due, if any, and payable by GOI to the Concessionaire to the extent required/ available and to recover deficit amount, if any, from the Concessionaire.

ARTICLE 19

DISPUTE RESOLUTION

19.1 Amicable Resolution

- (a) Save where expressly stated otherwise in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including incompleteness of the Project between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably by the Steering Group and failing resolution of the same in accordance with the procedure set forth in sub-article (b) below.
- (b) Either Party may require the Dispute to be referred to the Director General (Road Development) Government of India and the Chairman of the Board of Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the two shall meet at the earliest mutual convenience and in any event within 15 days of such reference to discuss and attempt to amicably resolve the Dispute. If the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the two, either Party may refer the Dispute to arbitration in accordance with the provisions of Article 19.2 below.

19.2 Arbitration

a) Arbitrators

Any Dispute which is not resolved amicably as provided in Article 19.1(a) shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and

²¹ Period could be Project specific.

the third to be appointed by the two arbitrators appointed by the Parties. A Party requiring arbitration shall appoint an arbitrator in writing, inform the other Party about such appointment and call upon the other Party to appoint its arbitrator. If the other Party fails to appoint its arbitrator, the Party appointing arbitrator shall take steps in accordance with Arbitration and Conciliation Act, 1996.

b) Place of Arbitration

The place of arbitration shall be New Delhi but by agreement of the Parties, the arbitration hearings, if required, can be held elsewhere from time to time.

c) English Language

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

d) Procedure

The procedure to be followed within the arbitration, including appointment of arbitrator / arbitral tribunal, the rules of evidence which are to apply shall be in accordance with the Arbitration and Conciliation Act, 1996.

e) Enforcement of Award

Any decision or award resulting from arbitration shall be final and binding upon the Parties. The Parties hereto hereby waive, to the extent permitted by law, any rights to appeal or to review of such award by any court or tribunal. The Parties hereto agree that the arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and that a judgement upon the arbitral award may be entered in any court having jurisdiction thereof.

f) Fees and Expenses

The fees and expenses of the arbitrators and all other expenses of the arbitration shall be initially borne and paid by respective Parties subject to determination by the arbitrators. The arbitrators may provide in the arbitral award for the reimbursement to the prevailing party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by Party.

g) Performance during Arbitration

Pending the submission of and/or decision on a Dispute, difference or claim or until the arbitral award is published, the Parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.

ARTICLE 20

REPRESENTATIONS AND WARRANTIES, DISCLAIMER

20.1 Representations and Warranties of the Concessionaire

The Concessionaire represents and warrants to GOI that:

- (i) it is duly organised, validly existing and in good standing under the laws of India;
- (ii) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;

- (iii) it has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement;
- (iv) it has the financial standing and capacity to undertake the Project;
- (v) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (vi) it is subject to civil and commercial laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
- (vii) 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 the Concessionaire's Memorandum and Articles of Association or any member of the Consortium or any Applicable Laws or any covenant, agreement, 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;
- (viii) there are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's 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 or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect;
- (ix) 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 Agency which may result in any material adverse effect or impairment of the Concessionaire's ability to perform its obligations and duties under this Agreement;
- (x) it has complied with all Applicable Laws 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 Material Adverse Effect;
- (xi) the aggregate equity share holding of the members of Consortium/Sponsors in the issued and paid up equity share capital of the Concessionaire shall not be less than (a) 51% (fifty one per cent) until expiry of 3 (three) years following COD, and (b) 26% (twenty six per cent) during the remaining Operations Period;
- (xii) each member of Consortium was and is duly organised and existing under the laws of the jurisdiction of its incorporation and has full power and authority to consent to and has validly consented to and requested GOI to enter into this Agreement with the Concessionaire and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (xiii) subject to receipt by the Concessionaire from GOI of the Termination Payment and any other amount due under any of the provisions of this Agreement, in the manner and to the extent provided for under the applicable provisions of this Agreement all rights and interests of the Concessionaire in and to the Project Assets shall pass to and vest in GOI on the Termination Date free and clear of all Encumbrances without any further act or deed on the part of the Concessionaire or GOI;
- (xiv) no representation or warranty by the Concessionaire contained herein or in any other document furnished by it to GOI or to any Government Agency 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; and

- (xv) no sums, in cash or kind, have been paid or will be paid, by or on behalf of the Concessionaire, to any person by way of fees, commission or otherwise for securing the Concession or entering into of this Agreement or for influencing or attempting to influence any officer or employee of GOI in connection therewith.

20.2 Disclaimer

- (a) Without prejudice to any express provision contained in this Agreement, the Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has after a complete and careful examination made an independent evaluation of the traffic volumes, Specifications and Standards, Project Site and all the information provided by GOI, and has determined to the Concessionaire's satisfaction the nature and extent of such difficulties, risks and hazards as are likely to arise or may be faced by the Concessionaire in the course of performance of its obligations hereunder.
- (b) The Concessionaire further acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in (a) above and hereby confirms that GOI/STG shall not be liable for the same in any manner whatsoever to the Concessionaire.

20.3 Representations and Warranties of GOI

GOI represents and warrants to the Concessionaire that:

- (i) GOI has full power and authority to grant the Concession;
- (ii) GOI has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- (iii) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof.

ARTICLE 21

MISCELLANEOUS

21.1 Assignment and Charges

- (a) Subject to sub-articles (b) and (c) hereinbelow, this Agreement shall not be assigned by the Concessionaire save and except with prior consent in writing of GOI, which consent GOI shall be entitled to decline without assigning any reason whatsoever.
- (b) Subject to sub-article (c) hereinbelow, the Concessionaire shall not create nor permit to subsist any Encumbrance over or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which Concessionaire is a party except with prior consent in writing of GOI, which consent GOI shall be entitled to decline without assigning any reason whatsoever.
- (c) Restraint set forth in sub-articles (a) and (b) above shall not apply to:
 - (i) liens/encumbrances arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project ;

- (ii) mortgages/pledges/hypothecation of goods/assets other than Project Site, as security for indebtedness, in favour of the Lenders and working capital providers for the Project;
 - (iii) assignment of Concessionaire's rights, title and interest under this Agreement to or in favour of the Lenders pursuant to and in accordance with the Substitution Agreement as security for their financial assistance.
- (d) Upon occurrence of the Concessionaire Event of Default the Lenders shall have the right of substitution as provided in the Substitution Agreement.

21.2 Liability And Indemnity

(a) General Indemnity

- (i) The Concessionaire shall indemnify, defend and hold GOI harmless against any and all proceedings, actions and, third party claims arising out of a breach by Concessionaire of any of its obligations under this Agreement except to the extent that any such claim has arisen due to GOI Event of Default).
 - (ii) GOI will, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of defect in title and/or the rights of GOI and/or arising of a breach by GOI, its officers, servants and agents of any obligations of GOI under this Agreement except to the extent that any such claim has arisen due to Concessionaire Event of Default.
- (b) Without limiting the generality of this Article 21.2 the Concessionaire shall fully indemnify, save harmless and defend GOI including its officers servants, agents and subsidiaries from and against any and all loss and damages arising out of or with respect to (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits, (b) payments of taxes relating to the Concessionaire's Contractors, suppliers and representatives income or other taxes required to be paid by the Concessionaire without reimbursement hereunder, or (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its Contractors which are payable by the Concessionaire or any of its Contractors.
- (c) Without limiting the generality of the provisions of this Article 21.2, the Concessionaire shall fully indemnify, save harmless and defend the GOI from and against any and all damages which the GOI may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the suspension of the injunction or restraint order. If, in any such suit claim or proceedings, the Project, or any part, thereof or comprised therein is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for GOI a license, at no cost to GOI, authorising continued use of the infringing work. If the Concessionaire is unable to secure such license within a reasonable time, the Concessionaire shall, at its own expense and without impairing the Specifications and Standards either replace the affected work, or part, or process thereof with non-infringing work or parts or process, or modify the same so that it becomes non-infringing.
- (d) In the event that either Party receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 21.2 (the 'Indemnified Party') it shall notify the other Party ("Indemnifying Party") within 14 (fourteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the

Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim it may conduct the proceedings in the name of the Indemnified Party subject to the Indemnified Party being secured against any costs involved to its reasonable satisfaction.

(e) Defence of Claims

- (i) The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder and their reasonable costs and expenses shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the person indemnified in respect of loss to the full extent provided by this Article 21.2, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding liabilities, payments and obligations at its expense and through counsel of its choice provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnified Party unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure, the loss to be indemnified hereunder to the extent so compromised or settled.
- (ii) If the Indemnifying Party has exercised its rights under Article 21.2(d) above, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the indemnifying Party (which consent shall not be unreasonably withheld or delayed).
- (iii) If the Indemnifying Party exercises its rights under Article 21.2(d) above, then the Indemnified Party shall nevertheless have the right to employ its own counsel and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of such Indemnified Party, when and as incurred, unless:
 - (1) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or
 - (2) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
 - (3) the indemnifying Party shall not in fact have employed independent counsel reasonably satisfactory to the Indemnified Party to assume the defence of such action and shall have been so notified by the Indemnified Party; or
 - (4) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either
 - (a) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
 - (b) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement,

provided that if sub-articles (2), (3) or (4) of Article 21.2(e)(ii) shall be applicable, counsel for the Indemnified Party shall have the right to direct the defence of such claim, action, suit or proceeding on behalf of the Indemnified Party and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

21.3 Advertising on the Project Site

The Concessionaire shall not undertake or permit any form of commercial advertising, display or hoarding at any place on the Project Site if such advertising, display or hoarding shall affect the safety of users of the Project Facility while driving. Provided, however, that this sub-article shall not apply within the rest areas on the Project Site.

21.4 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 New Delhi, India shall have jurisdiction over all matters arising out of or relating to this Agreement.

21.5 Waiver

- (a) Waiver by either Party of any default by the other Party in the observance and performance of any provision of or obligations or under this Agreement:
 - (i) 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;
 - (ii) shall not be effective unless it is in writing and executed by a duly authorised representative of such Party; and
 - (iii) shall not affect the validity or enforceability of this Agreement in any manner.
- (b) 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.

21.6 Survival

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

21.7 Amendments

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 agreed to by all the Parties hereto and evidenced in writing.

21.8 Notices

Unless otherwise stated, notices to be given under this Agreement including but not limited to a notice of waiver of any term, breach of any term of this Agreement and termination of this Agreement, shall be in writing and shall be given by hand delivery, recognised international courier, mail, telex or facsimile transmission and delivered or transmitted to the Parties at their respective addresses set forth below :

If to Government of India

 Fax No. -----

If to the Concessionaire

The Managing Director,
 ----- Limited,

 Fax No. -----

Or such address, telex number, or facsimile number as may be duly notified by the respective Parties from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication made by letter, when delivered by hand, by recognised international courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

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 upon one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable. Provided failure to agree upon any such provisions shall not be subject to dispute resolution under this Agreement or otherwise.

21.10 No Partnership

Nothing contained in this Agreement shall be construed or interpreted as constituting a partnership between the Parties. Neither Party shall have any authority to bind the other in any manner whatsoever.

21.11 Language

All notices required to be given under this Agreement and all communications, documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

21.12 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 any Party not contained in a binding legal agreement executed by the Parties.

21.13 Counterparts

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

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

SIGNED SEALED AND DELIVERED

For and on behalf of President of India by

(Signature)

(Name)

(Designation)

SIGNED, SEALED AND DELIVERED

For and on behalf of CONCESSIONAIRE by:

In the presence of.

1)

2)

SCHEDULE A

PROJECT

1. Need for the Project
2. Project Location including index map
3. Site related information
4. Brief description of the NH
5. Brief Description of existing facilities, if any
6. Drainage
7. Traffic estimates(summary only)

Annexures:

1. Feasibility Study
2. Detailed Project Report / Designs / Drawings (Optional)
3. Environmental and Social Impact Assessment Report

SCHEDULE B

PROJECT SITE

(Description and particulars of the land on which the Project is to be implemented would need to be set out.)

SCHEDULE C

PROJECT FACILITY

(The facilities to be constructed, built, installed, erected or provided by the Concessionaire in the Project Site are to be set out, with brief description/ specifications.)

SCHEDULE D

PROJECT COMPLETION SCHEDULE

(The Project Completion Schedule as agreed to with the Concessionaire would need to be set out).

Sr.No.	Project Milestone	Date for Completion

SCHEDULE E²²

BILL OF QUANTITIES

(The Bill of Quantities (BOQ) for the material would need to be set out).

Sr. No	Item	Rate	Unit	Quantity	Amount

²² Where the Bill of Quantities is provided by the MOST in the bidding documents the same should be attached in the present format as Schedule 'E'. In cases where the detailed design & engineering is the responsibility of the Concessionaire, the same would need to be submitted as part of the bid in the format specified above. This format would therefore need to be a part of the bid document for the project.

Total					

SCHEDULE F**FEE NOTIFICATION**
MINISTRY OF SURFACE TRANSPORT
(Roads Wing)
NOTIFICATION

New Delhi, the --- th ----- 2000

S.O. ----- . – In exercise of powers conferred by Sections 7 and 8A of the National Highways Act, 1956 (48 of 1956), the Central Government hereby notifies that there shall be levied and paid fees on mechanical vehicles, for the use of the -----²³ (hereinafter referred as-----) at the rates specified in Schedule hereunder and having regard to the Concession Agreement dated ----- entered into with _____ (*Name of the Concessionaire*) -----, having its registered office at ----- to build, operate and transfer the ____ (*Name of the Project Facility*) and for service provided by it, hereby authorise the said _____ (*Name of the Concessionaire*) or its authorised legal representative to collect and retain fees at the rates specified in the said Schedule from the _____ (*Scheduled Project Completion Date*) to (*Last day of the Concession Period*)

SCHEDULE

²³ Insert Name of the Project Facility

(Rates to be recovered per trip from users of the bridge)²⁴

a. For use of the entire Project Facility

(All amounts in Rupees)

Period		Fee for each type of vehicle			
From	To	Motor Cycle, Scooter or any other two wheelers mechanically propelled vehicle	Motor Car, Taxi, Jeep, Pick-up Van, Station Wagon, Tempo, auto rickshaws, three wheeler scooters or other Auto driven light vehicles with or without trailer.	Bus, Truck and other heavy vehicles including Truck Trailer combination laden with goods or passengers, when (i) Loaded (ii) Unloaded	Other mechanically propelled vehicles not mentioned above such as mobile crane dozers, earth movers, road rollers, when (i) Loaded (ii) Unloaded
DD/MM/YY ²⁵	DD/MM/YY ²⁶				

b. For use of part of the Project Facility: (optional - specify details if applicable)

(All amounts in Rupees)

Period		Fee for each type of vehicle			
From	To	Motor Cycle, Scooter or any other two wheelers mechanically propelled vehicle	Motor Car, Taxi, Jeep, Pick-up Van, Station Wagon, Tempo, auto rickshaws, three wheeler scooters or other Auto driven light vehicles with or without trailer.	Bus, Truck and other heavy vehicles including Truck Trailer combination laden with goods or passengers, when (iii) Loaded (iv) Unloaded	Other mechanically propelled vehicles not mentioned above such as mobile crane dozers, earth movers, road rollers, when (i) Loaded (ii) Unloaded
DD/MM/YY ²⁷	DD/MM/YY ²⁸				

Notes :

- The Fee set forth above shall be charged to the users of the _____ (name of Project Facility) for a one way trip.
- When a vehicle has to use the _____ (Name of the Project Facility) more than once in a day, the user shall at his option be entitled to do so on payment of one and half times the Fee for one way trip in the first trip itself. A vehicle owner shall also be entitled to a monthly pass on payment of Fee equal to thirty times the Fee for one way trip.
- Following vehicles are exempted from the fee specified above, namely :-
(i) Defence vehicles,

²⁴ Fee indicated in the Bid Document shall be increased by 10% every second anniversary of the bid document date and shall be rounded off to the nearest rupee and set out in this table.

²⁵ Bid document date.

²⁶ Second anniversary of the Bid Document date.

²⁷ Bid document date.

²⁸ Second anniversary of the Bid Document date.

- (ii) Vehicles with VIP symbols,
 - (iii) Police vehicles,
 - (iv) Fire Fighting vehicles,
 - (v) Ambulances,
 - (vi) Funeral vans,
 - (vii) Post and Telegraphs Department vehicles,
 - (viii) Central and State Government vehicles on duty.
4. The vehicles officially relating to the following shall be deemed to be vehicles having VIP Symbols :-
- (i) President of India,
 - (ii) Vice-President of India,
 - (iii) Central and State Minister,
 - (iv) Leaders of Oppositions of Lok Sabha or Rajya Sabha or State Legislatures having the status of Cabinet Minister,
 - (v) Governors of States,
 - (vi) Lieutenant Governors of Union Territories,
 - (vii) Speakers or Chairman of Central and State Legislatures,
 - (viii) Executive Councillors of local elected bodies,
 - (ix) Foreign dignitaries on State visit to India,
 - (x) Foreign Diplomats Stationed in India using cars with CD symbols,
 - (xi) Members of Parliament and State Legislative Assembly/Council in their respective constituencies.
5. The above mentioned rates shall be conspicuously displayed at the Toll Plazas and also at a distance of about 200 metres ahead of Toll Plazas on either side of _____(Name of Project Facility).
6. The said (Name of Concessionaire) or its authorised legal representative shall give a receipt to the payer for the fee collected from the payer.

[No. -----]
Director General (Road Development) and Addl. Secy.

SCHEDULE G**ENVIRONMENTAL CLEARANCES**

Details of the Environmental Clearances obtained/issued by GOI for the Project and the conditions to be fulfilled for the same to be effective are to be listed and the environmental clearance letters may be attached.

SCHEDULE H**CASHFLOW PROJECTIONS²⁹**

		Year of Operation					
	Year "0"	1	2	3	4	5	
Initial Investment (1)							
Toll Revenue (2)							
O&M Expenses(3)							
Total Expenses (5=2+3+4)							
Cashflow (2-1-5)							
Internal Rate of Return (%)							

"Initial Investment" means the cost of construction of the facility, including all reasonable overheads, preliminary and pre-operative expenses in relation thereto, estimated by the Concessionaire. For the purpose of Cashflow Projections the entire Initial Investment would be deemed to have been made on COD

"Year "0" means the year of the COD.

"Toll Revenue" means the income received by Concessionaire by levy of Fee, computed by multiplying the applicable Fee provided in the Fee Schedule and the estimate of traffic made by the Concessionaire.

"O&M Expenses" means the expenses to be incurred by the Concessionaire on operating and maintaining the Project Facility, in order to ensure that the Project Facility conforms to Specifications and Standards.

"Internal Rate of Return" means the pre-tax internal rate of return of the cashflow stream in the Cashflow Projections.

²⁹ The cashflow projections statement enclosed in Schedule 'H' would be the same statement submitted in the above format by the Concessionaire as part of the bid. This format would therefore need to be a part of bid document for the project.

SCHEDULE I STATE SUPPORT AGREEMENT

THIS STATE SUPPORT AGREEMENT is entered into on this the ----- day of ---- (Month) ----- (Year) at -----.

AMONGST,

THE PRESIDENT OF INDIA in his executive capacity for the Government of India, represented by the Ministry of Surface Transport, Government of India, hereinafter referred to as “**GOI**” (which expression shall include its successors and assigns),

THE GOVERNOR OF ----- in his executive capacity for the State of -----, acting through the Public Works Department/ Roads and Building Department, Government of ----- hereinafter referred to as “**STG**” (which expression shall include its successors and assigns), And

M/s XXXX Limited, a company incorporated under the Companies Act, 1956, having its registered office at ----- hereinafter referred to as the “**Concessionaire**” (which expression shall include its permitted successors and assigns)

WHEREAS,

- A. GOI is implementing a project envisaging construction, operation and maintenance of ----- (more particularly described in Schedule ‘A’ and hereinafter referred to as “the Project”) with private sector participation on Build, Operate and Transfer (BOT) basis;
- B. By the Concession Agreement dated ----- entered into between GOI and the Concessionaire (hereinafter referred to as “the Concession Agreement”) the Concessionaire has been granted the Concession to implement the Project on BOT basis;
- C. With the view to facilitate Implementation and operation of the Project by the Concessionaire in accordance with the Concession Agreement, STG has agreed to enter into State Support Agreement, being these presents with the Concessionaire to extend continued support and grant certain rights and authorities as hereinafter set forth to the Concessionaire.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AS FOLLOWS :

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

“**Agreement**” means this agreement and includes any amendment or modification made to this agreement in accordance with the provisions hereof.

“**STG Support**” means the obligations assumed and the facilities agreed to be provided by STG to the Concessionaire pursuant hereto or the Substitution Agreement as applicable.

- 1.2 Capitalised terms used in this Agreement but not defined shall have the meaning assigned to them respectively in the Concession Agreement or the Substitution Agreement as the case may be.

2. TERM

2.1 This Agreement shall come into force from the date hereof and shall be in force and effect during the Concession Period.

3. SUPPORT OF STG

3.1 Upon and with effect from the date hereof, STG agrees :

- (i) so long as the Concessionaire is not in breach of the obligations under this Agreement, STG agrees to enable access to the Project Site to the Concessionaire for peaceful use of and operations at the Project Site by the Concessionaire under and in accordance with the provisions of the Concession Agreement without any let or hindrance from STG or persons claiming through or under it;
- (ii) subject to the Concessionaire complying with Applicable Laws, provide to the Concessionaire Applicable Permits to the extent STG or any of its agencies is entitled to issue;
- (iii) upon written request from the Concessionaire, provide and/or assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
- (iv) ensure that no barriers are erected or placed by STG or any of its agencies that interrupts free flow of traffic on the Project /Project Facility except on account of any law and order situation or upon national security consideration;
- (v) provide the Concessionaire with assistance through a dedicated team against payment of prescribed fee and charges, if any, for regulation of traffic on the Project/Project Facility;
- (vi) provide to the Concessionaire with police assistance in the form of dedicated highway patrol parties against payment of prescribed costs and charges, if any, for patrolling and provision of security on the Project/Project Facility;
- (vii) observe and comply with its obligations set forth in this Agreement;
- (viii) support, cooperate with and facilitate GOI and the Concessionaire in the implementation of the Project;
- (ix) subject to and in accordance with the Applicable Laws, assist the Concessionaire in the procurement of all Applicable Permits required from any municipal and other local authorities and bodies including pachayats, in the State of ----- for the implementation of the Project;
- (x) ensure, subject to and in accordance with the Applicable Laws, that all relevant municipal and other local authorities and bodies including panchayats in the State of - ----- do not put any barriers or other obstructions that interrupt free flow of traffic on the Project/Project Facility; and
- (xi) not do or omit to do any act, deed or thing which may in any manner be violative of or cause the Concessionaire to violate any the provisions of the Concession Agreement.

3.2 STG agrees and undertakes that it shall not construct and operate either itself or have the same, inter alia, built and operated on BOT basis or otherwise a competing facility, either toll free or otherwise during the Concession Period.

- 3.3 STG agrees and undertakes that it shall not levy any additional toll, fee, charge or tax on the use of whole or any part of the Project Facility. STG acknowledges the rights of Lender(s) and GOI under the Substitution Agreement and hereby covenants that upon substitution of the Concessionaire by the Selectee pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the Selectee is a party hereto and the Selectee shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire by the Selectee.

4. CONCESSIONAIRE'S OBLIGATIONS

- 4.1 Concessionaire agrees and undertakes to perform, observe and comply with the following :
- (i) All Applicable Laws and Applicable Permits;
 - (ii) The provisions of the Concession Agreement, the Substitution Agreement, and the Project Agreements; and
 - (iii) Observe, comply and perform its obligations under this Agreement.

5. REPRESENTATIONS AND WARRANTIES

- 5.1 The Concessionaire represents and warrants to STG that:
- (i) it is duly organised, validly existing and in good standing under the laws of India;
 - (ii) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
 - (iii) it has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement;
 - (iv) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
 - (v) it is subject to civil and commercial laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
 - (vi) the execution, delivery and performance of this Agreement will not conflict with nor will the same result in any breach or default under the Memorandum and Articles of Association of the Concessionaire or any member of the Consortium or any Applicable Laws or any covenant, agreement, 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;
 - (vii) there are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's 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 or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect;
 - (viii) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any order of any Government Authority which may result in any Material Adverse Effect;
 - (ix) it has complied with all Applicable Laws 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 Material Adverse Effect;

- (x) No representation or warranty by the Concessionaire contained herein or in any other document furnished by it to STG, or to any Governmental Agency in relation to Applicable Permits contains or will contain any untrue statement or material fact necessary to make such representation or warranty not misleading;
- (xi) No sums have been paid or will be paid by or on behalf of the Concessionaire 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 GOI/STG in connection therewith.

5.2 STG represents and warrants to the Concessionaire that:

- (i) It has full power and authority to execute, deliver and perform this Agreement;
- (ii) It has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- (iii) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof.

6. SOVEREIGN IMMUNITY

6.1 STG hereto unconditionally and irrevocably :

- (i) Agrees that the execution, delivery and performance by it of this Agreement do not constitute sovereign acts;
- (ii) Agrees that should any proceedings be brought against it or its assets in relation to this Agreement or any transaction contemplated by this Agreement, no sovereign immunity from such proceedings, execution, attachment or other legal process shall be claimed by or in behalf of itself or with respect to any of its assets, to the extent permitted by law; and
- (iii) To the extent permitted by law, waives right of sovereign immunity, which it or its assets now has or may acquire in future.

6.2 Notwithstanding anything to the contrary herein contained such waiver of right of immunity shall not apply to

- (i) Property and assets of any consular or diplomatic mission or consulate or
- (ii) Property belonging to the Defence Services and such assets of the Union of India.

7. BREACH AND COMPENSATION

7.1 In case STG is in breach of any of its obligations under this Agreement, which breach is not cured within 30 days of receipt of notice in writing from the Concessionaire and which has not occurred as a result of Concessionaire's breach of its obligation under this Agreement or the Concession Agreement, STG shall pay to the Concessionaire by way of Compensation, all direct additional costs suffered or incurred by the Concessionaire and determined by GOI as arising out of such material default by STG.

7.2 In case of any dispute by STG as to the extent of compensation determined by GOI, the same shall be settled as per provisions of the Dispute Settlement Mechanism provided in Article 9 of this Agreement.

7.3 Any sum payable by STG to the Concessionaire pursuant to the preceding sub-article 7.1 shall be paid to the Concessionaire in one lumpsum within 60 (sixty) days of receiving GOI's

determination thereof. Failing such payment, GOI shall within the next 30 days pay the sum due to the Concessionaire and seek reimbursement of the same from STG.

8. INDEMNITY

- 8.1 The Concessionaire will indemnify, defend and hold STG harmless against any and all proceedings, actions and claims for any loss, damage, cost and expense of whatever kind and nature arising out of design, engineering, construction, operation and maintenance of the Project/Project Facility or arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with and observe Applicable Laws and Applicable Permits;
- 8.2 STG will, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of STG to fulfill any of its obligations under this Agreement adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by STG, its officers, servants and agents;
- 8.3 Without limiting the generality of Clause 8.2, GOI shall indemnify the Concessionaire and shall save it harmless from and against any payments required to be made by the Concessionaire with respect to levy of any Local Taxes provided nothing contained herein shall be construed or interpreted as restricting in any way or manner the right to STG or any municipal, panchayat or other local authorities to levy any taxes which they or any of them are lawfully entitled to levy, impose or collect (the "Expected Taxes"). The Concessionaire shall not be entitled to and STG shall be under no obligation to reimburse Expected Taxes to the Concessionaire or any person claiming through or under the Concessionaire;
- 8.4 In the event that either party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this Clause 8 or in respect of which it is entitled to reimbursement (the 'Indemnified Party') it shall notify the other Party ("Indemnifying Party") within 14 (fourteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party. 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 co-operation and assistance in contesting any claim and shall sign all such writings, and documents as the Indemnified Party may reasonably require.

9. GOVERNING LAW AND DISPUTE SETTLEMENT

- 9.1 This Agreement shall be governed by and construed and interpreted in accordance with the laws of India. The provisions contained in Clause 8 shall survive the termination of this Agreement.
- 9.2 Any dispute, difference or claim arising out of or in connection with or in relation to this Agreement which is not resolved amicably shall be decided finally by reference to arbitration to a Board or Arbitrators comprising of one nominee of each party to the dispute. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The Arbitrators shall issue a reasoned award. The venue of such arbitration shall be -----
-----, The Award shall be final and binding on the Parties.

10. MISCELLANEOUS

10.1 Alteration of Terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of STG and the Concessionaire.

10.2 Time or Indulgence Allowed

An indulgence by one Party to the other in respect of any obligation or matter hereunder including time for performance to the other party hereunder or to remedy any breach hereof shall not be construed as a waiver of any of its rights hereunder. Party may be on such terms and subject to such conditions as the Party giving it may specify and shall be without prejudice to that Party's then accrued rights under this Agreement except to the extent expressly varied in writing when giving such time or other indulgence.

10.3 Severance of Terms

If any provisions of this Agreement are declared to be invalid, unenforceable or illegal by any competent arbitration tribunal or court, such invalidity, unenforceability or illegality shall not prejudice or affect the remaining provisions of this Agreement, which shall continue in full force and effect.

10.4 Language

All notices, certificates, correspondence or other communications under or in connection with the Agreement shall be in English.

10.5 Notices

Any notice or communication hereunder shall be in writing and shall either be delivered personally or sent by registered post, with copy by facsimile transmission or other means of telecommunication in permanent written form. A copy of all notices and communications will also be forwarded to the Lender's Representative. The service of notice shall unless otherwise notified by a notice hereunder to the parties at their following address:

IF to STG :

Attn :

Fax No:

Tel No:

IF to GOI :

Attn :

Fax No :

Tel No :

IF to the Concessionaire :

Attn :

Fax No :

Tel No :

The notice pursuant hereto will be deemed to have been received on the date when such notice is in fact received by the addressee.

10.6 Authorised Representatives

Each of the Parties shall by notice in writing designate their respective authorised representative through whom only all communications shall be made. A Party hereof shall be entitled to remove and/or substitute or make fresh appointment of its such authorised representative by similar notice.

10.7 Original Document

This Agreement is made in three counterparts, each of which shall be deemed to be an original but shall constitute one document.

IN WITNESS WHEREOF THE PARTIES HERETO HAVE PUT THEIR HANDS HEREUNTO ON THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

For the Concessinaire

By :-----

Name -----

Title -----

For STG

By :-----

Name -----

Title -----

For GOI

By :-----

Name -----

Title -----

SCHEDULE J**PART A****INDEPENDENT ENGINEER'S SERVICES****TERMS OF REFERENCE****1. OBJECTIVES**

The Independent Engineer shall be required to :

- (i) Act independently on behalf of both GOI and the Concessionaire to review and monitor all activities associated with design, construction, operation and maintenance³⁰ to ensure compliance with provisions of the Concession Agreement.
- (ii) Visit, inspect, and report to GOI/Steering Group on various aspects of the project and carry out all such activities as are provided in the Concession Agreement. Without prejudice to this, the scope of services of the Independent Engineer shall be as specified in para 2 to 4.

The Independent Engineer shall have no authority to relieve the Concessionaire of any of its duties or to impose additional obligations other than those expressly provided in the Concession Agreement.

2. SCOPE OF SERVICES**2.1 Pre-implementation Period**

- (i) Review the Project Report prepared by the Concessionaire.
- (ii) Review the Implementation Schedule submitted by the Concessionaire.
- (iii) Proof checking of designs, calculations and working drawings prepared by the Concessionaire for the construction of various components of the Project Facility in accordance with provisions of the Concession Agreement.
- (iv) Review the adequacy of the geo-technical studies, sub-soil investigations, hydrological investigation and the topographical survey, if any, carried out by the Concessionaire.
- (v) Review the environmental management plan for the Project during Implementation Period and Operations Period.
- (vi) Review the proposed quality assurance and quality control procedures during the Implementation Period and Operations Period.
- (vii) Review the safety measures proposed during Implementation Period and Operations Period.

2.2 Implementation Period

- (i) Monitor quality assurance and quality control during Implementation period.
- (ii) Review the material testing results, mix designs and order special tests of materials and/or completed works, and/or order removal and substitution of substandard materials and/or works as required.
- (iii) Ensure that the construction work is carried out in accordance with the Specifications and Standards and Good Industry Practice.
- (iv) Identify delays in completion and recommend to the Steering Group/ Concessionaire the remedial measures to expedite the progress.
- (v) Review "As Built" drawings for each component of the works prepared by the Concessionaire.
- (vi) Review the safety measures provided by the Concessionaire.

³⁰ In case where PWD Engineer is designated.

- (vii) Supervise and monitor various Completion Tests as provided in the Concession Agreement
- (viii) Issue Provisional Completion Certificate or the Completion Certificate, as the case may be, in accordance with the provisions of the Concession Agreement.
- (ix) Review and approve the Maintenance Manual prepared by the Concessionaire.

2.3 General

- (i) Design a Management Information System (MIS) for monitoring of the Project by GOI.
- (ii) Determine and recommend changes to the Project Completion Schedule, Scheduled Project Completion Date and the Concession Period in accordance with the Concession Agreement.
- (iii) Mediate and assist in resolving disputes between GOI/STG and Concessionaire.

3. INTERACTION WITH STEERING GROUP

The Independent Engineer shall interact with the Steering Group on a regular basis.

4. REPORTING REQUIREMENTS

The Independent Engineer shall prepare and submit to the Steering Group three copies and to the Concessionaire two copies each of the following reports.

- (a) Implementation Period
 - Monthly Progress Report
- (b) Various other reports as provided in the Concession Agreement such as Completion Report.

5. PERIOD OF SERVICES

The period of services shall be the Implementation Period.

SCHEDULE J**PART B****PWD ENGINEER'S SERVICES
TERMS OF REFERENCE****1. OBJECTIVES**

The PWD Engineer shall be required to :

- (i) To review and monitor all activities associated with operation and maintenance to ensure compliance with provisions of the Concession Agreement.
- (ii) Visit, inspect, and report to GOI/Steering Group on various aspects of the project and carry out such other activities as provided in the Concession Agreement. Without prejudice to this, the scope of services of the PWD Engineer shall be as specified in para 2 to 4.

The PWD Engineer shall have no authority to relieve the Concessionaire of any of their duties or to impose additional obligations other than those expressly provided in the Concession Agreement.

2. SCOPE OF SERVICES

- (i) Review work plan and schedules of various operation and maintenance activities.
- (ii) Review and ensure compliance with Maintenance Programme, Minimum Maintenance Requirements and the Maintenance Manual.
- (iii) Supervise action to undertaken by GOI's contractor(s) to carry out maintenance obligations of the Concessionaire at the risk and cost of the Concessionaire in the event of his failure to carry out the same.
- (iv) Undertake audit of the traffic using the Project at least once a month.
- (v) Review and inspect the Project at least once a month during the Operations Period and submit an Inspection Report thereafter to GOI.
- (vi) Mediate and assist in resolving disputes between GOI/STG and Concessionaire.

3. REPORTING REQUIREMENTS

The Independent Engineer shall prepare and submit to the Steering Group three copies and to the Concessionaire two copies each of the following reports.

- Monthly and Quarterly Inspection Reports
- Monthly report on audit of the traffic using the Project

4. PERIOD OF SERVICES

The period of services shall be the Operations Period.

SCHEDULE K
DRAWINGS

SCHEDULE L
SPECIFICATIONS AND STANDARDS

SCHEDULE M

TESTS

SCHEDULE N
COMPLETION CERTIFICATE

SCHEDULE O
MINIMUM MAINTENANCE REQUIREMENTS

SCHEDULE P
SAFETY STANDARDS

SCHEDULE Q**PROFORMA OF BANK GUARANTEE – I**

(FOR IMPLEMENTATION PERIOD)
(To be issued by a Scheduled Bank in India)

THIS DEED OF GUARANTEE executed on this the ---- day of ---- at ---- by -----
----- (Name of the Bank) having its Head/Registered office at -----
----- hereinafter referred to as “the Guarantor” which expression shall unless it be repugnant to the subject or context thereof include successors and assigns;

In favour of

The President of India in his executive capacity for the Government of India, represented by the Ministry of Surface Transport, Government of India, hereinafter called “GOI” (which expression shall include its successors and assigns);

WHEREAS

- A. By the Concession Agreement dated ----- entered into between GOI and M/s. XXXX Limited, a company incorporated under the Companies Act, 1956 having its registered office at ----- hereinafter called “the Company”, (“the Concession Agreement”) the Company has been granted the Concession to implement the project envisaging construction, operation and maintenance of ----- on build, operate and transfer basis.
- B. In terms of Article 3.1(a) of the Concession Agreement, the Company is required to furnish to GOI, an unconditional and irrevocable bank guarantee for an amount of Rs.----- (Rupees ----- only) as security for due and punctual performance/discharge of its obligations under the Concession Agreement during the Implementation Period, substantially in the format annexed as Schedule ‘Q’ to the Concession Agreement.
- C. At the request of the Company, the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Company of its obligations under the Concession Agreement during the Implementation Period.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS :

1. Capitalised terms used herein but not defined shall have the meaning assigned to them respectively in the Concession Agreement.
2. The Guarantor hereby guarantees the due and punctual performance by the Company of all its obligations under the Concession Agreement during the Implementation Period.
3. The Guarantor shall, without demur, pay to GOI sums not exceeding in aggregate Rs.----- (Rupees ----- only), within five (5) days of receipt of a written demand therefor from GOI stating that the Company has failed to meet its performance obligations under the Concession Agreement during the Implementation Period. The Guarantor shall have no obligation to go into the veracity of any demand so made by GOI and shall pay the amount specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Company or any other Person.
4. In order to give effect to this Guarantee GOI shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the Concession Agreement or other documents or by the extension of time for performance granted to the Company or postponement/non exercise/ delayed exercise of any of its rights by GOI or any indulgence shown by GOI to the Concessionaire and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non exercise, delayed exercise of any of its

rights by GOI or any indulgence shown by GOI provided nothing contained herein shall enlarge the Guarantor's obligation hereunder.

5. This Guarantee shall be irrevocable and shall remain in full force and effect until discharge by the Guarantor of all its obligations hereunder.
6. This Guarantee shall not be affected by any change in the constitution or winding up of the Company/the Guarantor or any absorption, merger or amalgamation of the Company/the Guarantor with any other Person.
7. The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorised to execute this Guarantee pursuant to the power granted under _____.

IN WITNESS WHEREOF THE GUARANTOR HAS SET ITS HANDS HEREUNTO ON THE DAY, MONTH AND YEAR FIRST HEREINABOVE WRITTEN.

SIGNED AND DELIVERED by ----- Bank by the hand of Shri -----

its ----- and authorised official.

SCHEDULE R

PROFORMA OF BANK GUARANTEE – II
(FOR OPERATIONS PERIOD)
 (To be issued by a Scheduled Bank in India)

THIS DEED OF GUARANTEE executed on this the ----- day of --- at ----by -----
 ----- (Name of the Bank) having its Head/Registered office at -----
 ----- hereinafter referred to as “the Guarantor” which expression shall unless it be repugnant to the subject or context thereof include its successors and assigns;

In favour of

The President of India in his executive capacity for the Government of India, represented by the Ministry of Surface Transport, Government of India, hereinafter called “GOI” (which expression shall include its successors and assigns);

WHEREAS

- A. By the Concession Agreement dated ----- entered into between GOI and M/s. XXXX Limited, a company incorporated under the Companies Act, 1956 having its registered office at ----- hereinafter called “the Company”, (“the Concession Agreement”) the Company has been granted the Concession to implement the project envisaging construction, operation and maintenance of ----- on build, operate and transfer basis.
- B. In terms of Article 3.1(a) of the Concession Agreement, the Company is required to furnish to GOI, an unconditional and irrevocable bank guarantee for an amount of Rs.----- (Rupees ----- only) as security for due and punctual performance/discharge of its obligation under the Concession Agreement during the Operations Period substantially in the format annexed as Schedule ‘—’ to the Concession Agreement.
- C. At the request of the Company, the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Company of its obligations under the Concession Agreement during the Operations Period.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS :

- 1. Capitalised terms used herein but not defined shall have the meaning assigned to them respectively in the Concession Agreement.
- 2. The Guarantor hereby guarantees the due and punctual performance by the Company of all its obligations under the Concession Agreement during the Operations Period.
- 3. The Guarantor shall, without demur, pay to GOI sums not exceeding in aggregate Rs.----- (Rupees ----- only), within five (5) days of receipt of a written demand therefor from GOI stating that the Company has failed to meet its performance obligations under the Concession Agreement during the Operations Period³¹. The Guarantor shall have no obligation to go into the veracity of any demand made by GOI and shall pay the amounts specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Company or any other Person.
- 4. In order to give effect to this Guarantee GOI shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the

³¹ Banks are unlikely to issue guarantee for the entire Operations Period in one stretch. Initially the guarantee may be issued for a period of 2-3 years. The Company shall have to keep the guarantee valid throughout the Operations Period by seeking extension from time to time.

terms and conditions of the Concession Agreement or other documents or by the extension of time for performance granted to the Company or postponement/non exercise/ delayed exercise of any of its rights by GOI or any indulgence shown by GOI to the Concessionaire and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non exercise, delayed exercise of any of its rights by GOI or any indulgence shown by GOI provided nothing contained herein shall enlarge the Guarantor's obligation hereunder.

5. This Guarantee shall be irrevocable and shall remain in full force and effect until discharged by the Guarantor of all its obligations hereunder.
6. This Guarantee shall not be affected by any change in the constitution or winding up of the Company/the Guarantor or any absorption, merger or amalgamation of the Company/the Guarantor with any other Person.
7. The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorised to execute this Guarantee pursuant to the power granted under _____.

IN WITNESS WHEREOF THE GUARANTOR HAS SET ITS HANDS HEREUNTO ON THE DAY, MONTH AND YEAR FIRST HEREINABOVE WRITTEN.

SIGNED AND DELIVERED by ----- Bank by the hand of Shri -----

its ----- and authorised official.

SCHEDULE S
AGREEMENT WITH MINISTRY OF RAILWAYS

SCHEDULE T**SUBSTITUTION AGREEMENT**

THIS SUBSTITUTION AGREEMENT is entered into on this the ----- day of ----- (Month) ---- (Year) at -----.

AMONGST,

The President of India acting in his executive capacity for the Government of India represented by the Ministry of Surface Transport, hereinafter referred to as “**GOI**” (which expression shall unless repugnant to the context of meaning thereof include its successors and assigns);

M/s. XXXX Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its Registered Office at ----- hereinafter referred to as “**the Concessionaire**” (which expression shall unless repugnant to the context or meaning thereof include its successors and assigns), AND

YYYY (Financial Institution/ Bank) having its Registered Office/Head Office at ----- hereinafter referred to as “**the Lender**”.

OR

ZZZZ (Financial Institution/Bank) having its Registered Office/Head Office at ----- acting for and on behalf of the Lenders listed in Schedule I hereto (hereinafter referred as “**the Lender’s Representative**” .

WHEREAS,

- A. GOI is keen to implement a project envisaging construction, operation and maintenance of ----- (more particularly described in Schedule ‘A’ and hereinafter referred to as “the Project”) with private sector participation on Build, Operate and Transfer (BOT) basis;
- B. By the Concession Agreement dated ----- entered into between GOI and the Concessionaire (hereinafter referred to as “the Concession Agreement”) the Concessionaire has been granted the Concession to implement the Project on BOT basis;
- C. With a view to facilitate financing of the Project by the Concessionaire, in pursuance of Article ----- of the Concession Agreement, GOI and the Concessionaire have agreed to enter into Substitution Agreement being these presents with the Lender/s/Lenders’ Representative.
- D. As a condition to making any disbursement pursuant to the Financing Documents, the Lender(s) has/ have required that the Substitution Agreement being these presents be entered into, and GOI and the Concessaionaire have agreed to the same

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AS FOLLOWS :

ARTICLE 1**DEFINITIONS AND INTERPRETATION****1.1 Definitions**

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

“Agreement” means this agreement and includes any amendment or modification made to this agreement in accordance with the provisions hereof.

“Financial Assistance” means the financial assistance set forth in Schedule I hereto, agreed to be provided by the Lender(s) to the Concessionaire for financing the the Project.

“Lender(s)” means the financial institutions/banks whose name(s) and addresses are set out in Schedule I hereto.

“Residual Concession Period” means the period which shall be the aggregate remainder of the Concession Period as the Suspension Period.

“Selectee” means a Person proposed by the Lender/Lender’s Representative pursuant to this Agreement and approved by GOI for substituting the Concessionaire for the residual Concession Period, in accordance with the provisions of this Agreement.

Suspension Period” means the period commencing from the expiry of the Cure Period specified in the Preliminary Notice and ending on the date on which all formalities connected with substitution of the Concessionaire by the Selectee including handing over of Project Site/Project Facility, in accordance with this Agreement are completed and the substitution has become effective.

- 1.2 Capitalised terms used in this Agreement but not defined shall have the meaning assigned to them respectively in the Concession Agreement.

ARTICLE 2

SUBSTITUTION OF THE CONCESSIONAIRE BY THE SELECTEE

2.1 Lenders right to Substitute

GOI and the Concessionaire hereby irrevocably agree that upon occurrence of an Concessionaire Event of Default, the Lender(s) shall, without prejudice to any other rights or remedies available to them under law/Financing Documents and without being required to exercise or exhaust such rights or remedies, have the right to seek substitution of the Concessionaire by Selectee for the residual Concession under the Concession Agreement in accordance with the provisions of this Agreement. Provided upon substitution the Selectee shall be entitled to the extension of the remainder of the Concession Period by the Suspension Period.

2.2 Preliminary Notice of Termination

GOI shall as soon as possible but in any case not later than 15 days of its knowledge of the occurrence of the Concessionaire Event of Default issue Preliminary Notice of Termination to the Concessionaire in terms of Article 16.2(a) of the Concession Agreement, with a copy thereof simultaneously to the Lenders. Provided if the Concessionaire Event of Default is the one set out in Article 16.1(a)(9) of the Concession Agreement, the GOI shall not be obliged to issue Preliminary Termination Notice until receipt by GOI of the recall notice issued by the Lender(s) to the Concessionaire

2.3 Suspension of Concession and Takeover of the Project Facility

The Concessionaire irrevocably agrees that if the Cure Period specified in the Preliminary Notice of Termination lapses without the Concessionaire Event of Default having been cured, the Concession shall effective from the expiry of such Cure Period stand suspended without any further notice or other act of GOI being required, and that GOI shall have the right to enter upon and takeover the Project Site/Project Facility and to take all such steps as are necessary for the continued operation and maintenance of the Project Facility, levy, collection

and appropriation of Fee subject to servicing the Debt Due as per the Financing Documents, and the substitution of the Concessionaire by the Selectee in accordance with this Agreement. The Concessionaire hereby irrevocably consents to the takeover of the Project Facility/ Project Site by GOI forthwith upon suspension becoming effective.

2.4 Substitution Notice

GOI and the Concessionaire hereby irrevocably agree that in the event of the Concessionaire's failure to cure the Event of Default specified in the Preliminary Notice of Termination. The Lender/Lender's Representative may, within 30 (thirty) days of the expiry of the Cure Period specified therein notify GOI and the Concessionaire about the intention of the Lender(s) to seek substitution of the Concessionaire by the Selectee for the Residual Concession (the "Substitution Notice").

2.5 Criteria for selection of the Selectee.

The Lender/ Lenders' Representative shall in addition to any other criteria that it may deem fit and necessary, apply the following criteria in the selection of the Selectee:

- (i) the Selectee shall possess the network, experience, technical capability and managerial ability to perform and discharge all the residual duties, obligations and liabilities of the Concessionaire in respect of the Concession, under the Concession Agreement;
- (ii) the Selectee shall have the capability and shall unconditionally consent to assume the liability for the payment and discharge of dues, if any, of the Concessionaire to GOI under and in accordance with the Concession Agreements and also payment of Debt Due to the Lender(s) upon terms and conditions as agreed to between the Selectee and the Lenders.

ARTICLE 3

MODALITY FOR SUBSTITUTION

3.1 Modalities for Substitution.

The following modalities shall be followed for substitution of the Concessionaire by the Selectee pursuant to this Agreement:

- (i) The Lender(s)/Lenders' Representative shall be entitled, within a period of 120 (one hundred twenty) days from the date of delivery of the Substitution Notice pursuant to the preceding Article 2.2 to invite or procure offers either through private negotiations or public auction or process of tender or otherwise from the eligible Persons, for the substitution of the Concessionaire by the Selectee and propose to GOI for its approval the Selectee (the "Proposal"). The Proposal of the Lender/Lender's Representative shall contain the particulars and information in respect of the Selectee, the terms of Substitution, particulars of the Debt Due and such data and information as would be necessary and relevant for GOI to decide as to the acceptability of the Selectee. The Lender/ Lender's Representative shall provide to GOI such additional information and clarification in respect of any data, particulars or information contained in the Proposal, as GOI may promptly and reasonably require.
- (ii) The Proposal shall be accompanied by an unconditional undertaking of the Selectee to the effect that it shall upon acceptance by GOI of the Proposal observe, comply with, perform and fulfill the residual terms, conditions and covenants of the Concession Agreement as if the Selectee had been the Concessionaire under the Concession Agreement and to assume, discharge and pay the Debt Due on the terms and conditions agreed to by the Selectee with the Lenders. The Selectee shall

also undertake to enter into such documents and writings with GOI and the Lender(s) as may be necessary or required to give effect to the substitution of the Concessionaire by the Selectee.

- (iii) GOI shall convey to the Lender/ Lenders' Representative its acceptance or otherwise of the Selectee within 30(thirty) days of (a) the date of receipt of the Proposal by GOI, or (b) the date of receipt of the additional information and clarifications in respect of any data, particulars or information comprised in the Proposal, provided by the Lender/Lender's Representative to the GOI, whichever is later.
- (iv) At any time prior to the acceptance of the Selectee by GOI pursuant to this Agreement, GOI may require the Lender/Lenders' Representative to satisfy it as to the eligibility of the Selectee and the decision of GOI as to acceptance or rejection of any Selectee (which shall be reasonable), shall be final, conclusive and binding on the Lender(s), the Selectee and the Concessionaire. In the event that GOI fails to communicate its acceptance or otherwise or the objections if any it has to the acceptance of the Proposal/ the Selectee within a period of 30 days prescribed in preceding sub-article (iii), GOI shall be deemed to have accepted the Proposal/ the Selectee
- (v) The rejection of the Selectee if made by GOI shall be reasoned and be made after hearing the Lender/Lenders' Representative. Following the rejection of the Proposal, the Lender/Lenders' Representative shall have the right to submit a fresh Proposal, proposing another Selectee, within 30 days of receipt of communication regarding rejection of the Selectee previously proposed. The provisions of preceding sub-article (iii) and (iv) shall apply mutatis mutandis to such fresh Proposal.
- (vi) If GOI accepts the Proposal/fresh Proposal, GOI shall take all necessary steps to substitute the Concessionaire by the Selectee by amendment of the Concession Agreement or by execution of fresh agreement or such other writing as may be required or necessary to give effect to the substitution of the Concessionaire by the Selectee for the Residual Concession Period.
- (vii) The substitution of the Concessionaire by the Selectee shall be deemed to be complete upon the Selectee executing all necessary documents and writings with or in favour of GOI and the Lender(s) so as to give full effect to the terms and conditions of substitution subject to which the Selectee has been accepted by the Lender(s) and GOI and upon the delivery by GOI of the Project Assets to the Selectee. Upon the substitution becoming effective pursuant to this sub-article all the rights of the Concessionaire under the Concession Agreement shall cease to exist. Provided nothing contained in this sub-article shall prejudice any pending/subsisting claims of the Concessionaire against GOI or any claim of GOI against the Concessionaire and the Selectee shall incur no liability or consequence on account of any previous breach/default and shall subject to the terms and conditions of the substitution, have a period of 90 days to cure any breach/default subsisting on the date of substitution and required to be cured.
- (viii) The decision of the Lenders and GOI in the selection of the Selectee shall be final and binding on the Concessionaire and shall be deemed to have been made with the concurrence of the Concessionaire. The Concessionaire hereby expressly waives all rights to object to or challenge such selection of the Selectee on any ground whatsoever.

3.2 Termination and Termination Payment.

- (i) Where the Lender/Lenders' Representative (on behalf of all the Lenders) communicates in writing that (i) the Lender/ Lender's Representative does not intend to seek substitution of the Concessionaire, or (ii) that the Lender/Lenders' Representative has not been able to find suitable Selectee or (iii) that GOI has declined to accept the Selectee proposed by the Lender/Lenders' Representative,

GOI shall proceed to terminate the Concession and to make Termination Payment, in accordance with the provisions of the Concession Agreement.

- (ii) Notwithstanding anything contained hereinabove, GOI shall not upon Termination of the Concession Agreement, be required to take over, the Debt Due save and except to the extent of Termination Payment due and payable under the Concession Agreement. In such an event the GOI's obligation shall be limited to assumption of such liabilities and payments of Debt Due as GOI has agreed to bear under the Concession Agreement.
- (iii) Nothing contained in these presents shall mean or be interpreted as provision of any guarantee or surety by GOI and it is expressly agreed that GOI has not provided any surety, guarantee or counter guarantee whether directly or indirectly for the recovery of amounts advanced by the Lenders to the Concessionaire.

ARTICLE 4

MODE OF TERMINATION PAYMENTS

4.1 Mode of Payment

- (i) GOI and Concessionaire hereby irrevocably agree, and confirm that so long as the Debt Due is outstanding the Termination Payment and any other amounts due and payable by GOI to the Concessionaire under any of the provisions of the Concession Agreement shall be paid only by way of credit directly to a bank account designated therefor by the Lender(s)/Lenders' Representative and advised to GOI and the Concessionaire in writing. The Lender(s) shall be entitled to receive and appropriate the same without any further reference to or consent of the Concessionaire towards the satisfaction of the Debt Due, subject to payment by the Lender(s) of the surplus amount if any remaining after satisfaction of the Debt Due, to the Concessionaire. Any payment so made shall to the extent of such payment constitute a valid discharge to GOI of its obligations with regard to the Termination Payment and of any other monies due to the Concessionaire under the Concession Agreement.
- (ii) For the purpose of giving full effect to the provisions contained in the preceding sub-article (i), the Lender(s)/the Lender's Representative shall be entitled to make a demand for payment of the Termination Payment if the Concessionaire has failed to make such demand as required under Article 16.4 of the Concession Agreement within 15 days from the Termination Date under intimation to the Lender(s)/Lender's Representative.
- (iv) The Concessionaire hereby irrevocably appoints and constitutes the Lender(s)/Lenders' Representative as its agent to make such demand for Termination Payment. Any demand made by the Lender(s)/Lenders' Representative pursuant to the power and authority conferred hereby shall for the purpose of the Article 16.4 of the Concession Agreement be deemed to be a demand for Termination Payment made by the Concessionaire.

ARTICLE 5

GENERAL

5.1 General

- (i) The Parties hereto expressly represent and warrant that they are duly empowered to sign and execute this Agreement and the Lenders Representative is duly and fully authorised by each of the Lenders to enter into this Agreement on their behalf.

- (ii) Notices under this Agreement shall be sent to the Addresses first hereinabove mentioned. Any change in the address of any Party shall be duly notified by a Registered post acknowledgement due and delivered to the other parties.
- (iii) The expressions “GOI”, the “Concessionaire”, the “Lender” and the “Lenders’ Representative” herein used shall unless there be anything repugnant to the subject or context include the respective successors, legal representatives, administrators and permitted assigns.
- (iv) This Agreement shall not be affected by reorganisation of any Lender, the Concessionaire or GOI and the successor in interest of the Lender or GOI shall have the benefit of this Agreement.
- (v) Any dispute, difference or claim arising out of or in connection with or in relation to this Agreement which is not resolved amicably shall be decided finally by arbitration by a Board of Arbitrators comprising of a nominee of each party to the dispute. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The arbitrators shall issue a reasoned award. The venue of such arbitration shall be New Delhi, India. The Award shall be final and binding on the Parties. The Parties agree and undertake to carry out the award of the arbitrators (the “Award”) without delay.
- (vi) This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder. The Courts in New Delhi alone shall have jurisdiction over all matters arising out of or relating to the arbitration agreement contained herein or proceedings arising out of or relating to the arbitration proceedings thereunder.
- (vii) The consultation, recommendation or approval of the Lenders’ Representative under this Agreement shall always be taken as consultation, recommendation or approval of every concerned Lender and each such Lender shall be bound by the same.
- (viii) This Agreement shall be in addition to and shall not be in derogation of the terms of the Financing Documents.
- (ix) It shall not be necessary for the Lender(s) or the Lenders’ Representative to enforce or exhaust any other remedy available to them before invoking the provisions of this Agreement.
- (x) No amendment, variation or modification to this Agreement shall be valid and effectual unless made in writing and executed by the duly authorised representatives of all the Parties hereto.
- (xi) All stamp duties or other imposts and charges as are applicable on this Agreement or on amendment of the Concession Agreement or execution of fresh Concession Agreement for the purpose of substitution as aforesaid shall be borne by and be to the account of the Concessionaire. In the event of the Lenders making such payment for the time being, it shall be deemed to be a part of the Debt Dues.
- (xii) The Parties hereby expressly agree that for the purpose of giving full and proper effect to this Agreement, the Concession Agreement and this Agreement shall be read together and construed harmoniously. The terms of this Agreement shall prevail in the event of any inconsistency with the Concession Agreement.

SCHEDULE I

PARTICULARS OF FINANCIAL ASSISTANCE.

Name and Address of the Lender	Nature and Amount of Financing Assistance

IN WITNESS WHEREOF THE PARTIES HERETO HAVE SET THEIR HANDS HEREUNTO ON THE DAY, MONTH AND YEAR HEREINABOVE MENTIONED.

SIGNED AND DELIVERED ON BEHALF OF
-----LIMITED

BY : _____

Name :

Title :

SIGNED AND DELIVERED ON BEHALF OF
GOVERNMENT OF INDIA

BY : _____

Name :

Title :

SIGNED AND DELIVERED ON BEHALF OF
----- ON BEHALF OF THE
LENDERS SETFORTH IN SCHEDULE I

BY : _____

Name :

SCHEDULE U

MEMORANDUM OF UNDERSTANDING

Where the Project is being implemented by a Consortium, the Memorandum of Understanding entered into them for the purpose of implementing the Project may be appended.