

CONTRACT AGREEMENT FOR  
DESIGN AND CONSTRUCTION OF  
SERVICE AREA BUILDINGS  
IN DHOLERA SPECIAL INVESTMENT REGION, DHOLERA  
ON EPC BASIS

CIN NO. - DICDL/DSIR/AA/SAB/CONS/02

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Gujarat, India

March 2019

Prepared By

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**AECOM**

## TABLE OF CONTENTS

<b>PART I - PRELIMINARY .....</b>	<b>1</b>
<b>1. Definitions and Interpretation.....</b>	<b>5</b>
1.1    Definitions.....	5
1.2    Interpretation.....	5
1.3    Measurements and arithmetic conventions .....	7
1.4    Priority of agreements and errors/discrepancies .....	7
1.5    Joint and several liability .....	8
<b>PART II - SCOPE OF PROJECT.....</b>	<b>9</b>
<b>2. Scope of the Project .....</b>	<b>10</b>
2.1    Scope of the Project .....	10
<b>3. Obligations of the Contractor .....</b>	<b>11</b>
3.1    Obligations of the Contractor.....	11
3.2    Obligations relating to sub-contracts and any other agreements.....	12
3.3    Employment of foreign nationals .....	13
3.4    Contractor's personnel .....	13
3.5    Advertisement on Project Site.....	14
3.6    Contractor's care of the Works.....	14
3.7    Electricity, water and other services .....	14
3.8    Unforeseeable difficulties .....	14
<b>4. Obligations of the Employer .....</b>	<b>15</b>
4.1    Obligations of the Employer .....	15
4.2    Deleted .....	16
4.3    Environmental Clearances .....	16
<b>5. Representations and Warranties .....</b>	<b>17</b>
5.1    Representations and warranties of the Contractor.....	17
5.2    Representations and warranties of the Employer .....	18
5.3    Disclosure .....	19
<b>6. Disclaimer .....</b>	<b>20</b>
6.1    Disclaimer .....	20
<b>PART III - CONSTRUCTION AND MAINTENANCE.....</b>	<b>21</b>
<b>7. Performance Security.....</b>	<b>22</b>
7.1    Performance Security.....	22
7.2    Extension of Performance Security.....	22
7.3    Appropriation of Performance Security .....	22
7.4    Release of Performance Security .....	23
7.5    Retention Money.....	23
<b>8. The Project Site.....</b>	<b>25</b>

8.1	The Site .....	25
8.2	Procurement of the Site .....	25
8.3	Damages for delay in handing over the Site.....	26
8.4	Site to be free from Encumbrances .....	27
8.5	Protection of Site from encroachments .....	27
8.6	Special/temporary Roads .....	27
8.7	Access to the Employer and the Employer’s Engineer .....	28
8.8	Geological and archaeological finds .....	28
<b>9.</b>	<b>Utilities and Trees.....</b>	<b>29</b>
9.1	Existing utilities and roads - Deleted .....	29
9.2	Shifting of obstructing utilities.....	29
9.3	New utilities .....	29
9.4	Felling of trees .....	29
<b>10.</b>	<b>Design and Construction of the Project Works.....</b>	<b>31</b>
10.1	Obligations prior to commencement of Works .....	31
10.2	Design and Drawings .....	32
10.3	Construction of the Project Works .....	34
10.4	Maintenance during Construction Period.....	34
10.5	Extension of time for completion.....	34
10.6	Incomplete Works .....	36
10.7	Maintenance Manual.....	36
<b>11.</b>	<b>Quality Assurance, Monitoring and Supervision.....</b>	<b>37</b>
11.1	Quality of Materials and workmanship .....	37
11.2	Quality control system .....	37
11.3	Methodology .....	37
11.4	Inspection and technical audit by the Employer .....	38
11.5	External technical audit.....	38
11.6	Inspection of construction records .....	38
11.7	Monthly progress reports .....	38
11.8	Inspection.....	38
11.9	Samples .....	39
11.10	Tests.....	39
11.11	Examination of work before covering up.....	39
11.12	Rejection .....	40
11.13	Remedial work .....	40
11.14	Delays during construction .....	40
11.15	Quality control records and Documents.....	41
11.16	Video recording .....	41
11.17	Suspension of unsafe Construction Works.....	41

<b>12. Completion Certificate .....</b>	<b>42</b>
12.1 Tests on completion .....	42
12.2 Provisional Certificate.....	42
12.3 Completion of remaining Works.....	43
12.4 Completion Certificate .....	43
12.5 Rescheduling of Tests .....	44
<b>13. Change of Scope.....</b>	<b>45</b>
13.1 Change of Scope .....	45
13.2 Procedure for Change of Scope.....	45
13.3 Payment for Change of Scope.....	47
13.4 Restrictions on Change of Scope .....	47
13.5 Power of the Employer to undertake works .....	47
<b>14. Maintenance .....</b>	<b>48</b>
14.1 Maintenance obligations of the Contractor .....	48
14.2 Maintenance Requirements .....	49
14.3 Maintenance Programme .....	49
14.5 Deleted .....	49
14.6 Reduction of payment for non-performance of Maintenance obligations.....	49
14.7 Employer’s right to take remedial measures .....	49
14.8 Restoration of loss or damage to Project Works .....	50
14.9 Overriding powers of the Employer .....	50
<b>15. Supervision and Monitoring During Maintenance .....</b>	<b>51</b>
15.1 Inspection by the Contractor .....	51
15.2 Inspection and payments .....	51
15.3 Tests .....	51
15.4 Deleted .....	51
<b>16. Deleted .....</b>	<b>52</b>
<b>17. Defects Liability .....</b>	<b>53</b>
17.1 Defects Liability Period.....	53
17.2 Remediating Defects .....	53
17.3 Cost of remediating Defects.....	53
17.4 Contractor’s failure to rectify Defects.....	53
17.5 Contractor to search cause .....	54
17.6 Extension of Defects Liability Period .....	54
<b>18. Employer’s Engineer .....</b>	<b>55</b>
18.1 Appointment of the Employer’s Engineer .....	55
18.2 Duties and authority of the Employer’s Engineer .....	55
18.3 Delegation by the Employer’s Engineer .....	55
18.4 Instructions of the Employer’s Engineer.....	56

18.5	Determination by the Employer’s Engineer .....	56
18.6	Remuneration of the Employer’s Engineer .....	57
18.7	Termination of the Employer’s Engineer .....	57
<b>PART IV - FINANCIAL COVENANTS .....</b>		<b>58</b>
<b>19. Payments .....</b>		<b>59</b>
19.1	Contract Price.....	59
19.2	Advance Payment .....	59
19.3	Procedure for estimating the payment for the Works.....	60
19.4	Stage Payment Statement for Works.....	61
19.5	Stage Payment for Works .....	61
19.6	Monthly Maintenance Statement of the Project Works .....	62
19.7	Payment for Maintenance of the Project Works .....	62
19.8	Payment of Damages .....	62
19.9	Time of payment and interest.....	63
19.10	Price adjustment for the Works .....	63
19.11	Restrictions on price adjustment .....	64
19.12	Price adjustment for Maintenance of Work .....	64
19.13	Final Payment Statement .....	65
19.14	Discharge .....	65
19.15	Final Payment Certificate.....	65
19.16	Final payment statement for Maintenance .....	66
19.17	Change in law .....	66
19.18	Correction of Interim Payment Certificates .....	67
19.19	Employer’s claims.....	67
19.20	Bonus for early completion .....	67
<b>20. Insurance .....</b>		<b>68</b>
20.1	Insurance for Works and Maintenance.....	68
20.2	Notice to the Employer .....	69
20.3	Evidence of Insurance Cover .....	69
20.4	Remedy for failure to insure .....	69
20.5	Waiver of subrogation.....	70
20.6	Contractor’s waiver.....	70
20.7	Cross liabilities.....	70
20.8	Accident or injury to workmen .....	70
20.9	Insurance against accident to workmen .....	71
20.10	Application of insurance proceeds .....	71
20.11	Compliance with policy conditions.....	71
<b>PART V - FORCE MAJEURE AND TERMINATION.....</b>		<b>72</b>
<b>21. Force Majeure.....</b>		<b>73</b>

21.1	Force Majeure .....	73
21.2	Non-Political Event.....	73
21.3	Indirect Political Event.....	74
21.4	Political Event.....	74
21.5	Duty to report Force Majeure Event .....	75
21.6	Effect of Force Majeure Event on the Agreement .....	75
21.7	Termination Notice for Force Majeure Event .....	76
21.8	Termination Payment for Force Majeure Event.....	76
21.9	Dispute resolution .....	77
21.10	Excuse from performance of obligations .....	77
<b>22.</b>	<b>Suspension of Contractor’s Rights .....</b>	<b>78</b>
22.1	Suspension upon Contractor Default.....	78
22.2	Employer to act on behalf of Contractor .....	78
22.3	Revocation of Suspension .....	78
22.4	Termination .....	78
<b>23.</b>	<b>Termination.....</b>	<b>80</b>
23.1	Termination for Contractor Default .....	80
23.2	Termination for Employer Default.....	82
23.3	Termination for Employer’s convenience .....	82
23.4	Requirements after Termination .....	83
23.5	Valuation of Unpaid Works .....	83
23.6	Termination Payment.....	83
23.7	Other rights and obligations of the Parties .....	84
23.8	Survival of rights.....	85
<b>PART VI - OTHER PROVISIONS .....</b>		<b>86</b>
<b>24.</b>	<b>Assignment and Charges.....</b>	<b>87</b>
24.1	Restrictions on assignment and charges.....	87
24.2	Hypothecation of Materials or Plant .....	87
<b>25.</b>	<b>Liability and Indemnity .....</b>	<b>88</b>
25.1	General indemnity.....	88
25.2	Indemnity by the Contractor .....	88
25.3	Notice and contest of claims .....	89
25.4	Defence of claims.....	89
25.5	No consequential claims .....	90
25.6	Survival on Termination .....	90
<b>26.</b>	<b>Dispute Resolution .....</b>	<b>91</b>
26.1	Dispute Resolution.....	91
26.2	Conciliation.....	91
26.3	Arbitration.....	91

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26.4	Adjudication by Regulatory Authority, Tribunal or Commission.....	92
<b>27.</b>	<b>Miscellaneous .....</b>	<b>93</b>
27.1	Governing law and jurisdiction.....	93
27.2	Waiver of immunity .....	93
27.3	Delayed payments .....	93
27.4	Waiver.....	93
27.5	Liability for review of Documents and Drawings.....	94
27.6	Exclusion of implied warranties etc. ....	94
27.7	Survival.....	94
27.8	Entire Agreement.....	95
27.9	Severability .....	95
27.10	No partnership.....	95
27.11	Third parties .....	95
27.12	Successors and assigns .....	95
27.13	Notices .....	95
27.14	Language.....	96
27.15	Counterparts.....	96
27.16	Confidentiality .....	96
27.17	Copyright and Intellectual Property rights .....	96
27.18	Limitation of Liability.....	97
<b>28.</b>	<b>Definitions .....</b>	<b>98</b>
28.1	Definitions.....	98

**PART I - PRELIMINARY**



**ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT**

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

**BETWEEN**

**Dholera Industrial City Development Limited (DICDL), a company incorporated under the Companies Act 2013 or any other applicable statute to the extent applicable, having its registered office at.....**represented by its Chief Executive Officer Mr....., who has been duly authorized by the Board of Directors vide resolution dated....., certified copy of the said resolution is annexed herewith as Annexure – I, to sign and execute this Agreement and to do all necessary acts, deeds and things on behalf of the Company, (hereinafter referred to as the “**Employer**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of One Part;

**AND**

{-----}, a company incorporated under.....Act having its registered office at.....represented by its Chairman/ Managing Director/ Director Mr.....who has been duly authorized by the Board of Directors vide resolution dated.....certified copy of the said resolution is

annexed herewith as Annexure – II to sign and execute this Agreement and to do all acts, deeds and things on behalf of the company (hereinafter referred to as the “**Contractor**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns) of the Other Part.

**WHEREAS:**

- (A) To sustain the growth and with a vision to develop modern industrial cities, the Government of India wishes to develop the Delhi Mumbai Industrial Corridor (DMIC) as a global manufacturing and investment destination. To this end, the Government of India has set up Delhi Mumbai Industrial Corridor Development Corporation, incorporated under the Indian Companies Act 1956, to establish, promote and facilitate the development of Delhi Mumbai Industrial Corridor (DMIC) along the alignment of proposed multi-modal high axle load dedicated freight corridor between Delhi and Mumbai, covering an overall length of 1483 km.

The Dholera Special Investment Region (DSIR) is to be developed under DMIC project. For this purpose, DMICDC, with support of Gujarat Infrastructure Development Board (GIDB) and its extended arm, Gujarat Industrial Corridor Corporation (GICC) has set up Dholera Special Investment Region Development Authority (DSIRDA).

A Special Purpose Vehicle viz., Dholera Industrial City Development limited has been set up (the “Employer”) with the equity participation of Central and State Governments for procurement and construction of trunk infrastructure in DSIR.

- (B) Accordingly, the Employer has decided to undertake the “Design and Construction of ..... on EPC basis and its Maintenance in DSIR, Dholera” (the “**Project**”) in the State of Gujarat through Engineering, Procurement and Construction (the “EPC”) basis in accordance with the terms and conditions to be set forth in this agreement.
- (C) The Employer had accordingly invited bids (CIN No.....) for RFQ cum RFP from bidders for design and construction of the above referred Project on the turnkey basis and comprehensive maintenance of the same for 4 (Four) years and Pre Qualified certain bidders including, inter alia, the selected bidder for next stage of evaluation.
- (D) After evaluation of the bids received, the Employer had accepted the bid of the selected bidder and issued its Letter of Acceptance No. .... dated ..... (Hereinafter called the “**LOA**”) to the selected bidder for erection, procurement, construction and comprehensive maintenance of the. “Design and Construction of ..... in DSIR, Dholera” at the contract price specified hereinafter, requiring the selected bidder to inter alia:
- (i) deliver to the Employer a legal opinion from the legal counsel of the selected bidder with respect to the authority of the selected bidder to enter into this Agreement and the enforceability of the provisions thereof, within 10 (ten) days of the date of issue of LOA; and
  - (ii) execute this Agreement within 30 (thirty) days of the date of issue of LOA.

(E) The Contractor has fulfilled the requirements specified in Recital (D) above;

NOW THEREFORE in consideration of the foregoing and the respective covenants and agreements set forth in this Agreement, the sufficiency and adequacy of which is hereby acknowledged, the Employer hereby covenants to pay the Contractor, in consideration of the obligations specified herein, the Contract Price or such other sum as may become payable under the provisions of the Agreement at the times and in the manner specified by the Agreement and intending to be legally bound hereby, the Parties agree as follows:

## ARTICLE 1

### 1. Definitions and Interpretation

#### 1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 28) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

#### 1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;
- (c) references to a “person” and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include successors and assigns;
- (d) the table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (e) the words “include” and “including” are to be construed without limitation and shall be deemed to be followed by “without limitation” or “but not limited to” whether or not they are followed by such phrases;
- (f) references to “construction” or “building” include, unless the context otherwise requires, survey and investigation, design, developing, engineering, procurement, supply of plant, materials, equipment, labour, delivery, transportation, installation, processing, fabrication, testing, and commissioning of the Project Works, including maintenance during the Construction Period, removing of defects, if any, and other activities incidental to the construction and “construct” or “build” shall be construed accordingly;
- (g) references to “development” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, up-gradation and other

activities incidental thereto during the Construction Period, and “develop” shall be construed accordingly;

- (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) references to a “business day” shall be construed as a reference to a day (other than a Sunday) on which banks in Ahmedabad are generally open for business;
- (k) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- (l) references to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- (m) any reference to any period commencing “from” a specified day or date and “till” or “until” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- (n) the words importing singular shall include plural and vice versa;
- (o) references to any gender shall include the other and the neutral gender;
- (p) “lakh” means a hundred thousand (100,000) and “crore” means ten million (10,000,000);
- (q) “indebtedness” shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- (r) references to the “winding-up”, “dissolution”, “insolvency”, or “reorganisation” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- (s) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence 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 the Employer hereunder or pursuant hereto in any manner whatsoever;
- (t) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Employer’s Engineer shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party or

the Employer's Engineer, as the case may be, in this behalf and not otherwise;

- (u) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (v) references to Recitals, Articles, Clauses, Sub-clauses or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses and Schedules of or to this Agreement, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a Paragraph of this Agreement or of the Schedule in which such reference appears;
- (w) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the "**Damages**"); and
- (x) time shall be of the essence in the performance of the Parties' respective obligations. If any time period specified herein is extended for the reasons specified in the Agreement, such extended time shall also be of the essence.

1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Contractor to the Employer shall be provided free of cost and in three copies, and if the Employer is required to return any such Documentation with its comments and/or approval, it shall be entitled to retain two copies thereof.

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

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

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

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

### **1.4 Priority of agreements and errors/discrepancies**

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

- (a) this Agreement; and

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

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

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

## **1.5 Joint and several liability**

1.5.1 If the Contractor has formed a Joint Venture of two or more persons for implementing the Project:

- (a) these persons shall, without prejudice to the provisions of this Agreement, be deemed to be jointly and severally liable to the Employer for the performance of the Agreement; and
- (b) the Contractor shall ensure that no change in the composition of the Consortium is effected without the prior consent of the Employer.

1.5.2 Without prejudice to the joint and several liability of all the members of the Consortium, the Lead Member shall represent all the members of the Consortium and shall at all times be liable and responsible for discharging the functions and obligations of the Contractor. The Contractor shall ensure that each member of the Consortium shall be bound by any decision, communication, notice, action or inaction of the Lead Member on any matter related to this Agreement and the Employer shall be entitled to rely upon any such action, decision or communication of the Lead Member. The Employer shall have the right to release payments solely to the Lead Member and shall not in any manner be responsible or liable for the *inter se* allocation of payments among members of the Consortium. }

## **PART II - SCOPE OF PROJECT**



## ARTICLE 2

### 2. Scope of the Project

#### 2.1 Scope of the Project

Under this Agreement, the scope of the Project (the “**Scope of the Project**”) shall mean and include:

- (a) design and construction of Service Area Buildings set forth in Schedule-A and as specified in Schedule-B together with provision of Project Facilities as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;
- (b) Maintenance of the Project in accordance with the provisions of this Agreement and in conformity with the requirements set forth in Schedule-E; and
- (c) Performance and fulfilment of all other obligations of the Contractor in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Contractor under this Agreement.

## ARTICLE 3

### 3. Obligations of the Contractor

#### 3.1 Obligations of the Contractor

- 3.1.1 Subject to and on the terms and conditions of this Agreement, the Contractor shall undertake the survey, investigation, design, engineering, procurement, construction, and maintenance of the Service Area Buildings in Dholera Special Investment Region, Dholera on EPC basis as defined in Scope and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 3.1.2 The Contractor shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- 3.1.3 Subject to the provisions of Clauses 3.1.1 and 3.1.2, the Contractor shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.
- 3.1.4 The Contractor shall remedy any and all loss or damage to the roads and services/utilities from the Appointed Date until the end of the Construction Period at the Contractor's cost, save and except to the extent that any such loss or damage shall have arisen from any default or neglect of the Employer.
- 3.1.5 The Contractor shall remedy any and all loss or damage to the roads and services/utilities during the Defects Liability Period at the Contractor's cost to the extent that such loss or damage shall have arisen out of the reasons specified in Clause 17.3.
- 3.1.6 The Contractor shall remedy any and all loss or damage to the roads and services/utilities during the Maintenance Period at the Contractor's cost, including those stated in Clause 14.1.2, save and except to the extent that any such loss or damage shall have arisen on account of any default or neglect of the Employer or on account of a Force Majeure Event.
- 3.1.7 The Contractor shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
- (a) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars and details as may be required for obtaining Applicable Permits set forth in Schedule-F and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
  - (b) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for Materials, methods, processes and systems used or incorporated into the Project Works ;
  - (c) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Sub-contractors in connection with

the performance of its obligations under this Agreement;

- (d) ensure and procure that its Sub-contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Contractor's obligations under this Agreement;
- (e) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
- (f) support, cooperate with and facilitate the Employer in the implementation and operation of the Project in accordance with the provisions of this Agreement;
- (g) ensure that the Contractor and its Sub-contractors comply with the safety and welfare measures for labour in accordance with the Annexure-II of Manual for Construction Procedures and the Applicable Laws;
- (h) keep, on the Site, a copy of this Agreement, publications named in this Agreement, the Drawings, Documents relating to the Project, and Change of Scope Orders and other communications given under this Agreement. The Employer's Engineer and its authorised personnel shall have the right of access to all these documents at all reasonable times;
- (i) cooperate with other contractors employed by the Employer and personnel of any public authority; and
- (j) Deleted
- (k) the Contractor shall be responsible for development of BIM model and CAD in all stages of Design and Construction as per the requirements mentioned in Schedule Q.
- (l) the Contractor shall prepare Project specific Health, Safety and Environment plan based on guidelines provided in Schedule-R for implementation.
- (m) contractor and their sub-contractors shall comply with Project Management requirements as mentioned in Schedule-S

3.1.8 The Contractor shall undertake all necessary superintendence to plan, arrange, direct, manage, inspect and test the Works.

### **3.2 Obligations relating to sub-contracts and any other agreements**

3.2.1 The Contractor shall not sub-contract any Works in more than 30% (thirty per cent) of the total contract amount of the Project and shall carry out Works directly under its own supervision and through its own personnel in at least 70% (seventy per cent) of the total contract amount of the Project. Provided, however, that in respect of the Works carried out directly by the Contractor, it may enter into contracts for the supply and installation of Materials, Plant, equipment, , safety devices and labour, as the case may be, for such Works. The Parties further agree that all obligations and liabilities under this Agreement for the entire project Works shall at all times remain with the Contractor. In case of a Joint Venture, the Parties also agree that obligation of the Contractor to carry out Works directly in at least 70% (seventy per cent) of the total contract amount of the Project shall be discharged solely by the Lead Member.

3.2.2 In the event any sub-contract for Works, or the aggregate of such sub-contracts with any Sub-contractor, exceeds 5% (five percent) of the Contract Price, the Contractor

shall communicate the name and particulars, including the relevant experience of the sub-contractor, to the Employer prior to entering into any such sub-contract. The Employer shall examine the particulars of the sub-contractor from the national security and public interest perspective and may require the Contractor, no later than 15 (fifteen) business days from the date of receiving the communication from the Contractor, not to proceed with the sub-contract, and the Contractor shall comply therewith.

- 3.2.3 In the event any sub-contract referred to in Clause 3.2.2 relates to a sub-contractor who has, over the preceding 3 (three) years, not undertaken at least one work of a similar nature with a contract value exceeding 40% (forty per cent) of the value of the sub-contract to be awarded hereunder and received payments in respect thereof for an amount equal to at least such 40% (forty per cent), the Employer may, no later than 15 (fifteen) business days from the date of receiving the communication from the Contractor, require the Contractor not to proceed with such sub-contract, and the Contractor shall comply therewith.
- 3.2.4 It is expressly agreed that the Contractor shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the agreements with its Sub-contractors or any other agreement that may be entered into by the Contractor, and no default under any such agreement shall excuse the Contractor from its obligations or liability hereunder.

### **3.3 Employment of foreign nationals**

The Contractor acknowledges, agrees and undertakes that employment of foreign personnel by the Contractor and/or its Sub-contractors and their sub-contractors shall be subject to grant of requisite regulatory permits and approvals including employment/residential visas and work permits, if any required, and the obligation to apply for and obtain the same shall and will always be of the Contractor. Notwithstanding anything to the contrary contained in this Agreement, refusal of or inability to obtain any such permits and approvals by the Contractor or any of its Sub-contractors or their sub-contractors shall not constitute Force Majeure Event, and shall not in any manner excuse the Contractor from the performance and discharge of its obligations and liabilities under this Agreement.

### **3.4 Contractor's personnel**

- 3.4.1 The Contractor shall ensure that the personnel engaged by it or by its Sub-contractors in the performance of its obligations under this Agreement are at all times appropriately qualified, skilled and experienced in their respective functions in conformity with Good Industry Practice.
- 3.4.2 The Employer's Engineer may, for reasons to be specified in writing, direct the Contractor to remove any member of the Contractor's or Sub-contractor's personnel. Provided that any such direction issued by the Employer's Engineer shall specify the reasons for the removal of such person.
- 3.4.3 The Contractor shall on receiving such a direction from the Employer's Engineer order for the removal of such person or persons with immediate effect. It shall be the duty of the Contractor to ensure that such persons are evicted from the Site within 10

(ten) days of any such direction being issued in pursuance of Clause 3.4.2. The Contractor shall further ensure that such persons have no further connection with the Works or Maintenance under this Agreement. The Contractor shall then appoint (or cause to be appointed) a replacement.

### **3.5 Advertisement on Project Site**

The Project Site or any part thereof shall not be used in any manner to advertise any commercial product or services.

### **3.6 Contractor's care of the Works**

The Contractor shall bear full risk in and take full responsibility for the care of the Works, and of the Materials, goods and equipment for incorporation therein, from the Appointed Date until the date of Provisional Certificate (with respect to the Works completed prior to the issuance of the Provisional Certificate) and/or Completion Certificate (with respect to the Works referred to in the Punch List), save and except to the extent that any such loss or damage shall have arisen from any default or neglect of the Employer.

### **3.7 Electricity, water and other services**

The Contractor shall be responsible for procuring of all power, water and other services that it may require during the construction period.

### **3.8 Unforeseeable difficulties**

Except as otherwise stated in the Agreement:

- (a) The Contractor accepts complete responsibility for having foreseen all difficulties and costs of successfully completing the Works;
- (b) The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs; and
- (c) The Scheduled Completion Date shall not be adjusted to take account of any unforeseen difficulties or costs.

## ARTICLE 4

### 4. Obligations of the Employer

#### 4.1 Obligations of the Employer

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

To assist in due discharge of its obligation, the Employer has appointed AECOM as the Programme Manager for the Project (Program Manager for New Cities, the “PMNC”). All communications relating to contract management on this project shall be submitted to the PMNC for final approval of Employer.

4.1.2 The Employer shall be responsible for the correctness of the Scope of the Project, Project Facilities, Specifications and Standards and the criteria for testing of the completed Works.

4.1.3 The Employer shall provide to the Contractor:

- (a) upon receiving the Performance Security under Clause 7.1.1, the land for the construction work in accordance with the provisions of Clauses 8.2 and 8.3, within a period of 15 (fifteen) days from the date of this Agreement, on no less than 90% (ninety per cent) of the total Project Area and;
- (b) Deleted
- (c) all environmental clearances as required under Clause 4.3.

4.1.4 Deleted

4.1.5 Deleted

4.1.6 The Employer agrees to provide support to the Contractor and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:

- (a) upon written request from the Contractor, and subject to the Contractor complying with Applicable Laws, provide reasonable support to the Contractor in procuring Applicable Permits required from any Government Instrumentality for implementation of the Project;
- (b) upon written request from the Contractor, provide reasonable assistance to the Contractor in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favourable than those generally available to commercial customers receiving substantially equivalent services;
- (c) procure that no barriers that would have a Material Adverse Effect on works are erected or placed on or about the Site by any Government Instrumentality

or persons claiming through or under it, except for reasons of Emergency, national security, law and order or collection of inter-state taxes;

- (d) not do or omit to do any act, deed or thing which may in any manner be violated in any of the provisions of this Agreement;
- (e) support, cooperate with and facilitate the Contractor in the implementation of the Project in accordance with the provisions of this Agreement; and
- (f) upon written request from the Contractor and subject to the provisions of Clause 3.3, provide reasonable assistance to the Contractor and any expatriate personnel of the Contractor or its Sub-contractors to obtain applicable visas and work permits for the purposes of discharge by the Contractor or its Sub-contractors of their obligations under this Agreement and the agreements with the Sub-contractors.

#### **4.2 Deleted**

#### **4.3 Environmental Clearances**

The Employer represents and warrants that the environmental clearances required for construction of the Project have been procured by the Employer prior to the Bid Due Date. For the avoidance of doubt, the present status of environmental clearances is specified in Schedule-A.

## ARTICLE 5

### 5. Representations and Warranties

#### 5.1 Representations and warranties of the Contractor

The Contractor represents and warrants to the Employer that:

- (a) it is duly organised and validly existing under the laws of India, and has full power and Employer to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and/or other actions under Applicable Laws to authorise the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (c) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (d) it is subject to the laws of India, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (e) the information furnished in the Bid and as updated on or before the date of this Agreement is true and accurate in all respects as on the date of this Agreement;
- (f) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its memorandum and articles of association or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (g) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform any of its obligations under this Agreement;
- (h) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;



- (i) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under this Agreement;
- (j) no representation or warranty by it contained herein or in any other document furnished by it to the Employer or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (k) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the contract or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Employer in connection therewith;
- (l) all information provided by the {selected bidder/ members of the Consortium} in response to the Request for Qualification and Request for Proposals or otherwise, is to the best of its knowledge and belief, true and accurate in all material respects; and
- (m) nothing contained in this Agreement shall create any contractual relationship or obligation between the Employer and any Sub-contractors, designers, consultants or agents of the Contractor.

## **5.2 Representations and warranties of the Employer**

The Employer represents and warrants to the Contractor that:

- (a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) it has taken all necessary actions under the Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under this Agreement;
- (d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (e) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on the Employer's ability to perform its obligations under this Agreement;
- (f) it has complied with Applicable Laws in all material respects;
- (g) it has good and valid right to the Site; and

- (h) it has procured land for project Site and environment clearances such that the Contractor can commence construction forthwith on the work Site.

### **5.3 Disclosure**

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

## ARTICLE 6

### 6. Disclaimer

#### 6.1 Disclaimer

- 6.1.1 The Contractor acknowledges that prior to the execution of this Agreement, the Contractor has, after a complete and careful examination, made an independent evaluation of the Request for Qualification, Request for Proposal, Scope of the Project, Specifications and Standards of design, construction and maintenance, Site, local conditions, physical qualities of ground, subsoil and geology, , suitability and availability of access routes to the Site and all information provided by the Employer or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. Save as provided in Clause 4.1.2 and Clause 5.2, the Employer makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Contractor confirms that it shall have no claim whatsoever against the Employer in this regard.
- 6.1.2 The Contractor acknowledges and hereby accepts to have satisfied itself as to the correctness and sufficiency of the Contract Price.
- 6.1.3 The Contractor acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 6.1.1 above and hereby acknowledges and agrees that the Employer shall not be liable for the same in any manner whatsoever to the Contractor, or any person claiming through or under any of them, and shall not lead to any adjustment of Contract Price or Scheduled Completion Date.
- 6.1.4 The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 6.1.1 above shall not vitiate this Agreement, or render it voidable.
- 6.1.5 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 6.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error.
- 6.1.6 Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Contractor; and the Employer shall not be liable in any manner for such risks or the consequences thereof.

### **PART III - CONSTRUCTION AND MAINTENANCE**

## ARTICLE 7

### 7. Performance Security

#### 7.1 Performance Security

- 7.1.1 The Contractor shall, for the performance of its obligations hereunder during the Construction Period, provide to the Employer, within 10 (ten) days of the date of this Agreement, an irrevocable and unconditional guarantee from a Bank in the form set forth in Annex-I of Schedule-G (the “**Performance Security**”) for an amount equal to 7.5% (seven and half percent) of the Contract Price. The Performance Security shall be valid until 60 (sixty) days after the Defects Liability Period. Until such time the Performance Security is provided by the Contractor pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security, the Employer shall release the Bid Security to the Contractor. For the avoidance of doubt, the parties expressly agree that the Contractor shall provide, no later than 30 (thirty) days prior to the expiry of the Performance Security for the defects Liability Period specified in Clause 17.1.1,
- 7.1.2 Notwithstanding anything to the contrary contained in this Agreement, the Parties agree that in the event of failure of the Contractor to provide the Performance Security in accordance with the provisions of Clause 7.1.1 and within the time specified therein or such extended period as may be provided by the Employer, in accordance with the provisions of Clause 7.1.3, the Employer may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Contractor under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Contractor, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.
- 7.1.3 In the event the Contractor fails to provide the Performance Security within 10 (ten) days of this Agreement, it may seek extension of time for a period not exceeding 20 (twenty) days on payment of Damages for such extended period in a sum calculated at the rate of 0.05% (zero point zero five per cent) of the Contract Price for each day until the Performance Security is provided.

#### 7.2 Extension of Performance Security

The Contractor may initially provide the Performance Security for a period of 2 (two) years; provided that it shall procure the extension of the validity of the Performance Security, as necessary, at least 2 (two) months prior to the date of expiry thereof. Upon the Contractor providing an extended Performance Security, the previous Performance Security shall be deemed to be released and the Employer shall return the same to the Contractor within a period of 7 (seven) business days from the date of submission of the extended Performance Security.

#### 7.3 Appropriation of Performance Security

- 7.3.1 Upon occurrence of a Contractor’s Default, the Employer shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages for such

Contractor's Default.

7.3.2 Upon such encashment and appropriation from the Performance Security, the Contractor shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Contractor shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which the Employer shall be entitled to terminate the Agreement in accordance with Article 23. Upon replenishment or furnishing of a fresh Performance Security, as the case may be, as aforesaid, the Contractor shall be entitled to an additional Cure Period of 30 (thirty) days for remedying the Contractor's Default, and in the event of the Contractor not curing its default within such Cure Period, the Employer shall be entitled to encash and appropriate such Performance Security as Damages, and to terminate this Agreement in accordance with Article 23.

#### **7.4 Release of Performance Security**

The Employer shall return the Performance Security to the Contractor within 60 (sixty) days of the later of the expiry of the Maintenance Period or the Defects Liability Period under this Agreement. Notwithstanding the aforesaid, the Parties agree that the Employer shall not be obliged to release the Performance Security until all Defects identified during the Defects Liability Period have been rectified.

#### **7.5 Retention Money**

7.5.1 From every payment for Works due to the Contractor in accordance with the provisions of Clause 19.5, the Employer shall deduct 6% (six per cent) thereof as guarantee money for performance of the obligations of the Contractor during the Construction Period (the "**Retention Money**") subject to the condition that the maximum amount of Retention Money shall not exceed 5% (five per cent) of the Contract Price.

7.5.2 Upon occurrence of a Contractor's Default, the Employer shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Retention Money as Damages for such Contractor's Default.

7.5.3 The Contractor may, upon furnishing an irrevocable and unconditional bank guarantee substantially in the form provided at Annex-II of Schedule-G, require the Employer to refund the Retention Money deducted by the Employer under the provisions of Clause 7.5.1. Provided that the refund hereunder shall be made in tranches of not less than 1% (one per cent) of the Contract Price.

7.5.4 Within 15 (fifteen) days of the date of issue of the Completion Certificate, the Employer shall discharge the bank guarantees furnished by the Contractor under the provisions of Clause 7.5.3 and refund the balance of Retention Money remaining with the Employer after adjusting the amounts appropriated under the provisions of Clause 7.5.2 and the amounts refunded under the provisions of Clause 7.5.3.

7.5.5 The Parties agree that in the event of Termination of this Agreement, the Retention Money and the bank guarantees specified in this Clause 7.5 shall be treated as if they are Performance Security and shall be reckoned as such for the purposes of Termination Payment under Clause 23.6.

## ARTICLE 8

### 8. The Project Site

#### 8.1 The Site

The Site of the Project works (the “**Site**”) shall comprise the Site described in Schedule-A in respect of which the Site shall be provided by the Employer to the Contractor. The Employer shall be responsible for:

- (a) acquiring and providing the Site in accordance with the alignment finalised by the Employer, free from all encroachments and encumbrances, and free access thereto for the execution of this Agreement; and
- (b) Obtaining licences and permits for environment clearance for the Project Works.

#### 8.2 Procurement of the Site

8.2.1 The Employer Representative and the Contractor shall, within 15 (fifteen) days of the date of this Agreement, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site. Subject to the provisions of Clause 8.2.3, such memorandum shall have appended thereto an appendix (the “**Appendix**”) specifying in reasonable detail those parts of the Site to which vacant access has not been given to the Contractor. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall be deemed to constitute a valid evidence of giving the Site to the Contractor for discharging its obligations under and in accordance with the provisions of this Agreement and for no other purpose whatsoever.

Whenever the Employer is ready to hand over the Site, it shall inform the Contractor, by notice, the proposed date and time such of handing over. The Employer Representative and the Contractor shall, on the date so notified, inspect the specified parts of the Site, and prepare a memorandum containing an inventory of the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site so handed over. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall be deemed to constitute a valid evidence of giving the relevant Site to the Contractor.

8.2.2 The Employer shall provide the Site to the Contractor in respect of all land included in the Appendix by the date specified in Schedule-A for those parts of the Site referred to therein, or no later than 90 (ninety) days of the Appointed Date for those parts of the Site which have not been specified in Schedule-A,

8.2.3 Notwithstanding anything to the contrary contained in this Clause 8.2, the Employer shall specify the parts of the Site, if any, for which land shall be provided to the Contractor on the dates specified in Schedule-A. Such parts shall also be included in the Appendix prepared in pursuance of Clause 8.2.1.



### 8.3 Damages for delay in handing over the Site

8.3.1 In the event the Right of Way to any part of the Site is not provided by the Employer on or before the date(s) specified in Clause 8.2 for any reason other than Force Majeure or breach of this Agreement by the Contractor, the Employer shall pay Damages to the Contractor in a sum calculated in accordance with the following formula for and in respect of those parts of the Site to which the Right of Way has not been provided:

Amount of Damages in Rs. per day per sq. metre =  $0.05 \times C \times 1/L \times 1/N$

Where

C = the Contract Price; L = Total Area of site in sq. metres; and

N = Completion period in days (Appointed Date to Scheduled Completion Date)

In the event that any Damages are due and payable to the Contractor under the provisions of this Clause 8.3.1 for delay in providing the Right of Way, the Contractor shall, subject to the provisions of Clause 10.5, be entitled to Time Extension equal to the period for which the Damages have become due and payable under this Clause 8.3.1, save and except that:

- (a) If any delays involve time overlaps, the overlaps shall not be additive; and
- (b) Such Time Extension shall be restricted only to the Works which are affected by the delay in providing the Right of Way.

For the avoidance of doubt, the Parties expressly agree that the Damages specified hereunder and the Time Extension specified in Clause 10.5 shall be restricted only to failure of the Employer to provide the Right of Way for and in respect of the width of the roadway, its embankment, and required width for ducts and services lines and a parallel working strip at least 3 (three) metres wide.

8.3.2 Notwithstanding anything to the contrary contained in this Agreement, the Contractor expressly agrees that Works on all parts of the Site for which Right of Way is granted within 90 (ninety) days of the Appointed Date, or with respect to the parts of the Site provided in Schedule-A, no later than the date(s) specified therein, as the case may be, shall be completed before the Scheduled Completion Date and shall not qualify for any Time Extension under the provisions of Clause 8.3.1.

8.3.3 Notwithstanding anything to the contrary contained in this Agreement, the Employer may at any time withdraw any Works forming part of this Agreement, subject to such Works not exceeding an aggregate value, such value to be determined in accordance with Schedule-H, equal to 10(ten) percent of the Contract Price.

Provided that if any Works cannot be undertaken within the municipal limits of a town or within any area falling in a reserved forest or wildlife sanctuary, as the case may be, because the requisite clearances or approvals for commencing construction of Works therein have not been given within 240 (two hundred and forty) days of the

Appointed date, the affected Works shall be deemed to be withdrawn under the provisions of this Clause 8.3.3 unless the Parties agree to the contrary, and such Works shall not be computed for the purposes of the aforesaid ceiling of 10% (ten per cent) hereunder. For the avoidance of doubt, the Parties agree that such withdrawal of Works hereunder shall be without prejudice to the Contractor's entitlement to damages under Clauses 8.3 and 9.2.

- 8.3.4 In the event of withdrawal of Works under Clause 8.3.3, the Contract Price shall be reduced by an amount equal to 90 (ninety) per cent of the value of the Works withdrawn and the Contractor shall not be entitled to any other compensation or Damages for the withdrawal of Works, save and except for Damages as provided under Clauses 8.3 and 9.2..

Provided that if any Works are withdrawn after commencement of the Construction of such works, the Employer shall pay to the Contractor 110% (one hundred and ten per cent) of the fair value of the work done, as assessed by the Employer's Engineer:

#### **8.4 Site to be free from Encumbrances**

Subject to the provisions of Clause 8.2, the Site shall be made available by the Employer to the Contractor pursuant hereto free from all Encumbrances and occupations and without the Contractor being required to make any payment to the Employer on account of any costs, compensation, expenses and charges for the acquisition and use of such Site for the duration of the Project Completion Schedule. For the avoidance of doubt, it is agreed that the existing Site, easements, privileges, liberties and appurtenances to the Site shall not be deemed to be Encumbrances. It is further agreed that, unless otherwise specified in this Agreement, the Contractor accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Site.

#### **8.5 Protection of Site from encroachments**

On and after signing the memorandum and/or subsequent memorandum referred to in Clause 8.2.1, and until the issue of the Completion Certificate, the Contractor shall maintain a round-the-clock vigil over the Site and shall ensure and procure that no encroachment thereon takes place. During the Construction Period, the Contractor shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Sub-contractor or other person claiming through or under the Agreement to place or create any Encumbrance or security threat over all or any part of the Site or the Project Assets, or on any rights of the Contractor therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement. In the event of any encroachment or occupation on any part of the Site, the Contractor shall report such encroachment or occupation forthwith to the Employer and undertake its removal at its own cost and expenses.

#### **8.6 Special/temporary Roads**

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

## **8.7 Access to the Employer and the Employer's Engineer**

- 8.7.1 The Site given to the Contractor hereunder shall always be subject to the right of access of the Employer and the Employer's Engineer and their employees and agents for inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.
- 8.7.2 The Contractor shall ensure, subject to all relevant safety procedures, that the Employer has un-restricted access to the Site during any emergency situation, as decided by the Employer's Engineer.

## **8.8 Geological and archaeological finds**

- 8.8.1 It is expressly agreed that mining, geological or archaeological rights do not form part of this Agreement with the Contractor for the Works, and the Contractor hereby acknowledges that it shall not have any mining rights or interest in the underlying minerals, fossils, antiquities, structures or other remnants or things either of particular geological or archaeological interest and that such rights, interest and property on or under the Site shall vest in and belong to the Employer or the concerned Government Instrumentality. The Contractor shall take all reasonable precautions to prevent its workmen or any other person from removing or damaging such interest or property and shall inform the Employer forthwith of the discovery thereof and comply with such instructions as the concerned Government Instrumentality may reasonably give for the removal of such property. For the avoidance of doubt, it is agreed that any reasonable expenses incurred by the Contractor hereunder shall be reimbursed by the Employer. It is also agreed that the Employer shall procure that the instructions hereunder are issued by the concerned Government Instrumentality within a reasonable period.

## ARTICLE 9

### 9. Utilities and Trees

#### 9.1 Existing utilities and roads - Deleted

#### 9.2 Shifting of obstructing utilities

The Contractor shall, in accordance with Applicable Laws and with assistance of the Employer, cause shifting of any utility (including electric lines, water pipes and telephone cables) to an appropriate location or alignment, if such utility or obstruction adversely affects the execution of Works or Maintenance of the Project Works in accordance with this Agreement. The actual cost of such shifting, as approved and communicated by the entity owning the utility, shall be paid by the Contractor and reimbursed by the Employer to the Contractor. In the event of any delay in such shifting by the entity owning the utility beyond a period of 180 (one hundred and eighty) days from the date of notice by the Contractor to the entity owning the utility and to the Employer, the Contractor shall be entitled to Damages in a sum calculated in accordance with the formula specified in Clause 8.3.1 for the period of delay, and to Time Extension in accordance with Clause 10.5 for and in respect of the part(s) of the Works affected by such delay; provided that if the delays involve any time overlaps, the overlaps shall not be additive. For details please refer Schedule B.

#### 9.3 New utilities

9.3.1 The Contractor shall allow, subject to such conditions as the Employer may specify, access to, and use of the Site for laying telephone lines, water pipes, electric cables or other public utilities. Where such access or use causes any financial loss to the Contractor, it may require the user of the Site to pay compensation or damages as per Applicable Laws. For the avoidance of doubt, it is agreed that use of the Site under this Clause 9.3 shall not in any manner relieve the Contractor of its obligation to construct and maintain the Project Works in accordance with this Agreement and any damage caused by such use shall be restored forthwith at the cost of the Employer. For details please refer Schedule B.

9.3.2 The Employer may, by notice, require the Contractor to connect any adjoining road and services to the Project roads and services, and the connecting portion thereof falling within the Site shall be constructed by the Contractor at the Employer's cost in accordance with Article 10. For details please refer Schedule B.

9.3.3 Deleted.

9.3.4 In the event the construction of any Works is affected by a new utility or works undertaken in accordance with this Clause 9.3, the Contractor shall be entitled to a reasonable Time Extension as determined by the Employer's Engineer.

#### 9.4 Felling of trees

The Employer shall assist the Contractor in obtaining the Applicable Permits for felling of trees to be identified by the Employer for this purpose if and only if such trees cause a Material Adverse Effect on the construction or maintenance of the

Project Works. The cost of such felling shall be borne by the Employer and in the event of any delay in felling thereof for reasons beyond the control of the Contractor; it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. The Parties hereto agree that the felled trees shall be deemed to be owned by the Employer and shall be disposed in such manner and subject to such conditions as the Employer may in its sole discretion deem appropriate. For the avoidance of doubt, the Parties agree that if any felling of trees hereunder is in a forest area, the Applicable Permit thereof shall be procured by the Employer within the time specified in the Agreement.

## ARTICLE 10

### 10. Design and Construction of the Project Works

#### 10.1 Obligations prior to commencement of Works

10.1.1 Within 20 (twenty) days of the Appointed Date, the Contractor shall:

- (a) appoint its representative, duly authorised to deal with the Employer in respect of all matters under or arising out of or relating to this Agreement;
- (b) appoint a design director (the “**Design Director**”) who will head the Contractor’s design unit and shall be responsible for surveys, investigations, collection of data, and preparation of preliminary and detailed designs;
- (c) undertake and perform all such acts, deeds and things as may be necessary or required before commencement of Works under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and
- (d) make its own arrangements for quarrying of materials needed for the Project Works under and in accordance with the Applicable Laws and Applicable Permits.

10.1.2 The Employer shall, within 30 (thirty) days of the date of this Agreement, appoint an engineer (the “**Employer’s Engineer**”) to discharge the functions and duties specified in this Agreement, and shall notify to the Contractor the name, address and the date of appointment of the Employer’s Engineer forthwith.

10.1.3 Within 30 (thirty) days of the Appointed Date, the Contractor shall submit to the Employer and the Employer’s Engineer a programme (the “**Programme**”) for the Works, developed using networking techniques giving the following details:

Part I Contractor’s organisation for the Project, the general methods and arrangements for design and construction, environmental management plan, Quality Assurance Plan including design quality plan, and safety plan covering safety of users and workers during construction, Contractor’s key personnel and equipment.

Part II Programme for completion of all stages of construction considering the weightage given in Schedule-H and Project Milestones of the Works as specified in Project Completion Schedule set forth in Schedule-J. The Programme shall include:

- (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of design and stages of Works;
- (b) the periods for reviews under Clause 10.2;
- (c) the sequence and timing of inspections and tests specified in this Agreement.

The Contractor shall submit a revised programme whenever the previous programme is inconsistent with the actual progress or with the Contractor’s obligations.

Part III Monthly cash flow forecast.

10.1.4 The Contractor shall compute, on the basis of the Drawings prepared in accordance with Clause 10.2.4, and provide to the Employer's Engineer, the length, area and numbers, as the case may be, in respect of the various items of work specified in Schedule-H and comprising the Scope of the Project. The Parties expressly agree that these details shall form the basis for estimating the interim payments for the Works in accordance with the provisions of Clause 19.3. For the avoidance of doubt, the sum of payments to be computed in respect of all the items of work shall not exceed the Contract Price, as may be adjusted in accordance with the provisions of this Agreement.

10.1.5 Deleted

10.1.6 Deleted

**10.2 Design and Drawings**

10.2.1 Design and Drawings shall be developed in conformity with the Specifications and Standards set forth in Schedule-D.

10.2.2 Deleted

10.2.3 Deleted

10.2.4 In respect of the Contractor's obligations with respect to the design and Drawings of the Project Works as set forth in Schedule-I, the following shall apply:

- (a) the Contractor shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of the design and Drawings, , to the Employer's Engineer for review.
- (b) by submitting the Drawings for review to the Employer's Engineer, the Contractor shall be deemed to have represented that it has determined and verified that the design and engineering, including field construction criteria related thereto, are in conformity with the Scope of the Project, the Specifications and Standards and the Applicable Laws;
- (c) within 15 (fifteen) days of the receipt of the Drawings, the Employer's Engineer shall review the same and convey its observations to the Contractor with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Contractor shall not be obliged to await the observations of the Employer's Engineer on the Drawings submitted pursuant hereto beyond the said period of 15 (fifteen) days and may begin or continue Works at its own discretion and risk;
- (d) if the aforesaid observations of the Employer's Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Contractor in conformity with the provisions of this Agreement and

resubmitted to the Employer's Engineer for review. The Employer's Engineer shall give its observations, if any, within 10 (ten) days of receipt of the revised Drawings. In the event the Contractor fails to revise and resubmit such Drawings to the Employer's Engineer for review as aforesaid, the Employer's Engineer may withhold the payment for the affected works in accordance with the provisions of Clause 19.5.4. If the Contractor disputes any decision, direction or determination of the Employer's Engineer hereunder, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure;

- (e) no review and/or observation of the Employer's Engineer and/or its failure to review and/or convey its observations on any Drawings shall relieve the Contractor of its obligations and liabilities under this Agreement in any manner nor shall the Employer's Engineer or the Employer be liable for the same in any manner; and if errors, omissions, ambiguities, inconsistencies, inadequacies or other Defects are found in the Drawings, they and the construction works shall be corrected at the Contractor's cost, notwithstanding any review under this Article 10;
- (f) the Contractor shall be responsible for delays in submitting the Drawing as set forth in Schedule-I caused by reason of delays in surveys and field investigations, and shall not be entitled to seek any relief in that regard from the Employer; and
- (g) the Contractor warrants that its designers, including any third parties engaged by it, shall have the required experience and capability in accordance with Good Industry Practice and it shall indemnify the Employer against any damage, expense, liability, loss or claim, which the Employer might incur, sustain or be subject to arising from any breach of the Contractor's design responsibility and/or warranty set out in this Clause.

10.2.5 Any cost or delay in construction arising from review by the Employer's Engineer shall be borne by the Contractor.

10.2.6 Works shall be executed in accordance with the Drawings provided by the Contractor in accordance with the provisions of this Clause 10.2 and the observations of the Employer's Engineer thereon as communicated pursuant to the provisions of Clause 10.2.4 (d). Such Drawings shall not be amended or altered without prior written notice to the Employer's Engineer. If a Party becomes aware of an error or defect of a technical nature in the design or Drawings, that Party shall promptly give notice to the other Party of such error or defect.

10.2.7 Within 90 (ninety) days of the Project Completion Date, the Contractor shall furnish to the Employer and the Employer's Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in micro film form or in such other medium as may be acceptable to the Employer, reflecting the Project Works as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Project Works and setback lines, if any, of the buildings and structures forming part of Project Facilities.



### 10.3 Construction of the Project Works

- 10.3.1 The Contractor shall construct the Project Works as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works. The [545(Five Hundred Forty Five) day] from the Appointed Date shall be the scheduled completion date (the “**Scheduled Completion Date**”) and the Contractor agrees and undertakes that the construction shall be completed on or before the Scheduled Completion Date, including any extension thereof.
- 10.3.2 The Contractor shall construct the Project Works in accordance with the Project Completion Schedule set forth in Schedule-J. In the event that the Contractor fails to achieve any Project Milestone or the Scheduled Completion Date within a period of 30 (thirty) days from the date set forth in Schedule-J, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Employer, it shall pay Damages to the Employer of a sum calculated at the rate of 0.05% (zero point zero five percent) of the Contract Price for delay of each day reckoned from the date specified in Schedule –J and until such Project Milestone is achieved or the Works are completed; provided that if the period for any or all Project Milestones or the Scheduled Completion Date is extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-J shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-J has been amended as above; provided further that in the event the Works are completed within or before the Scheduled Completion Date including any Time Extension, applicable for that work or section, the Damages paid under this Clause 10.3.2 shall be refunded by the Employer to the Contractor, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 10.3.2 shall be without prejudice to the rights of the Employer under this Agreement including the right of Termination thereof. The Parties further agree that Time Extension hereunder shall only be reckoned for and in respect of the affected works as specified in Clause 10.5.2.
- 10.3.3 The Employer shall notify the Contractor of its decision to impose Damages in pursuance with the provisions of this Clause 10.3. provided that no deduction on account of Damages shall be effected by the Employer without notifying the Contractor of its decision to impose the Damages, and taking into consideration the representation, if any, made by the Contractor within 20 (twenty) days of such notice. The Parties expressly agree that the total amount of Damages under Clause 10.3.2 shall not exceed 10% (ten percent) of the Contract Price.

### 10.4 Maintenance during Construction Period

Deleted

### 10.5 Extension of time for completion

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

- (a) delay in providing the Site, environmental
- (b) Change of Scope (unless an adjustment to the Scheduled Completion Date has been agreed under Article 13);
- (c) occurrence of a Force Majeure Event;
- (d) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's personnel or the Employer's other contractors on the Site; and
- (e) any other cause or delay which entitles the Contractor to Time Extension in accordance with the provisions of this Agreement.

10.5.2 The Contractor shall, no later than 15 (fifteen) business days from the occurrence of an event or circumstance specified in Clause 10.5.1, inform the Employer's Engineer by notice in writing, with a copy to the Employer, stating in reasonable detail with supporting particulars, the event or circumstances giving rise to the claim for Time Extension in accordance with the provisions of this Agreement. Provided that the period of 15 (fifteen) business days shall be calculated from the date on which the Contractor became aware, or should have become aware, of the occurrence of such an event or circumstance.

Provided further that notwithstanding anything to the contrary contained in this Agreement, Time Extension shall be due and applicable only for the Works which are affected by the aforesaid events or circumstances and shall not in any manner affect the Project Completion Schedule for and in respect of the Works which are not affected hereunder.

10.5.3 In the event of the failure of the Contractor to issue to the Employer's Engineer a notice in accordance with the provisions of Clause 10.5.2 within the time specified therein, the Contractor shall not be entitled to any Time Extension and shall forfeit its right for any such claims in future. For the avoidance of doubt, in the event of failure of the Contractor to issue notice as specified in this clause 10.5.3, the Employer shall be discharged from all liability in connection with the claim.

10.5.4 The Employer's Engineer shall, on receipt of the claim in accordance with the provisions of Clause 10.5.2, examine the claim expeditiously within the time frame specified herein. In the event the Employer's Engineer requires any clarifications to examine the claim, the Employer's Engineer shall seek the same within 15 (fifteen) days from the date of receiving the claim. The Contractor shall, on receipt of the communication of the Employer's Engineer requesting for clarification, furnish the same to the Employer's Engineer within 10 (ten) days thereof. The Employer's Engineer shall, within a period of 60 (sixty) days from the date of receipt of such clarifications, forward in writing to the Contractor its determination of Time Extension.

Provided that when determining each extension of time under this Clause 10.5, the Employer's Engineer shall review previous determinations and may increase, but shall not decrease, the total Time Extension.

10.5.5 If the event or circumstance giving rise to the notice has a continuing effect:

- (a) a fully detailed claim shall be considered as interim;
- (b) the Contractor shall, no later than 10 (ten) days after the close of each month, send further interim claims specifying the accumulated delay, the extension of time claimed, and such further particulars as the Employer's Engineer may reasonably require; and
- (c) the Contractor shall send a final claim within 30 (thirty) days after the effect of the event or the circumstance ceases.

Upon receipt of the claim hereunder, the Employer's Engineer shall examine the same in accordance with the provisions of Clause 10.5.4 within a period of 60 (sixty) days of the receipt thereof.

## **10.6 Incomplete Works**

In the event the Contractor fails to complete the Works in accordance with the Project Completion Schedule, including any Time Extension granted under this Agreement, the Contractor shall endeavour to complete the balance work expeditiously and shall pay Damages to the Employer in accordance with the provisions of Clause 10.3.2 for delay of each day until the Works are completed in accordance with the provisions of this Agreement. Recovery of Damages under this Clause shall be without prejudice to the rights of the Employer under this Agreement including the right to termination under Clause 23.1.

## **10.7 Maintenance Manual**

No later than 60 (sixty) days prior to the Project Completion Date, the Contractor shall, in consultation with the Employer's Engineer, evolve a maintenance manual (the "**Maintenance Manual**") for the regular and preventive maintenance of the Project Works in conformity with the Specifications and Standards, safety requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the Employer's Engineer. The Employer's Engineer shall review the Maintenance Manual within 15 (fifteen) days of its receipt and communicate its comments to the Contractor for necessary modifications, if any.

## ARTICLE 11

### 11. Quality Assurance, Monitoring and Supervision

#### 11.1 Quality of Materials and workmanship

The Contractor shall ensure that the Construction, Materials and workmanship are in accordance with the requirements specified in this Agreement, Specifications and Standards and Good Industry Practice.

#### 11.2 Quality control system

11.2.1 The Contractor shall establish a quality control mechanism to ensure compliance with the provisions of this Agreement (the “**Quality Assurance Plan**” or “**QAP**”).

11.2.2 The Contractor shall, within 30 (thirty) days of the Appointed Date, submit to the Employer’s Engineer its Quality Assurance Plan which shall include the following:

- (a) organisation, duties and responsibilities, procedures, inspections and documentation;
- (b) quality control mechanism including sampling and testing of Materials, test frequencies, standards, acceptance criteria, testing facilities, reporting, recording and interpretation of test results, approvals, check list for Site activities, and proforma for testing and calibration in accordance with the Standard and Specifications and Good Industry Practice; and
- (c) internal quality audit system.

The Employer’s Engineer shall convey its comments to the Contractor within a period of 21 (twenty-one) days of receipt of the QAP stating the modifications, if any, required, and the Contractor shall incorporate those in the QAP to the extent required for conforming with the provisions of this Clause 11.2.

11.2.3 The Contractor shall procure all documents, apparatus and instruments, fuel, consumables, water, electricity, labour, Materials, samples, and qualified personnel as are necessary for examining and testing the Project Assets and workmanship in accordance with the Quality Assurance Plan.

11.2.4 The cost of testing of Construction, Materials and workmanship under this Article 11 shall be borne by the Contractor.

#### 11.3 Methodology

The Contractor shall, at least 15 (fifteen) days prior to the commencement of the construction, submit to the Employer’s Engineer for review the methodology proposed to be adopted for executing the Works, giving details of equipment to be deployed, and measures for ensuring safety. The Employer’s Engineer shall complete the review and convey its comments to the Contractor within a period of 10 (ten) days from the date of receipt of the proposed methodology from the Contractor.

#### **11.4 Inspection and technical audit by the Employer**

The Employer or any representative authorised by the Employer in this behalf may inspect and review the progress and quality of the construction of Project Works and issue appropriate directions to the Employer's Engineer and the Contractor for taking remedial action in the event the Works are not in accordance with the provisions of this Agreement.

#### **11.5 External technical audit**

At any time during construction, the Employer may appoint an external technical auditor to conduct an audit of the quality of the Works. The findings of the audit, to the extent accepted by the Employer, shall be notified to the Contractor and the Employer's Engineer for taking remedial action in accordance with this Agreement. The Contractor shall provide all assistance as may be required by the auditor in the conduct of its audit hereunder. Notwithstanding anything contained in this Clause 11.5, the external technical audit shall not affect any obligations of the Contractor or the Employer's Engineer under this Agreement.

#### **11.6 Inspection of construction records**

The Employer shall have the right to inspect the records of the Contractor relating to the Works.

#### **11.7 Monthly progress reports**

During the Construction Period, the Contractor shall, no later than 10 (ten) days after the close of each month, furnish to the Employer and the Employer's Engineer a monthly report on progress of the Works and shall promptly give such other relevant information as may be required by the Employer's Engineer.

#### **11.8 Inspection**

11.8.1 The Employer's Engineer and its authorized representative shall at all reasonable times:

- (a) have full access to all parts of the Site and to all places from which natural Materials are being obtained for use in the Works; and
- (b) during production, manufacture and construction at the Site and at the place of production, be entitled to examine, inspect, measure and test the Materials and workmanship, and to check the progress of manufacture of Materials.

11.8.2 The Contractor shall give the Employer's Engineer and its authorized agents access, facilities and safety equipment for carrying out their obligations under this Agreement.

11.8.3 The Employer's Engineer shall submit a monthly inspection report (the "**Inspection Report**") to the Employer and the Contractor bringing out the results of inspections and the remedial action taken by the Contractor in respect of Defects or deficiencies. For the avoidance of doubt, such inspection or submission of Inspection Report by the Employer's Engineer shall not relieve or absolve the Contractor of its obligations and

liabilities under this Agreement in any manner whatsoever.

## **11.9 Samples**

The Contractor shall submit the following samples of Materials and relevant information to the Employer's Engineer for pre-construction review:

- (a) manufacturer's test reports and standard samples of manufactured Materials; and
- (b) samples of such other Materials as the Employer's Engineer may require.

## **11.10 Tests**

11.10.1 For determining that the Works conform to the Specifications and Standards, the Employer's Engineer shall require the Contractor to carry out or cause to be carried out tests, at such time and frequency and in such manner as specified in this Agreement, and in accordance with Good Industry Practice for quality assurance. The test checks by the Employer's Engineer shall comprise at least 20 (twenty) percent of the quantity or number of tests prescribed for each category or type of test for quality control by the Contractor.

11.10.2 In the event that results of any tests conducted under this Clause 11.10 establish any Defects or deficiencies in the Works, the Contractor shall carry out remedial measures and furnish a report to the Employer's Engineer in this behalf. The Employer's Engineer shall require the Contractor to carry out or cause to be carried out tests to determine that such remedial measures have brought the Works into compliance with the Specifications and Standards, and the procedure shall be repeated until such Works conform to the Specifications and Standards. For the avoidance of doubt, the cost of such tests and remedial measures in pursuance thereof shall be solely borne by the Contractor.

## **11.11 Examination of work before covering up**

In respect of the work which the Employer's Engineer is entitled to examine, inspect, measure and/or test before it is covered up or put out of view or any part of the work is placed thereon, the Contractor shall give notice to the Employer's Engineer whenever any such work is ready and before it is covered up. The Employer's Engineer shall then either carry out the examination, inspection or testing without unreasonable delay, or promptly give notice to the Contractor that the Employer's Engineer does not require to do so. Provided, however, that if any work is of a continuous nature where it is not possible or prudent to keep it uncovered or incomplete, the Contractor shall notify the schedule of carrying out such work to give sufficient opportunity, not being less than 3 (three) business days' notice, to the Employer's Engineer to conduct its inspection, measurement or test while the work is continuing. Provided further that in the event the Contractor receives no response from the Employer's Engineer within a period of 3 (three) business days from the date on which the Contractor's notice hereunder is delivered to the Employer's Engineer, the Contractor shall be entitled to assume that the Employer's Engineer would not undertake the said inspection.

## **11.12 Rejection**

If, as a result of an examination, inspection, measurement or testing, any Plant, Materials, design or workmanship is found to be defective or otherwise not in accordance with the provisions of this Agreement, the Employer's Engineer shall reject the Plant, Materials, design or workmanship by giving notice to the Contractor, with reasons. The Contractor shall then promptly make good the Defect and ensure that the rejected item complies with the requirements of this Agreement.

If the Employer's Engineer requires the Plant, Materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions, as applicable in each case. If the rejection and retesting cause the Employer to incur any additional costs, such cost shall be recoverable by the Employer from the Contractor; and may be deducted by the Employer from any monies due to be paid to the Contractor.

## **11.13 Remedial work**

11.13.1 Notwithstanding any previous test or certification, the Employer's Engineer may instruct the Contractor to:

- (a) remove from the Site and replace any Plant or Materials which are not in accordance with the provisions of this Agreement;
- (b) remove and re-execute any work which is not in accordance with the provisions of this Agreement and the Specification and Standards; and
- (c) execute any work which is urgently required for the safety of the Project Works, whether because of an accident, unforeseeable event or otherwise; provided that in case of any work required on account of a Force Majeure Event, the provisions of Clause 21.6 shall apply.

11.13.2 If the Contractor fails to comply with the instructions issued by the Employer's Engineer under Clause 11.13.1, within the time specified in the Employer's Engineer's notice or as mutually agreed, the Employer's Engineer may advise the Employer to have the work executed by another agency. The cost so incurred by the Employer for undertaking such work shall, without prejudice to the rights of the Employer to recover Damages in accordance with the provisions of this Agreement, be recoverable from the Contractor and may be deducted by the Employer from any monies due to be paid to the Contractor.

## **11.14 Delays during construction**

Without prejudice to the provisions of Clause 10.3.2 in the event the Contractor does not achieve any of the Project Milestones or the Employer's Engineer shall have reasonably determined that the rate of progress of Works is such that Completion of the Project Works is not likely to be achieved by the end of the Scheduled Completion Date, it shall notify the same to the Contractor, and the Contractor shall, within 15 (fifteen) days of such notice, by a communication inform the Employer's Engineer in reasonable detail about the steps it proposes to take to expedite progress and the period within which it shall achieve the Project Completion Date.

### **11.15 Quality control records and Documents**

The Contractor shall hand over to the Employer's Engineer a copy of all its quality control records and documents before the Completion Certificate is issued pursuant to Clause 12.2.

### **11.16 Video recording**

During the Construction Period, the Contractor shall provide to the Employer for every calendar quarter, a video recording, which will be compiled into a 3 (three)-hour compact disc or digital video disc, as the case may be, covering the status and progress of Works in that quarter. The video recording shall be provided to the Employer no later than 15 (fifteen) days after the close of each quarter after the Appointed Date.

### **11.17 Suspension of unsafe Construction Works**

11.17.1 Upon recommendation of the Employer's Engineer to this effect, the Employer may by notice require the Contractor to suspend forthwith the whole or any part of the Works if, in the reasonable opinion of the Employer's Engineer, such work is unsafe and detrimental to the project..

11.17.2 The Contractor shall, pursuant to the notice under Clause 11.17.1, suspend the Works or any part thereof for such time and in such manner as may be specified by the Employer and thereupon carry out remedial measures to secure the safety of suspended works, the Users and the workers. The Contractor may by notice require the Employer's Engineer to inspect such remedial measures forthwith and make a report to the Employer recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Employer's Engineer, the Employer shall either revoke such suspension or instruct the Contractor to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Employer, and the procedure set forth in this Clause 11.17 shall be repeated until the suspension hereunder is revoked.

11.17.3 Subject to the provisions of Clause 21.6, all reasonable costs incurred for maintaining and protecting the Works or part thereof during the period of suspension (the "**Preservation Costs**"), shall be borne by the Contractor; provided that if the suspension has occurred as a result of any breach of this Agreement by the Employer, the Preservation Costs shall be borne by the Employer.

11.17.4 If suspension of Works is for reasons not attributable to the Contractor, the Employer's Engineer shall determine any Time Extension to which the Contractor is reasonably entitled.



## ARTICLE 12

### 12. Completion Certificate

#### 12.1 Tests on completion

12.1.1 At least 30 (thirty) days prior to the likely completion of the Project Works, the Contractor shall notify the Employer's Engineer of its intent to subject the Project Works or a Section/ or any part thereof, to Tests. The date and time of each of the Tests shall be determined by the Employer's Engineer in consultation with the Contractor, and notified to the Employer who may designate its representative to witness the Tests. The Contractor shall either conduct the Tests as directed by the Employer's Engineer or provide such assistance as the Employer's Engineer may reasonably require for conducting the Tests. In the event of the Contractor and the Employer's Engineer failing to mutually agree on the dates for conducting the Tests, the Contractor shall fix the dates by giving not less than 10 (ten) days' notice to the Employer's Engineer.

12.1.2 All Tests shall be conducted in accordance with Schedule-K. The Employer's Engineer shall either conduct or observe, monitor and review the Tests conducted by the Contractor, as the case may be, and review the results of the Tests to determine compliance of the Project Works or a Section or any part thereof, with Specifications and Standards and if it is reasonably anticipated or determined by the Employer's Engineer during the course of any Test that the performance of the Project Works or Section or any part thereof, does not meet the Specifications and Standards, it shall have the right to suspend or delay such Test and require the Contractor to remedy and rectify the Defect or deficiencies. Upon completion of each Test, the Employer's Engineer shall provide to the Contractor and the Employer copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Employer's Engineer may require the Contractor to carry out or cause to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Project Works or Section or any part thereof with the Specifications and Standards.

#### 12.2 Provisional Certificate

12.2.1 Subject to the provisions of Clause 12.2.5, upon completion of all Works forming part of the Project Works, save and except the Works for which Time Extension has been granted under Clause 10.5, the Employer's Engineer shall, at the request of the Contractor, issue a provisional certificate of completion substantially in the form set forth in Schedule-L (the "**Provisional Certificate**") if the Tests for and in respect of the completed Works are successful. The Provisional Certificate shall have appended thereto a list of outstanding items of work (the "**Punch List**") that need to be completed in accordance with the provisions of this Agreement. The Contractor undertakes to complete the minor outstanding items of works in respect of those Sections of the Project Works for which the Provisional Certificate has been issued, within a period of 30 (thirty) days of the date of Provisional Certificate, and those parts of the Works in respect of which Time Extension has been granted, within the extended period thereof. For the avoidance of doubt, the Parties agree that the Punch List shall include all Works for which Time Extension has been granted and shall also include any minor outstanding items of work forming part of the completed Sections

if such works do not materially affect the use of the completed Sections for their intended purpose. The Parties further agree that Provisional Certificate shall not be issued if the completed Works cannot be safely and reliably placed in service of the Users thereof.

- 12.2.2 Upon issue of Provisional Certificate, the provisions of Articles 14 and 17 shall apply to the completed parts of the Project Works and the property and ownership of all such completed Works shall vest in the Employer.
- 12.2.3 If the Employer's Engineer determines that the Project Works or any completed part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in operation, it shall forthwith make a report in this behalf and send copies thereof to the Employer and the Contractor and withhold issuance of the Provisional Certificate until the Defects or deficiencies are rectified by the Contractor and Tests are successful in accordance with this Article 12.
- 12.2.4 Notwithstanding anything to the contrary contained in Clause 12.2.3, the Employer may, at any time after receiving a report from the Employer's Engineer under that Clause, direct the Employer's Engineer to issue a Provisional Certificate under Clause 12.2.1 and such direction shall be complied forthwith.
- 12.2.5 No Provisional Certificate shall be issued under the provisions of this Clause 12.2 until the Contractor has submitted valid claims for payment of at least 80% (eighty per cent) of the amount arrived at after reducing the lump sum price specified in Clause 19.1.1 by the amount attributable to works which have been withdrawn under the provisions of Clause 8.3.3. For the avoidance of doubt and by way of illustration, the Parties agree that if the Contract Price specified in Clause 19.1.1 is Rs. 105 cr. (Rs. one hundred and five crore) and the works withdrawn under Clause 8.3.3 have a value of Rs. 5 cr. (Rs. five crore), a Provisional Certificate shall not be issued until valid claims for payment of an amount of Rs. 80 cr. (Rs. eighty crore) have been submitted by the Contractor in accordance with the provisions of this Agreement. It is further agreed that all price adjustments made in pursuance of Clause 19.10 shall not be reckoned for computation of the claims for payments referred to in this Clause 12.2.5.

### **12.3 Completion of remaining Works**

All items in the Punch List shall be completed by the Contractor in accordance with the provisions of this Agreement. For any delay in their completion other than for the reasons solely attributable to the Employer or due to Force Majeure, the Employer shall be entitled to recover Damages from the Contractor in accordance with the provisions of Clause 10.3.2 of this Agreement.

### **12.4 Completion Certificate**

- 12.4.1 Upon completion of all Works, including the items specified in the Punch List, and the Employer's Engineer determining the Tests to be successful, it shall forthwith issue to the Contractor and the Employer a certificate substantially in the form set forth in Schedule-L (the "**Completion Certificate**").

- 12.4.2 Upon receiving the Completion Certificate, the Contractor shall remove its equipment, materials, debris and temporary works from the Site within a period of 30 (thirty) days thereof, failing which the Employer may remove or cause to be removed, such equipment, materials, debris and temporary works and recover from the Contractor an amount equal to 120% (one hundred and twenty per cent) of the actual cost of removal incurred by the Employer.
- 12.4.3 Without prejudice to the obligations of the Contractor specified in Articles 14 and 17, the property and ownership of all the completed Works forming part of the Project Works shall vest in the Employer.

## **12.5 Rescheduling of Tests**

If the Employer's Engineer certifies to the Employer and the Contractor that it is unable to issue the Completion Certificate or Provisional Certificate, as the case may be, because of events or circumstances on account of which the Tests could not be held or had to be suspended, the Contractor shall be entitled to re-schedule the Tests and hold the same as soon as reasonably practicable.

## ARTICLE 13

### 13. Change of Scope

#### 13.1 Change of Scope

13.1.1 The Employer may, notwithstanding anything to the contrary contained in this Agreement, require the Contractor to make modifications/alterations to the Works (“**Change of Scope**”) before the issue of the Completion Certificate either by giving an instruction or by requesting the Contractor to submit a proposal for Change of Scope involving additional cost or reduction in cost. Any such Change of Scope shall be made and valued in accordance with the provisions of this Article 13.

13.1.2 Change of Scope shall mean:

- (a) change in specifications of any item of Works;
- (b) omission of any work from the Scope of the Project except under Clause 8.3.3; provided that, subject to Clause 13.5, the Employer shall not omit any work under this Clause in order to get it executed by any other authority; and / or
- (c) any additional work, Plant, Materials or services which are not included in the Scope of the Project, including any associated Tests on completion of construction.

13.1.3 If the Contractor determines at any time that a Change of Scope will, if adopted, (i) accelerate completion, (ii) reduce the cost to the Employer of executing, maintaining or operating the Project Works, (iii) improve the efficiency or value to the Employer of the completed Project Works, or (iv) otherwise be of benefit to the Employer, it shall prepare a proposal with relevant details at its own cost. The Contractor shall submit such proposal, supported with the relevant details and the amount of reduction in the Contract Price to the Employer to consider such Change of Scope. The Employer shall, within 15 (fifteen) days of receipt of such proposal, either accept such Change of Scope with modifications, if any, and initiate proceedings therefor in accordance with this Article 13 or reject the proposal and inform the Contractor of its decision. For the avoidance of doubt, the Parties agree that the Contractor shall not undertake any Change of Scope without the express consent of the Employer, save and except any Works necessary for meeting any Emergency.

#### 13.2 Procedure for Change of Scope

13.2.1 In the event of the Employer determining that a Change of Scope is necessary, it may direct the Employer’s Engineer to issue to the Contractor a notice specifying in reasonable detail the works and services contemplated thereunder (the “**Change of Scope Notice**”).

13.2.2 Upon receipt of a Change of Scope Notice, the Contractor shall, with due diligence, provide to the Employer and the Employer’s Engineer such information as is necessary, together with preliminary documentation in support of:

- (a) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period; and
- (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including the following details:
  - (i) break down of the quantities, unit rates and cost for different items of work;
  - (ii) proposed design for the Change of Scope; and
  - (iii) proposed modifications, if any, to the Project Completion Schedule of the Project Works.

For the avoidance of doubt, the Parties expressly agree that, subject to the provisions of Clause 13.4.2, the Contract Price shall be increased or decreased, as the case may be, on account of Change of Scope.

13.2.3 The Contractor's quotation of costs for the Change of Scope shall be determined on the following principles:

- (a) the latest available edition of Gujarat State Schedule of Rates (GSSR) Published by R&B applicable to Ahmedabad will be adopted for the valuation of any works which are not already covered by the items included in Price Schedules. Payments for the Variations Items shall be made in INR only.
- (b) in the event that items are not covered in the GSSR, then the latest edition of the Gujarat Water Supply and Sewerage Board applicable for Ahmedabad and then the Delhi Schedule of Rates related to Ahmedabad Circle will be used in that order.
- (c) the market rates substantiated with 3 quotations, followed by work order and/or Tax Invoice shall be considered only when the executed variation items are not covered under Price Schedule or the above referred schedule of rates. A fixed percentage of 15% shall be added to cover the Contractor's Overhead and Profit for the rates evaluated under this category (c).

13.2.4 Upon reaching an agreement, the Employer shall issue an order (the "**Change of Scope Order**") requiring the Contractor to proceed with the performance thereof. In the event that the Parties are unable to agree, the Employer may:

- (a) issue a Change of Scope Order requiring the Contractor to proceed with the performance thereof at the rates and conditions approved by the Employer till the matter is resolved in accordance with Article 26; or
- (b) proceed in accordance with Clause 13.5.

13.2.5 The provisions of this Agreement, insofar as they relate to Works and Tests, shall apply *mutatis mutandis* to the works undertaken by the Contractor under this Article 13.

### **13.3 Payment for Change of Scope**

Payment for Change of Scope shall be made in accordance with the payment schedule specified in the Change of Scope Order.

### **13.4 Restrictions on Change of Scope**

13.4.1 No Change of Scope shall be executed unless the Employer has issued the Change of Scope Order save and except any Works necessary for meeting any Emergency.

13.4.2 Unless the Parties mutually agree to the contrary, the total value of all Change of Scope Orders shall not exceed 10 (ten) per cent of the Contract Price.

13.4.3 Notwithstanding anything to the contrary in this Article 13, no change made necessary because of any default of the Contractor in the performance of its obligations under this Agreement shall be deemed to be Change of Scope, and shall not result in any adjustment of the Contract Price or the Project Completion Schedule.

### **13.5 Power of the Employer to undertake works**

13.5.1 In the event the Parties are unable to agree to the proposed Change of Scope Orders in accordance with Clause 13.2, the Employer may, after giving notice to the Contractor and considering its reply thereto, award such works or services to any person on the basis of open competitive bidding from amongst bidders who are pre-qualified for undertaking the additional work; provided that the Contractor shall have the option of matching the first ranked bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Employer, and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Contractor shall be entitled to exercise such option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% (ten percent) thereof. It is also agreed that the Contractor shall provide assistance and cooperation to the person who undertakes the works or services hereunder, but shall not be responsible for rectification of any Defects and/ or maintenance of works carried out by other agencies.

13.5.2 The works undertaken in accordance with this Clause 13.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimises the disruption in operation of the Project Works. The provisions of this Agreement, insofar as they relate to Works and Tests, shall apply *mutatis mutandis* to the works carried out under this Clause 13.5.

## ARTICLE 14

### 14. Maintenance

#### 14.1 Maintenance obligations of the Contractor

14.1.1 The Contractor shall maintain the Project Works carried out by the contractor for a period of 4 (four) years commencing from the date of the Provisional Certificate (the “**Maintenance Period**”). For the performance of its Maintenance obligations, the Contractor shall be paid a total amount equal to 1% (one per cent) of the Contract Price for the first year of maintenance, and 1.5% (one and half per cent) of the Contract Price for the Second, Third and Fourth year of maintenance, inclusive of all taxes.. The amount payable for maintenance shall be adjusted to reflect any increase or decrease arising out of variation in WPI to be determined in accordance with the provisions of Clause 19.12. For the avoidance of doubt, it is agreed that in the event no Provisional Certificate is issued, the Maintenance Period shall commence from the date of the Completion Certificate. It is further agreed that the Contract Price hereunder shall be reckoned with reference to the amount specified in Clause 19.1.1, which shall be adjusted to the extent of Change of Scope and the works withdrawn under the provisions of Clause 8.3.3, but shall not include any price adjustments in pursuance of Clause 19.10.

14.1.2 During the Maintenance Period, the Employer shall provide to the Contractor access to the Site for Maintenance in accordance with this Agreement. The obligations of the Contractor hereunder shall include:

- (a) Deleted;
- (b) Undertaking routine maintenance;
- (c) Undertaking repairs to structures;
- (d) Deleted
- (e) Informing the Employer of any encroachments on the Project Site; and
- (f) Operation and maintenance of all utilities/equipment/items supplied and installed by the contractor under this contract and any further item as per the final approved drawings. Communication, patrolling, and administrative works necessary for the efficient maintenance of all the service area plots and is also to be carried out by the contractor in accordance with the provisions of this Agreement.

14.1.3 In respect of any Defect or deficiency not specified in Schedule-E, the Contractor shall, at its own cost, undertake repair or rectification in accordance with Good Industry Practice, save and except to the extent that such Defect or deficiency shall have arisen on account of any default or neglect of the Employer or a Force Majeure Event.

14.1.4 The Contractor shall remove promptly from the Project works any waste materials

(including hazardous materials and waste water), rubbish and other debris (including, without limitation, accident debris) and keep the Project works in a clean, tidy and orderly condition, and in conformity with the Applicable Laws, Applicable Permits and Good Industry Practice.

## **14.2 Maintenance Requirements**

The Contractor shall ensure and procure that at all times during the Maintenance Period, the Project Works conforms to the maintenance requirements set forth in Schedule-E (the “**Maintenance Requirements**”).

## **14.3 Maintenance Programme**

14.3.1 The Contractor shall prepare a monthly maintenance programme (the “**Maintenance Programme**”) in consultation with the Employer’s Engineer and submit the same to the Employer’s Engineer not later than 10 (ten) days prior to the commencement of the month in which the Maintenance is to be carried out. For this purpose a joint monthly inspection by the Contractor and the Employer’s Engineer shall be undertaken. The Maintenance Programme shall contain the following:

- (a) the condition of the work in the format prescribed by the Employer’s Engineer;
- (b) the proposed maintenance works; and
- (c) deployment of resources for maintenance works.

## **14.4 Deleted**

## **14.5 Deleted**

## **14.6 Reduction of payment for non-performance of Maintenance obligations**

14.6.1 In the event that the Contractor fails to repair or rectify any Defect or deficiency set forth in Schedule-E within the period specified therein, it shall be deemed as failure of performance of Maintenance obligations by the Contractor and the Employer shall be entitled to effect reduction in monthly lump sum payment for maintenance in accordance with Clause 19.7 and Schedule-M, without prejudice to the rights of the Employer under this Agreement, including Termination thereof.

14.6.2 If the nature and extent of any defect justifies more time for its repair or rectification than the time specified in Schedule-E, the Contractor shall be entitled to additional time in conformity with Good Industry Practice. Such additional time shall be determined by the Employer’s Engineer and conveyed to the Contractor and the Employer with reasons thereof.

## **14.7 Employer’s right to take remedial measures**

In the event the Contractor does not maintain and/or repair the Project Works or any part thereof in conformity with the Maintenance Requirements, the Maintenance Manual or the Maintenance Programme, as the case may be, and fails to commence remedial works within 15 (fifteen) days of receipt of the Maintenance Inspection



Report under Clause 15.2 or a notice in this behalf from the Employer or the Employer's Engineer, as the case may be, the Employer shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the cost of the Contractor, and to recover its cost from the Contractor. In addition to recovery of the aforesaid cost, a sum equal to 20% (twenty per cent) of such cost shall be paid by the Contractor to the Employer as Damages.

#### **14.8 Restoration of loss or damage to Project Works**

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

#### **14.9 Overriding powers of the Employer**

- 14.9.1 If in the reasonable opinion of the Employer, the Contractor is in material breach of its obligations under this Agreement and, in particular, the Maintenance Requirements, and such breach is causing or likely to cause material hardship or danger to the Users and pedestrians, the Employer may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Contractor to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.
- 14.9.2 In the event that the Contractor, upon notice under Clause 14.9.1, fails to rectify or remove any hardship or danger within a reasonable period, the Employer may exercise overriding powers under this Clause 14.9.2 and take over the performance of any or all the obligations of the Contractor to the extent deemed necessary by it for rectifying or removing such hardship or danger; provided that the exercise of such overriding powers by the Employer shall be of no greater scope and of no longer duration than is reasonably required hereunder; provided further that any costs and expenses incurred by the Employer in discharge of its obligations hereunder shall be recovered by the Employer from the Contractor, and the Employer shall be entitled to deduct any such costs and expenses incurred from the payments due to the Contractor under Clause 19.7 for the performance of its Maintenance obligations.
- 14.9.3 In the event of a national emergency, civil commotion or any other circumstances specified in Clause 21.3, the Employer may take over the performance of any or all the obligations of the Contractor to the extent deemed necessary by it, and exercise such control over the Project Works or give such directions to the Contractor as may be deemed necessary; provided that the exercise of such overriding powers by the Employer shall be of no greater scope and of no longer duration than is reasonably required in the circumstances which caused the exercise of such overriding power by the Employer. For the avoidance of doubt, it is agreed that the consequences of such action shall be dealt in accordance with the provisions of Article 21. It is also agreed that the Contractor shall comply with such instructions as the Employer may issue in pursuance of the provisions of this Clause 14.9.3, and shall provide assistance and cooperation to the Employer, on a best effort basis, for performance of its obligations hereunder.

## ARTICLE 15

### 15. Supervision and Monitoring During Maintenance

#### 15.1 Inspection by the Contractor

15.1.1 The Employer's Engineer shall undertake regular inspections to evaluate continuously the compliance with the Maintenance Requirements.

15.1.2 Deleted

#### 15.2 Inspection and payments

15.2.1 The Employer's Engineer may inspect the Project Works and at any time, but at least once every month, to ensure compliance with the Maintenance Requirements. It shall make a report of such inspection ("**Maintenance Inspection Report**") stating in reasonable detail the Defects or deficiencies, if any, with particular reference to the Maintenance Requirements, the Maintenance Manual, and the Maintenance Programme, and send a copy thereof to the Employer and the Contractor within 10 (ten) days of such inspection.

15.2.2 After the Contractor submits to the Employer's Engineer the Monthly Maintenance Statement for the Project Works pursuant to Clause 19.6, the Employer's Engineer shall carry out an inspection within 10 (ten) days to certify the amount payable to the Contractor. The Employer's Engineer shall inform the Contractor of its intention to carry out the inspection at least 3 (three) business days in advance of such inspection. The Contractor shall assist the Employer's Engineer in verifying compliance with the Maintenance Requirements.

15.2.3 For each case of non-compliance of Maintenance Requirements as specified in the inspection report of the Employer's Engineer, the Employer's Engineer shall calculate the amount of reduction in payment in accordance with the formula specified in Schedule-M.

15.2.4 Any deduction made on account of non-compliance will not be paid subsequently even after establishing the compliance thereof. Such deductions will continue to be made every month until the compliance is procured.

#### 15.3 Tests

For determining that the Project Works conforms to the Maintenance Requirements, the Employer's Engineer shall require the Contractor to carry out, or cause to be carried out, tests specified by it in accordance with Good Industry Practice. The Contractor shall, with due diligence, carry out or cause to be carried out all such tests in accordance with the instructions of the Employer's Engineer and furnish the results of such tests forthwith to the Employer's Engineer.

#### 15.4 Deleted

## ARTICLE 16

### 16. Deleted

## ARTICLE 17

### 17. Defects Liability

#### 17.1 Defects Liability Period

17.1.1 The Contractor shall be responsible for all the Defects and deficiencies, except usual wear and tear in the Project Works or any Section thereof, till the expiry of a period of 4 (Four) years commencing from the date of Provisional Certificate (the “**Defects Liability Period**”). Provided that the Defects Liability Period shall in no case be less than 48 (Forty Eight) months from the date of Completion Certificate for and in respect of works for which Time Extension was granted. Provided further that in the event no Provisional Certificate is issued, the Defects Liability Period shall commence from the date of the Completion Certificate. For the avoidance of doubt, any repairs or restoration on account of usual wear or tear in the Project Works or any Section or part thereof shall form a part of the Maintenance obligations of the Contractor as specified in Article 14.

17.1.2 Deleted

#### 17.2 Remediating Defects

Save and except as provided in , the Contractor shall repair or rectify all Defects and deficiencies observed by the Employer’s Engineer during the Defects Liability Period within a period of 15 (fifteen) days from the date of notice issued by the Employer’s Engineer in this behalf, or within such reasonable period as may be determined by the Employer’s Engineer at the request of the Contractor, in accordance with Good Industry Practice.

#### 17.3 Cost of remedying Defects

For the avoidance of doubt, any repair or rectification undertaken in accordance with the provisions of Clause 17.2, including any additional testing, shall be carried out by the Contractor at its own risk and cost, to the extent that such rectification or repair is attributable to:

- (a) The design of the Project;
- (b) Plant, Materials or workmanship not being in accordance with this Agreement and the Specifications and Standards;
- (c) Improper maintenance during construction of the Project Works by the Contractor; and/ or
- (d) Failure by the Contractor to comply with any other obligation under this Agreement.

#### 17.4 Contractor’s failure to rectify Defects

In the event that the Contractor fails to repair or rectify such Defect or deficiency within the period specified in Clause 17.2, the Employer shall be entitled to get the same repaired, rectified or remedied at the Contractor’s cost so as to make the Project Works conform to the Specifications and Standards and the provisions of this

Agreement. All costs consequent thereon shall, after due consultation with the Employer and the Contractor, be determined by the Employer's Engineer. The cost so determined and an amount equal to twenty percent of the cost as Damages shall be recoverable by the Employer from the Contractor and may be deducted by the Employer from any monies due to the Contractor.

#### **17.5 Contractor to search cause**

- 17.5.1 The Employer's Engineer may instruct the Contractor to examine the cause of any Defect in the Works or part thereof before the expiry of the Defects Liability Period.
- 17.5.2 In the event any Defect identified under Clause 17.5.1 is attributable to the Contractor, the Contractor shall rectify such Defect within the period specified by the Employer's Engineer, and shall bear the cost of the examination and rectification of such Defect.
- 17.5.3 In the event such Defect is not attributable to the Contractor, the Employer's Engineer shall, after due consultation with the Employer and the Contractor, determine the costs incurred by the Contractor on such examination and notify the same to the Contractor, with a copy to the Employer, and the Contractor shall be entitled to payment of such costs by the Employer.

#### **17.6 Extension of Defects Liability Period**

The Defects Liability Period shall be deemed to be extended till the identified Defects under Clause 17.2 have been remedied.

## ARTICLE 18

### 18. Employer's Engineer

#### 18.1 Appointment of the Employer's Engineer

18.1.1 The Employer shall appoint a consulting engineering firm substantially in accordance with the selection criteria set forth in Schedule-N, to be the engineer under this Agreement (the "**Employer's Engineer**").

18.1.2 The appointment of the Employer's Engineer shall be made no later than 30 (thirty) days from the date of this Agreement. The Employer shall notify the appointment or replacement of the Employer's Engineer to the Contractor.

18.1.3 The staff of the Employer's Engineer shall include suitably qualified engineers and other professionals who are competent to assist the Employer's Engineer to carry out its duties.

#### 18.2 Duties and authority of the Employer's Engineer

18.2.1 The Employer's Engineer shall perform the duties and exercise the authority in accordance with the provisions of this Agreement, and substantially in accordance with the terms of reference ("**Terms of Reference**" or "**TOR**") set forth in Annex 1 of Schedule N, but subject to obtaining prior written approval of the Employer before determining:

- (a) any Time Extension;
- (b) any additional cost to be paid by the Employer to the Contractor;
- (c) the Termination Payment; or
- (d) any other matter which is not specified in (a), (b) or (c) above and which creates an obligation or liability on either Party for a sum exceeding Rs. 5,000,000 (Rs. fifty lakh).

18.2.2 No decision or communication of the Employer's Engineer shall be effective or valid unless it is accompanied by an attested true copy of the approval of the Employer/PMNC for and in respect of any matter specified in Clause 18.2.1.

18.2.3 The Employer's Engineer shall submit regular periodic reports, at least once every month, to the Employer/PMNC in respect of its duties and functions under this Agreement. Such reports shall be submitted by the Employer's Engineer within 10 (ten) days of the beginning of every month.

#### 18.3 Delegation by the Employer's Engineer

18.3.1 The Employer's Engineer may, by order in writing, delegate any of his duties and responsibilities to suitably qualified and experienced personnel who are accountable to Employer's Engineer, or may revoke any such delegation, under intimation to the Employer/PMNC and the Contractor. Provided, however, that the Employer's

Engineer shall be responsible and liable for all actions and omissions of such personnel.

18.3.2 Any failure of the Employer's Engineer to disapprove any work, Plant or Materials shall not constitute approval, and shall therefore not prejudice the right of the Employer to reject the work, Plant or Materials, which is not in accordance with the provisions of this Agreement and the Specifications and Standards.

18.3.3 Notwithstanding anything stated in Clause 18.3.1 above, the Employer's Engineer shall not delegate the authority to refer any matter for the Employer's/PMNC prior approval wherever required in accordance with the provisions of Clause 18.2.

#### **18.4 Instructions of the Employer's Engineer**

18.4.1 The Employer's Engineer may issue to the Contractor instructions for remedying any Defect. The Contractor shall take such instructions from the Employer's Engineer, or from an assistant to whom appropriate authority has been delegated under Clause 18.3.

18.4.2 The instructions issued by the Employer's Engineer shall be in writing. However, if the Employer's Engineer issues any oral instructions to the Contractor, it shall confirm in writing the oral instructions within 2 (two) working days of issuing them.

18.4.3 In case the Contractor does not receive the confirmation of the oral instruction within the time specified in Clause 18.4.2, the Contractor shall seek the written confirmation of the oral instructions from the Employer's Engineer. The Contractor shall obtain acknowledgement from the Employer's Engineer of the communication seeking written confirmation. In case of failure of the Employer's Engineer or its delegated assistant to reply to the Contractor within 2 (two) days of the receipt of the communication from the Contractor, the Contractor may not carry out the instruction.

18.4.4 In case of any dispute on any of the instructions issued by the delegated assistant, the Contractor may refer the dispute to the Employer's Engineer, who shall then confirm, reverse or vary the instructions within 3 (three) business days of the dispute being referred.

#### **18.5 Determination by the Employer's Engineer**

18.5.1 The Employer's Engineer shall consult with each Party in an endeavor to reach agreement wherever this Agreement provides for the determination of any matter by the Employer's Engineer. If such agreement is not achieved, the Employer's Engineer shall make a fair determination in accordance with this Agreement having due regard to all relevant circumstances. The Employer's Engineer shall give notice to both the Parties of each agreement or determination, with supporting particulars.

18.5.2 Each Party shall give effect to each agreement or determination made by the Employer's Engineer in accordance with the provisions of this Agreement. Provided, however, that if any Party disputes any instruction, decision, direction or determination of the Employer's Engineer, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.

## **18.6 Remuneration of the Employer's Engineer**

The remuneration, cost and expenses of the Employer's Engineer shall be paid by the Employer.

## **18.7 Termination of the Employer's Engineer**

18.7.1 The Employer may, in its discretion, replace the Employer's Engineer at any time, but only after appointment of another Employer's Engineer in accordance with Clause 18.1.

18.7.2 If the Contractor has reasons to believe that the Employer's Engineer is not discharging its duties and functions in accordance with the provisions of this Agreement, it may make a written representation to the Employer and seek termination of the appointment of the Employer's Engineer. Upon receipt of such representation, the Employer shall hold a tripartite meeting with the Contractor and Employer's Engineer and make best efforts for an amicable resolution of the representation. In the event that the appointment of the Employer's Engineer is terminated hereunder, the Employer shall appoint forthwith another Employer's Engineer in accordance with Clause 18.1.



## **PART IV - FINANCIAL COVENANTS**

## ARTICLE 19

### 19. Payments

#### 19.1 Contract Price

19.1.1 The Employer shall make payments to the Contractor for the Works on the basis of the lump sum price accepted by the Employer in consideration of the obligations specified in this Agreement for an amount of **Rs .....** (**Rupees .....** **only**) (The “**Contract Price**”), which shall be subject to adjustments in accordance with the provisions of this Agreement. For the avoidance of doubt, the Parties expressly agree that the Contract Price shall not include the cost of Maintenance which shall be paid separately in accordance with the provisions of Clause 19.7. The Parties further agree that save and except as provided in this Agreement, the Contract Price shall be valid and effective until issue of Completion Certificate.

19.1.2 The Contract Price includes all duties, taxes, royalty, and fees that may be levied in accordance with the laws and regulations in force as on the Base Date on the Contractor's equipment, Plant, Materials and supplies acquired for the purpose of this Agreement and on the services performed under this Agreement. Nothing in this Agreement shall relieve the Contractor from its responsibility to pay any tax including any tax that may be levied in India on profits made by it in respect of this Agreement.

19.1.3 The Contract Price shall not be adjusted for any change in costs stated in Clause 19.1.2 above, except as stated in Clauses 19.10 and 19.17.

19.1.4 The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs, unless otherwise provided for in this Agreement.

19.1.5 Unless otherwise stated in this Agreement, the Contract Price covers all the Contractor's obligations for the Works under this Agreement and all things necessary for the Construction and the remedying of any Defects in the Project Works.

19.1.6 All payments under this Agreement shall be made in Indian Rupees.

#### 19.2 Advance Payment

19.2.1 The Employer shall make an interest bearing advance payment @ Bank Rate + 5% per annum -(the “**Advance Payment**”), equal in amount to 10 (ten) percent of the Contract Price, for mobilisation expenses and for acquisition of equipment. The Advance Payment shall be made in three instalments. The first instalment shall be an amount equal to 2% (two percent) of the Contract Price, the second instalment shall be equal to 3% (three percent) of the Contract Price, and the third instalment shall be equal to 5% (five percent) of the Contract Price.

19.2.2 The Contractor may apply to the Employer for the first instalment of the Advance Payment at any time after the Appointed Date, along with an irrevocable and unconditional guarantee from a Bank for an amount equivalent to 110% (one hundred and ten per cent) of such instalment, in the form provided at Annex-III of Schedule-G,

to remain effective till the complete and full repayment thereof.

- 19.2.3 At any time after 30 (thirty) days from the Appointed Date, the Contractor may apply for the second instalment of the Advance Payment along with an irrevocable and unconditional guarantee from a Bank for an amount equivalent to 110% (one hundred and ten per cent) of such instalment, in the form provided at Annex-III of Schedule-G, to remain effective till the complete and full repayment thereof along with proof of satisfactory utilization of first instalment of the Advance Payment.
- 19.2.4 At any time, after 60 (sixty) days from the Appointed Date, the Contractor may apply to the Employer for the third instalment of the Advance Payment along with an irrevocable and unconditional guarantee from a Bank for an amount equivalent to 110% (one hundred and ten per cent) of such instalment, in the form provided at Annex-III of Schedule-G, to remain effective till the complete and full repayment thereof along with proof of satisfactory utilization of second instalment of the Advance Payment. No advance shall be given after 40% of the original Contract amount has been paid
- 19.2.5 The first, second and the third instalments shall be paid by the Employer to the Contractor within 15 (fifteen) days of the receipt of its respective requests in accordance with the provisions of this Clause 19.2.
- 19.2.6 The recovery of all Advances shall commence when 20% (twenty per cent) of the original Contract Price of the work has been paid, or at ten months after the Commencement Date of the Contract whichever is the earlier, and it will be completed by the time 80% of the original contract value has been paid or by the time of original Completion Date whichever is earlier. The recovery of advances shall be limited to 30% (thirty per cent) of an account bill.
- 19.2.7 If the Advance Payment has not been fully repaid prior to Termination under Clause 21.7 or Article 23, as the case may be, the whole of the balance then outstanding including interest shall immediately become due and payable by the Contractor to the Employer.

### **19.3 Procedure for estimating the payment for the Works**

- 19.3.1 The Employer shall make interim payments to the Contractor as certified by the Employer's Engineer on completion of a stage, in a length, number or area as specified, and valued in accordance with the proportion of the Contract Price assigned to each item and its stage in Schedule-H.
- 19.3.2 The Contractor shall base its claim for interim payment for the stages completed till the end of the month for which the payment is claimed, valued in accordance with Clause 19.3.1, supported with necessary particulars and documents in accordance with this Agreement.
- 19.3.3 Any reduction in the Contract Price arising out of Change of Scope or the works withdrawn under Clause 8.3 shall not affect the amounts payable for the items or stage payments thereof which are not affected by such Change of Scope or withdrawal. The Parties further agree that the adjustments arising out of the aforesaid modifications shall be carried out in a manner that the impact of such modifications is restricted to the said Change of Scope or withdrawal, as the case may be, and does not

alter the payments due for and in respect of items or stage payments which do not form part of such Change of Scope or withdrawal.

#### **19.4 Stage Payment Statement for Works**

The Contractor shall submit a statement (the “**Stage Payment Statement**”), in 3 copies, by the 7th (seventh) day of the month to the Employer’s Engineer in the form set forth in Schedule-O, showing the amount calculated in accordance with Clause 19.3 to which the Contractor considers himself entitled for completed stage(s) of the Works. The Stage Payment Statement shall be accompanied with the progress reports and any other supporting documents. The Contractor shall not submit any claim for payment of incomplete stages of work.

#### **19.5 Stage Payment for Works**

19.5.1 Within 7 (seven) days of receipt of the Stage Payment Statement from the Contractor pursuant to Clause 19.4, the Employer’s Engineer shall broadly determine the amount due to the Contractor and recommend the release of 90 (ninety) percent of the amount so determined as part payment against the Stage Payment Statement, pending issue of the Interim Payment Certificate by the Employer’s Engineer. Within 7 (seven) days of the receipt of recommendation of the Employer’s Engineer, the Employer shall make electronic payment directly to the Contractor’s bank account.

19.5.2 Within 15 (fifteen) days of the receipt of the Stage Payment Statement referred to in Clause 19.4, the Employer’s Engineer shall determine and shall deliver to the Employer and the Contractor an IPC certifying the amount due and payable to the Contractor, after adjusting the payments already released to the Contractor against the said statement. For the avoidance of doubt, the Parties agree that the IPC shall specify all the amounts that have been deducted from the Stage Payment Statement and the reasons therefor.

19.5.3 In cases where there is a difference of opinion as to the value of any stage, the Employer’s Engineer’s view shall prevail and interim payments shall be made to the Contractor on this basis; provided that the foregoing shall be without prejudice to the Contractor’s right to raise a Dispute.

19.5.4 The Employer’s Engineer may, for reasons to be recorded, withhold from payment:

- (a) the estimated value of work or obligation that the Contractor has failed to perform in accordance with this Agreement and the Employer’s Engineer had notified the Contractor; and
- (b) the estimated cost of rectification of work done being not in accordance with this Agreement.

19.5.5 Payment by the Employer shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction with the work done.

## **19.6 Monthly Maintenance Statement of the Project Works**

19.6.1 The Contractor shall submit to the Employer's Engineer a monthly maintenance statement ("**Monthly Maintenance Statement**") in 3 (three) copies by the 7<sup>th</sup> (seventh) day of each month in the format set forth in Schedule-O for the Maintenance of the Project Works during the previous month.

19.6.2 The monthly lump sum amount payable for Maintenance shall be 1/12<sup>th</sup> (one-twelfth) of the annual cost of Maintenance as specified in Clause 14.1.1.

## **19.7 Payment for Maintenance of the Project Works**

19.7.1 Within 15 (fifteen) days of receipt of the Monthly Maintenance Statement from the Contractor pursuant to Clause 19.6, the Employer's Engineer shall verify the Contractor's monthly maintenance statement and certify the amount to be paid to the Contractor taking into account:

- (a) compliance with the Maintenance Requirements; and
- (b) reduction for non-compliance with the Maintenance Requirement in accordance with Clause 19.7.2.

The Employer's Engineer shall deliver to the Employer an IPC approving or amending the monthly statement to reflect the amount due to the Contractor in accordance with this Agreement.

19.7.2 Maintenance shall be measured in units of Square meter each; provided, however, that payment thereof shall be made in fixed monthly amounts in accordance with this Agreement. If the Maintenance Requirements set forth in Schedule-E are not met, reduction in payments shall be made in accordance with the provisions of Schedule-M. The reductions for non-compliance with the Maintenance Requirements shall be applied on the basis of monthly inspections by the Employer's Engineer.

19.7.3 The deduction made on account of non-compliance with the Maintenance Requirements shall not be subsequently considered for payment after the compliance is achieved by repair or rectification.

19.7.4 The Employer shall pay to the Contractor every quarter any amount due under any IPC under this Clause 19.7. The payment shall be made no later than 30 (thirty) days from the date of submission of the last IPC for the relevant quarter.

## **19.8 Payment of Damages**

19.8.1 The Contractor may claim Damages due and payable to it in accordance with the provisions of this Agreement.

19.8.2 The Employer's Engineer shall issue the IPC within 15 (fifteen) days of the receipt of the claim under Clause 19.8.1, after making adjustments in accordance with the provisions of this Agreement. The Employer shall pay to the Contractor the amount due under any IPC within a period of 30 (thirty) days from the date of the submission of the claim under this Clause 19.8. In the event of the failure of the Employer to

make payment to the Contractor within the specified time, the Employer shall be liable to pay to the Contractor interest thereon and the provisions of Clause 19.9 shall apply *mutatis mutandis* thereto.

## **19.9 Time of payment and interest**

19.9.1 The Employer shall pay to the Contractor any amount due under any payment certificate issued by the Employer's Engineer in accordance with the provisions of this Article 19, or in accordance with any other clause of this Agreement as follows:

- (a) payment shall be made no later than 30 (thirty) days from the date of submission of the Stage Payment Statement by the Contractor to the Employer's Engineer for certification in accordance with the provisions of Clause 19.4 for an IPC; provided that, in the event the IPC is not issued by the Employer's Engineer within the aforesaid period of 30 (thirty) days, the Employer shall pay the amount shown in the Contractor's Stage Payment Statement and any discrepancy therein shall be added to, or deducted from, the next payment certificate issued to the Contractor; and
- (b) payment shall be made no later than 30 (thirty) days from the date of submission of the Final Payment Certificate for Works along with the discharge submitted to the Employer's Engineer in accordance with the provisions of Clause 19.15 for certification.

19.9.2 In the event of the failure of the Employer to make payment to the Contractor within the time period stated in this Clause 19.9, the Employer shall be liable to pay to the Contractor interest at the Bank Rate plus 5% (five percent), calculated at quarterly rests, on all sums remaining unpaid from the date on which the same should have been paid, calculated in accordance with the provisions of Clause 19.9.1(a) and (b) and till the date of actual payment.

## **19.10 Price adjustment for the Works**

19.10.1 The amounts payable to the Contractor for Works shall be adjusted in accordance with the provisions of this Clause 19.10.

19.10.2 Subject to the provisions of Clause 19.10.3, the amounts payable to the Contractor for Works, shall be adjusted in the IPC issued by the Employer's Engineer for the increase or decrease in the index cost of inputs for the Works, by the addition or subtraction of the amounts determined by the formulae prescribed in Clause 19.10.4.

19.10.3 To the extent that full compensation for any increase or decrease in costs to the Contractor is not covered by the provisions of this or other Clauses in this Agreement, the costs and prices payable under this Agreement shall be deemed to include the amounts required to cover the contingency of such other increase or decrease of costs and prices.

19.10.4 The Contract Price shall be adjusted for increase or decrease in rates and price of labour, cement, steel, Plant, machinery and spares, bitumen, fuel and lubricants, and other material inputs in accordance with the principles, procedures and formulae specified below:

- (a) price adjustment shall be applied on completion of the specified stage of the respective item of work in accordance with Schedule-H;
- (b) The following expressions and meanings are assigned to the value of the work done:
- (c) Price adjustment for changes in cost shall be paid in accordance with the following formula:

$$PV = 0.85 R \times (UI - U0) / U0$$

Where

R = Value of work done for the completion of a stage under Schedule-H

PV = Increase or decrease in the cost of works during the period under consideration due to changes in Indices

U0 = The Building Construction Cost Indices for Ahmedabad published by Construction Industry Development Council, (hereinafter called "Building CCI") for the month of the Base Date.

UI = The Building CCI for the month three months prior to the month to which the IPC relates.

### **19.11 Restrictions on price adjustment**

Price adjustment shall be due and payable only in respect of the stages of Works for which the Stage Payment Statement has been submitted by the Contractor no later than 30 (thirty) days from the date of the applicable Project Milestone or the Scheduled Completion Date, as the case may be, including any Time Extension granted therefor in accordance with the provisions of this Agreement. For the avoidance of doubt, in the event of submission of any Stage Payment Statement after the period specified herein, price adjustment shall be applicable until the date of the respective Project Milestone or the Scheduled Completion Date, as the case may be.

### **19.12 Price adjustment for Maintenance of Work**

Lump sum payment for Maintenance shall be adjusted every quarter for changes in rates and prices of various inputs in accordance with the formula given below:

$$V = P \times (W^I - W^O) / W^O$$

V = Increase or decrease in the quarterly lump sum payment

P = Quarterly lump sum payment due to the Contractor after adjusting any reduction in payment for noncompliance of the Maintenance Requirements

W<sup>O</sup> = The wholesale price index (all commodities) for the month of the Base Date.

W<sup>I</sup> = the wholesale price index (all commodities) for the first day of the quarter

under consideration for determining the price adjustment.

### **19.13 Final Payment Statement**

19.13.1 Within 60 (sixty) days after receiving the Completion Certificate under Clause 12.4, the Contractor shall submit to the Employer's Engineer for consideration six copies of a Final Payment Statement (the "**Final Payment Statement**") for Works, with supporting documents showing in detail, in the form prescribed by the Employer's Engineer:

- (a) the summary of Contractor's Stage Payment claims for Works as submitted in accordance with Clause 19.4;
- (b) the amounts received from the Employer against each claim; and
- (c) any further sums which the Contractor considers due to it from the Employer.

If the Employer's Engineer disagrees with or cannot verify any part of the Final Payment Statement, the Contractor shall submit such further information as the Employer's Engineer may reasonably require. The Employer's Engineer shall deliver to the Employer:

- (i) an IPC for those parts of the Final Payment Statement which are not in dispute, along with a list of disputed items which shall then be settled in accordance with the provisions of Article 26; or
- (ii) a Final Payment Certificate in accordance with Clause 19.15 if there are no disputed items.

19.13.2 If the Employer's Engineer does not prescribe the form referred to in Clause 19.13.1 within 15 (fifteen) of the date of issue of the Completion Certificate, the Contractor shall submit the statement in such form as it deems fit.

### **19.14 Discharge**

Upon submission of the Final Payment Statement for Works under Clause 19.13, the Contractor shall give to the Employer, with a copy to the Employer's Engineer, a written discharge confirming that the total of the Final Payment Statement represents full and final settlement of all monies due to the Contractor in respect of this Agreement for all the Works arising out of this Agreement, except for any monies due to either Party on account of any Defect. Provided that such discharge shall become effective only after the payment due has been made in accordance with the Final Payment Certificate issued pursuant to Clause 19.15.

### **19.15 Final Payment Certificate**

19.15.1 Within 30 (thirty) days after receipt of the Final Payment Statement for Works under Clause 19.13, and the written discharge under Clause 19.14, and there being no disputed items of claim, the Employer's Engineer shall deliver to the Employer, with a copy to the Contractor, a final payment certificate (the "**Final Payment Certificate**") stating the amount which, in the opinion of the Employer's Engineer, is finally due under this Agreement or otherwise. For the avoidance of doubt, before



issuing the Final Payment Certificate, the Employer's Engineer shall ascertain from the Employer all amounts previously paid by the Employer and for all sums to which the Employer is entitled, the balance, if any, due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be.

19.15.2 The Employer shall, in accordance with the provisions of Clause 19.9, pay to the Contractor the amount which is stated as being finally due in the Final Payment Certificate.

## **19.16 Final payment statement for Maintenance**

19.16.1 Within 30 (thirty) days after completion of the Maintenance Period, the Contractor shall submit to the Employer's Engineer six copies of the final payment statement for Maintenance of the Project Works, with supporting documents showing the details set forth below in the form prescribed by the Employer's Engineer :

- (a) the total amount claimed in accordance with the monthly statement for Maintenance of Project Works;
- (b) the amount paid in accordance with the Interim Payment Certificates; and
- (c) any sums which the Contractor considers to be due to it, with supporting documents.

19.16.2 The Employer's Engineer shall certify final payment within 30 (thirty) days of the receipt of the final payment statement of Maintenance under Clause 19.16.1, segregating the items of amount payable from the items of amount disallowed. The Employer shall make payment on the basis of the final payment authorized by the Employer's Engineer within a period of 30 (thirty) days of the receipt of the Final Payment Statement from the Employer's Engineer.

19.16.3 If the Employer's Engineer does not prescribe the form within 15 (fifteen) days of the date of issue of the Completion Certificate, the Contractor shall submit the statement in such form as it deems fit.

## **19.17 Change in law**

19.17.1 If as a result of Change in Law, the Contractor suffers any additional costs in the execution of the Works or in relation to the performance of its other obligations under this Agreement, the Contractor shall, within 15 (fifteen) days from the date it becomes reasonably aware of such addition in cost, notify the Employer with a copy to the Employer's Engineer of such additional cost due to Change in Law.

19.17.2 If as a result of Change in Law, the Contractor benefits from any reduction in costs for the execution of this Agreement or in accordance with the provisions of this Agreement, either Party shall, within 15 (fifteen) days from the date it becomes reasonably aware of such reduction in cost, notify the other Party with a copy to the Employer's Engineer of such reduction in cost due to Change in Law.

19.17.3 The Employer's Engineer shall, within 15 (fifteen) days from the date of receipt of the notice from the Contractor or the Employer, determine any addition or reduction to the Contract Price, as the case may be, due to the Change in Law.

### **19.18 Correction of Interim Payment Certificates**

The Employer's Engineer may by an Interim Payment Certificate make any correction or modification in any previous Interim Payment Certificate issued by the Employer's Engineer.

### **19.19 Employer's claims**

If the Employer considers itself to be entitled to any payment from the Contractor under any Clause of this Agreement, it shall give notice and particulars to the Contractor 20 (twenty) days before making the recovery from any amount due to the Contractor, and shall take into consideration the representation, if any, made by the Contractor in this behalf, before making such recovery.

### **19.20 Bonus for early completion**

Deleted

## ARTICLE 20

### 20. Insurance

#### 20.1 Insurance for Works and Maintenance

20.1.1 The Contractor shall effect and maintain at its own cost the insurances specified in Schedule-P and as per the requirements under the Applicable Laws.

20.1.2 Subject to the provisions of Clause 21.6, the Employer and the Contractor shall, in accordance with its obligations as provided for in this Agreement, be liable to bear the cost of any loss or damage that does not fall within the scope of this Article 20 or cannot be recovered from the insurers.

20.1.3 Subject to the exceptions specified in Clause 20.1.4 below, the Contractor shall, save and except as provided for in this Agreement, fully indemnify, hold harmless and defend the Employer from and against any and all losses, damages, costs, charges and/or claims with respect to:

- (a) the death of or injury to any person; or
- (b) the loss of or damage to any property (other than the Works);

That may arise out of or in consequence of any breach by the Contractor of this Agreement during the execution of the Works or the remedying of any Defects therein.

20.1.4 Notwithstanding anything stated above in Clause 20.1.3, the Employer shall fully indemnify the Contractor from and against any and all losses, damages, costs, charges, proceedings and/or claims arising out of or with respect to

- (a) the use or occupation of land or any part thereof by the Employer;
- (b) the right of the Employer to execute the Works, or any part thereof, on, over, under, in or through any land;
- (c) the damage to property which is the unavoidable result of the execution and completion of the Works, or the remedying of any Defects therein, in accordance with this Agreement; and
- (d) the death of or injury to persons or loss of or damage to property resulting from any act or neglect of the Employer, its agents, servants or other contractors, not being employed by the Contractor.

Provided that, in the event of any injury or damage as a result of the contributory negligence of the Contractor, the Employer shall be liable to indemnify the Contractor from and against any and all losses, damages, costs, charges, proceedings and/or claims to the extent as may be proportionately determined to be the liability of the Employer, its servants or agents or other contractors not associated with the Contractor in such injury or damage.

20.1.5 Without prejudice to the obligations of the Parties as specified under Clauses 20.1.3 and 20.1.4, the Contractor shall maintain or effect such third party insurances as may be required under the Applicable Laws.

20.1.6 The Contractor shall provide to the Employer, within 30 days of the Appointed Date, evidence of professional liability insurance maintained by its Design Director and/or consultants to cover the risk of professional negligence in the design of Works. The professional liability coverage shall be for a sum of not less than 3% (three per cent) of the Contract Price and shall be maintained until the end of the Defects Liability Period.

## **20.2 Notice to the Employer**

No later than 15 (fifteen) days after the date of this Agreement, the Contractor shall by notice furnish to the Employer, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 20. Within 15 (fifteen) days of receipt of such notice, the Employer may require the Contractor to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

## **20.3 Evidence of Insurance Cover**

20.3.1 All insurances obtained by the Contractor in accordance with this Article 20 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 10 (ten) days from the Appointed Date, the Contractor shall furnish to the Employer notarised true copies of the certificate(s) of insurance, copies of insurance policies and premium payment receipts in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 45 (forty-five) days after notice of such proposed cancellation, modification or non-renewal has been delivered by the Contractor to the Employer. The Contractor shall act in accordance with the directions of the Employer. Provided that the Contractor shall produce to the Employer the insurance policies in force and the receipts for payment of the current premium.

20.3.2 The Contractor shall ensure the adequacy of the insurances at all times in accordance with the provisions of this Agreement.

## **20.4 Remedy for failure to insure**

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

## **20.5 Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Contractor pursuant to this Article 20 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, inter alia, the Employer, and its assigns, successors, undertakings and their subsidiaries, Affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

## **20.6 Contractor's waiver**

The Contractor hereby further releases, assigns and waives any and all rights of subrogation or recovery against, inter alia, the Employer and its assigns, undertakings and their subsidiaries, Affiliates, employees, successors, insurers and underwriters, which the Contractor may otherwise have or acquire in or from or in any way connected with any loss, liability or obligation covered by policies of insurance maintained or required to be maintained by the Contractor 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.

## **20.7 Cross liabilities**

Any such insurance maintained or effected in pursuance of this Article 20 shall include a cross liability clause such that the insurance shall apply to the Contractor and to the Employer as separately insured.

## **20.8 Accident or injury to workmen**

Notwithstanding anything stated in this Agreement, it is hereby expressly agreed between the Parties that the Employer shall not be liable for or in respect of any damages or compensation payable to any workman or other person in the employment of the Contractor or Sub-contractor, save and except as for death or injury resulting from any act, omission or default of the Employer, its agents or servants. The Contractor shall indemnify and keep indemnified the Employer from and against all such claims, proceedings, damages, costs, charges, and expenses whatsoever in respect of the above save and except for those acts, omissions or defaults for which the Employer shall be liable.

## **20.9 Insurance against accident to workmen**

The Contractor shall effect and maintain during the Agreement such insurances as may be required to insure the Contractor's personnel and any other persons employed by it on the Project Site from and against any liability incurred in pursuance of this Article 20. Provided that for the purposes of this Clause 20.9, the Contractor's personnel/any person employed by the Contractor shall include the Sub-contractor and its personnel. It is further provided that, in respect of any persons employed by any Sub-contractor, the Contractor's obligations to insure as aforesaid under this Clause 20.9 shall be discharged if the Sub-contractor shall have insured against any liability in respect of such persons in such manner that the Employer is indemnified under the policy. The Contractor shall require such Sub-contractor to produce before the Employer, when required, such policy of insurance and the receipt for payment of the current premium within 10 (ten) days of such demand being made by the Employer.

## **20.10 Application of insurance proceeds**

The proceeds from all insurance claims, except for life and injury, shall be applied for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project Works and the provisions of this Agreement in respect of construction of works shall apply *mutatis mutandis* to the works undertaken out of the proceeds of insurance.

## **20.11 Compliance with policy conditions**

Each Party hereby expressly agrees to fully indemnify the other Party from and against all losses and claims arising from its failure to comply with conditions imposed by the insurance policies affected in accordance with this Agreement.

## **PART V - FORCE MAJEURE AND TERMINATION**

## ARTICLE 21

### 21. Force Majeure

#### 21.1 Force Majeure

As used in this Agreement, the expression “Force Majeure” or “Force Majeure Event” shall mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 21.2, 21.3 and 21.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the “**Affected Party**”) of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party.

#### 21.2 Non-Political Event

A Non-Political Event shall mean one or more of the following acts or events:

- (a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);
- (b) strikes or boycotts (other than those involving the Contractor, Sub-contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting supplies and services to the Project Works for a continuous period of 24 (twenty-four) hours and an aggregate period exceeding 10 (ten) days in an Accounting Year, and not being an Indirect Political Event set forth in Clause 21.3;
- (c) any failure or delay of a Sub-contractor but only to the extent caused by another Non-Political Event;
- (d) any judgment or order of any court of competent jurisdiction or statutory authority made against the Contractor in any proceedings for reasons other than (i) failure of the Contractor to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Employer;
- (e) the discovery of geological conditions, toxic contamination or archaeological remains on the Site that could not reasonably have been expected to be discovered through a site inspection; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.



### **21.3 Indirect Political Event**

An Indirect Political Event shall mean one or more of the following acts or events:

- (a) 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;
- (b) industry-wide or State-wide strikes or industrial action for a continuous period of 24 (twenty-four) hours and exceeding an aggregate period of 10 (ten) days in an Accounting Year;
- (c) any civil commotion, boycott or political agitation which prevents construction of the Project Works by the Contractor for an aggregate period exceeding 10 (ten) days in an Accounting Year;
- (d) any failure or delay of a Sub-contractor to the extent caused by any Indirect Political Event;
- (e) any Indirect Political Event that causes a Non-Political Event; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

### **21.4 Political Event**

A Political Event shall mean one or more of the following acts or events by or on account of any Government Instrumentality:

- (a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Clause 19.17;
- (b) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Contractor or of the Sub-Contractors;
- (c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Contractor or any of the Sub-contractors to perform their respective obligations under this Agreement; provided that such delay, modification, denial, refusal or revocation did not result from the Contractor's or any Sub-contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;
- (d) any failure or delay of a Sub-contractor but only to the extent caused by another Political Event; or
- (e) any event or circumstances of a nature analogous to any of the foregoing.

## **21.5 Duty to report Force Majeure Event**

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

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 21 with evidence in support thereof;
- (b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
- (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and
- (d) any other information relevant to the Affected Party's claim.

21.5.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 10 (ten) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

21.5.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 21.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

## **21.6 Effect of Force Majeure Event on the Agreement**

21.6.1 Upon the occurrence of any Force Majeure after the Appointed Date, the costs incurred and attributable to such event and directly relating to this Agreement (the "**Force Majeure costs**") shall be allocated and paid as follows:

- (a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure costs and neither Party shall be required to pay to the other Party any costs thereof;
- (b) upon occurrence of an Indirect Political Event, all Force Majeure costs attributable to such Indirect Political Event, and not exceeding the Insurance Cover for such Indirect Political Event, shall be borne by the Contractor, and to the extent Force Majeure costs exceed such Insurance Cover, one half of such excess amount shall be reimbursed by the Employer to the Contractor for the Force Majeure events; and
- (c) upon occurrence of a Political Event, all Force Majeure costs attributable to such Political Event shall be reimbursed by the Employer to the Contractor.

For the avoidance of doubt, Force Majeure costs may include costs directly attributable to the Force Majeure Event, but shall not include debt repayment obligations, if any, of the Contractor.

- 21.6.2 Save and except as expressly provided in this Article 21, neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.
- 21.6.3 Upon the occurrence of any Force Majeure Event during the Construction Period, the Project Completion Schedule for and in respect of the affected Works shall be extended on a day for day basis for such period as performance of the Contractor's obligations is affected on account of the Force Majeure Event or its subsisting effects.

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

- 21.7.1 If a Force Majeure Event subsists for a period of 60 (sixty) days or more within a continuous period of 120 (one hundred and twenty) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 21, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days' time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

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

- 21.8.1 In the event of this Agreement being terminated on account of a Non-Political Event, the Termination Payment shall be an amount equal to the sum payable under Clause 23.5.

Provided that in the event Termination occurs during the Maintenance Period, the Employer's Engineer shall only determine the value of Works associated with Maintenance.

- 21.8.2 If Termination is on account of an Indirect Political Event, the Termination Payment shall include:
- (a) any sums due and payable under Clause 23.5; and
  - (b) the reasonable cost, as determined by the Employer's Engineer, of the Plant and Materials procured by the Contractor and transferred to the Employer for use in Construction or Maintenance, only if such Plant and Materials are in conformity with the Specifications and Standards;

Provided that in the event Termination occurs during the Maintenance Period, the Employer's Engineer shall only determine the value of Works associated with Maintenance.

21.8.3 If Termination is on account of a Political Event, the Employer shall make a Termination Payment to the Contractor in an amount that would be payable under Clause 23.6.2 as if it were an Employer Default.

## **21.9 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 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.

## **21.10 Excuse from performance of obligations**

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

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

## ARTICLE 22

### 22. Suspension of Contractor's Rights

#### 22.1 Suspension upon Contractor Default

Upon occurrence of a Contractor Default, the Employer shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (i) suspend carrying out of the Works or Maintenance or any part thereof, and (ii) carry out such Works or Maintenance itself or authorise any other person to exercise or perform the same on its behalf during such suspension (the “**Suspension**”). Suspension hereunder shall be effective forthwith upon issue of notice by the Employer to the Contractor and may extend up to a period not exceeding 90 (ninety) days from the date of issue of such notice.

#### 22.2 Employer to act on behalf of Contractor

During the period of Suspension hereunder, all rights and liabilities vested in the Contractor in accordance with the provisions of this Agreement shall continue to vest therein and all things done or actions taken, including expenditure incurred by the Employer for discharging the obligations of the Contractor under and in accordance with this Agreement shall be deemed to have been done or taken for and on behalf of the Contractor and the Contractor undertakes to indemnify the Employer for all costs incurred during such period. The Contractor hereby licences and sub-licences respectively, the Employer or any other person authorised by it under Clause 22.1 to use during Suspension, all Intellectual Property belonging to or licenced to the Contractor with respect to the Project Works and its design, engineering, construction and maintenance, and which is used or created by the Contractor in performing its obligations under the Agreement.

#### 22.3 Revocation of Suspension

22.3.1 In the event that the Employer shall have rectified or removed the cause of Suspension within a period not exceeding 60 (sixty) days from the date of Suspension, it shall revoke the Suspension forthwith and restore all rights of the Contractor under this Agreement. For the avoidance of doubt, the Parties expressly agree that the Employer may, in its discretion, revoke the Suspension at any time, whether or not the cause of Suspension has been rectified or removed hereunder.

22.3.2 Upon the Contractor having cured the Contractor Default within a period not exceeding 60 (sixty) days from the date of Suspension, the Employer shall revoke the Suspension forthwith and restore all rights of the Contractor under this Agreement.

#### 22.4 Termination

22.4.1 At any time during the period of Suspension under this Article 22, the Contractor may by notice require the Employer to revoke the Suspension and issue a Termination Notice. The Employer shall, within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 23.

22.4.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 90 (ninety) days from the date of Suspension hereunder, the Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, *mutatis mutandis*, to such Termination as if a Termination Notice had been issued by the Employer upon occurrence of a Contractor Default.

## ARTICLE 23

### 23. Termination

#### 23.1 Termination for Contractor Default

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

- (a) the Contractor fails to provide, extend or replenish, as the case may be, the Performance Security in accordance with this Agreement;
- (b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 7.3, the Contractor fails to cure, within a Cure Period of 30 (thirty) days, the Contractor Default for which the whole or part of the Performance Security was appropriated;
- (c) the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, subject to any Time Extension, and continues to be in default for 45 (forty five) days;
- (d) the Contractor abandons or manifests intention to abandon the construction or Maintenance of the Project Works without the prior written consent of the Employer;
- (e) the Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/or the Maintenance for 30 (thirty) days without reflecting the same in the current programme and such stoppage has not been authorised by the Employer’s Engineer;
- (f) the Project Completion Date does not occur within the period specified in Schedule-J for the Scheduled Completion Date, or any extension thereof;
- (g) failure to complete the Punch List items within the periods stipulated therefor in Clause 12.2.1;
- (h) the Contractor fails to rectify any Defect, the non-rectification of which shall have a Material Adverse Effect on the Project, within the time specified in this Agreement or as directed by the Employer’s Engineer;
- (i) the Contractor subcontracts the Works or any part thereof in violation of this Agreement or assigns any part of the Works or the Maintenance without the prior approval of the Employer;
- (j) the Contractor creates any Encumbrance in breach of this Agreement;

- (k) an execution levied on any of the assets of the Contractor has caused a Material Adverse Effect;
- (l) the Contractor is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Contractor or for the whole or material part of its assets that has a material bearing on the Project;
- (m) the Contractor has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Employer, a Material Adverse Effect;
- (n) a resolution for winding up of the Contractor is passed, or any petition for winding up of the Contractor is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Contractor 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 entire property, assets and undertaking of the Contractor are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Contractor under this Agreement; and provided that:
  - (i) the amalgamated or reconstructed entity has the capability and experience necessary for the performance of its obligations under this Agreement; and
  - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and has a credit worthiness at least as good as that of the Contractor as at the Appointed Date;
- (o) any representation or warranty of the Contractor herein contained which is, as of the date hereof, found to be materially false or the Contractor is at any time hereafter found to be in breach thereof;
- (p) the Contractor submits to the Employer any statement, notice or other document, in written or electronic form, which has a material effect on the Employer's rights, obligations or interests and which is false in material particulars;
- (q) the Contractor has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
- (r) the Contractor commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Project or on the Employer.

23.1.2 Without prejudice to any other rights or remedies which the Employer may have under this Agreement, upon occurrence of a Contractor Default, the Employer shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Employer shall



by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

23.1.3 After termination of this Agreement for Contractor Default, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Materials, Plant and equipment, Contractor's documents and other design documents made by or on behalf of the Contractor.

## **23.2 Termination for Employer Default**

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

- (a) the Employer commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Contractor;
- (b) the Employer has failed to make payment of any amount due and payable to the Contractor within the period specified in this Agreement;
- (c) the Employer has failed to provide, within a period of 180 (one hundred and eighty) days from the Appointed Date, the environmental clearances required for construction of the Project Works;
- (d) the Employer repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement; or
- (e) the Employer's Engineer fails to issue the relevant Interim Payment Certificate within 60 (sixty) days after receiving a statement and supporting documents.

23.2.2 Without prejudice to any other right or remedy which the Contractor may have under this Agreement, upon occurrence of an Employer Default, the Contractor shall be entitled to terminate this Agreement by issuing a Termination Notice to the Employer; provided that before issuing the Termination Notice, the Contractor shall by a notice inform the Employer of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Employer to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

## **23.3 Termination for Employer's convenience**

Notwithstanding anything stated hereinabove, the Employer may terminate this Agreement for convenience. The termination shall take effect 30 (thirty) days from the date of notice hereunder.

## 23.4 Requirements after Termination

Upon Termination of this Agreement in accordance with the terms of this Article 23, the Contractor shall comply with and conform to the following:

- (a) deliver to the Employer all Plant and Materials which shall have become the property of the Employer under this Article 23;
- (b) deliver all relevant records, reports, Intellectual Property and other licences pertaining to the Works, Maintenance, other design documents and in case of Termination occurring after the Provisional Certificate has been issued, the “as built’ Drawings for the Works;
- (c) transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws; and
- (d) vacate the Site within 15 (fifteen) days.

## 23.5 Valuation of Unpaid Works

23.5.1 Within a period of 45 (forty-five) days after Termination under Clause 23.1, 23.2 or 23.3, as the case may be, has taken effect, the Employer’s Engineer shall proceed in accordance with Clause 18.5 to determine as follows the valuation of unpaid Works (the “**Valuation of Unpaid Works**”):

- (a) value of the completed stage of the Works, less payments already made;
- (b) reasonable value of the partially completed stages of works as on the date of Termination, only if such works conform with the Specifications and Standards; and
- (c) value of Maintenance, if any, for completed months, less payments already made,

and shall adjust from the sum thereof (i) any other amounts payable or recoverable, as the case may be, in accordance with the provisions of this Agreement; and (ii) all taxes due to be deducted at source.

23.5.2 The Valuation of Unpaid Works shall be communicated to the Employer, with a copy to the Contractor, within a period of 30 (thirty) days from the date of Termination.

## 23.6 Termination Payment

23.6.1 Upon Termination on account of Contractor’s Default under Clause 23.1, the Employer shall:

- (a) encash and appropriate the Performance Security and Retention Money, or in the event the Contractor has failed to replenish or extend the Performance Security, claim the amount stipulated in Clause 7.1.1, as agreed pre-determined compensation to the Employer for any losses, delays and cost of completing the Works and Maintenance, if any;

- (b) encash and appropriate the bank guarantee, if any, for and in respect of the outstanding Advance Payment and interest thereon; and
- (c) pay to the Contractor, by way of Termination Payment, an amount equivalent to the Valuation of Unpaid Works after adjusting any other sums payable or recoverable, as the case may be, in accordance with the provisions of this Agreement.

23.6.2 Upon Termination on account of an Employer Default under Clause 23.2 or for Employer's convenience under Clause 23.3, the Employer shall:

- (a) return the Performance Security and Retention Money forthwith;
- (b) encash and appropriate the bank guarantee, if any, for and in respect of the outstanding Advance Payment; and
- (c) Pay to the Contractor, by way of Termination Payment, an amount equal to:
  - (i) Valuation of Unpaid Works;
  - (ii) the reasonable cost, as determined by the Employer's Engineer, of the Plant and Materials procured by the Contractor and transferred to the Employer for its use, only if such Plant and Materials are in conformity with the Specifications and Standards;
  - (iii) the reasonable cost of temporary works, as determined by the Employer's Engineer; and
  - (iv) 10% (ten per cent) of the cost of the Works and Maintenance that are not commenced or not completed,

and shall adjust from the sum thereof (i) any other amounts payable or recoverable, as the case may be, in accordance with the provisions of this Agreement, and (ii) all taxes due to be deducted at source.

23.6.3 Termination Payment shall become due and payable to the Contractor within 30 (thirty) days of a demand being made by the Contractor to the Employer with the necessary particulars, and in the event of any delay, the Employer shall pay interest at the Base Rate plus 2% (two percent), calculated at quarterly rests, on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Employer of its payment obligations in respect thereof hereunder.

23.6.4 The Contractor expressly agrees that Termination Payment under this Article 23 shall constitute a full and final settlement of all claims of the Contractor on account of Termination of this Agreement and that it shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

## **23.7 Other rights and obligations of the Parties**

Upon Termination for any reason whatsoever

- (a) property and ownership in all Materials, Plant and Works and the Project Works shall, as between the Contractor and the Employer, vest in the Employer in whole; provided that the foregoing shall be without prejudice to Clause 23.6

- (b) risk of loss or damage to any Materials, Plant or Works and the care and custody thereof shall pass from the Contractor to the Employer; and
- (c) the Employer shall be entitled to restrain the Contractor and any person claiming through or under the Agreement from entering upon the Site or any part of the Project except for taking possession of materials, stores, implements, construction plants and equipment of the Contractor, which have not been vested in the Employer in accordance with the provisions of this Agreement.

### **23.8 Survival of rights**

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

## **PART VI - OTHER PROVISIONS**

## ARTICLE 24

### **24. Assignment and Charges**

#### **24.1 Restrictions on assignment and charges**

This Agreement shall not be assigned by the Contractor to any person, save and except with the prior consent in writing of the Employer, which consent the Employer shall be entitled to decline without assigning any reason.

#### **24.2 Hypothecation of Materials or Plant**

Notwithstanding the provisions of Clause 24.1, the Contractor may pledge or hypothecate to its lenders, any Materials or Plant prior to their incorporation in the Works. Further, the Contractor may, by written notice to the Employer, assign its right to receive payments under this Agreement either absolutely or by way of charge, to any person providing financing to the Contractor in connection with the performance of the Contractor's obligations under this Agreement. The Contractor acknowledges that any such assignment by the Contractor shall not relieve the Contractor from any obligations, duty or responsibility under this Agreement.

## ARTICLE 25

### 25. Liability and Indemnity

#### 25.1 General indemnity

25.1.1 The Contractor will indemnify, defend, save and hold harmless the Employer and its officers, servants, agents, Government Instrumentalities and Government owned and/or controlled entities/enterprises, (the “**Employer Indemnified Persons**”) against any and all suits, proceedings, actions, demands and third party claims for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Contractor of any of its obligations under this Agreement or from any negligence under the Agreement, including any errors or deficiencies in the design documents, or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Employer Indemnified Persons.

#### 25.2 Indemnity by the Contractor

25.2.1 Without limiting the generality of Clause 25.1, the Contractor shall fully indemnify, hold harmless and defend the Employer and the Employer Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Contractor to comply with Applicable Laws and Applicable Permits;
- (b) payment of taxes required to be made by the Contractor in respect of the income or other taxes of the Sub-contractors, suppliers and representatives; or
- (c) non-payment of amounts due as a result of Materials or services furnished to the Contractor or any of its Sub-contractors which are payable by the Contractor or any of its Sub-contractors.

25.2.2 Without limiting the generality of the provisions of this Article 25, the Contractor shall fully indemnify, hold harmless and defend the Employer Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Employer 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 Contractor or by the Sub-contractors in performing the Contractor’s obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Contractor shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Project Works, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Contractor shall promptly make every reasonable effort to secure for the Employer a licence, at no cost to the Employer, authorising continued use of the infringing work. If the Contractor is unable to secure such licence within a reasonable time, the Contractor shall, at its own

expense, and without impairing the Specifications and Standards, either replace the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

### **25.3 Notice and contest of claims**

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 25 (the “Indemnified Party”) it shall notify the other Party (the “Indemnifying Party”) within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

### **25.4 Defence of claims**

25.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 25, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

25.4.2 If the Indemnifying Party has exercised its rights under Clause 25.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

25.4.3 If the Indemnifying Party exercises its rights under Clause 25.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

- (a) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or



- (b) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
- (c) 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
- (d) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
  - (i) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
  - (ii) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 25.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

#### **25.5 No consequential claims**

Notwithstanding anything to the contrary contained in this Article 25, the indemnities herein provided shall not include any claim or recovery in respect of any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement.

#### **25.6 Survival on Termination**

The provisions of this Article 25 shall survive Termination.

## ARTICLE 26

### 26. Dispute Resolution

#### 26.1 Dispute Resolution

26.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “Dispute”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

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

#### 26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Employer’s Engineer, or such other person as the Parties may mutually agree upon (the “**Conciliator**”) to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the CEO of the Employer and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

#### 26.3 Arbitration

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 26.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act 1996. The venue of such arbitration shall be [Gandhinagar], and the language of arbitration proceedings shall be English.

26.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

- 26.3.3 The arbitrators shall make a reasoned award (the “Award”). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Employer agree and undertake to carry out such Award without delay.
- 26.3.4 The Contractor and the Employer agree that an Award may be enforced against the Contractor and/or the Employer, as the case may be, and their respective assets wherever situated.
- 26.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.
- 26.3.6 In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance.

#### **26.4 Adjudication by Regulatory Authority, Tribunal or Commission**

In the event of constitution of a statutory regulatory authority, tribunal or commission, as the case may be, with powers to adjudicate upon disputes between the Contractor and the Employer, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 26.3, be adjudicated upon by such regulatory authority, tribunal or commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or court of competent jurisdiction, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.

## ARTICLE 27

### 27. Miscellaneous

#### 27.1 Governing law and jurisdiction

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

#### 27.2 Waiver of immunity

Each Party unconditionally and irrevocably:

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

#### 27.3 Delayed payments

The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to Base Rate plus 5 (five) percent, calculated at quarterly rests, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

#### 27.4 Waiver

27.4.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:-

- (a) shall not operate or be construed as a waiver of any other or subsequent

default hereof or of other provisions of or obligations under this Agreement;

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

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

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

Except to the extent expressly provided in this Agreement:

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

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

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

## **27.7 Survival**

27.7.1 Termination shall:

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

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

## **27.8 Entire Agreement**

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

## **27.9 Severability**

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

## **27.10 No partnership**

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

## **27.11 Third parties**

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

## **27.12 Successors and assigns**

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

## **27.13 Notices**

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

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

#### **27.14 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.

#### **27.15 Counterparts**

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

#### **27.16 Confidentiality**

The Parties shall treat the details of this Agreement as private and confidential, except to the extent necessary to carry out obligations under it or to comply with Applicable Laws. The Contractor shall not publish, permit to be published, or disclose any particulars of the Works in any trade or technical paper or elsewhere without the previous agreement of the Employer.

#### **27.17 Copyright and Intellectual Property rights**

- 27.17.1 As between the Parties, the Contractor shall retain the copyright and other intellectual property rights in the Contractor's Documents and other design documents made by (or on behalf of) the Contractor. The Contractor shall be deemed (by signing this Agreement) to give to the Employer a non-terminable transferable non-exclusive royalty-free licence to copy, use and communicate the Contractor's Documents,

including making and using modifications of them. This licence shall:

- (a) apply throughout the actual or intended working life (whichever is longer) of the relevant parts of the Works,
- (b) entitle any person in proper possession of the relevant part of the Works to copy, use and communicate the Contractor's Documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing and demolishing the Works, and
- (c) in the case of Contractor's Documents which are in the form of computer programs and other software, permit their use on any computer on the Site and other places as envisaged by this Agreement, including replacements of any computers supplied by the Contractor:

27.17.2 The Contractor's Documents and other design documents made by (or on behalf of) the Contractor shall not, without the Contractor's consent, be used, copied or communicated to a third party by (or on behalf of) the Employer for purposes other than those permitted under this Clause 27.17.

27.17.3 As between the Parties, the Employer shall retain the copyright and other intellectual property rights in this Agreement and other documents made by (or on behalf of) the Employer. The Contractor may, at its cost, copy, use, and obtain communication of these documents for the purposes of this Agreement. They shall not, without the Employer's consent, be copied, used or communicated to a third party by the Contractor, except as necessary for the purposes of the contract.

## **27.18 Limitation of Liability**

27.18.1 Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with this Agreement, save and except as provided under Articles 23 and 25.

27.18.2 The total liability of one Party to the other Party under and in accordance with the provisions of this Agreement, save and except as provided in Articles 23 and 25, shall not exceed the Contract Price. For the avoidance of doubt, this Clause shall not limit the liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party causing any losses or damages or bodily injury or death to the other Party's and its personnel, officers etc.



## ARTICLE 28

### 28. Definitions

#### 28.1 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 the first day of April of any calendar year and ending on the thirty-first day of March of the next calendar year;

**“Advances”** shall have the aggregate Advance Payment; **“Advance Payment”** shall have the meaning set forth in Clause 19.2;

**“Affected Party”** shall have the meaning set forth in Clause 21.1;

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

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

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

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

**“Appointed Date”** means that date which is later of the 15th day of the date of this Agreement, the date on which the Contractor has delivered the Performance Security in accordance with the provisions of Article 7 and the date on which the Employer has provided the Project Site on no less than 90% (Ninety per cent) of the total area of Site;

**“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;

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

“**Employer Default**” shall have the meaning set forth in Clause 23.2;

“**Employer’s Engineer**” shall have the meaning set forth in Clause 18.1;

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

“**Bank**” means a bank incorporated in India and having a minimum net worth of Rs. 1,000 crore (Rupees one thousand crore) or any other bank acceptable to the Employer;

“**Bank Rate**” means the Repo rate of interest announced by the Reserve Bank of India for all its lending operations on the Base Date;

“**Base Date**” means the last date of that calendar month, which date precedes the Bid Due Date by at least 28 (twenty eight) days;

“**Bid**” means the documents in their entirety comprised in the bid submitted by the [selected bidder/Consortium] in response to the Request for Proposals in accordance with the provisions thereof;

“**Bid Security**” means the bid security provided by the Contractor to the Employer in accordance with the Request for Proposal, and which is to remain in force until substituted by the Performance Security;

“**CCI**” means the Building Urban Infra Construction Cost Indices published by Construction Industry Development Council,

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

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

“**Change of Scope**” shall have the meaning set forth in Article 13;

**“Change of Scope Notice”** shall have the meaning set forth in Clause 13.2.1;

**“Change of Scope Order”** shall have the meaning set forth in Clause 13.2.4;

**“Completion Certificate” shall have the meaning set forth in Clause 12.4;**

{**“Consortium”** means the consortium of entities which have formed a joint venture for implementation of this Project ;}\$

**“Construction”** shall have the meaning set forth in Clause 1.2.1 (f);

**“Construction Period”** means the period commencing from the Appointed Date and ending on the date of the issuance of Completion Certificate;

**“Contract Price”** means the amount specified in Clause 19.1.1;

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

**“Contractor Default”** shall have the meaning set forth in Clause 23.1;

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

- (a) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;
- (b) not relieve any Party from liability to pay Damages or compensation subject to terms of this Agreement; and
- (c) not in any way be extended by any period of Suspension under this Agreement; provided that if the cure of any breach by the Contractor requires any reasonable action by the Contractor that must be approved by the Employer or the Employer’s Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the Employer or the Employer’s Engineer to accord their approval;

**“Damages”** shall have the meaning set forth in paragraph (w) of Clause 1.2.1;

\$ This definition may be omitted if the Contractor is not a Consortium.

**“Defect”** means any defect or deficiency in Construction of the Works or any part thereof, which does not conform with the Specifications and Standards, and in the case of Maintenance, means any defect or deficiency which is specified in Schedule-E;

**“Defects Liability Period”** shall have the meaning set forth in Clause 17.1;

**“Dispute”** shall have the meaning set forth in Clause 26.1.1;

**“Dispute Resolution Procedure”** means the procedure for resolution of Disputes set forth in Article 26;

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

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

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

**“Encumbrances”** means, in relation to the Project Works, any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project Works, where applicable herein but excluding utilities referred to in Clause 9.1;

**“EPC”** means engineering, procurement and construction;

**“Extended Time”** shall mean the extension of time granted beyond scheduled completion date in accordance with Clause 10.5.1;

**“Final Payment Certificate”** shall have the meaning set forth in Clause 19.15.1;

**“Final Payment Statement”** shall have the meaning set forth in Clause 19.13.1;

**“Force Majeure” or “Force Majeure Event”** shall have the meaning ascribed to it in Clause 21.1;

**“GAD” or “General Arrangement Drawings”** shall have the meaning set forth in Clause 4.1.3 (b);

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

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

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

**“IRC”** means the Indian Roads Congress;

**“Indemnified Party”** means the Party entitled to the benefit of an indemnity pursuant to Article 25;

**“Indemnifying Party”** means the Party obligated to indemnify the other Party pursuant to Article 25;

**“Indirect Political Event”** shall have the meaning set forth in Clause 21.3;

**“Insurance Cover”** means the aggregate of the maximum sums insured under the insurances taken out by the Contractor pursuant to Article 20, and includes all insurances required to be taken out by the Contractor under Clauses 20.1 and 20.9 but not actually taken, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable or deemed to be insured and payable in relation to such act or event;

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

**“Interim Payment Certificate”** or **“IPC”** means the interim payment certificate issued by the Employer’s Engineer for payment to the Contractor in respect of Contractor’s claims for payment raised in accordance with the provisions of this Agreement;

**“IS”** means the Indian Standard of Bureau of India Standards

{**“Lead Member”** shall, in the case of a consortium, mean the member of such consortium who shall have the authority to bind the contractor and each member of the Consortium; and shall be deemed to be the Contractor for the purposes of this Agreement;}

**“LOA”** or **“Letter of Acceptance”** means the letter of acceptance referred to in Recital (E);

**“Maintenance”** means the maintenance of the Project Works as set forth in Article 14 for the period specified therein;

**“Maintenance Inspection Report”** shall have the meaning set forth in Clause 15.2.1;

**“Maintenance Manual”** shall have the meaning ascribed to it in Clause 10.7;

**“Maintenance Programme”** shall have the meaning set forth in Clause 14.3;

**“Maintenance Period”** shall have the meaning set forth in Clause 14.1.1;

**“Maintenance Requirements”** shall have the meaning set forth in Clause 14.2;

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

**“Materials”** are all the supplies used by the Contractor for incorporation in the Works or for the maintenance of the Project Works;

**“Monthly Maintenance Statement”** shall have the meaning set forth in Clause 19.6.1;

**“MORTH”** means the Ministry of Road Transport and Highways or any substitute thereof dealing with Highways;

**“Non-Political Event”** shall have the meaning set forth in Clause 21.2;

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

**“Performance Security”** shall have the meaning set forth in Clause 7.1;

**“Plant”** means the apparatus and machinery intended to form or forming part of the Works;

**“PMNC” shall have the meaning set forth in Clause 4.1.1;**

**“Political Event”** shall have the meaning set forth in Clause 21.4;

**“Programme”** shall have the meaning set forth in Clause 10.1.3;

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

**“Project Assets”** means all physical and other assets relating to (a) tangible assets such as civil works and equipment including foundations, embankments, pavements,

road surface, interchanges, bridges, culverts, road over-bridges, drainage works, traffic signals, sign boards, kilometre-stones, [toll plaza(s)], electrical systems, communication systems, rest areas, relief centres, maintenance depots and administrative offices; and (b) Project Facilities situated on the Site;

**“Project Completion Date”** means the date on which the Provisional Certificate is issued and in the event no Provisional Certificate is issued, the date on which the Completion Certificate is issued;

**“Project Completion Schedule”** means the progressive Project Milestones set forth in Schedule-J for completion of the Project Works on or before the Scheduled Completion Date;

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

**“Project Works”** means the Site forming part of Design and Construction of Service Area Buildings and all Project Assets, and its subsequent development and augmentation in accordance with this Agreement;

**“Project Milestone”** means the project milestone set forth in Schedule-J;

**“Proof Consultant”** shall have the meaning set forth in Clause 10.2.2;

**“Provisional Certificate”** shall have the meaning set forth in Clause 12.2;

**“Punch List”** shall have the meaning set forth in Clause 12.2.1;

**“Quality Assurance Plan”** or **“QAP”** shall have the meaning set forth in Clause 11.2;

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

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

**“Retention Money”** shall have the meaning set forth in Clause 7.5.1;

**“Scheduled Completion Date”** shall be the date set forth in Clause 10.3.1;

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

**“Site”** shall have the meaning set forth in Clause 8.1;

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

**"Stage Payment Statement"** shall have the meaning set forth in Clause 19.4;

**“Sub-contractor”** means any person or persons to whom a part of the Works or the Maintenance has been subcontracted by the Contractor and the permitted legal successors in title to such person, but not an assignee to such person;

**“Suspension”** shall have the meaning set forth in Article 22;

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

**“Termination”** means the expiry or termination of this Agreement;

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

**“Termination Payment”** means the amount payable by either Party to the other upon Termination in accordance with Article 23;

**“Terms of Reference”** or **“TOR”** shall have the meaning set forth in Clause 18.2.1;

**“Tests”** means the tests set forth in Schedule-K to determine the completion of Works in accordance with the provisions of this Agreement;

**“Time Extension”** shall have the meaning set forth in Clause 10.5.1;

**“User”** means a person who uses or intends to use on the Project Works or any part thereof;

**“Valuation of Unpaid works”** shall have the meaning set forth in Clause 23.5.1;

**“Works”** means all works including survey and investigation, design, engineering, procurement, construction, Plant, Materials, maintenance, temporary works and other things necessary to complete the Project Works in accordance with this Agreement; and



“WPI” means the wholesale price index for various commodities as published by the Ministry of Commerce and Industry, GOI and shall include any index which substitutes the WPI, and any reference to WPI shall, unless the context otherwise requires, be construed as a reference to the WPI published for the period ending with the preceding month.

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

SIGNED, SEALED AND  DELIVERED  For and on behalf of  THE EMPLOYER by:	SIGNED, SEALED AND  DELIVERED  For and on behalf of  THE CONTRACTOR by:
(Signature)	(Signature)
(Name)	(Name)
(Designation)	(Designation)
In the presence of:  1.  2.	1.  2.