

# **REQUEST FOR PROPOSAL (RFP)**

## **for**

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**Setup of Production Unit for production of  
Concentrated Poppy Straw (CPS) from Opium  
Poppy Crop and extractions of Alkaloids on  
PPP basis**

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### ***Volume 2: Draft Concession Agreement***

**(BID DUE DATE: .....)**

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## **Part I – Preliminary**

## **DRAFT CONCESSION AGREEMENT**

THIS AGREEMENT is entered into on this the \_\_\_\_\_ day of \_\_\_\_\_ 2022

### **BETWEEN**

- 1) ....., established under ....., represented by its ..... and having its principal office at ..... (hereinafter referred to as the “Authority” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns); of One Part;

### **AND**

- 2) ..... Limited, a Special Purpose Vehicle incorporated under the provisions of the Companies Act, 2013 and having its registered office at ....., (hereinafter referred to as the “Concessionaire” which expression shall, unless it be repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Other part.

### **WHEREAS:**

- A. The Authority had resolved to establish an opium poppy straw processing plant at Neemuch/Mandsaur district with an installed capacity of extracting 100 MT of alkaloid per annum, with private sector participation on design, build, finance, operate and transfer (the “**DBFOT**”) basis on a land parcel of 25 (Twenty-five) acres in accordance with the terms and conditions to be set forth in a Concession Agreement to be entered into.
- B. The Authority had prescribed the technical and commercial terms and conditions, and invited bids (the “**Request for Proposal**” or the “**RFP**”), for undertaking the Project and, accordingly issued Notice Inviting Tender (NIT), and invited proposals from interested Bidders vide Request for Proposal dated ....., 2022.
- C. After evaluation of the bids received, the Authority had accepted the Bid of M/s..... and issued its Letter of Award No. .... dated ..... (herein after called the “**LOA**”) to the M/s..... requiring, inter alia, the execution of this Concession Agreement within 30 (thirty) days of the date of issue thereof.
- D. The Selected Bidder/Consortium has since promoted and incorporated the Concessionaire as a limited liability company under the Companies Act 2013, and has requested the Authority to accept the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the {Selected Bidder/Consortium under the LOA}, including the obligation to enter into this Concession Agreement pursuant to the LOA for undertaking the Project.
- E. By its letter dated ....., the Concessionaire has also joined in the said request of the Selected Bidder/ Consortium to the Authority to accept it as the entity which shall undertake and perform the obligations and exercise the rights of the Selected Bidder/ Consortium including the obligation to enter into this Concession Agreement pursuant to the LOA. The Concessionaire has further represented to the effect that it has been promoted by the Selected Bidder/ Consortium for the purposes hereof.
- F. The Authority has agreed to the said request of the Concessionaire and the Concessionaire, and has accordingly agreed to enter into this Concession Agreement with the Concessionaire for implementation of the Project on DBFOT basis, subject to and on the terms and conditions set forth hereinafter.
- G. The Concessionaire represents and warrants that it/they have duly fulfilled all the terms and condition necessary for the execution of this Agreement as per the terms and condition in Bid documents and are in a position to execute this Agreement and Implement the Project as envisaged in the Bid and this document. The Concessionaire further acknowledges and confirm that it has submitted the Construction Performance Security in terms of Article 9 of this Agreement.

In light of compliance by the Selected Bidder/Concessionaire of the pre-conditions to the execution of the Agreement, Authority has agreed to enter into this Agreement vesting the rights for the implementation of the Project with the Concessionaire on the terms, conditions, and covenants hereinafter set forth in this Agreement.

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



## ARTICLE 1: DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement 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.

**"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 except in the first and the last calendar year of the subsistence of this Agreement. In the first year of subsistence of this Agreement, it means the period from the signing of Concession Agreement to the immediately following, 31st March. In the last year of subsistence of this Agreement, it means the period from 1st April to the Transfer Date;

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

a) on or before COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Project, revised to the extent of one half of the variation in WPI occurring between the first day of the month of Appointed Date and the Reference Date;

b) from COD and until the 4th (fourth) anniversary thereof, an amount equal to the Adjusted Equity as on COD shall be deemed to be the base (the **"Base Adjusted Equity"**) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following COD to the extent of variation in WPI occurring between COD and the Reference Date;

c) after the 4th (fourth) anniversary of COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by 0.28% (zero point twenty-eight per cent) thereof at the commencement of each month following the 4th (fourth) anniversary of COD and the amount so arrived at shall be revised to the extent of variation in WPI occurring between COD and the Reference Date;

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

Period is extended, but the revision on account of WPI shall continue to be made;

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

“**Agreement**” or “**Concession Agreement**” means this Agreement, including the Recitals, Schedules, and documents appended hereto, as amended, supplemented or modified from time to time in accordance with the provisions hereof;

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

“**Appointed Date**” means the date on which Financial Close is achieved and every Condition Precedent is either satisfied or waived, as the case may be, in accordance with the provisions of this Agreement, and such date shall be the date of commencement of the Concession Period;

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

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

“**Authority Representative**” means such person or persons as may be authorized in writing by the Authority to act on its behalf under this Agreement and shall include any person or persons having authority to

exercise any rights or perform and fulfil any obligations of the Authority under this Agreement;

“**Bank**” means a bank incorporated in India and having a minimum net worth of Rs. 1,000 crore (Rupees one thousand crore) or any other bank acceptable to Senior Lenders, but does not include a bank in which any Senior Lender has an interest;

“**Bank Rate**” means the rate of interest specified by the Reserve Bank of India from time to time in pursuance of section 49 of the Reserve Bank of India Act, 1934 or any replacement of such Bank Rate for the time being in effect;

“**Bid**” means the documents in their entirety comprised in the Bid submitted by the Selected Bidder/Consortium in response to the Request for Proposal in accordance with the provisions thereof;

“**Bid Date**” means the last date on which the Bid may have been submitted in accordance with the provisions of the Request for Proposal;

“**Bid Security**” means the security provided by the Concessionaire to the Authority along with the Bid in a sum of Rs ..... (Rupees ..... only ), in accordance with the Request for Proposal, and which is to remain in force until substituted by the Performance Security;

“**COD**” or “**Commercial Operation Date**” shall have the meaning as set forth in Clause 16.4;

“**Certificate of Compliance**” shall have meaning set forth in Clause 4.1.4;

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

- a) the enactment of any new Indian law;
- b) the repeal, modification or re-enactment of any existing Indian law;
- c) the commencement of any Indian law which has not entered into effect until the Bid Date; or
- 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 Bid Date;

“**Change in Ownership**” shall have the meaning as set forth in Clause 5.14;

“**Change of Scope**” shall have the meaning set forth in Clause 17.1;

“**Commencement Notice**” shall have the meaning set forth in Clause 16.2;

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

“**Completion Notice**” shall have the meaning as set forth in Clause 16.1;

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

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

“**Concessionaire**” shall have the meaning attributed thereto in the array of Parties as set forth in the Recital 2;

“**Concessionaire's Representative**” means the Person appointed by Concessionaire under Clause 5.12;

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

“**Concession Fees**” shall have the meaning as set forth in Clause 23.1.1;

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

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

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

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

“**Construction Documents**” means and includes all drawings, calculations, computer application software (programs), samples, patterns, models, operation and Maintenance Manuals, and other manuals and information of a similar nature prepared in relation to the Project Facilities;

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

“**Construction Performance Security**” shall have meaning as set forth in Clause 9.1.1;

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

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

“**Cure Notice**” shall have meaning as set forth in Clause 16.2;

“**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 under the provisions 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 Concessionaire requires any reasonable action by the Concessionaire that must be approved by the Authority or the Independent Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the Authority or the Independent Engineer to accord their approval;

“**DBFOT**” or “**Design Build, Finance, Operate and Transfer**” shall have the meaning as set forth in Recital (B);

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

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

- a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the “principal”) but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;
- b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated

repayment of debt except where such charges have arisen due to Authority Default; and

c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;

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

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

**“Detailed Project Report”** or **“DPR”** means the detailed design and engineering report for the Project, as indicated in the Clause 14.3;

**“Designs and Drawings”** means the conceptual and detailed designs, drawings and engineering, project master plans, backup technical information required for the Project Facilities and all calculations, samples, patterns, models, specifications and other technical information relating to the Project, submitted by the Concessionaire from time to time in accordance with the provisions of this Agreement;

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

**“Dispute”** shall have the meaning as set forth in Clause 38.1.1;

**“Dispute Resolution Procedure”** means the procedure for resolution of Disputes set forth in Article 38;

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

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

**“Effective Date”** shall mean the date on which the Concession Agreement has been executed by the Parties;

**“Easement”** means all easements, reservations, rights-of-way, utilities and other similar rights as to the use of real property, which are necessary or

appropriate for the conduct of activities of the Concessionaire related to the Project;

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

**“Encumbrances”** means in relation to the Project, any encumbrances such as a mortgage, charge, pledge, lien, hypothecation, Security Interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, or restriction and shall include physical or legal obstructions or encroachments on the whole or any part of the Project Site or Third Party claims or rights of any kind attaching to the whole or any part of the Project Site or any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project;

**“EPC Contract”** means the engineering, procurement and construction contract or contracts entered into by the Concessionaire with one or more Contractors for, inter alia, engineering and construction of the Project in accordance with the provisions of this Agreement;

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

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

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

**“Escrow Agreement”** shall have the meaning as set forth in Clause 25.1.2;

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

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

**“Financial Assistance or Financing”** means the aggregate amounts provided by way of loan, lease finance, advances, guarantees or otherwise by the Lenders to the Concessionaire for the implementation of the Project

and shall include all related financial charges, fees and expenses of all kinds under the Financing Documents relating to the Project;

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

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

**“Financing Documents”** means, collectively, the documents executed in favor of or entered into with the Lenders, by the Concessionaire in respect of the Financial Assistance, including loan agreements, lease agreements, hire purchase agreements, notes, indentures, security agreements or arrangements, guarantees and acceptable letters of credit and other agreements evidencing any obligation of the Concessionaire and other necessary undertakings required pursuant to the respective terms thereof, relating to the Financial Assistance or any part thereof (including refinancing) provided by the Lenders to the Concessionaire for the Project;

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

**“Financial Package”** means the financing package indicating the total capital cost of the Project and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements, Subordinated Debt and Equity Support, if any;

**“Financing Agreements”** means the agreements executed by the Concessionaire in respect of Financial Assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.1.1 (d);

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

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

**“Good Industry Practice”** means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence followed and practiced globally, which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in



the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Concessionaire in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner and for providing safe, economical, reliable and efficient Project Facilities;

**"Government Authority"** or **"Government"** means Gol, or any state government or governmental department, commission, board, body, bureau, agency, authority, instrumentality, court or other judicial or administrative body, central, state, or local, having jurisdiction over the Concessionaire, the Project, the Project Assets and the Works or any part thereof or the performance of all or any of the services, obligations or covenants of Concessionaire under or pursuant to this Agreement or any portion thereof;

**"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 of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Project or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement;

**"Indemnified Party"** means the Party entitled to the benefit if an indemnity pursuant to Clause 36.4.1;

**"Indemnifying Party"** means the Party obligated to indemnify the other party pursuant to Clause 36.4;

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

**"Independent Testing Laboratory"** shall have the meaning as set forth in Clause 40.1;

**"Indirect Political Event"** shall have the meaning as set forth in Clause 28.3;

**"Inspection Report"** shall have the meaning as set forth in Clause 15.2;

**"Insurance Cover"** means the aggregate of the maximum sums insured under the insurances taken out by the Concessionaire pursuant to Article 26, and includes all insurances required to be taken out by the Concessionaire under Clause 26.2 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;

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

**“Lenders”** means any Person based in India or abroad providing Financial Assistance under the Financing Documents and includes financial institutions, banks, non-banking financial companies, funds, trusts who provide for Financial Assistance (including refinancing) to the Concessionaire and includes subscribers to/trustee for the holders of the debentures/bonds or other securities issued by the Concessionaire to meet the debt component of the cost of the Project and whose identity has been notified to the Authority by the Concessionaire from time to time. It is clarified that "Lenders" for the purposes of this Agreement, shall not include promoter entity or Affiliates of the Selected Bidder or the Concessionaire;

**“Lender’s Representative”** means the person duly authorized by the Senior Lenders to act for and on behalf of the Senior Lenders with regard to matters arising out of or in relation to this Agreement, and includes his successors, assigns and substitutes;

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

**“Maintenance Manual”** shall have the meaning ascribed to it in Clause 18.3.1;

**“Maintenance Programme”** shall have the meaning ascribed to it in Clause 18.4.1;

**“Maintenance Requirements”** shall have the meaning as set forth in Clause 18.2;

**“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;

**“Material Breach”** means a breach by either Party of any of its obligations under this Agreement which has or is likely to have a Material Adverse Effect on the Project and which such Party shall have failed to cure;

**“Month”** shall have 30 days in a month;

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

**“Non-Political Event”** shall have the meaning as set forth in Clause 28.2;

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

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

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

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

**“O&M Inspection Report”** shall have the meaning as set forth in Clause 20.2;

**“Operation Performance Security”** shall have meaning as set forth in Clause 9.1.4;

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

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

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

“**Person**” means (unless otherwise specified or required by the context), any individual, company, corporation, partnership, joint venture, trust, unincorporated organization, Government or Governmental Authority or agency or any other legal entity;

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

“**Political Event**” shall have the meaning as set forth in Clause 28.4;

“**Preservation Costs**” shall have the meaning as set forth in Clause 15.4.3;

“**Project**” means, subject to the provisions of this Agreement, the (i) designing, financing, construction, implementation, completion, commissioning, operation, management and transfer of the Project Facilities and all activities incidental thereto, such as engineering, testing, commissioning and insurance etc., by the Concessionaire during the Concession Period;

“**Project Agreements**” means this Agreement, the Financing Agreements, EPC Contract, O&M Contract, and any other material agreements or contracts entered into or may hereafter be entered into by the Concessionaire with any person in connection with matters relating to, arising out of or incidental to the Project, but does not include the Escrow Agreement, Substitution Agreement;

“**Project Assets**” shall mean and comprise of all tangible and intangible assets relating to the Project/Project Facilities, as the case may be, excluding land but including and not limited to, (a) rights over the Site in the form of license, right-of-way or otherwise, (b) each of tangible assets comprising the Project Facilities such as Plant & Machinery, apparatus, equipment, foundation, embankments, buildings, structures, super structures, constructions, additions, alterations or improvements etc. thereof, landscape structures, pavement and walkways, drainage facilities, sign boards, electrical, mechanical, civil, sanitation and other works, telephone, other communication equipment, laboratories with equipment, other equipment, technology at the Site/relating to the Project; (c) financial assets of the Project such as receivables, cash and investments, security deposits for utilities, etc.; (d) rights of the Selected Bidder/Concessionaire under the Project Agreements and other agreements relating to the Project entered into by the Concessionaire, (e) proceeds from insurance policies taken by the Concessionaire in relation to the Project Facilities (f) all Applicable Permits, affiliations and authorizations relating to or in respect of the project (g) movable assets of the Project/Project Facilities, movable property, things and goods like equipment, machinery, fittings and fixtures etc.

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

**“Project Facilities”** means all the amenities and facilities situated on the Site, as described in Schedule-C and will also include any other facilities developed during the Concession Period at the Site;

**“Project Milestones”** means the project milestones as set forth in Schedule-H;

**“Project Site”** or **“Site”** shall have the meaning as set forth in Schedule A;

**“Proposal”** or **“Bid”** means the entire set of technical, financial, qualifying and other documents in their entirety comprised in the proposal or Bid submitted by the Selected Bidder in response to the Request for Proposal in accordance with the provisions thereof, and accepted by the Authority;

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

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

**“Safety Requirements”** shall have the meaning as set forth in Clause 19.1.1;

**“Schedule”** means any of the schedules appended to this Agreement;

**“Scheduled Project Completion Date”** or **“Scheduled Completion Date”** shall have the meaning as set forth Clause 16.6;

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

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

**“Selected Bidder”** means the consortium/entity that has been successful in the Bidding Process for the Project and that has been incorporated as the Concessionaire;

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

**"Special Purpose Vehicle"** or **"SPV"** shall mean the Concessionaire;

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

**“State”** means the State or the Union Territory, as the case may be, in which the Project is situate and **“State Government”** means the government of that State or Union Territory;

**“Statutory Auditors”** means a reputable firm of chartered accountants acting as the statutory auditors of the Concessionaire under the provisions of the Companies Act, 1956, including any statutory re-enactment or modification thereof, for the time being in force, and appointed in accordance with Clause 27.2.1;

**“Sub-contractor”** means the construction contractor(s) and/or operation and maintenance contractor(s) and/or any other contractors and sub-contractors, manufacturers or suppliers of Works and/or building/ services or part thereof, as the context may require, to whom the Concessionaire contracts or subcontracts the Works in full or part;

**“Substitute Entity”** means the entity defined in the Substitution Agreement;

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

a) the principal amount of debt provided by Lenders or the Concessionaire’s shareholders for meeting the Total Project Cost and subordinated to the financial assistance provided by the Senior Lenders; and

b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Rate in case of loans expressed in Indian Rupees

and lesser of the actual interest rate and six-month LIBOR (London Inter-Bank Offer Rate) plus 2% (two per cent) in case of loans expressed in foreign currency, but does not include any interest that had fallen due one year prior to the Transfer Date;

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

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

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

**"Taxes"** means any Indian taxes including excise duties, 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 charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;

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

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

**"Termination Payment"** means the amount payable by the Authority to the Concessionaire upon Termination and may consist of payments on account of and restricted to the Debt Due and Adjusted Equity, as the case may be, which form part of the Total Project Cost in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, it is agreed that within a period of 60 (sixty) days from COD, the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment, and it is further agreed that in the event such disaggregation is not notified to the Authority, the Equity and Debt Due shall be arrived at by adopting the proportion between Debt and Equity as specified in the Financing Agreements;

“**Tests**” means the tests to be carried out in accordance with the Construction Requirements and if not expressly specified in the said requirements, as instructed by the Authority /Independent Engineer, in accordance with this Agreement, tests set forth in Schedule J to determine the completion of the Project;

“**Third Party**” means any Person, real or legal, or entity other than the Parties to this Agreement;

“**Total Project Cost**” means the lowest of:

- a) the capital cost of the Project, as set forth in the Financial Package; or
- b) a sum of Rs. .... (Rupees .....);

provided that in the event WPI increases, on an average, by more than 3% (three per cent) per annum for the period between the date hereof and COD, the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount hereinbefore specified such that the effect of increase in WPI, in excess of such 3% (three per cent), is reflected in the Total Project Cost;

provided further that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement;

provided also that the Total Project Cost shall not exceed the actual capital cost of the Project upon completion of the Project;

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

“**Vacant Possession**” means delivery of possession of the land comprising the Site free from all Encumbrances, restriction or impediments and with all Easement and all other rights appurtenant or in relation thereto;

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

“**Works**” mean the works under and in accordance with the provisions of this Agreement relating to design, development of Site, construction, completion, testing and commissioning of the Project/Project Facilities (the “Construction Works”), and the O&M Works, collectively or singularly as the context may admit or require, including the technology, services and things to be designed, engineered, constructed, installed, equipped, supplied, executed, manufactured, completed, tested, commissioned, rectified,



replaced, made good, carried out and undertaken in respect of the Project/Project Facilities and any other permanent, temporary or urgent works required hereunder;

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

“**Year**” means 12 months with 30 days in each month.

## 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) Terms and words beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the terms and words defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

f) the words “**include**” and “**including**” are to be construed without limitation and shall be deemed to be followed by “**without limitation**” or “**but not limited to**” whether or not they are followed by such phrases;

- g) references to “**construction**” or “**building**” include, unless the context otherwise requires, investigation, design, development of site, engineering, procurement, delivery, transportation, installation, processing, fabrication, equipping, establishment, testing, commissioning and other activities incidental to the construction and “**construct**” or “**build**” shall be construed accordingly;
- h) references to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, upgradation and other activities incidental thereto, and “**develop**” shall be construed accordingly;
- i) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- j) any reference to a day shall mean a reference to a calendar day;
- k) Any reference to Rs. or Rupees shall mean a reference to Indian Rs. or Rupees (currency of India);
- l) references to a “**business day**” shall be construed as reference to a day (other than a Sunday) on which banks in Bhopal are generally open for business;
- m) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- n) 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;
- o) any reference to any period commencing “**from**” a specified day or date and “**till**” or “**until**” a specified day or date shall include both such days or dates; 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;
- p) words importing singular shall include plural and vice versa;
- q) references to any gender shall include the other and the neutral gender;
- r) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- s) “**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;

t) references to the “**winding-up**”, “**dissolution**”, “**insolvency**”, or “**reorganization**” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, re-organization, dissolution, arrangement, protection or relief of debtors;

u) 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 Sub-clause (s) shall not operate so as to increase liabilities or obligations of the Authority hereunder or pursuant hereto in any manner whatsoever;

v) any Agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effective only if it is in writing under the hand of a duly authorized representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;

w) 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;

x) references to Recitals, Articles, Clauses, Sub-clauses, Provisos or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses, Provisos and Schedules of or to this Agreement, references to an Annex shall, subject to anything to the contrary specified therein, be construed as a reference to an Annex to the Schedule in which such reference occurs, and references to a Paragraph shall, subject to anything to the contrary specified therein, be construed as a reference to a Paragraph of this Schedule or Annex, as the case may be, in which such reference appears;

y) 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**”);

z) time shall be of the essence in the performance of the Parties’ respective obligations. If any time period specified herein is extended, such extended

time shall also be of the essence; and

aa) wherever in this Agreement provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate, Agreement, authorization, communication, information or report or determination by any Party, unless otherwise specified, such notice, endorsement, consent, approval, certificate, Agreement, authorization, communication, information or report or determination shall be in writing under the hand of duly authorized representative of such Party and/or the Independent Engineer in this behalf.

1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Concessionaire to the Authority and/or the Independent Engineer shall be provided free of cost and in three copies, and if the Authority and/or the Independent Engineer is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.

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

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

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

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

### **1.4 Priority of Agreements, clauses and Schedules**

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

a) this Agreement; and

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

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

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

## **Part II– The Concession**

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

### **2.1 Scope of Project**

The scope of the Work (the “**Scope of the Project**”) shall mean and include, during the Concession Period:

- a) planning, designing, financing, constructing, operating, maintaining and transfer of the Project as specified in Schedule B and Schedule C on the Site set forth in Schedule A, and in conformity with the Specifications and Standards set forth in Schedule D;
- b) operation and maintenance of the Project Facilities in accordance with the provisions of this Agreement in Schedule L; and
- c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

## ARTICLE 3: GRANT OF CONCESSION

### 3.1 The Concession

3.1.1 Subject to and in accordance with the terms and conditions set forth in this Agreement, the Authority hereby grants to the Concessionaire and the Concessionaire hereby accepts the Concession for a period of 20 years, with a provision of one time extension for an additional period of 10 years (the “**Term**”), commencing from the Appointed Date, including the exclusive right, license and Authority during the subsistence of this Agreement to implement the Project (the “**Concession**”).

Provided further that, in the event the Concessionaire has been in material default of the provisions of this Agreement, then, the Authority shall not be under any obligation to provide extension to the Concessionaire in accordance with this Clause 3.1.1.

In any event, at all times, any decision concerning the extension of the Concession Period shall vest with the Authority.

3.1.2 Subject to and in accordance with the terms and conditions set forth in this Agreement, the Concession hereby granted shall entitle the Concessionaire to enjoy, and oblige the Concessionaire to undertake the following in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits:

- a) right of way, access and license to the Project Site for the purpose of and to the extent conferred by the provisions of this Agreement;
- b) to design, develop, finance, construct, market, manage, administer, operate and maintain the project during the Concession Period;
- c) upon completion of the Project and during the Operations Period to manage, operate & maintain the Project and regulate the use thereof by Third Parties;
- d) To levy and collect revenues, as generated pursuant to the development of the Project;
- e) perform and fulfil all of the Concessionaire's obligations under this Agreement;
- f) bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Concessionaire under this Agreement;
- g) neither assign, transfer or sublet or create any lien or Encumbrance on this Agreement, or the Concession hereby granted or on the whole or any



part of the Project nor transfer, lease or part possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement;

h) to apply for and obtain all requisite approvals and consents including from all Governmental Authorities concerned, for the development of Project site, including plans for construction of building/s and other structure/s thereon for such uses and purposes as described herein; and

i) on the Transfer Date, transfer and hand over the Site along with the Project Facilities and Project Assets to the Authority or its nominated agency in accordance with the provisions hereof.

The Concessionaire acknowledges, accepts and confirms that the covenant contained herein is an essence of this Agreement.

### 3.1.3 **Concession Period**

The Concession Period shall commence from the Appointed Date for an initial term of 20 years, with a provision of further extension as decided by the Authority and in accordance with Clause 3.1.1, or the earlier Termination of this Agreement in terms hereof and during which the Concessionaire is authorized to implement the Project and to operate the Project Facilities in accordance with the provisions hereof. For the avoidance of doubt, the Concession Period shall include the Construction Period.

a) In the event of Termination, the Concession Period shall mean and be limited to the period commencing from the Appointed Date and ending with the Termination;

b) At the end of the Concession Period or sooner Termination of this Agreement for any reason whatsoever, all rights given under this Concession Agreement shall cease to have effect and the Project Site, Project Facilities and the Project Assets shall revert to the Authority.

## ARTICLE 4: CONDITIONS PRECEDENT

### 4.1 Conditions Precedent

- 4.1.1 Save and except as expressly provided in Articles 4, 5, 6, 7, 8, 10, 22, 28, 38 and 43, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “**Conditions Precedent**”) save and except to the extent of waiver, if any, that a Party may grant in accordance with the provisions of Clauses 4.1.2 or 4.1.3, as the case may be.
- 4.1.2 The Concessionaire may, upon providing the Construction Performance Security to the Authority in accordance with Article 9, at any time after 30 (thirty) days from the Effective Date or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 120 (one hundred twenty) days of the said notice. The Conditions Precedents required to be satisfied by the Authority prior to the Appointed Date shall be deemed to have been fulfilled when the Authority shall have:
- a) handed over vacant and peaceful possession of Site, on “as is where is basis” to the Concessionaire along with all Easementary Rights, in accordance with the terms and conditions of this Agreement; and
  - b) Appointed Independent Engineer as per the provisions of this Agreement.
  - c) Appointed an independent testing agency for testing of opium poppy crops to assess alkaloid content in the poppy straw
- 4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire prior to the Appointed Date within 180 days from the Effective Date shall be deemed to have been fulfilled when:
- a) Concessionaire shall have obtained all such Applicable Permits as listed in Schedule ‘E’ unconditionally or if subject to conditions then all such conditions have been satisfied in full and such Applicable Permits are and shall be kept in full force and effect for the relevant period during the subsistence of this Agreement;
  - b) Provide an undertaking that all of the Representations and Warranties of the Concessionaire set forth in Article 7 are true and correct as on date of this Concession Agreement and as on the Appointed Date and thereafter;
  - c) The Concessionaire shall have been granted all Government clearances and permits under the Applicable Laws relating to environmental protection and conservation from the Ministry of Environment and Forests;

- d) Certified true copies of all Project Agreements, in particular, the Financing Documents, the EPC Contract, O&M Contract (with an entity having the requisite O&M experience specified in the RFP document) as well as the shareholders funding agreement among the consortium partners have been delivered by the Concessionaire to the Authority;
- e) The Authority shall have received from the Concessionaire copies (certified as true copies by an authorized officer of the Concessionaire) of the constitutional documents of the Concessionaire;
- f) The Authority shall have received copies (certified as true copies by a Director of the Concessionaire) of all resolutions adopted by the Board of Directors of the Concessionaire authorizing the execution, delivery and performance by the Concessionaire of this Agreement and each of the Project Agreements;
- g) The Authority shall have received from the Indian legal counsel of the Concessionaire a legal opinion with respect to the Authority of the Concessionaire to enter into this Agreement and the Project Agreements and the Financing Documents and the enforceability of the provisions thereof;
- h) The Concessionaire has submitted detailed project report constituting proposed project plan, project capacity, site plan, detailed design, cost estimates, machinery details as per applicable laws to the Authority for information;
- i) executed and procured execution of the Escrow Agreement;
- j) executed and procured execution of the Substitution Agreement; and
- k) delivered to the Authority 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders;
- l) prepared, finalized and submitted DPR to the Authority in accordance with Article 14;

Any of the conditions precedent set forth in Clause 4.1.3, save and except condition of (c) thereof, may be waived fully or partially by the Authority at any time in its sole discretion.

#### 4.1.4 **Obligations to satisfy Condition Precedents**

- a) The Concessionaire and the Authority shall make all reasonable endeavors to procure the satisfaction in full of the Conditions Precedent set

out in Clause 4.1.3 above. The Concessionaire and the Authority shall make all reasonable endeavors to procure fulfillment of the conditions set forth in Sub-clause (c) of Clause 4.1.3. Each Party shall bear its respective cost and expense of satisfying such Condition Precedent.

b) Upon satisfaction in full of all Conditions Precedent for a Party, the other Party shall forthwith issue to such Party a certificate of compliance with Conditions Precedent (the “**Certificate of Compliance**”).

c) The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied

## **4.2 Deemed Termination upon Delay**

4.2.1 In the event that (i) the Concessionaire does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1.3 within a period of 180 (one hundred and eighty) days from the Effective Date, and (ii) the delay has not occurred as a result of failure to fulfil the obligations under Clause 4.1.3 or other breach of this Agreement by the Authority, or due to Force Majeure, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day’s delay until the fulfillment of such Conditions Precedent, subject to a maximum amount equal to 20% (twenty percent) of the Performance Security, and upon reaching such maximum, the Authority may, in its sole discretion, terminate the Agreement.

4.2.2 In the event that (i) the Authority does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the Authority shall pay to the Concessionaire Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day’s delay until the fulfillment of such Conditions Precedent, subject to a maximum of 10% (ten percent) of the Performance Security.

4.2.3 Without prejudice to the provisions of Clause 4.2, the Parties expressly agree that in the event the Appointed Date does not occur, for any reason whatsoever, within 270 days from the Effective Date or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual Agreement

of the Parties. Provided, however, that in the event the delay in occurrence of the Appointed Date is for reasons attributable to the Concessionaire, the Performance Security of the Concessionaire shall be encashed and appropriated by the Authority as Damages thereof.

Without prejudice to and notwithstanding anything to the contrary set out in the foregoing, the Parties may by mutual Agreement in writing, instead decide to extend the time for fulfilling the Conditions Precedent.

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

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

5.1.1 It is expressly agreed that the Concessionaire shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the Project Agreements or any other agreement, and no default under any Project Agreement or agreement shall excuse the Concessionaire from its obligations or liability hereunder.

The Concessionaire shall at its own cost and expense observe, undertake, comply with and perform, in addition to and not in derogation of its obligations elsewhere set out in this Agreement, the following:

- a) make, or cause to be made, necessary applications to the relevant Authority instrumentalities with such particulars and details, as may be required for obtaining Applicable Permits and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
- b) perform its obligations under this Agreement and notify to Authority forthwith the occurrence of Financial Close;
- c) submit to the Authority certified true copies of each of the Project Agreements within 7 (seven) days of their execution;
- d) The Concessionaire shall not make any addition, replacement or amendments to any of the Project Agreements without the prior written consent of the Authority if such addition, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the Authority, and in the event that any replacement or amendment is made without such consent, the Concessionaire shall not enforce such replacement or amendment nor permit enforcement thereof against the Authority. For the avoidance of doubt, the Authority acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the debt of the Concessionaire.
- e) remove promptly from the Project Site, all waste materials (including, without limitation, hazardous materials and wastewater), rubbish and other debris (including without limitation accident debris) and shall keep the Project Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable Permits;
- f) procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project;
- g) appoint, supervise and control the activities of Contractors under their

respective Project Agreements as may be necessary, also provide all assistance to the Independent Engineer and independent testing agency as it may require for the performance of their duties and services;

h) support, cooperate with and facilitate the Authority in execution of the Project Agreement, implementation and operation of the Project in accordance with the provisions of this Agreement;

i) provide reports to the Authority on regular basis during the Construction Period and the Operations Period in the form and manner set forth in this Agreement and Schedule “V”;

j) obtain and maintain in force on and from the Appointed Date all insurance in accordance with the provisions of this Agreement and Good Industry Practice;

k) undertake Debt Service Payments in accordance with the Financing Documents;

l) ensure and procure that each Project Agreement contains provisions that entitle the Authority to step into such Agreement in its discretion in place and substitution of the Concessionaire in the event of Termination or Suspension of this Agreement on account of default or breach by the Concessionaire;

m) make all necessary payments to the Authority such as Concession Fee, or any other payment that needs to be made to the Authority in accordance with the provisions of this Agreement;

n) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire’s obligations under this Agreement;

o) comply with all Applicable Permits and Applicable Laws in the performance of the Concessionaire’s obligations under this Agreement including those being performed by any of the Contractors;

p) develop, implement and administer a safety program for the Project, the users thereof, and the Contractors personnel engaged in the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Schedule ‘M’, Applicable Laws and Good Industry Practice;

q) take all reasonable precautions for the prevention of accidents on or about the Project and provide all reasonable assistance and emergency medical aid to accident victims;

- r) after receiving vacant possession of the Site or part thereof, ensure that such Site remains free from all encroachments and take all steps necessary to remove encroachments, if any;
- s) indemnify the Authority against all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be suffered by them on account of anything done or omitted to be done by the Concessionaire in connection with the performance of its obligations under this Agreement;
- t) comply with the Divestment Requirements and hand over the Project to Authority upon Termination of the Agreement;
- u) not do or omit to do any act, deed or thing which may in any manner violate any of the provisions of this Agreement;
- v) produce a minimum quantity equivalent to 60% - 65% of the total alkaloid content available in the poppy straw, as certified by the Independent Testing Laboratory. To estimate the total alkaloid content in the poppy straw received by the concessionaire, an independent testing agency would be jointly appointed.
- w) construct the premises for setting up an Independent Testing Laboratory to test the quality of poppy straw at a place designated by the Authority, the cost for the same to be borne as per Clause 40.3;
- x) create adequate storage facility for storage of poppy straw/raw material as well as finished products within the Project site by the first anniversary of Concession;
- y) Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire shall not sub-lease, sub-license, assign or in any manner create an Encumbrance on any Project Asset without prior written approval of the Authority, which approval the Authority may, in its discretion, deny if such sub-license, assignment or Encumbrance has or may have a Material Adverse Effect on the rights and obligations of the Authority under this Agreement or Applicable Laws. For the Avoidance of doubt, the restriction imposed here shall not apply to the assignment under Substitution Agreement.
- z) Provide office space for two designated officials of the Authority at all times during the concession period, within the project area;
- aa) Ensure that the alkaloids produced/extracted meet established / prescribed international quality standards/quality certification;
- ab) Ensure compliance to internationally established and accepted good



manufacturing practices through approvals from United States Food and Drug Administration (USFDA) / United Kingdom's Medicines and Healthcare products Regulatory Agency (UK MHRA) / European Directorate for the Quality of Medicines & HealthCare (EDQM) / Australian Therapeutic Goods Administration (TGA) / Brazilian Health Regulatory Agency (ANVISA), etc.;

ac) The Concessionaire shall, from time to time, undertake upgradation of the Project Assets in accordance with the provisions of this Agreement and Good Industry Practice;

ad) Ensure that the equipment used in the Project are in good condition and conform to the international specifications and efficiency standards;

ae) Not store any hazardous or explosive substance on the Site unless specific license is obtained from the regulatory body after taking prior consent from the Authority. The Concessionaire shall provide and maintain necessary fire-fighting and fire protection systems in the Site as per the Applicable Law;

**5.2** Subject to the terms and conditions of this Agreement, the Concessionaire shall at its cost and expense:

a) undertake the planning, design, financing, engineering, procurement, construction, administration, management, operation and maintenance of all the components of the Project in accordance with this Agreement.

**5.3** The Concessionaire shall, before commencement of construction of the Project:

a) submit to the Authority with due regard to Project Completion Schedule as set forth in Schedule 'H' and Scheduled Project Completion Date, its detailed design, engineering and construction time schedule in MSP/PRIMAVERA format and shall formulate and provide CPM/PERT/GANTT charts for the completion of the said activities;

b) finalize the Detailed Project Report (DPR) and detailed engineering basis and submit to the Authority during Condition Precedent period;

c) have requisite organization and designate and appoint a Project manager and such other managers, officers and representatives as it may deem appropriate to supervise the Project and to deal with the Authority Representative and be responsible for all necessary exchanges of information required pursuant to this Agreement; and

d) undertake, do and perform such acts, deeds and things as may be necessary or required for construction and Project completion under and in accordance with this Agreement.

**5.4** In respect of the Concessionaire’s obligations with respect to the Designs and Drawings of the Project as set forth in Schedule ‘I’, the following shall apply:

a) The Concessionaire shall prepare and submit with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of all Designs and Drawings to Authority and the Independent Engineer for review and comments.

b) By forwarding the Designs and Drawings for review and comment to Authority, the Concessionaire represents that it has determined and verified that the design and engineering including field construction criteria related thereto is in conformity with the Specifications and Standards and quality set forth in this Agreement for and in respect of the Project.

c) If the comments/observations of Authority indicate that the Designs and Drawings are not in conformity with the Specifications and Standards set forth in this Agreement or as per Applicable Laws, such Designs and Drawings shall be revised by the Concessionaire to the extent necessary and resubmitted to Authority for review, observations and comments.

d) The Concessionaire shall be responsible for delays in Project Completion Schedule caused by reasons of any of Designs and Drawings not being in conformity with the Specifications and Standards, and the Concession Period shall not be extended in any manner whatsoever on account of submission or revision of any Drawings.

e) Within 90 (ninety) days of the COD, the Concessionaire shall furnish the Authority with “as built” Drawings reflecting the Project as actually designed, engineered and constructed, including without limitation an “as built” survey illustrating the layout of the Project and setback lines, if any, of the buildings and structures forming part of Project Facilities.

**5.5** The Concessionaire shall submit to the Authority the drafts of all Project Agreements, or any amendments or replacements thereto, for its review and comments, and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, to the Concessionaire within 30 (thirty) days of the receipt of such drafts. Within 7 (seven) days of execution of any Project Agreement or amendment thereto, the Concessionaire shall submit to the Authority a true copy thereof, duly attested by a Director of the Concessionaire, for its record. For the avoidance of doubt, it is agreed that the review and comments hereunder shall be limited to ensuring compliance with the terms of this Agreement. It is further agreed that no review and/or observation of the Authority and/or its failure to review and/or convey its observations on any document shall relieve the Concessionaire of its obligations and liabilities under this

Agreement in any manner nor shall the Authority be liable for the same in any manner whatsoever.

## 5.6

a) During the Construction Period, the Concessionaire shall be responsible for maintaining the Project Site, at its own cost and expense.

b) Provide or arrange at its cost during the Concession Period all on-site infrastructure including power, electricity, water, sanitation, sewage treatment and disposal, drainage, solid and hazardous waste disposal, effluent treatment and disposal and other utilities and facilities required from time to time in respect of the construction, operation and maintenance of the Project/Project Facilities and be in compliance to the requirements relating thereto under the Applicable Laws, terms of Applicable Permits and Good Industry Practice.

c) It shall at its cost install meters to measure the consumption of power and water. The Concessionaire shall, at its cost, make alternate and back up arrangement for power, including but not limited to installation of generators and for water, subject to the Concessionaire obtaining Applicable Permits if any.

## 5.7

The Concessionaire shall, at all times, afford access to the Site to the authorized representatives of Authority, Senior Lenders, independent testing agency, and the Independent Engineer and to the persons duly authorized by any Governmental Agency having jurisdiction over the Project, including those concerned with safety, security or environmental protection to inspect the Project and to investigate any matter within their authority and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions with minimum disruption to the construction, operation and maintenance of the Project consistent with the purpose for which such persons have gained such access to the Project Site.

## 5.8 **Employment of foreign nationals**

The Concessionaire acknowledges, agrees and undertakes that employment of foreign personnel by the Concessionaire and/or its 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 Concessionaire and, notwithstanding anything to the contrary contained in this Agreement, refusal of or inability to obtain any such permits and approvals by the Concessionaire or any of its contractors or sub-contractors shall not constitute Force Majeure Event, and shall not in any manner excuse the

Concessionaire from the performance and discharge of its obligations and liabilities under this Agreement.

#### **5.9 Employment of trained personnel**

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

#### **5.10 Sole purpose of the Concessionaire**

The Concessionaire having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, i.e., the design, development, implementation, operation and management of the Project, the Concessionaire hereby agrees not to have any shareholding interest/control in any form or otherwise in any entity, or any other form of arrangement with any person, which may allow it to undertake or perform any other business activity.

The Concessionaire hereby agrees not to form any subsidiary/Joint Venture or to invest in securities of any other body corporate or to have any shareholding interest/control in any form, whether direct or indirect or through voting rights, or be or become directly or indirectly engaged, concerned or interested in any business, for undertaking its obligations in relation to design, development, implementation, operation and management of the Project.

#### **5.11 Branding of the Project**

The Project or any part thereof shall not be branded in any manner to advertise, display or reflect the name or identity of the Concessionaire or its shareholders. The Concessionaire undertakes that it shall not, in any manner, use the name or entity of the Project to advertise or display its own identity, brand equity or business interests, including those of its shareholders, save and except as may be necessary in the normal course of business.

#### **5.12 Concessionaire's Representative**

a) The Concessionaire's Representative shall be the person so designated by the Concessionaire. If at some point of time the Concessionaire is unable to provide the services of the person named as the Concessionaire's Representative, then it shall notify the Authority and its reasons for this, and thereafter, provide a substitute person who can be the Concessionaire's Representative.

b) The person named as the Concessionaire's Representative under this Concession Agreement shall be a qualified and competent person having previous experience in a similar capacity in works comparable to the

Project. Prior to appointment of the Concessionaire's Representative, the Concessionaire shall also submit the curriculum vitae of the person it proposes to appoint, detailing in particular the relevant project experience, and then obtain the written consent of the Authority to the appointment of the Concessionaire's Representative.

c) The Concessionaire's Representative shall be exclusively employed or engaged by the Concessionaire to give his whole time to directing the preparation of the Construction Documents, the execution of the Works, and operation and maintenance of the Project. Except as otherwise stated in the Concession Agreement, the Concessionaire's Representative shall receive on behalf of the Concessionaire all notices, instructions, consents, approvals, certificates, determinations and other communications under the Concession Agreement. Whenever the Concessionaire's Representative is to remain absent from the Project Site for a continuous period in excess of 14 (fourteen) days, a suitable replacement Person shall be appointed with the Authority's consent.

d) The Concessionaire's Representative may delegate, while retaining his prime responsibilities, any of his powers, functions and authorities to any competent Person, and may at any time revoke any such delegation. Any such delegation or revocation shall be in writing and shall not take effect until the Authority has received prior written notice signed by the Concessionaire's Representative, specifying the powers, functions and authorities being delegated or revoked. Concessionaire's Representative shall notify in writing to the Authority the names, duties and scope of authority of such Persons. Any instructions given to any of them shall be deemed to have been given to the Concessionaire's Representative. Any such delegation shall not relieve the Concessionaire's Representative of its obligation and duties under this Agreement.

## **5.13 Shareholding Lock-in**

5.13.1 The Concessionaire confirms that the Lead Member and each of the other members together with their Associates whose technical experience has been evaluated for the purposes of the RFP, has subscribe at least 51% (fifty per cent) or more and 26% (twenty-six percent) or more respectively, of the paid up and subscribed Equity of the Concessionaire and further commits that each such member shall, till COD of the Project, hold Equity share capital not less than:

- i. 51% (fifty one percent) of the subscribed and paid-up Equity share capital of the Concessionaire for Lead member;
- ii. 26% (twenty-six percent) of the subscribed and paid-up Equity share capital of the Concessionaire for the technical member and,

iii. 5% (five percent) of the Total Project Cost specified in the Concession Agreement;

5.13.2 Any transfer of such share capital after such Lock-in Period shall require the prior written approval of the Authority, which shall not be unreasonably denied. Provided, nothing contained in this sub-section shall preclude or prevent pledge of the Selected Bidder's/Consortium's shares in the Concessionaire in favor of Lenders as security for the Financial Assistance and enforcement thereof in accordance with this Agreement and/or the Financing Documents;

5.13.3 At no stage, including as specified under Clause 5.14.1 to 5.14.2 above, shall any change in the shareholding patterns shall be made in the Concessionaire without obtaining prior approval from the Authority. On an application made for the purpose, the Authority may permit the change of Equity Components/ shareholding patterns, and such permission shall not be unreasonably rejected or withheld, provided the Authority is satisfied that the proposed changes shall be in the interest of the implementation of the Project in future and would not be detrimental to any of the rights or interests of the Authority and any of the Confirming Authorities. However, no such change in the shareholding pattern shall be permitted by the Authority, which would make the Consortium Members or Associates or the Concessionaire non-compliant with sub-clauses above.

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

5.14.1 The Concessionaire shall not undertake or permit any Change in Ownership, except with the prior approval of the Authority.

5.14.2 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that:

a) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of 25% (twenty-five per cent) or more of the total Equity of the Concessionaire; or

b) acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him shall constitute a Change in Ownership requiring prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Concessionaire without such prior approval of the

Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavor to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire from any liability or obligation under this Agreement.

For the purposes of this Clause 5.14.2:

- (i) the expression “acquirer”, “control” and “person acting in concert” shall have the meaning ascribed thereto in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011 or any statutory re-enactment thereof as in force as on the date of acquisition of Equity, or the control of the Board of Directors, as the case may be, of the Concessionaire;
- (ii) the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control of any company or companies whether in India or abroad which results in the acquirer acquiring control over the shares or voting rights of shares of the Concessionaire; and
- (iii) power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situate in India or abroad) the Equity of the Concessionaire, not less than half of the directors on the Board of Directors of the Concessionaire or of any company, directly or indirectly whether situate in India or abroad, having ultimate control of 25% (twenty five per cent) or more of the Equity of the Concessionaire shall constitute acquisition of control, directly or indirectly, of the Board of Directors of the Concessionaire.

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

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

- 6.1.1 The Authority shall, at its own cost and expense, undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 6.1.2 The Authority agrees to provide support to the Concessionaire and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:
- a) enable access to the Site, free from Encumbrances, in accordance with this Agreement;
  - b) permit peaceful use of the Site by the Concessionaire as licensee under and in accordance with the provisions of this Agreement without any let or hindrance from Authority or persons claiming through or under it;
  - c) upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favorable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
  - d) procure that no barriers are erected or placed on or about the Project by any Government Instrumentality or persons claiming through or under it, except for reasons of Emergency, national security, law and order;
  - 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) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide reasonable support and assistance to the Concessionaire in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project;
  - g) upon written request from the Concessionaire and subject to the provisions of Clause 5.9, provide reasonable assistance to the Concessionaire and any expatriate personnel of the Concessionaire or its Contractors to obtain applicable visas and work permits for discharging their respective obligations under this Agreement and the Project Agreements;
  - h) facilitate provision of external infrastructure to the Project Site viz. road,



water and power by the relevant Government departments;

i) develop, operate and maintain the common services/utilities (as described in Schedule B, Clause 4), roads, service road along the development and if required, modify, repair or otherwise make improvements to the Site Facilities to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits;

j) Observe and comply with its obligations set forth in this Agreement.

k) make available a minimum of 6,000 MT of poppy straw per year from COD, as raw material to the Concessionaire;

l) specify the ratio of end products like Morphine, Codeine and Thebaine required to be produced by the Concessionaire in coming quarter, not later than end of last month of ongoing quarter. For example; specify the ratio of end products to be produced in the quarter of April to June, before the end of month of March (March being the last month of the quarter);

m) bear 50% cost of the testing laboratory to be constructed by the Concessionaire and appoint an independent third party to set-up, manage and operate the testing laboratory and bear 50% of the cost of its management & operation;

n) approve Total Project Cost for any additional or increase in plant capacity upon submission of DPR and other supporting documents by the Concessionaire, as and when requested by the Concessionaire as per the provisions of this Agreement; and

o) Ensure taking-off of the finished products within 15 (fifteen) days from the date of intimation by the Concessionaire.

## **6.2 Maintenance Obligations prior to Appointed Date**

Prior to the Appointed Date, the Authority shall maintain the Project Site surrounding, at its own cost and expense, so that its existing facilities (e.g. road, water supply system, sewerage and other similar facilities) and safety are at no time materially inferior as compared to its condition 7 (seven) days prior to the last date for submission of the Bid, and in the event of any material deterioration or damage other than normal wear and tear, undertake repair thereof, or pay to the Concessionaire the cost and expense, as determined by the Independent Engineer, for undertaking such repair after the Appointed Date. For the avoidance of doubt, the Authority shall undertake only routine maintenance during the Construction Period, and it shall undertake special repairs only for ensuring safe operation of the Project, or in the event of excessive deterioration or damage caused due to unforeseen events such as floods or torrential rain.

**6.3** In respect of the Authority's obligations with respect to the Designs and Drawings of the Project as set forth in Schedule 'I', the following shall apply:

6.3.1 Within 30 (thirty) days of the receipt of the Designs and Drawings, the Authority shall review the same and convey its comments/observations to the Concessionaire with particular reference to the conformity or otherwise with the Specifications and Standards set forth in this Agreement. It is expressly agreed that notwithstanding any review and comment/observations of Authority on any Drawings or failure of Authority to provide comments/ observations thereon, Authority shall not be liable for the same in any manner whatsoever and the Concessionaire shall remain solely responsible for and shall not be relieved or absolved in any manner whatsoever of its obligations, duties and liabilities as set forth in this Agreement. The Concessionaire shall not be obliged to await the comments/observations of Authority on the Drawings submitted pursuant hereto beyond the period set forth hereinabove.

6.3.2 On resubmission to Authority for review, observations and comments, Authority shall give its observations and comments, if any, within 15 (fifteen) days of the receipt of such revised Drawings provided, however, that any observations or comments of Authority or failure of Authority to give any observations or comments on such revised drawings shall not relieve or absolve the Concessionaire of its obligation to conform to such Specifications and Standards.

#### **6.4 Obligations relating to Re-financing**

Upon request made by the Concessionaire to this effect, the Authority shall, in conformity with any regulations or guidelines that may be notified by the Government or the Reserve Bank of India, as the case may be, permit and enable the Concessionaire to secure refinancing, in whole or in part, of the Debt Due on such terms as may be agreed upon between the Concessionaire and the entity providing such refinancing; provided, however, that the refinancing hereunder shall always be subject to the prior consent of the Authority, which consent shall not be unreasonably withheld. For the avoidance of doubt, the tenure of debt refinanced hereunder may be determined mutually between the Senior Lenders and the Concessionaire, but the repayment thereof shall be completed no later than 1 (one) year prior to expiry of the Concession Period.

#### **6.5 Supply of Raw Material**

6.5.1 The Authority undertakes to supply a minimum of 6,000 MT of poppy straw in an Accounting Year to the Concessionaire. However, it is clarified that the Concessionaire shall be paid the processing fee for processing 6,000 MT of raw material/poppy straw even if the Authority is not able to supply the committed quantity of raw material in any financial year.



## **ARTICLE 7: REPRESENTATIONS AND WARRANTIES**

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

The Concessionaire represents and warrants to the Authority that:

- a) It is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;
- b) It has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- c) It has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- d) along with its Associates, it has the financial standing and capacity to undertake the Project;
- e) the obligations of the Concessionaire under this Agreement will be legally valid, binding and enforceable against it in accordance with the terms hereof;
- f) It is subject to laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
- g) All the information furnished in the Bid is, and shall be, true and correct as on the Appointed Date and true, correct and accurate in all respects;
- h) The execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under or accelerate performance required by any of the terms of the Memorandum and Articles of Association of the Concessionaire or any member of the Consortium or any Applicable Laws or any covenant, Agreement, understanding, decree or order to which, it is a Party or by which it or any of its properties or assets is bound or affected;
- i) There are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect on its business, properties or assets or its condition, financial or otherwise, or in any

impairment of its ability to perform its obligations and duties under this Agreement;

j) It has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Governmental Agency which may result in any Material Adverse Effect or impairment of the Concessionaire's ability to perform its obligations and duties under this Agreement;

k) It has complied with all Applicable Laws and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have Material Adverse Effect on its financial condition or its ability to perform its obligations and duties under this Agreement;

l) it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.14 and that the {Selected Bidder/Consortium Members}, whose technical and financial capacity was evaluated for the purposes of qualification and short-listing in response to the Request for Proposal, shall hold at least, as specified below, during the Construction Period and five years thereafter together with {its/their} Associates:

- i. 51% (fifty one percent) of the subscribed and paid up Equity share capital of the Concessionaire as Lead member;
- ii. 26% (twenty six percent) of the subscribed and paid up Equity share capital of the Concessionaire for the technical member and,
- iii. 5% (five percent) of the Total Project Cost specified in the Concession Agreement;

Provided further that any such request made under Sub-Clause l of Clause 7.1, at the option of the Authority, may be required to be accompanied by a suitable no objection letter from Lenders;

m) the {Selected Bidder/ Consortium Members and its/their Associates} have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with this Agreement;

n) Each Consortium Member was and is duly organized and existing under the laws of the jurisdiction of its incorporation and has full power and authority to consent to and has validly consented to and requested Authority to enter into this Agreement with the Concessionaire pursuant to the LOA and has agreed to and unconditionally accepted the terms and conditions

set forth in this Agreement;

o) All rights and interests of the Concessionaire in and to the Project shall pass to and vest in Authority on the Transfer/ Termination Date free and clear of all liens, claims, and Encumbrances without any further act or deed on the part of the Concessionaire or Authority and that none of Project Assets including materials, supplies or equipment forming part thereof shall be acquired by the Concessionaire subject to any Agreement under which a security interest or other lien or Encumbrance is retained by any person save and except as expressly provided in this Agreement;

p) No representation or warranty by the Concessionaire contained herein or in any other document furnished by it to Authority, or to any Governmental Agency in relation to Applicable Permits contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;

q) It warrants that no sums, in cash or kind, have been paid or will be paid by or on behalf of the Concessionaire, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of Authority in connection therewith;

r) all information provided by the {Selected Bidder/ Consortium Members} in response to the Request for Proposals or otherwise, is to the best of its knowledge and belief, true and accurate in all material respects; and

s) all undertakings and obligations of the Concessionaire arising from the Request for Proposals or otherwise shall be binding on the Concessionaire as if they form part of this Agreement.

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

The Authority represents and warrants to the Concessionaire that:

a) Authority is duly organized and validly existing under the laws of India;

b) Authority has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;

c) Authority has taken all necessary action to authorize the execution, delivery and performance of this Agreement;

d) This Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof; and

e) it has no knowledge of any violation or default with respect to any order,

writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any Material Adverse Effect on the Authority's ability to perform its obligations under this Agreement;

f) To the best of the Authority's knowledge and belief, Project Site is free from all Encumbrances and is available for immediate development in accordance with the terms of this Agreement.

g) To the best of the Authority's knowledge and belief, there are no actions, suits, proceedings or investigations pending against it, at law or in equity, before any court or Governmental Authority, the outcome of which may result in the breach of or constitute a default of the authority under this Agreement, or constitute a default of the Authority under this Agreement or result in impairment of the Authority's ability to perform its obligations and duties under this Agreement.

h) it has complied with Applicable Laws in all material respects;

i) it has the right, power and Authority to manage and operate the Project up to the Appointed Date; and it has good and valid right to the Site, and has power and authority to grant a license in respect thereto to the Concessionaire.

### **7.3 Disclosure**

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

## **ARTICLE 8: DISCLAIMER**

### **8.1 Acceptance of Project Site**

8.1.1 The Concessionaire acknowledges that it has either itself or through its shareholders undertaken a due diligence over the Project Site, and all aspects of the Project. For the purposes of this Agreement, Concessionaire shall be deemed to have: -

a) inspected Project Site and all buildings thereat and its surroundings;

b) satisfied itself as to the nature of the climatic, noise level, hydrological and general physical conditions of Project Site, the nature of the ground and subsoil, the proposed form and nature of the Project, and the nature of the design, work and materials necessary for the performance of its obligations under this Agreement.

c) satisfied itself as to the means of communication with, access to and accommodation at Project Site, it may require or as may be otherwise necessary for the performance of its obligations under this Agreement;

d) obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect its rights and obligations hereunder and its other rights and obligations under or pursuant to this Agreement;

e) has determined the nature and extent of the difficulties, inputs, costs, time, resources, risks and hazards that are likely to arise or may be faced by it in the course of the performance of its obligations under this Agreement and for undertaking the Project;

**8.2** Concessionaire further acknowledges that it, or any entity claiming under it, shall have no recourse against Authority if it is, at a later date, found that the Project Site is deficient in any manner whatsoever, and in the event of any mistake made or misapprehension harbored by the Concessionaire in relation to any of the foregoing provisions of Article 8. If a deficiency is found, Concessionaire acknowledges and agrees that it shall, at its own cost, take all appropriate measures to remedy the same in order to undertake the Project.

**8.3** Concessionaire acknowledges and hereby accepts the difficulties, inputs, costs, time, resources, risks and hazards associated with the performance of its obligations hereunder and hereby agrees that Authority shall not be liable for the same in any manner whatsoever to Concessionaire, other than as expressly provided in this Agreement.

**8.4** It is clarified that all fossils, antiquities, structures and/or other remains or



things either of archaeological or of particular geological interest discovered at Project Site or in the course of carrying out any work shall not be the property of Concessionaire and Concessionaire shall have no right or interest in such fossils, antiquities and structures.

## **8.5 Deemed Knowledge and Disclaimer**

- 8.5.1 Subject to the provisions of this Agreement, the Concessionaire shall be fully and exclusively responsible for, and shall bear the financial, technical, commercial, legal and other risks in relation to the design, financing, construction, completion, commissioning, maintenance, operation, management and development of the Project and all its other rights and obligations under or pursuant to this Agreement regardless of whatever risks, contingencies, circumstances and/or hazards may be encountered (foreseen or not foreseen) and notwithstanding any change(s) in any of such risks, contingencies, circumstances and/or hazards on exceptional grounds or otherwise and whether foreseen or not foreseen and the Concessionaire shall have no right whether express or implied to bring any claim against, or to recover any compensation or other amount from, the Authority and/or any of their agencies other than in respect of those matters in respect of which express provision is made in this Agreement.

## **Part III – Development and Operations**

## ARTICLE 9: PERFORMANCE SECURITY

### 9.1 Performance Security

9.1.1 The Performance Security for this Concession Agreement include:

- a) **“Construction Performance Security”** in the form of Bank Guarantee, for “Construction Period”;
- b) **“Operation Performance Security”** in the form of Bank Guarantee, for “Operation Period”.

9.1.2 The Concessionaire has, for the performance of its obligations, provided to the Authority an irrevocable and unconditional guarantee of Construction Performance Security in accordance with Clause 4.1.2, valid from the Effective Date for a period of 36 months from a Bank for an amount of Rs. .... (Rupees ..... only) or 5% of Total Project Cost (whichever is higher), in the form set forth in Schedule-F (the **“Construction Performance Security”**).

The Selected Bidder/Concessionaire shall keep the Construction Performance Security, valid at all times during the stipulated period of Thirty-Six months from the Effective Date and any other extended period beyond Thirty-Six months, as required by the Authority. The Concessionaire shall renew it 30 (thirty) days prior to the expiry of its validity, as applicable;

9.1.3 The Concessionaire shall provide an Operation Performance Security in the form of Bank Guarantee (the **“Operation Performance Security”**), no later than 15 days from the Commercial Operation Date, for an amount of Rs. .... (Rupees ..... Only) or 1% of Total Project Cost (whichever is higher) valid for a period of 3 consecutive years. A renewed Operation Performance Security is to be submitted every third year as specified in Clause 9.1.3 (b), for next three years.

a) The Concessionaire’s failure to provide /and or maintain the Operation Performance Security, in accordance with the provisions of this Article 9.1 shall (i) entitle the Authority to call in and invoke the Construction Performance Security / subsisting Operation Performance Security, as the case may be and retain and appropriate the same; and (ii) constitute the same as a Concessionaire Default entitling the Authority to Terminate this Agreement under the provision hereof;

b) The Selected Bidder/Concessionaire shall keep the Operation Performance Security, valid at all times during the stipulated period and renew it 30 (thirty) days prior to the expiry of its validity, as applicable;

### 9.2 Appropriation of Performance Security

9.2.1 In the event of the Concessionaire being in default in the due and faithful

performance of its obligations under this Agreement and failing to remedy such default within the Cure Period, the Authority shall without prejudice to its other rights and remedies hereunder be entitled to encash and appropriate the Performance Security (for Construction Period or Operation period, as the case may be) as Damages for such default. Upon such encashment and appropriation of the Performance Security, Authority shall grant a period of 15 (fifteen) days to the Concessionaire to provide fresh Performance Security and the Concessionaire shall within the time so granted furnish to Authority such Performance Security failing which Authority shall be entitled to terminate this Agreement under clause 31.1.

9.2.2 Notwithstanding anything to the contrary contained in clause 9.2.1, upon furnishing of fresh Performance Security in accordance with clause 9.2.1, the Concessionaire shall be granted an additional period of 60 (Sixty) days as Cure Period for remedying the defaults and complying with his obligations under this Agreement. In the event of the Concessionaire continuing to be in breach of the provisions of this Agreement after such Cure Period, Authority shall be entitled to terminate this Agreement under the provisions of Clause 31.1.

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

a) Upon provision of the Operation Performance Security pursuant hereto, the Authority shall release the Construction Performance Security to the Concessionaire in terms hereof.

b) The Authority shall release the Operation Performance Security forthwith, upon expiry of 150 (one hundred and fifty) days from the Transfer Date, subject however to deductions towards any outstanding amount payable to Authority by Concessionaire in terms hereof.

c) The Performance Security shall remain in force and effect by the Concessionaire, throughout the Concession Period. Upon request made by the Concessionaire for release of the Performance Security along with the particulars which establish satisfaction of the requirements, the Authority shall release the Performance Security forthwith.

## **ARTICLE 10: LICENSE AND ACCESS TO THE PROJECT SITE**

### **10.1 The Site**

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

### **10.2 License and Access**

10.2.1 The Authority hereby grants to the Concessionaire access to the Project Site for carrying out any surveys, investigations, inspections and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of survey, investigations, inspections and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.

10.2.2 In consideration of the payments specified under the agreements, this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, license rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Project Site which is described, delineated and shown in Schedule A hereto (the “**Licensed Premises**”), on an ‘as is where is’ basis, free of any Encumbrances, to develop, operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easement and appurtenances whatsoever to the said Licensed Premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.

10.2.3 It is expressly agreed that the license granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Authority to terminate the license, upon the Termination of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Project Site by the Concessionaire or its sub-licensees, the license in respect of the Project Site shall automatically

terminate, without any further act of the Parties, upon Termination of this Agreement.

10.2.4 The Concessionaire hereby irrevocably appoints the Authority (or its nominee) to be its true and lawful attorney, to execute and sign in the name of the Concessionaire a transfer or surrender of the license granted hereunder at any time after the Concession Period has expired or has been terminated earlier in terms hereof, a sufficient proof of which will be the declaration of any duly authorized officer of the Authority, and the Concessionaire consents to it being registered for this purpose.

10.2.5 It is expressly agreed that trees on the Project Site are property of the Authority except that the Concessionaire shall be entitled to exercise usufructuary rights thereon during the Concession Period.

### **10.3 Handover of the Project Site**

10.3.1 The Parties shall, within 7 (seven) days of the Authority notice in this behalf to the Concessionaire prior to Appointed Date, carry out through the Authority Representative and the Concessionaire, on a mutually agreed date and time, inspection of the Project Site and preparation of a memorandum containing an inventory of the Project Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Project Site. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorized representatives of the Parties shall, subject to the provisions of Clause 10.2.2 be deemed to constitute a valid license to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Project Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever.

10.3.2 On and after signing the memorandum referred to in Clause 10.3.1, and until the Transfer Date, the Concessionaire shall maintain a round-the-clock vigil over the Project Site and shall ensure and procure that no encroachment thereon takes place, and in the event of any encroachment or occupation on any part thereof, the Concessionaire shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its cost and expenses.

10.3.3 Upon receiving the Access in respect of any land included in the Schedule A, the Concessionaire shall complete the Construction Works thereon within a reasonable period to be determined by the Independent Engineer in accordance with Good Industry Practice.

### **10.4 Project Site to be free from Encumbrances**

Subject to the provisions of Clause 10.3, the Project Site shall be made available by the Authority to the Concessionaire pursuant hereto free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to the Authority on account of any costs, compensation, expenses and charges for the acquisition and use of such Project Site for the duration of the Concession Period, except insofar as otherwise expressly provided in this Agreement. For the avoidance of doubt, it is agreed that existing rights of way, easement, privileges, liberties and appurtenances to the Licensed Premises shall not be deemed to be Encumbrances. It is further agreed that the Concessionaire accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Project Site.

#### **10.5 Protection of Project Site from Encumbrances**

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

#### **10.6 Special/temporary access to the Project Site**

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

#### **10.7 Access to the Authority, independent testing agency and Independent Engineer**

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

#### **10.8 Geological and archaeological finds**

10.8.1 It is expressly agreed that mining, geological or archaeological rights do not form part of the license granted to the Concessionaire under this Agreement and the Concessionaire hereby acknowledges that it shall not have any mining rights or interest in the underlying minerals, fossils, antiquities, structures or other remnants or things either of particular

geological or archaeological interest and that such rights, interest and property on or under the Project Site shall vest in and belong to the Authority or concerned Authority Instrumentality. The Concessionaire shall take all reasonable precautions to prevent its workmen or any other person from removing or damaging such interest or property and shall inform the Authority forthwith of the discovery thereof and comply with such instructions as the concerned Authority Instrumentality may reasonably give for the removal of such property. For the avoidance of doubt, it is agreed that any reasonable expenses incurred by the Concessionaire hereunder shall be reimbursed by the Authority. It is also agreed that the Authority shall procure that the instructions hereunder are issued by the concerned Authority Instrumentality within a reasonable period.



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

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

### **11.1 Shifting of obstructing utilities**

The Concessionaire shall, subject to Applicable Laws and with assistance of the Authority, undertake shifting of any utility including electric lines, water pipes and telephone cables, to an appropriate location or alignment within or outside the Project Site if and only if such utility causes or shall cause a Material Adverse Effect on the construction, operation or maintenance of the Project. The cost of such shifting shall be borne by the Authority or by the entity owning such utility, if the Authority so directs, and in the event of any delay in shifting thereof, the Concessionaire shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay on the part of the entity owning such electric lines, water pipes or telephone cables, as the case may be.

### **11.2 New utilities and roads**

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

### **11.3 Felling of trees**

The Authority shall assist the Concessionaire in obtaining the Applicable Permits for felling of trees to be identified by the Authority for this purpose if and only if such trees cause a Material Adverse Effect on the construction, operation or maintenance of the Project. The cost of such felling shall be borne by the Authority, and in the event of any delay in felling thereof for reasons beyond the control of the Concessionaire, it shall be excused for

failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. For the avoidance of doubt, the Parties hereto agree that the felled trees shall be deemed to be owned by the Authority and shall be disposed in such manner and subject to such conditions as the Authority may in its sole discretion deem appropriate.

## **ARTICLE 12: PROJECT ASSET DEVELOPMENT**

### **12.1 Covenants in respect of the Concession**

- 12.1.1 In consideration of the development of the Project Site by the Concessionaire and subject to payments to the Authority in accordance with the terms hereof and adherence to the terms and conditions as contained in this Agreement and/or the Project Documents, the Authority permits the Concessionaire unhindered, exclusive and unobstructed right to implement the Project on the Project Site for the Term.
- 12.1.2 The Concessionaire shall be solely responsible to seek connection of, to procure and ensure at its own cost and expense, water, electricity and all other utilities required for the construction, operation and maintenance of Project Assets at the Project Site and the Authority shall not be responsible to provide any infrastructure in relation to any such services and/or utilities. The Authority shall provide reasonable assistance to the Concessionaire in applying for and procuring any such connections for the supply of electricity, water, fuel and other utilities. Provided, however, the Concessionaire shall not be permitted to dig bore wells or extract ground water at any point of time, without the prior permission/approval from the concerned local/State/Central Government authorities under Applicable Laws.
- 12.1.3 It is agreed that the Concessionaire shall, with effect from the Appointed Date, pay all present and future outgoings, cesses, taxes (including municipal taxes), rates and other charges whatsoever and all increases thereto, in respect of the Project Site on the due dates thereof and the Authority shall not be liable to pay the same. The Concessionaire shall also pay all taxes (including GST), levies, import duties, fees (including any Concession Fees) and other charges, dues, assessments or outgoings payable in respect of the Concession Fee (including GST) or in respect of Project or in respect of the materials stored therein which may be levied by any Governmental Authority. If the Concessionaire fails to pay any of the above charges, the Authority shall be entitled, but not obliged to pay the same and recover the same from the Concessionaire along with interest at a rate per annum of 5% above prime lending rate of State Bank of India (or in the absence of State Bank of India's prime lending rate, the highest lending rate applicable to term lending).
- 12.1.4 The Authority shall, at all times during the construction of Project Assets be entitled to inspect the Project Site through its duly authorized representative. Provided however, the duly authorized representatives of the Authority shall not interfere with or prevent the Concessionaire's officials from discharging their functions.
- 12.1.5 During the Term, the Concessionaire shall not transfer or create any Encumbrance over the Project Site.

- 12.1.6 The Parties recognize and agree that nothing contained in this Agreement shall be construed to constitute a transfer of title in the Project Site in favor of the Concessionaire. The Concessionaire shall not at any time during the Term, assert any ownership rights over the Project Site.
- 12.1.7 The Concessionaire shall at all times be responsible for the Project in accordance with this Agreement and in compliance with the local building byelaws/regulations and development requirements prescribed in Schedule B, C and D hereto.
- 12.1.8 The Concessionaire shall undertake the Project using due care and diligence in a professional manner, using sound engineering and design principles and project management and supervisory procedures and in accordance with Good Industry Practice.
- 12.1.9 The Concessionaire shall at all times, obtain and maintain all Applicable Permits which are required by Applicable Law to undertake the Project and all certifications in accordance with Schedule E. The Authority shall provide all reasonable assistance to the Concessionaire to obtain and maintain all such Applicable Permits. The Concessionaire shall apply for and obtain all Applicable Permits required to be obtained in the name of the Authority, for which purposes the Authority shall extend assistance to the Concessionaire on a best efforts basis, including through executing all documents required to apply for such approvals. The Parties agree that the Concessionaire shall indemnify the Authority in respect of any loss caused to, or suffered by the Authority, arising out of a breach of the terms of any Applicable Permit taken in the name of the Authority.
- 12.1.10 The Concessionaire shall be obliged to achieve all Project Milestones as per Project Completion Schedule set forth in Schedule H, and commence the commercial operations of all permissible Project Assets on the Project site, within a period of 1095 (one thousand ninety five) days from the Appointed Date. Provided that, upon occurrence of an Authority default which substantially prevents the Concessionaire from achieving commercial operations of all permissible Project Assets on Project site within a period of 1095 (one thousand ninety five) days from the Appointed Date, the Concessionaire shall be entitled to a day for day extension beyond the aforesaid period, equivalent to the time taken by the Authority to complete its obligations hereunder. Further, subject to the Concessionaire having made timely applications for all Applicable Permits, in the event of a delay [as reasonably determined by the Authority] in the receipt of Applicable Permits, the Authority may permit a day for day extension beyond the aforesaid 1095 (one thousand ninety five) days equivalent to the delay in receipt of such Applicable Permits.
- 12.1.11 Concessionaire will undertake the Project during the Term with due regard to safety precautions, fire protection, security, transportation, delivery of

- goods, materials, control of pollution, maintenance of competent personnel and labour and industrial relations as per the codal provision, amended up to date and the mandatory compliances as per the Schedule E.
- 12.1.12 Concessionaire will ensure that all materials, equipment, machinery, etc. installed and/or used at Project site will be of sound and merchantable quality, that all workmanship shall be in accordance with globally Good Industry Practices applicable at the time of installation, construction or repair and that each part of the construction will be fit for the purpose for which it is required.
- 12.1.13 Concessionaire shall be responsible for safety, soundness and durability of the Project Assets constructed upon Project site and shall ensure their compliance with the specifications and standards set out in Schedule D.
- 12.1.14 Concessionaire shall be responsible for the operation and maintenance of the Project and shall at all times ensure that the Project Assets upon the Project site are operated, maintained and managed in accordance with the Good Industry Practice and guidelines as laid down in Schedule L. The Concessionaire shall have the right to undertake such operation and maintenance itself, or through a sub-contractor, provided however, that it shall always be the liability of the Concessionaire to ensure compliance with the operation and management standards prescribed in this Agreement.
- 12.1.15 The Concessionaire shall obtain and maintain in force on and from the Appointed Date all insurance in accordance with the provisions of this Agreement and Good Industry Practice;
- 12.1.16 The Concessionaire shall procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project Assets located upon the Project site;
- 12.1.17 After receiving possession of Project site, the Concessionaire shall ensure that such land remains free from all encroachments during the Term, provided however, upon request of the Authority, the Concessionaire shall provide to the Authority or to the relevant Governmental Authority as requested by the Authority, such temporary access to the Project site as is required for the provision of services or utilities to Project site;
- 12.1.18 The Concessionaire shall co-operate with all other contractors present on or in the vicinity of the Project site. In the event that the Authority appoints any Contractor to undertake the development of the facilities pursuant to any of the other Project Documents, the Concessionaire shall co-operate with such contractors and their sub-contractors to ensure a coordinated development of the Project site;
- 12.1.19 In the event that there are any existing structures laid upon or on the Project

site, then the Concessionaire shall be required to demolish/dispose all such structures at its own risk and cost, with the prior written approval of the Authority, which shall not be unreasonably withheld;

- 12.1.20 The Concessionaire shall not set up labour camp and/or lay down areas within the Site.
- 12.1.21 During construction, the Concessionaire shall use only those approach roads to the Project Site which are specified by the Authority, provided that the Authority may notify any change in such approach routes which shall be followed by the Concessionaire.
- 12.1.22 The Concessionaire shall indemnify the Authority against all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be suffered by them on account of anything done or omitted to be done by the Concessionaire in connection with the performance of its obligations under this Agreement, provided however that the Concessionaire's obligation to indemnify the Authority shall only extend to all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be claimed during the Term or for a period of two years after the expiry of the Term, in relation to any claim for an event occurring during the Term.
- 12.1.23 The Concessionaire shall, from time to time, promptly pay all the charges/bills for the usage of infrastructure facilities provided to them by the relevant Governmental Authority or by the Authority.
- 12.1.24 The Authority covenants that it shall not seek or agree to an amendment of the terms of the Agreement so as to adversely affect the grant to the Concessionaire hereunder, without the consent of the Concessionaire.

## **12.2 Sub-Contracts**

- 12.2.1 Concessionaire shall have the right to grant a sub-contract with regard to any activity relating to the Project, including but not limited to the design, construction, operation, maintenance or any part thereof, provided always that notwithstanding the sub-contract, Concessionaire shall retain overall responsibility, obligation and liability in relation to the Project. It is clarified that Concessionaire shall remain liable and responsible for any acts, omissions or defaults of any Sub-contractor and shall indemnify the Authority in respect thereof. Provided further that Concessionaire shall ensure that all such sub-contracts are in compliance with the terms of this Agreement.
- 12.2.2 Concessionaire shall have license rights over all the Project Assets constructed upon Project Site and shall have no right to grant licenses of spaces within the Project Assets (including the Project site or any part thereof) to third parties.

12.2.3 The Concessionaire shall further procure that any contracts entered into by any counter-party, licensees, as the case may be and relating to the Project Assets shall be for a duration not exceeding the expiry of the Term hereof.

The Concessionaire shall ensure all rights of the Authority under Article 42.1 (ii) are incorporated in all contracts between Concessionaire and third parties with a specific obligation on the parties to such contracts to enter into novation agreement with the Authority upon exercise of its option by the Authority under said Article 42.1(ii).

## **ARTICLE 13: DEVELOPMENT REQUIREMENTS**

- 13.1** Without prejudice to the generality of anything contained in this Agreement and compliance with the Development Requirements set out in Schedule B, the Concessionaire shall inter alia comply with the following in order to achieve the above-mentioned objective:
- 13.1.1 Concessionaire shall, in addition to compliance with Applicable Law, at all times during the Term hereof, undertake the development, operation and maintenance of the Project Assets in accordance with the requirements set forth in Schedule A, B, C, D & L hereof. The Concessionaire shall also use best endeavors to comply with the requirements of Schedule A, B, C, D & L hereto. Prior to making any application to the State/Central Government Authority in relation to sanction of any plans for construction of Project Assets, the Concessionaire shall be required to get a no-objection in respect of development/layout plans from the Authority. Any subsequent changes to said development/layout plans would also require a no objection certificate from the Authority, which certificate shall not be unreasonably withheld by the Authority. All constructions shall be in accordance with the development plans in respect of which the Authority has issued a no-objection certificate. In the event, the Authority is of the reasonable opinion that the Project Assets developed by Concessionaire do not comply with the requirements specified in Schedule L, the Authority shall have a right to issue a written notice to the Concessionaire requiring the Concessionaire to cure the defect and develop the Project Assets as per the requirements specified in Schedule B, within the period specified in such notice. Notwithstanding anything set forth herein, the Concessionaire agrees and recognizes that the Concessionaire shall not be entitled to commercially operate an Project asset on Project Site if the same does not conform to the requirements of Schedule B. The Parties agree that a no-objection certificate granted by the Authority shall in no event amount to certifying the conformity of the Concessionaire's development layout plans with Applicable Law or discharge the Concessionaire from the requirement of obtaining Applicable Permits. The Authority shall be required to communicate its no-objection or reject the development layout plans within a period of 15 Business Days from the receipt of the development lay-out plans, failing which the Authority shall be deemed to have granted its no-objection with respect to the development / lay-out plans.
- 13.1.2 Any development and/or construction of any Project Asset on Project Site shall at all times comply with the requirements of Schedule E and the Concessionaire shall not make any Project Asset on Project site other than those stipulated in Schedule B. The Concessionaire agrees and recognizes that the Concessionaire shall not be entitled to commercially operate a Project Asset on Project Site if the same does not conform to the



requirements of Schedule B and C.

## **ARTICLE 14: CONSTRUCTION OF THE PROJECT FACILITIES**

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

Prior to commencement of Construction Works, the Concessionaire shall:

- a) Submit to the Authority and the Independent Engineer its Detailed Project Report, detailed design, drawings, construction methodology, quality assurance procedures, cost estimates and the procurement, engineering and construction time schedule for completion of the project in accordance with the Project Completion Schedule as set forth in Schedule-H;
- b) Appoint its representative duly authorized to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;
- c) Undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, Applicable Laws and Applicable Permits;
- d) Undertake all the statutory approvals or permits required to be taken before the commencement of the Construction Works from State/Central Government Authorities; and
- e) Make its own arrangements for construction and procurement of materials needed for the Project under and in accordance with Applicable Laws and Applicable Permits.

### **14.2 Maintenance during Construction Period**

During the Construction Period, the Concessionaire shall maintain, at its cost, the existing facilities (e.g. road, water supply system, sewerage and other) so that the Site surroundings and safety thereof are at no time materially inferior as compared to their condition 7 (seven) days prior to the date of this Agreement, and shall undertake the necessary repair and maintenance works for this purpose; provided that the Concessionaire may, at its cost, interrupt and divert the facility if such interruption and diversion is necessary for the efficient progress of Construction Works and conforms to Good Industry Practice; provided further that such interruption and diversion shall be undertaken by the Concessionaire only with the prior written approval of the Independent Engineer which approval shall not be unreasonably withheld. For the avoidance of doubt, it is agreed that the Concessionaire shall at all times be responsible for ensuring safe operation of the Project.

### **14.3 Detailed Project Report**

In respect of the Concessionaire's obligations relating to the Detailed Project Report of the Project as set forth in Schedule-I, the following shall apply:

a) The Concessionaire shall, at its cost, charges and expenses, prepare or cause preparation and submit within 60 (sixty) days of the Effective Date, with reasonable promptness the Detailed Project Report, Designs and Drawings for the Project Facilities in such sequence as is consistent with the Project Completion Schedule, 3 (three) copies each of all the documents to the Authority/Independent Engineer for review.

b) The DPR shall, inter alia, set out the full details of the developmental activities proposed to be carried out by the Concessionaire for implementation of the Project, proposed order, sequence and method of working, the steps, procedures and processes undertaken and to be undertaken by the Concessionaire, the Project Completion Schedule with the Project Milestones, detailed schedule bar charts / PERT networks with milestone dates, master plan and building plan of the Project, including the site development, proposed construction activities, names of likely Sub-contractors/vendors etc., plans for mobilization of finances, proposed arrangements for operating and managing the Project, the organization chart of the Concessionaire and such other similar details which define and clarify the method and direction of the Concessionaire's plans for the implementation of the Project;

c) By submitting the Detailed Project Report, Designs and Drawings for review to the Authority/ Independent Engineer, the Concessionaire shall be deemed to have represented that it has determined and verified that the Detailed Project Report, Designs and Drawings are in conformity with the Scope of the Project, Specifications and Standards, Applicable Laws and Good Industry Practice.

d) Within 15 (fifteen) days of the receipt of the Detailed Project Report, Designs and Drawings, the Independent Engineer shall review the same and convey its observations to the Concessionaire with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards.

e) If the aforesaid observations of the Authority/ Independent Engineer indicate that the Detailed Project Report, Designs and Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such documents shall be revised by the Concessionaire and resubmitted to the Authority/ Independent Engineer for review. The Authority/ Independent Engineer shall give its observations, if any, within 21 (twenty-one) days of receipt of the revised documents.

- f) No review and/or observation of the Authority/ Independent Engineer and/or its failure to review and/or convey its observations on any Drawings shall not relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the Authority be liable for the same in any manner.
- g) The project development guidelines which may be considered by the Authority with respect to the ecosystem of the project surrounding area shall be incorporated by the Concessionaire.
- h) Without prejudice to the foregoing provisions of this Clause 14.3, the Concessionaire shall submit to the Authority for its information, its Detailed Project Report, Designs and Drawings. The Authority shall respond within 30 (thirty) days of the receipt of such documents. The Concessionaire will be obliged to make changes, if any, as suggested by the Authority. The provisions of this Clause 14.3 shall apply mutatis mutandis to the review and comments hereunder.
- i) Within 90 (ninety) days of COD, the Concessionaire shall furnish to the Authority and the Independent Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in CD/DVD or in such other medium as may be acceptable to the Authority, reflecting the Project/Project Facilities as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Project Facilities and setback lines, if any, of the buildings and structures forming part of the Project Facilities.
- j) The Concessionaire shall not be entitled to any extension of time for completing construction or any other relief on account of delay caused due to providing any clarification or in resubmitting the DPR, Designs and Drawings. Provided however the Authority may suitably extend the Construction Period or provide other relief to compensate for any such delay not attributable to the Concessionaire and which has a Material Adverse Effect.
- k) The Concessionaire shall not change any DPR, Designs and Drawings, specifications and calculations approved by the Independent Engineer and the Authority under this Agreement, without the prior written consent of the Authority.
- l) The Concessionaire shall obtain sanction to the building plans for the Project Facilities, with necessary designs, plans and specifications, as necessary to commence and undertake construction, from the proper municipal/local bodies/State or Central Government departments or Authority, at its own expense.

m) At any time during the Concession Period, the Concessionaire shall not revise the DPR, Designs and Drawings, including expansion of existing Project Facilities/develop additional Project Facilities as permitted under the provisions of this Agreement, without the prior approval of the Authority.

#### **14.4 Construction standards and maintenance of the Project**

- 14.4.1 The Concessionaire shall ensure that all contract(s) and arrangement(s) entered into in relation to the Construction Works shall (to the extent such provisions can be reasonably obtained in the market concerned) include provisions whereby the relevant Contractor warrants that each part of such Works carried out there under shall be fit for its purpose and free from all defects in design, workmanship and materials;
- 14.4.2 In the execution of the Construction Works, the Concessionaire shall procure coordination amongst and avoidance of conflicts in the working of the Contractors, including all types of suppliers, sub-contractors, agents, advisors and consultants. The Concessionaire shall monitor and supervise the activities of the Contractors, retained by it to fulfill its obligations hereunder, under the terms of their respective contracts;
- 14.4.3 The Concessionaire shall, by itself or through its Contractors, at its cost and risk undertake the development of the Site, including land filling, levelling, clearing, landscaping and demarcation and division of the Site etc. for establishment of the Project Facilities, in accordance with the provisions of this Agreement, including the Specifications and Standards and Good Industry Practice. Each of the Project Facilities shall have adequate facilities with respect to water supply, power, entry & exit arrangement, fire safety provisions, etc.
- 14.4.4 The Concessionaire shall at its responsibility arrange for materials such as bricks, cement, steel, aggregates, soil, bituminous and asphalt materials, and any other materials used in undertaking the Construction Works, as well as equipment, machinery, tools and ancillary materials such as shuttering and scaffolding, bearings, joint fillers and similar materials. The Concessionaire shall make arrangements for transport, loading and unloading, stacking and proper storage (including making sheds) for all materials and equipment. The Independent Engineer/Authority shall have the right to inspect and check the quality and quantity of the materials and equipment and their storage in compliance with the terms of this Agreement.
- 14.4.5 The Concessionaire shall organize the Site during the period of construction with regard to safety precautions, fire protection, security, transportation, delivery of goods, materials, plant and equipment, control of pollution, maintenance of competent personnel and labor and industrial relations and general site services including, without limitation, access to

and on the Site.

- 14.4.6 The Concessionaire shall ensure that the Works shall comprise only materials and goods which shall be of sound quality and which shall have been manufactured and prepared and all workmanship shall be in accordance with the Specifications and Standards and Good Industry Practice and that each part of the Works shall be fit for the purpose for which it is required as stated in or as may be reasonably inferred from such plans.
- 14.4.7 The Concessionaire shall carry out or cause to be carried out the Works with the skill, care and diligence to be expected of appropriately qualified and experienced professional designers, engineers and contractors with experience of work similar in scope and nature to that required under this Agreement. The Concessionaire shall design, engineer and execute the construction and implementation of the Works using the best design and engineering principles and practices.
- 14.4.8 The Concessionaire shall ensure that in fulfilling its obligations hereunder, it shall procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for the designs, software, materials, methods, processes and systems used or incorporated into the Works undertaken by it and indemnify and keep indemnified the Authority and its advisors and consultants against all costs, damages, liabilities or consequences arising out of any breach by the Concessionaire in this behalf.

#### **14.5 Construction Commencement & Construction Works**

- 14.5.1 On or after the Appointed Date, the Concessionaire shall undertake construction of the Project as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D.
- 14.5.2 The Concessionaire shall construct the Project in accordance with the Project Completion Schedule set forth in Schedule-H. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Project Milestone in Schedule-H, unless such failure has occurred due to Force Majeure or for reasons attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Construction Performance Security for delay of each day until such Project Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-H shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-H has been amended as above; provided further that in the event COD is achieved on or before the Scheduled Date, the Damages paid

under this Clause 14.5.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 14.5.2 shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.

## **ARTICLE 15: MONITORING AND SUPERVISION OF CONSTRUCTION**

### **15.1 Monthly progress reports**

During the Construction Period, the Concessionaire shall, no later than 7 (seven) days after the close of each month, furnish to the Authority and the Independent Engineer a monthly report on progress of the Construction Works and shall promptly give such other relevant information as may be required by the Independent Engineer.

### **15.2 Inspection**

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

### **15.3 Delays during construction**

Without prejudice to the provisions of Clause 14.5.2, if the Concessionaire does not achieve any of the Project Milestones or the Independent Engineer shall have reasonably determined that the rate of progress of Construction Works is such that the Project completion is not likely to be achieved by the Scheduled Project Completion Date, it shall notify the Concessionaire to this effect, and the Concessionaire shall, within 15 (fifteen) days of such notice, by a communication inform the Independent Engineer in reasonable detail about the steps it proposes to take to expedite progress and the period within which it shall achieve COD.

### **15.4 Suspension of unsafe Construction Works**

15.4.1 Upon recommendation of the Independent Engineer to this effect, the Authority may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the Authority, such work threatens the safety of the users or people.

15.4.2 The Concessionaire shall, pursuant to the notice under Clause 15.4.1, suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Authority and thereupon carry out



remedial measures to secure the safety of suspended works and the users. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Authority recommending whether or not the Suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Engineer, the Authority shall either revoke such Suspension or instruct the Concessionaire to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 15.4 shall be repeated until the Suspension hereunder is revoked.

15.4.3 Subject to the provisions of Clause 28.7, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the period of Suspension (the “**Preservation Costs**”) shall be borne by the Concessionaire; If the Suspension pursuant to Sub-clause 15.4.2 above, is caused by:

a) any reason other than default or breach of this Agreement by the Concessionaire including breach of any of the obligations of the Concessionaire under this Agreement, the Preservation Costs shall be borne by the Concessionaire;

b) reason of any Force Majeure Event, the Preservation Costs shall be borne by the Concessionaire save and except to the extent otherwise expressly provided in Article 28.

15.4.4 If Suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates set forth in the Project Completion Schedule to which the Concessionaire is reasonably entitled, and shall notify the Authority accordingly whereupon the Authority shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Engineer.

## ARTICLE 16: COMPLETION

- 16.1** Upon the completion of the design, development, construction and other activities, but prior to seeking completion certificate from Authority, in relation to the Project, in accordance with the terms of this Agreement, as may be required to bring the Project into commercial operation, the Concessionaire shall intimate Independent Engineer in writing, together with all Applicable Permits required for the purposes of commencement of commercial operations ("**Completion Notice**"). Independent Engineer shall, within 15 (fifteen) Business Days of the receipt of the Completion Notice, inspect the Project to ascertain its compliance with Applicable Laws and the terms of this Agreement including but not limited to Schedule B, C, and D.
- 16.2** In the event that the Project complies with this Agreement including but not limited to Schedule B, C, D, the Independent Engineer shall submit a compliance report to the Authority for information. The Authority may, if required, conduct a joint inspection of the Project Asset with the Independent Engineer. On finding the aforesaid report satisfactory, the Authority shall direct the Independent Engineer to issue a notice to the Concessionaire (the "**Commencement Notice**").
- If the Project does not comply with the Applicable Laws and/or this Agreement including but not limited to Schedule B, C & D, the Independent Engineer shall share a copy of a non-compliance report to the Authority and Concessionaire for information, indicating the deviations and requiring the Concessionaire to make such alterations to the Project as would be required to ensure its conformity. Upon receipt of report, the Authority may, if required, conduct a joint inspection with Independent Engineer. The Authority on finding the aforesaid report correct, shall direct the Independent Engineer to issue a notice to the Concessionaire, to make such alterations to the Project to ensure its conformity with the Applicable Laws and/or this Agreement including but not limited to Schedule B, C & D ("**Cure Notice**").
- 16.3** In the event that Independent Engineer issues a Cure Notice in accordance with Article 16.2, the Concessionaire shall undertake the alterations, that are required in terms of the Cure Notice, provided that such alterations are permissible as per Applicable Laws, where after the Concessionaire may issue another Completion Notice in accordance with Article 16.1.
- 16.4** Upon receipt of a Commencement Notice from Independent Engineer and any other Applicable Permits, the Concessionaire may commence commercial operation of the Project (the "**COD or Commercial Operation Date**").
- 16.5** The Independent Engineer shall issue either the Commencement Notice or the Cure Notice within fifteen (15) days of the inspection of the Project,

pursuant to the receipt of the Completion Notice. If Independent Engineer fails to issue either a Commencement Notice or a Cure Notice within the aforesaid period, Independent Engineer shall be deemed to have granted a Commencement Notice in respect of the Project.

**16.6** The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the Project Completion Schedule set forth in Schedule H and other provisions of this Agreement on a date not later than 1095 (One Thousand Ninety Five) days from the Appointed Date (**the “Scheduled Project Completion Date”**).

**16.7** If the COD is not achieved prior to the 61st day of the Scheduled Completion Date for any reason other than conditions constituting Force Majeure or for reasons attributable to Authority or any Governmental Agency, the Concessionaire shall pay to Authority as daily Damages for delay in the achievement of the COD, an amount calculated at the rate of 0.1% (point one per cent) of the Total Project Cost per week or part thereof.

In the event that the COD is not achieved within 180 (one hundred and eighty days) days of the Scheduled Completion Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, the Authority shall be entitled to terminate this Agreement.

**16.8** Authority shall not be responsible for any loss of business, profit, goodwill or any other loss caused to the Concessionaire due to a delay in the commencement of commercial operations of the Project Asset on account of issue of a Cure Notice by Independent Engineer.

## **ARTICLE 17: CHANGE OF SCOPE**

### **17.1 Change of Scope**

17.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the Scope of the Project as contemplated by this Agreement or arise due to the change in development controls as defined in Schedule B (the “Change of Scope”). Any such Change of Scope shall be made in accordance with the provisions of this Article 17 and the costs thereof shall be borne by the Concessionaire.

17.1.2 If the Concessionaire proposes at any time that a Change of Scope is required for providing safer and improved services or due to the change in development controls, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings therefore in accordance with this Article 17 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope. In case of acceptance of the proposal, all the cost and expenses shall be borne by the Concessionaire for the Change of Scope.

### **17.2 Procedure for Change of Scope initiated by Authority or Concessionaire**

17.2.1 In the event of the Authority determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the “Change of Scope Notice”).

17.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Authority such information as is necessary, together with preliminary Documentation in support of:

a) the impact, 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.

17.2.3 In the event of the Concessionaire proposes that a Change of Scope is required, it shall submit to the Authority a proposal with preliminary Drawings and other Documentation including information like implementation time and cost for consideration.

17.2.4 Upon receipt of information set forth in Clause 17.2.1 and 17.2.3, if the Authority decides to proceed with the Change of Scope, it shall convey its

preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time for implementation thereof. Upon reaching an agreement, the Authority shall issue an order (the “Change of Scope Order”) requiring the Concessionaire to proceed with the performance thereof.

## **ARTICLE 18: OPERATION AND MAINTENANCE**

### **18.1 O&M obligations of the Concessionaire**

18.1.1 During the Operation Period, the Concessionaire shall operate and maintain the Project in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Project to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Specifications and Standards and Good Industry Practice. The obligations of the Concessionaire hereunder shall include:

- a) permitting safe, smooth and uninterrupted use of Project Facilities during normal operating conditions;
- b) collecting and appropriating the revenues;
- c) minimizing disruption in the event of accidents or other incidents-affecting the safety and use of the Project Facilities by providing a rapid and effective response and maintaining liaison with emergency services of the State;
- d) carrying out periodic preventive maintenance of the Project;
- e) undertaking routine maintenance including prompt repairs of cracks, joints, drains, markings, lighting, signs and other control devices;
- f) undertaking major maintenance such as repairs to structures, and refurbishment of parking system and other equipment;
- g) preventing, with the assistance of concerned law enforcement agencies, any unauthorized use of the Project;
- h) preventing, with the assistance of the concerned law enforcement agencies, any encroachments on the Project Site;
- i) protection of the environment and provision of equipment and materials therefor;
- j) operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project;
- k) complying with Safety Requirements in accordance with Article 19;
- l) make all necessary payments in time bound manner to the Authority such as Concession Fee or any other payment to comply with the provisions of this Agreement;

m) make all necessary/ applicable and time bound utilities payments and taxes to all Central and State Government utilities;

18.1.2 The Concessionaire shall remove promptly from the Project Site all surplus construction machinery and materials, waste materials (including hazardous materials and wastewater), rubbish, debris (including, without limitation, accident debris) and keep the Project in a clean, tidy and orderly condition, and in conformity with Applicable Laws, Applicable Permits and Good Industry Practice.

## **18.2 Maintenance requirements**

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

## **18.3 Maintenance Manual**

18.3.1 The Concessionaire shall in consultation with the Independent engineer prepare not later than 180 (one hundred and eighty) days before the Scheduled Project Completion Date, the repair and maintenance manual (the “**Maintenance Manual**”) for the regular, periodic and preventive maintenance, and shall ensure and procure that at all times during the Operations Period, the Project is maintained in a manner that it complies with the Specifications and Standards and the minimum Maintenance Requirements set forth in Schedule L. The Concessionaire shall supply, at least two months before the COD, 2 (two) copies of the Maintenance Manual to Authority and Independent Engineer.

The Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 18.3.1 shall apply, mutatis mutandis, to such revision.

18.3.2 Without prejudice to the provision of Clause 18.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Assets and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Assets, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

## **18.4 Maintenance Programme**

18.4.1 On or before COD and not later than forty five (45) days before the beginning of each Accounting Year, the Concessionaire, shall provide to Authority, its proposed Programme of preventive and other scheduled maintenance of the Project subject to the minimum Maintenance Requirements set forth in Maintenance Manual and in Schedule ‘L’

necessary to maintain the Project at all times in conformity with the Specifications and Standards (the “**Maintenance Programme**”). Such Maintenance Programme shall include but not be limited to the following:

- a) intervals and procedures for the carrying out of inspection of all elements of the Project;
- b) criteria to be adopted for deciding maintenance needs;
- c) preventive maintenance schedule;
- d) intervals at which the Concessionaire shall carry out periodic maintenance;
- e) intervals for major maintenance and the scope thereof; and
- f) arrangements and procedures for carrying out periodic maintenance.

18.4.2 Within 15 (fifteen) days of receipt of the Maintenance Programme, the Authority shall review the same and convey its comments to the Concessionaire with particular reference to its conformity with the Maintenance Requirements, Maintenance Manual and Safety Requirements.

18.4.3 The Concessionaire may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 18.4.1 and 18.4.2 shall apply mutatis mutandis to such modifications.

## **18.5 De-commissioning due to Emergency**

18.5.1 If, in the reasonable opinion of the Concessionaire, there exists an Emergency which warrants de-commissioning and closure of the whole or any part of the Project/Project facilities, the Concessionaire shall be entitled to de-commission and close the whole or any part of the Project for so long as such Emergency and the consequences thereof warrant; provided that such decommissioning and particulars thereof shall be notified by the Concessionaire to the Authority without any delay, and the Concessionaire shall diligently carry out and abide by any reasonable directions that the Authority may give for dealing with such Emergency.

18.5.2 The Concessionaire shall re-commission the Project/Project facilities or the affected part thereof as quickly as practicable after the circumstances leading to its decommissioning and closure have ceased to exist or have so abated as to enable the Concessionaire to re-commission the Project and shall notify the Authority of the same without any delay.

## **18.6 Project/Project facilities closure**

18.6.1 Save and except as provided in Clause 18.5, the Concessionaire shall not



close any part of the Project/Project facilities for undertaking maintenance or repair works, not forming part of the Maintenance Programme, except with the prior written approval of the Authority. Such approval shall be sought by the Concessionaire through a written request to be made to the Authority, at least 7 (seven) days before the proposed closure and shall be accompanied by particulars thereof. Within 3 (three) days of receiving such request, the Authority shall grant permission with such modifications as it may deem reasonable and necessary in conformity with the Maintenance Manual and Maintenance Programme.

18.6.2 Upon receiving the permission pursuant to Clause 18.6.1, the Concessionaire shall be entitled to close the designated facility for the period specified therein.

### **18.7 Damages for breach of maintenance obligations**

18.7.1 In the event the Concessionaire does not maintain and/ or repair the Project or a part thereof up to and in accordance with the Specifications and Standards and/or in accordance with the Maintenance Programme or the Maintenance Manual, and shall have failed to commence remedial works within 15 (fifteen) days of receipt of notice in this behalf from Authority, or the O&M Inspection Report, as the case may be, Authority shall, without prejudice to its rights under this Agreement, including Termination thereof, be entitled to undertake the repair and maintenance of the Project at the risk and cost of the Concessionaire and to recover the same from the Concessionaire. In addition to recovery of the aforesaid cost of repair and maintenance by the Authority, a sum equal to 25% (twenty-five per cent) of such cost shall also be recovered by the Authority from the Concessionaire as Damages. The Authority shall have the right and the Concessionaire hereby expressly grants to the Authority the right to recover the same directly from the Escrow Account and for that purpose the Concessionaire hereby expressly authorizes Authority and hereby gives irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of Authority under this Clause.

18.7.2 In the event the Authority does not exercise its option to undertake the required repair and maintenance after expiry of the 15 (fifteen) days period set forth in 18.7.1, it shall recover Damages from the Concessionaire for default in operating and maintaining the Project Site in conformity with this Agreement. Such Damages shall be payable after the aforesaid period of 15 (fifteen) days and until the default is cured. The amount of Damages shall be calculated for each day of default at the higher of the following, namely (a) Rs.10,000 (Rs. Ten thousand), and (b) 0.1% (zero point one per cent) of the cost of such repair as estimated by the Authority. Recovery of such Damages shall be without prejudice to the rights of the Authority under this Agreement, including Termination thereof.

18.7.3 Damages set forth in Clause 18.7 may be assessed and specified forthwith by the Authority; provided that the Authority may, in its discretion, demand a smaller sum as Damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder. The Concessionaire shall pay such Damages forthwith and in the event that it contests such Damages, the Dispute Resolution Procedure shall apply.

18.7.4 If in the reasonable opinion of the Authority, the Concessionaire is in Material Breach of its obligations under this Agreement and, in particular, the Maintenance Requirements, and such breach is causing or likely to cause material hardship or danger to the people, the Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Concessionaire to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.

#### **18.8 Restoration of loss or damage**

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

#### **18.9 Modifications to the Project**

The Concessionaire shall not carry out any material modifications to the Project, save and except where such modifications are necessary for the Project to operate in conformity with the Specifications and Standards, Maintenance Requirements, Good Industry Practice and Applicable Laws; provided that the Concessionaire shall notify the Authority of the proposed modifications along with particulars thereof at least 15 (fifteen) days before commencing work on such modifications and shall reasonably consider any suggestions that the Authority may make within 15 (fifteen) days of receiving the Concessionaire's proposal. For the avoidance of doubt, all modifications made hereunder shall comply with the Safety Requirements, Specifications and Standards, Applicable Laws, Good Industry practice and the provisions of this Agreement.

#### **18.10 Excuse from performance of obligations**

The Concessionaire shall not be considered in breach of its obligations under this Agreement if any part of the Project is not available on account of any of the following for the duration thereof:

- a) an event of Force Majeure;

b) compliance with a request from the Authority or the directions of any Government Instrumentality, the effect of which is to close all or any part of the Project;

provided, that any such non-availability and particulars thereof shall be notified by the Concessionaire to the Authority without any delay.

#### **18.11 O&M Obligation of the Authority**

During the Operation Period, the Authority shall operate and maintain the common services/utilities, roads, external lightening along roads, either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Site Facilities to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits. The obligations of the Authority hereunder shall include:

- a) permitting safe, smooth and uninterrupted O&M of the Site Facilities in terms hereof during normal operating conditions;
- b) collecting and appropriating the revenue/ applicable fees from the Concessionaire;
- c) minimizing disruption of operation of Site facilities in terms hereof in the event of accidents or other incidents affecting the safety and use of the Project by providing a rapid and effective response and maintaining liaison with emergency services available in the State of Madhya Pradesh;
- d) carrying out periodic preventive maintenance of the common utilities/services etc.;
- e) undertaking major & routine maintenance such as repairs, refurbishments of common utilities/services etc.
- f) preventing, with the assistance of concerned law enforcement agencies, any unauthorized use or encroachments of the Project; and
- g) protection of the environment and provision of equipment and materials thereof.

## **ARTICLE 19: SAFETY REQUIREMENTS**

### **19.1 Safety Requirements**

19.1.1 The Concessionaire shall comply with the provisions of this Agreement, Applicable Laws and Applicable Permits and conform to Good Industry Practice for securing the safety of the persons present at the Project site. In particular, the Concessionaire shall develop, implement and administer a surveillance and safety Programme for providing a safe environment on or about the Project and shall comply with the safety requirements set forth in Schedule-M (the “**Safety Requirements**”).

19.1.2 The Authority shall carry out the safety audit of the Project in accordance with the Safety Requirements, and shall take all other actions necessary for securing compliance with the Safety Requirements.

### **19.2 Expenditure on Safety Requirements**

19.2.1 All costs and expenses arising out of or relating to Safety Requirements shall be borne by the Concessionaire.

## **ARTICLE 20: MONITORING OF OPERATION AND MAINTENANCE**

### **20.1 Monthly status reports**

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

20.1.2 During Operation Period, the Concessionaire shall, no later than 10 (ten) days after the close of each month, furnish to the Authority a monthly management report which shall be a summary of:

a) key performance indicators such as poppy straw processed and CPS produced, production of alkaloids and ratio of the same i.e. morphine, codeine, thebaine, etc. achieved in the month, alkaloid extraction efficiency, achieved in the month, along with an analysis of reasons for failures, if any, and proposals to remedy the same;

b) key operational hurdles and deliverables expected in the succeeding month along with strategies for addressing the same and for otherwise improving the Project's operational performance; and

c) key financial parameters for the month, as benchmarked against the monthly budget, the reasons for shortfall, if any, and proposals to remedy the same.

### **20.2 Inspection**

The Authority shall inspect the Project at least once a month. It shall make a report of such inspection (the "**O&M Inspection Report**") stating in reasonable detail the defects or deficiencies, if any, with particular reference to the Maintenance Requirements, Maintenance Manual, the Maintenance Programme and Safety Requirements, and send a copy thereof to the Authority and the Concessionaire within 7 (seven) days of such inspection.

### **20.3 Tests**

For determining that the Project conforms to the Maintenance Requirements, the Authority shall require the Concessionaire to carry out, or cause to be carried out, Tests specified by it in accordance with Good Industry Practice. The Concessionaire shall, with due diligence, carry out or cause to be carried out all such Tests in accordance with the instructions of

the Authority and furnish the results of such Tests forthwith to the Authority. One half of the costs incurred on such Tests, and to the extent certified by the Authority as reasonable, shall be reimbursed by the Authority to the Concessionaire.

## **20.4 Remedial measures**

- 20.4.1 The Concessionaire shall repair or rectify the defects or deficiencies, if any, set forth in the O&M Inspection Report or in the test results referred to in Clause 20.3 and furnish a report in respect thereof to the Authority within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Concessionaire shall submit progress reports of the repair works once every week until such works are completed in conformity with this Agreement.
- 20.4.2 The Authority shall require the Concessionaire to carry out or cause to be carried out Tests, at its own cost, to determine that such remedial measures have brought the Project into compliance with the Maintenance Requirements and the procedure set forth in this Clause 20.4 shall be repeated until the Project conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the Authority shall be entitled to recover Damages from the Concessionaire under and in accordance with the provisions of Clause 18.7.

## **20.5 Reports of unusual occurrence**

The Concessionaire shall send to the Authority, by facsimile or e-mail, a report stating accidents and unusual occurrences on the Project relating to the safety and security of the persons at Site, within 3 (three) days of the closing of each month. For the purposes of this Clause 20.5, accidents and unusual occurrences on the Project shall include:

- a) death or injury to any person;
- b) damaged or dislodged fixed equipment;
- c) any damage or obstruction on the Project, which results in slow down of the services being provided by the Concessionaire;
- d) disablement of any equipment during operation;
- e) smoke or fire or flooding of the Project Site; and
- f) such other relevant information as may be required by the Authority.

## **ARTICLE 21: INDEPENDENT ENGINEER**

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

- 21.1.1 The Authority shall appoint a consulting engineering firm or body corporate selected by the Authority in accordance with the selection process set forth in Schedule 'N'.
- 21.1.2 The appointment of the Independent engineer pursuant to Clause 21.1.1 shall be for a period of 3 (three) years from the date of its appointment. The date of such appointment shall be no later than 120 (one hundred twenty) days from the date of this Agreement.

### **21.2 Duties and functions**

- 21.2.1 The Independent Engineer shall discharge its duties and functions substantially in accordance with the terms of reference set forth in Schedule-O.
- 21.2.2 The Independent Engineer shall submit regular periodic reports (at least once every month) to the Authority in respect of its duties and functions set forth in Schedule-O.
- 21.2.3 A true copy of all communications sent by the Authority to the Independent Engineer and by the Independent Engineer to the Authority shall be sent forthwith by the Independent Engineer to the Concessionaire.
- 21.2.4 A true copy of all communications sent by the Independent Engineer to the Concessionaire and by the Concessionaire to the Independent Engineer shall be sent forthwith by the Independent Engineer to the Authority.

### **21.3 Remuneration**

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

### **21.4 Termination of Appointment**

- 21.4.1 The Authority may, in its discretion, terminate the appointment of the Independent Engineer at any time, but only after appointment of another Independent Engineer in accordance with Clause 21.1.
- 21.4.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Authority and seek termination of the appointment of the Independent Engineer. Upon receipt of such representation, the Authority shall hold a tripartite meeting with the

Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the Authority and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the appointment of the Independent Engineer is terminated hereunder, the Authority shall appoint forthwith another Independent Engineer in accordance with Clause 21.1.

- 21.4.3 If either party disputes any advice, instruction or award of the Independent Engineer, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.

## **21.5 Authorized signatories**

The Authority shall require the Independent Engineer to designate and notify to the Authority and the Concessionaire up to 2 (two) persons employed in its firm to sign for and on behalf of the Independent Engineer, and any communication or document required to be signed by the Independent Engineer shall be valid and effective only if signed by any of the designated persons; provided that the Independent Engineer may, by notice in writing, substitute any of the designated persons by any of its employees.

## **21.6 Dispute resolution**

Subject to the Dispute resolution mechanism contained herein where a technical issue arises in which the two parties have a different view, then either party can nominate suitable technical experts to review the process and the other party selects one of these experts. Each party would brief the expert in writing on the issue to be addressed and would provide a copy of the briefing to the other party. The two Parties would agree with the expert on the time frame to review and report on the matter. The cost of the review will be borne equally by the two Parties.



## **Part IV – Financial Covenants**

## **ARTICLE 22: FINANCIAL CLOSE**

### **22.1 Financial Close**

22.1.1 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire covenants with Authority that it shall achieve Financial Close within 180 (one hundred eighty) days from the Effective Date. If the Concessionaire shall fail to achieve Financial Close within the said 180 (one hundred eighty) days period, the Concessionaire shall be entitled to a further period of 90 (ninety) days subject to an advance weekly payment by the Concessionaire to Authority of a sum equal to 0.05% Performance Security per day for any delay beyond the said 180 (one hundred eighty) day period, as Damages on account of such delay in achieving Financial Close within the said 180 (one hundred eighty) day period by the Concessionaire.

Provided that the Damages specified herein shall be payable every day in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. For the avoidance of doubt, the Damages payable hereunder by the Concessionaire shall be in addition to the Damages, if any, due and payable under the provisions of Clause 4.2.

22.1.2 The Concessionaire shall, upon occurrence of Financial Close, notify the Authority forthwith, and shall have provided to the Authority, at least 2 (two) days prior to Financial Close, 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders.

### **22.2 Termination due to failure to achieve Financial Close**

22.2.1 Notwithstanding anything to the contrary contained in this Agreement, Authority shall be entitled to terminate this Agreement forthwith, without being liable in any manner whatsoever to the Concessionaire, by a communication in writing to the Concessionaire pursuant to Clause 31.1 if the Concessionaire shall have failed to pay in advance the Damages to Authority under and in accordance with Clause 22.1.1 above.

22.2.2 Notwithstanding anything to the contrary contained in this Agreement, if the Financial Close shall not occur within 270 (two hundred seventy) days from Effective Date as set forth in Clause 22.1.1 above, all rights, privileges, claims and entitlements, if any, of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by and to have

ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual Agreement of the Parties.

22.2.3 Upon Termination of this Agreement under Clauses 22.1.1 and 22.2.1, Authority shall be entitled to encash the Bid Security or the Performance Security, as the case may be, and appropriate the proceeds thereof as Damages.

22.2.4 If Financial Close has not occurred solely as a result of the Authority being in default of any of its obligations hereunder, specifically Article 4.1.2, the Authority shall, upon Termination, forthwith return the Performance Security to the Concessionaire.

## **ARTICLE 23: CONCESSION FEE**

### **23.1 Concession Fee**

- 23.1.1 In consideration of the grant of Concession, the Concessionaire shall pay to the Authority Concession Fee (the "**Concession Fee**") for a sum of Rs. 1 (Rupee One) only, every year.
- 23.1.2 In consideration of the obligations of the Concessionaire, the Authority shall pay to the Concessionaire an amount of Rs. .... as processing charges/fee for processing per MT of poppy straw/raw material. This processing charge/fee shall be payable on quarterly basis and shall be escalated every year by 5%.
- 23.1.3 For the avoidance of doubt, GST or any other tax applicable on processing charge/fee shall be borne by the Authority.

## **ARTICLE 24: PROCESSING FEE**

### **24.1 Collection and appropriation of revenue by the Concessionaire**

With effect from the COD till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Processing Fee from the Authority in accordance with Good Industry Practice and more particularly in terms set out under this Agreement.

### **24.2 Appropriation of revenue**

On and from the COD and during the Operations Period, the Concessionaire or its agents or servants shall charge and collect the revenues in respect of the Project and apply the same as per the provisions of the Escrow Agreement.

### **24.3 Collection & Handling**

The Concessionaire shall be liable for the loss of any revenue collected by it or its agents or servants whether by fraud, misappropriation, theft, accident, event of Force Majeure or any other event or circumstance whatsoever.

The Concessionaire shall put in place, prior to the receipt of any of the revenue, security measures necessary for handling, deposit and protection of revenue from loss, theft or destruction. Notwithstanding such security measures (i) all money being held by the Concessionaire shall at all times be insured against loss due to but no limited to theft, loss, fire and natural disasters and (ii) the Concessionaire shall remain liable for timely payment of Concession Fee to the Authority in accordance with the terms of this Agreement.

### **24.4 Payment Mechanism**

24.4.1 The Concessionaire shall be paid 100% of the Processing Fee only upon the Concessionaire achieving 60%-65% efficiency in alkaloid extraction per Kilogram of poppy straw, as established by the Independent Testing Laboratory. If the Concessionaire achieves efficiency in excess or below given threshold, the Processing Fee shall be adjusted in following manner:

<b>Efficiency in Alkaloid Extraction</b>	<b>Processing Fee to be paid (in %)</b>
More than 70%	115%
Between 65% and 70%	105%
Between 60% and 65%	100%

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<b>Efficiency in Alkaloid Extraction</b>	<b>Processing Fee to be paid (in %)</b>
Between 55% and 60%	95%
Between 50% and 55%	85%

24.4.2 The Processing Fee shall be paid on a quarterly basis to the Concessionaire. The Concessionaire shall raise its invoice at the end of every quarter, starting from COD, clearly mentioning the amount of raw material processed in the quarter, alkaloid content as certified by the Independent Testing Laboratory, and alkaloid yield per KG of poppy straw. The invoice should be duly supported with relevant particulars and necessary supporting documents. The Authority shall verify the invoice and if found to be in order, shall process the payment within 15 days of receipt of invoice.

24.4.3 If the Concessionaire achieves less than 50% efficiency in alkaloid extraction, in any quarter, the Processing Fee payable to the Concessionaire for that quarter would be equivalent to 50% of the agreed Processing Fees. However, in case where the Concessionaire achieves less than 50% efficiency in alkaloid extraction, in any 2 quarter in a year, the same shall be considered as an Event of Default leading to Termination.

## **ARTICLE 25: ESCROW ACCOUNT**

### **25.1 Escrow Account**

25.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank, acceptable to the Authority (the “**Escrow Bank**”) and all funds constituting the Financing Package for meeting the Total Project Cost shall be credited to such Escrow Account.

25.1.2 The nature and scope of the Escrow Account are fully described in the Agreement (the “**Escrow Agreement**”) to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Senior Lenders through the Lenders’ Representative, which shall be substantially in the form set forth in Schedule-Q.

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

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

- a) all funds constituting the Financial Package;
- b) all revenue from or in respect of the Project, including the proceeds of any rentals, deposits, capital receipts or insurance claims; and
- c) all payments by the Authority, after deduction of any outstanding payments due to the Authority;

Provided that the Senior Lenders may make direct disbursements to the EPC Contractor in accordance with the express provisions contained in this behalf in the Financing Agreements.

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

25.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:

- a) all taxes due and payable by the Concessionaire for and in respect of the Project;
- b) all Concession Fee and other payment due and payable to the Authority;
- c) all payments relating to construction of the Project, subject to and in accordance with the conditions, if any, set forth in the Financing

Agreements;

d) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;

e) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;

f) monthly proportionate provision of Debt Service due in an Accounting Year;

g) all payments, interests and Damages certified by the Authority as due and payable to it by the Concessionaire;

h) monthly proportionate provision of Debt Service payments due in an Accounting Year in respect of Subordinated Debt;

i) any reserve requirements set forth in the Financing Agreements; and

j) balance, if any, in accordance with the instructions of the Concessionaire.

25.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 25.3.1, except with the prior written approval of the Authority.

## **25.4 Withdrawals upon Termination**

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

a) all taxes due and payable by the Concessionaire for and in respect of the Project;

b) all Concession Fee and other payment due and payable to Authority;

c) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;

d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire;

e) retention and payments relating to the liability for defects and deficiencies set forth in Article 33;

f) outstanding Subordinated Debt;

g) incurred or accrued O&M Expenses;



h) any other payments required to be made under this Agreement; and

i) balance, if any, in accordance with the instructions of the Concessionaire:

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

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

## **ARTICLE 26: INSURANCE**

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

#### **26.1.1 Insurance during Construction Period**

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

b) No later than 45 (forty-five) days prior to commencement of the Construction Period, the Concessionaire shall by notice furnish to the Authority, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 26. Within 30 (thirty) days of receipt of such notice, the Authority may require the Concessionaire to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

#### **26.1.2 Insurance during Operation Period**

Not later than 60 days prior to the anticipated Completion of the Project, the Concessionaire shall obtain and maintain at no cost to Authority during the Operations Period in respect of the Project and its operations, such insurance as may be required under any of the Financing Documents, Applicable Laws and such insurance as the Concessionaire may reasonably consider necessary or desirable in accordance with Good Industry Practice. Provided, however, the level of insurance to be maintained after satisfaction of Senior Lenders' dues in full, shall be determined on the same principles as applicable for determining the level of Insurance prior to such date. This level shall be agreed with the Authority within 120 days of date of this Agreement. The Concessionaire shall procure that in each insurance policy, the Authority shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Escrow Account. For the avoidance of doubt,

the level of insurance to be maintained by the Concessionaire after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.

For the sake of brevity, the aggregate of the maximum sums insured under the insurance taken out by the Concessionaire pursuant to this Article 26 are herein referred to as the “**Insurance Cover**”.

## **26.2 Insurance Cover**

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

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

## **26.3 Evidence of Insurance Cover**

All insurances obtained by the Concessionaire in accordance with this Article 26 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 15 (fifteen) days of obtaining any insurance cover, the Concessionaire shall furnish to the Authority, notarized true copies of the certificate(s) of insurance, copies of insurance policies and premia payment receipts in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 45 (forty five) days after notice of such proposed cancellation, modification or non-renewal has been delivered by the Concessionaire to the Authority.

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

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

#### **26.5 Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Concessionaire pursuant to this Article 26 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, inter alia, the Authority, and its assigns, successors, undertakings and their subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

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

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

#### **26.7 Application of insurance proceeds**

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

## **ARTICLE 27: ACCOUNTS AND AUDIT**

### **27.1 Audited accounts**

27.1.1 The Concessionaire shall maintain separate books of accounts with respect to the Project in compliance with generally applicable accounting principles in India, which books of accounts shall be duly audited by a statutory auditor in accordance with the requirements of Applicable Law. Copies of such books of accounts shall be provided to Authority upon written request from Authority and shall also be available for audit in accordance with the requirements of this Agreement.

### **27.2 Appointment of auditors**

27.2.1 The Concessionaire shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it from the mutually agreed list of 5 (five) reputable firms of chartered accountants (the “**Panel of Chartered Accountants**”), such list to be prepared substantially in accordance with the criteria set forth in Schedule-R. All fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.

27.2.2 The Concessionaire shall appoint and have during the subsistence of this Agreement as its Statutory Auditors a firm of Chartered Accountants duly licensed to practice in India out of the mutually agreed list of 5 (five) independent and reputable firms of Chartered Accountants in India (the “**List of Chartered Accountants**”). The criteria for preparing the List of Chartered Accountants are set forth in Schedule ‘R’. Subject to a 30 days’ notice to Authority and the replacement Statutory Auditors being appointed from the List of Chartered Accountants, the Concessionaire may terminate the appointment of any Statutory Auditor appointed in accordance with this Article 27. The fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.

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

27.3.1 Any claim or document provided by the Concessionaire to the Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors.

### **27.4 Set-off**

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

## **Part V-Force Majeure and Termination**

## ARTICLE 28: FORCE MAJEURE

**28.1** Force Majeure: As used in this Agreement, a Force Majeure Event shall mean occurrence in India of any or all of Non Political Event, Indirect Political Event and/or Political Event as defined in Clauses 28.2, 28.3, and 28.4 respectively hereinafter which prevent the Party claiming Force Majeure (the “**Affected Party**”) from performing its obligations under this Agreement and which act or event is (i) beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money and (iii) has a Material Adverse Effect on the Project.

### **28.2 Non-Political Force Majeure Events**

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

a) acts of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, health pandemic, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);

b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/ representatives or attributable to any act or omission of any of them) interrupting supplies and services to the Project for a period exceeding a continuous period of 30 (thirty) days in an Accounting Year, and not being an Indirect Indian Political Event set forth in Clause 28.3 hereof;

c) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;

d) Any judgement or order of any court of competent jurisdiction or statutory authority in India made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or enforcement of this Agreement or exercise of any of its rights under this Agreement by the Authority; or

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 circumstance of a nature analogous to any of the foregoing.

### **28.3 Indirect Political Force Majeure Events**

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 which prevents operations of the Project/revenue generation for a continuous period exceeding 7 (seven) days in an Accounting Year;

b) industry wide or state-wide or India wide strikes or industrial action for a period exceeding a continuous period of 30 (thirty) days in an Accounting Year;

c) any civil commotion, boycott or political agitation which prevents operations of the Project/revenue generation by the Concessionaire for a continuous period exceeding 7 (seven) days in an Accounting Year;

d) any failure or delay of a Contractor to the extent caused by any Indirect Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; or

e) any event or circumstance of a nature analogous to any of the foregoing.

### **28.4 Political Force Majeure Events**

A Political Event shall mean one or more of the following acts or events by or on account of Government of India or any other Governmental Agency:

a) expropriation or compulsory acquisition by any Governmental Agency of any Project Assets or rights of the Concessionaire or of the Contractors;

b) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorization, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorization, no objection certificate, exemption, consent, approval or permit;

c) Any decision or order of a court or tribunal which has the effect of restraining all or any part of the activities concerning the construction,



operation or maintenance of the Project including the determination, levy, demand, collection, retention and appropriation of Financials;

d) any failure or delay of a Contractor but only to the extent caused by another Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; or

e) any event or circumstance of a nature analogous to any of the foregoing.

#### **28.5 Effect of Force Majeure before Appointed Date**

Upon the occurrence of any Force Majeure Event prior to Appointed Date as set forth in Article 22, the following shall apply:

a) There shall be no Termination except as provided in Clause 28.8;

b) the period set forth in Clause 4.1 for fulfilment of Conditions Precedent and in Clause 22.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event;

c) The Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs arising out of such Force Majeure Event.

#### **28.6 Effect of Force Majeure Event after Appointed Date**

Upon occurrence of any Force Majeure Event after Appointed Date, the following shall apply:

a) There shall be no Termination of this Agreement except as provided in Clause 28.8;

b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;

c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to operations of the Project/revenue generation, but if he is unable to operations of the Project/revenue generation during the subsistence of such Force Majeure Event, the Concession Period shall be extended by the period for which operations of the Project/revenue generation remains suspended on account thereof;

d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of Clause 28.7;

e) The Parties expressly agree that payment of Concession Fee shall not

be suspended during the pendency of Force Majeure event and/or its effect.

## **28.7 Allocation of costs during subsistence of Force Majeure**

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

Subject to the provisions of clause 28.6, upon occurrence of a Force Majeure Event after Appointed Date, the costs arising out of such event shall be allocated as follows:

a) When the Force Majeure Event is a Non-Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any costs arising out of any such Force Majeure Event;

b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the “**Force Majeure Costs**”) shall be borne by the Concessionaire to the extent of the Insurance Claims, and to the extent such Force Majeure Costs exceed the Insurance Claims, one half of the same to the extent actually incurred and duly certified by the statutory Auditors of Concessionaire shall be reimbursed by the Authority to the Concessionaire;

c) Where the Force Majeure Event is a Political Event, the Force Majeure Costs to the extent actually incurred and certified by the Statutory Auditors of Concessionaire shall be reimbursed by the Authority to the Concessionaire, provided that no Force Majeure Costs shall be payable by the Authority if the Concession Period is increased under Clause 28.6.

For avoidance of doubt, Force Majeure Costs shall not include loss of revenues or any debt repayment obligations but shall include interest payments on such debt, O&M Expenses and all other costs directly attributable to the Force Majeure Event.

## **28.8 Termination Notice**

If a Force Majeure Event subsists for a period of 365 days (three hundred and sixty five) days, either Party may in its sole discretion terminate this Agreement by giving 30 (thirty) days Termination Notice in writing to the other Party without being liable in any manner whatsoever, save as provided in Clause 28.9 and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period,

whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

## **28.9 Termination Payment for Force Majeure Events**

28.9.1 Upon Termination of this Agreement pursuant to Clause 28.8, Termination Payment to the Concessionaire shall be made in accordance with the following:

a) If the Termination is on account of a Non-Political Event, the Concessionaire shall be entitled to receive from Authority by way of Termination Payment an amount equal to 90% of the Debt Due less Insurance Cover.

b) If the Termination is on account of an Indirect Political Event, the Concessionaire shall be entitled to receive from the Authority by way of Termination Payment an amount equal to:

(i) the total Debt Due, less due insurance claims, if any. Provided, however, that if all or any of the insurance claims are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due, plus

(ii) 110% (one hundred ten per cent) of the Adjusted Equity.

c) If the Termination of this Agreement is on account of a Political Event, the Concessionaire shall be entitled to receive from Authority by way of Termination Payment an amount equal to:

(i) the total Debt Due, plus

(ii) 150% (one hundred fifty per cent) of the Adjusted Equity.

## **28.10 Dispute Resolution**

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

## **28.11 Liability for other losses, damages, etc.**

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

## **28.12 Duty to Report**

The Affected Party shall discharge the following obligations in relation to reporting the occurrence of a Force Majeure Event to the other Party:

a) The Affected Party shall not claim any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party in writing of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event within 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence and the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

b) Any notice pursuant to this Clause 28.12 shall include full particulars of:

- (i) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 28 with evidence in support thereof;
- (ii) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
- (iii) the measures which the Affected Party is taking or proposes to take, to alleviate the impact of such Force Majeure Event; and
- (iv) any other information relevant to the Affected Party's claim.

c) For so long as the Affected Party continues to claim to be affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) written reports containing information as required by this Clause 28.12, and such other information as the other Party may reasonably request the Affected Party to provide.

## **28.13 Excuse from performance of obligations:**

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

a) The suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;

b) The Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and

- c) When the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party written notice to that effect and shall promptly resume performance of its obligations hereunder.

## **ARTICLE 29: COMPENSATION FOR BREACH OF AGREEMENT**

### **29.1 Compensation for default by Concessionaire**

In the event of Concessionaire being in material default of this Agreement and such default is cured before Termination, the Concessionaire shall pay to Authority as compensation, all direct additional costs suffered or incurred by Authority arising out of such material default by the Concessionaire, in one lumpsum within 30 (thirty) days of receiving the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 29.1 for any material breach or default in respect of which damages are expressly specified and payable under this Agreement or for any consequential losses incurred by the Authority.

### **29.2 Compensation for default by the Authority**

In the event of Authority being in material default of this Agreement and such Material Breach is cured before Termination, Authority shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by Authority, in one lumpsum within 30 (thirty) days of receiving the demand supported by necessary particulars thereof; provided that no compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in the Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other directly attributable to such material breach or default but shall not include loss of revenues, debt repayments obligations or other consequential losses.

### **29.3 Extension of Concession Period**

Subject to the provisions of Clause 29.5, in the event that a Material Breach or default of this Agreement set forth in Clause 29.2 causes delay in achieving COD or leads to suspension of or reduction in the realization of revenues, as the case may be, the Authority shall, in addition to payment of compensation under Clause 29.2, extend the Concession Period, such extension being equal in duration to the period by which COD was delayed.

### **29.4 Compensation to be in addition**

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

### **29.5 Mitigation of costs and damage**

The Affected Party shall make all reasonable efforts to mitigate or limit the costs and damage arising out of or as a result of breach of Agreement by the other Party.

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

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

Upon occurrence of a Concessionaire Event of Default, the Authority shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (a) suspend all rights of the Concessionaire under this Agreement including the Concessionaire's right to collect Processing Fee, and other revenues pursuant hereto, and (b) exercise such rights itself and perform the obligations hereunder or authorize any other person to exercise or perform the same on its behalf during such suspension (the "**Suspension**"). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 120 (one hundred and twenty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders' Representative, the Authority shall extend the aforesaid period of 120 (one hundred and twenty) days by a further period not exceeding 60 (sixty) days.

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

30.2.1 Subject to clause 30, Authority shall have the right to utilize the proceeds of Processing Fees and other revenues for meeting the costs incurred by Authority to remedy and rectify the cause of such Suspension and for defraying the O&M Expenses during such Suspension period. Provided, however, that if the Concessionaire is making diligent efforts to remedy and rectify such cause, then Authority shall allow the Concessionaire reasonable time and opportunity for such remedy or rectification.

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



### **30.3 Revocation of Suspension**

- 30.3.1 The Suspension of the rights of the Concessionaire by Authority pursuant to Clause 30.1 above shall be revoked by Authority forthwith upon the Concessionaire having remedied or removed the cause of Suspension within a period not exceeding 90 days from date of Suspension to the satisfaction of Authority unless in the meantime this Agreement has been terminated by Authority in accordance with Article 30.

### **30.4 Substitution of the Concessionaire**

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

### **30.5 Termination**

- 30.5.1 At any time during the period of Suspension under this Article 30, the Concessionaire may by notice require the Authority to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 30.4, the Authority shall, within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 30.
- 30.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 30.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual Agreement of the Parties and all the provisions of this Agreement shall apply, *mutatis mutandis*, to such Termination as if a Termination Notice had been issued by the Authority upon occurrence of a Concessionaire Event of Default.

## ARTICLE 31: TERMINATION

### 31.1 Termination for Concessionaire Default

- 31.1.1 Each of the following events or circumstances, to the extent not caused by a default of Authority or Force Majeure shall be considered for the purposes of this Agreement as events of default of the Concessionaire ("**Concessionaire Event of Default**") which, if not remedied within the Cure Period set forth below, or where no Cure Period is specified, within 60 (sixty) days, upon receipt of written notice from Authority, shall provide Authority the right to terminate this Agreement in accordance with Article 31.1.4:
- a) The Concessionaire fails to achieve Financial Close in accordance with the provisions of Article 22;
  - b) The Concessionaire fails to achieve any Project milestone other than Scheduled Project Completion Date within the period set forth in Schedule 'H' and fails to cure such default within a period of 120 (one hundred and twenty) days from the date of its occurrence.
  - c) The Concessionaire abandons the operations of the Project for more than 15 (fifteen) consecutive days without the prior consent of Authority, provided that the Concessionaire shall be deemed not to have abandoned such operation if such abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations by Authority.
  - d) COD does not occur within the period of 180 days from Schedule Project Completion Date specified in Clause 16.7;
  - e) The Concessionaire creates any Encumbrance, charges or lien in favor of any person save and except as otherwise expressly permitted under Clause 34.2;
  - f) The shareholding of the Consortium Members falls below the minimum prescribed under Clause 7.1 (l) and the Concessionaire does not Suo moto cure such default within 90 (ninety) days of its occurrence;
  - g) the Concessionaire is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its Project Assets that has a material bearing on the Project;
  - h) a resolution for winding up of the Concessionaire is passed, or any petition for winding up of the Concessionaire 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 Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, Project Assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements; and provided that:

- (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
  - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
  - (iii) each of the Project Agreements remains in full force and effect;
- i) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all or part of the Project Assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
  - j) a resolution is passed by the shareholders of the Concessionaire for the voluntary winding up of the Concessionaire;
  - k) the Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement;
  - l) the Concessionaire suffers an execution being levied on any of its Project Assets/ equipment causing a Material Adverse Effect on the Project and allows it to be continued for a period of 15 (fifteen) days;
  - m) the Concessionaire has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days;
  - n) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;
  - o) upon occurrence of a Financial Default, the Lenders' Representative has by notice required the Authority to undertake Suspension or Termination, as the case may be, in accordance with the Substitution Agreement and the Concessionaire fails to cure the default within the Cure Period specified hereinabove;
  - p) the Performance Security has been encashed and appropriated in

accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a Cure Period of 15 (fifteen) days;

q) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to meet any Condition Precedent or cure the Concessionaire Default, as the case may be, for which whole or part of the Performance Security was appropriated, within a Cure Period of 120 (one hundred and twenty) days;

r) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;

s) the Concessionaire achieves less than 50% efficiency in alkaloid extraction, in any 2 quarter in a year;

t) the Concessionaire or its employees, contractors, agents, etc. are found to be involved in theft, misappropriation, etc. of the raw material, semi processed or finished products; and

u) the Concessionaire does not allow access to the project facilities to Independent Engineers, authorised government agencies, Authority, or any other person authorized by Authority.

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

31.1.3 The Authority shall, if there be Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 31.1.2 to inform the Lenders' Representative and grant 15 (fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement.

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

- 31.1.4 Save and except as otherwise provided in Clause 31.1.2, and without prejudice to any other right or remedy which Authority may have in respect thereof under this Agreement, upon the occurrence of any breach or default by the Concessionaire under this Agreement including any Concessionaire Event of Default, Authority shall be entitled to terminate this Agreement by a communication in writing (the "**Termination Notice**") to the Concessionaire if the Concessionaire has failed to cure such breach or default within the period provided for the same in this Agreement or Cure Period of 60 (sixty) days.

Subject to Clause 31.1.2, the following shall apply in respect of cure of any of the defaults and/or breaches of this Agreement:

- a) The Cure Period shall commence from the date on which a notice in writing is delivered by Authority to the Concessionaire asking the latter to cure the breach or default specified in such notice.
- b) The Cure Period provided in this Agreement shall not relieve the Concessionaire from liability for Damages caused by its breach or default;
- c) The Cure Period shall not in any way be extended by any period of Suspension under this Agreement;
- d) If the cure of any breach by the Concessionaire requires any reasonable action by Concessionaire that must be approved by Authority or the Independent engineer hereunder, the applicable Cure Period (and any liability of the Concessionaire for Damages incurred) shall be extended by the period taken by Authority or the Independent Engineer to accord their required approval.

## **31.2 Termination for Authority Default**

- 31.2.1 The Concessionaire may after giving 90 (ninety) days' notice in writing to Authority terminate this Agreement upon the occurrence and continuation of any of the following events (each a "**Authority Event of Default**"), unless any such Authority Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event:
- a) Authority is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and Authority has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;

- b) the Authority repudiates this Agreement or otherwise evidences an irrevocable intention not to be bound by this Agreement;
- c) the Authority has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days;
- d) The Authority is in breach of any representation or warranty made under this Agreement, or it repudiates this Agreement; or
- e) There is a defect in the title, ownership and/or possession of the Authority with respect to the Project Site.

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

### **31.3 Termination Payment**

#### **31.3.1 Upon Termination of the Agreement pursuant to a Concessionaire Event of Default occurring**

##### **Prior to COD:**

Upon Termination on account of Concessionaire Event of Default during the Construction Period, no Termination Payment shall be due and payable for and in respect of expenditure comprising the first 40% (forty per cent) of the Total Project Cost and in the event of expenditure exceeding such 40% (forty per cent) and forming part of Debt Due, the provisions of Clause 31.3.1 shall, to the extent applicable to Debt Due, apply for and in respect of the expenditure exceeding such 40% (forty per cent). For the avoidance of doubt and by way of illustration, the Parties agree that if the total expenditure incurred prior to Termination is 90% (ninety per cent) of the Total Project Cost, the expenditure eligible for computation of Termination Payment hereunder shall be 50% (fifty per cent) of the Total Project Cost and the Termination Payment due and payable in such event shall not exceed 45% (forty-five per cent) of the Total Project Cost. The Parties also agree that for determining the Termination Payment under this Clause 31.3.1, only the expenditure comprising and up to the latest Project Milestone shall be reckoned.

##### **Post COD:**

Upon Termination by Authority on account of occurrence of Concessionaire Event of Default during the Operations Period, the Authority shall pay to the Concessionaire by way of Termination Payment an amount equal to 90% (ninety per cent) of the Debt Due less insurance claims, if any, provided, however, that if all or any of the insurance claims are not admitted and paid, then 70% (seventy per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due.

**31.3.2 Upon Termination of this Agreement pursuant to an Authority Event of Default occurring prior to COD and post COD, the Authority shall make a payment of:**

- (i) the total Debt Due, plus
- (ii) 150% (one hundred fifty per cent) of the Adjusted Equity actually spent on the Project if such Termination occurs at any time during three years commencing from the Appointed Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year and the adjusted amount so arrived at shall be reduced every year by 7.5% (seven and a half per cent) per annum.

31.3.3 The Termination Payment pursuant to this Agreement shall become due and payable to the Concessionaire by Authority within 30 days of a demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If Authority fails to disburse the full Termination Payment within 90 (ninety) days, the amount remaining unpaid shall be disbursed along with interest rate equal to 3% (three per cent) above the Bank rate for the period of delay on such amount. For the avoidance of doubt, it is expressly agreed that the Termination payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

31.3.4 Mode of Payment: Payment of compensation of costs by Authority pursuant to this Article 31 shall be made by way of credit to the Escrow Account and such payment shall constitute valid discharge of Authority's obligations for Termination Payment hereunder.

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

**31.4 Certain limitations on Termination Payment**

31.4.1 Termination payment due and payable under this Agreement shall be computed with reference to the Debt Due and Adjusted Equity, as the case

may be, in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, the Parties agree that within a period of 60 (sixty) days from COD, the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment. The Parties further agree that in the event such disaggregation is not notified to the Authority, the Equity and Debt Due shall be arrived at by adopting the proportion between debt and Equity as specified in the Financing Agreements. It is further agreed that for the purposes of computing Termination Payment, the Debt Due shall at no time exceed 85% (eighty-five per cent) of the Total Project Cost.

### **31.5 Other rights and obligations of the Authority**

Upon Termination for any reason whatsoever, the Authority shall:

- a) take possession and control of the Project/Project Facilities forthwith;
- b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;
- d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 32.1; and
- e) succeed upon election by the Authority, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.



### **31.6 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 accrued rights of either Party including its right to claim and recover money damages and other rights and remedies which it may have in law or contract. All rights and obligations of either Party under this Agreement, including without limitation Termination Payments and Divestment procedures, shall survive the Termination of this Agreement to the extent such survival is necessary for giving effect to such rights and obligations.

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

### **32.1 Divestment Requirements**

- 32.1.1 Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements:
- a) notify to the Authority forthwith the location and particulars of all Project Assets;
  - b) deliver forthwith the actual or constructive possession of the Project, free and clear of all Encumbrances, save and except to the extent set forth in the Substitution Agreement;
  - c) cure all Project Assets, of all defects and deficiencies so that the Project is compliant with the Maintenance Requirements; provided that in the event of Termination during the Construction Period, all Project Assets shall be handed over on 'as is where is' basis after bringing them to a safe condition;
  - d) deliver and transfer relevant records, reports, Intellectual Property and other licenses pertaining to the Project and its design, engineering, construction, operation and maintenance, including all programmes and manuals pertaining thereto, and complete 'as built' Drawings as on the Transfer Date. For the avoidance of doubt, the Concessionaire represents and warrants that the Intellectual Property delivered hereunder shall be adequate and complete for the design, engineering, construction, operation and maintenance of the Project and shall be assigned to the Authority free of any Encumbrance;
  - e) transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws;
  - f) execute such deeds of conveyance, documents and other writings as the Authority may reasonably require for conveying, divesting and assigning all the rights, title and interest of the Concessionaire in the Project Assets, including manufacturers' warranties in respect of any plant or equipment and the right to receive outstanding insurance claims to the extent due and payable to the Authority, absolutely unto the Authority or its nominee; and
  - g) comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights, title and interest of the Concessionaire in the Project, free from all Encumbrances, absolutely unto the Authority or to its nominee.
- 32.1.2 Subject to the exercise by the Authority of its rights under this Agreement or under any of the Project Agreements to perform or procure the performance by a third party of any of the obligations of the Concessionaire,

the Parties shall continue to perform their obligations under this Agreement, notwithstanding the issuance of any Termination Notice, until the Termination of this Agreement becomes effective in accordance with its terms.

### **32.2 Inspection and cure**

Not earlier than 90 (ninety) days prior to Termination but not later than 30 (thirty) days prior to the effective date of such Termination, the Independent Engineer shall verify, after giving due notice to the Concessionaire of the time, date and place of such verification, compliance by the Concessionaire with the Maintenance Requirements, and if required, cause appropriate tests to be carried out at the Concessionaire's cost for this purpose. Defaults, if any, in the Maintenance Requirements shall be cured by the Concessionaire at its cost and the provisions of Article 33 shall apply, *mutatis mutandis*, in relation to curing of defects or deficiencies under this Article 32.

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

32.3.1 The Parties shall cooperate on a best effort basis and take all necessary measures, in good faith, to achieve a smooth transfer of the Project in accordance with the provisions of this Agreement so as to protect the safety of and avoid undue delay or inconvenience to the people or the lawful occupiers of any part of the Site.

32.3.2 The Parties shall provide to each other, 9 (nine) months prior to the Transfer Date in the event of Termination by efflux of time and immediately in the event of either Party conveying to the other Party its intent to issue a Termination Notice, as the case may be, as much information and advice as is reasonably practicable regarding the proposed arrangements for operation of the Project following the Transfer Date. The Concessionaire shall further provide such reasonable advice and assistance as the Authority, its concessionaire or agent may reasonably require for operation of the Project until the expiry of 6 (six) months after the Transfer Date.

32.3.3 The Authority shall have the option to purchase or hire from the Concessionaire at a fair market value and free from any encumbrances all or any part of the plant and machinery used in connection with the Project but which does not form part of the Project Assets specified in Clause 32.1.1 and is reasonably required in connection with operation of the Project. For the avoidance of doubt, in the event of dispute or difference relating to fair market value, the Dispute Resolution Procedure shall apply.

### **32.4 Vesting Certificate**

The divestment of all rights, title and interest in the Project shall be deemed to be complete on the date when all of the Divestment Requirements have

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

**32.5 Divestment costs etc.**

- 32.5.1 The Concessionaire shall bear and pay all costs incidental to divestment of all of the rights, title and interest of the Concessionaire in the Project Assets in favor of the Authority upon Termination, save and except that all stamp duties payable on any deeds or Documents executed by the Concessionaire in connection with such divestment shall be borne by the Authority.
- 32.5.2 In the event of any Dispute relating to matters covered by and under this Article 32, the Dispute Resolution Procedure shall apply.

## **ARTICLE 33: DEFECTS LIABILITY**

### **33.1 Liability of Defects before Expiry**

#### **33.1.1 Initial Inspection**

a) Not less than 30 months nor more than 36 months prior to the expiry of the Concession Period, the Concessionaire and the Authority shall conduct a joint inspection (the “**Initial Inspection**”) of the Project and all facilities.

b) Within 90 days after the completion of the Initial Inspection, the Concessionaire shall provide to the Authority a report on the condition of the Project and its facilities and a notice setting out the Concessionaire’s proposals as to the renewal works required to comply with the Divestment Requirements.

c) The Authority within 90 days after receipt of the notice from the Concessionaire in accordance with Clause 33.2, by notice to the Concessionaire object to the proposals giving details of the grounds for such objection and shall give the Authority’s proposals in respect of the renewal works.

d) If no Agreement is reached between the Concessionaire and the Authority within 30 days of receipt of such notice, then either the Concessionaire or the Authority may refer the matter to the Disputes Resolution Procedure.

e) Upon Agreement or determination in accordance with the Disputes Resolution Procedure, the Concessionaire shall carry out the renewal works at its own cost.

#### **33.1.2 Second Inspection**

a) Not less than 9 months nor more than 12 months prior to the expiry of the Concession Period, the Concessionaire and the Authority shall conduct a joint inspection (the “**Second Inspection**”) of all elements of the Project and all facilities (whether or not the Renewal Works have been carried out).

b) Within 30 days after the completion of the Second Inspection, the Concessionaire shall provide to the Authority a report on the condition of the Project and its facilities and a notice setting out any revisions or additions to the renewal works required in order to ensure compliance with the Divestment Requirements.

c) The Authority, within 30 days after receipt of the notice from the Concessionaire in accordance with Clause 33.2, by notice to the Concessionaire object to the proposals giving details of the grounds for such objection and shall give the Authority’s proposals in respect of the renewal

works.

d) If no Agreement is reached between the Concessionaire and the Authority within 30 days of receipt of such notice, then either the Concessionaire or the Authority may refer the matter to the Disputes Resolution Procedure.

e) Upon Agreement or determination in accordance with the Disputes Resolution Procedure, the Concessionaire shall carry out the renewal works at its own cost.

### **33.2 Liability for defects after Termination**

The Concessionaire shall be responsible for all defects and deficiencies in the Project for a period of 120 (one hundred and twenty) days after Termination, and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Authority in the Project during the aforesaid period. In the event that the Concessionaire fails to repair or rectify such defect or deficiency within a period of 15 (fifteen) days from the date of notice issued by the Authority in this behalf, the Authority shall be entitled to get the same repaired or rectified at the Concessionaire's risk and cost so as to make the Project conform to the Maintenance Requirements. All costs incurred by the Authority hereunder shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receipt of demand thereof, and in the event of default in reimbursing such costs, the Authority shall be entitled to recover the same from the funds retained in the Escrow Account under the provisions of Clause 33.3 or from the Performance Guarantee provided thereunder. For the avoidance of doubt, the provisions of this Article 33 shall not apply if Termination occurs prior to COD.

### **33.3 Retention in Escrow Account in case of Expiry**

33.3.1 From the date which is 2 years prior to the expiry of the Concession Period, a sum equal to the Performance Security shall, notwithstanding anything to the contrary contained in this Agreement, be submitted in the Escrow Account by the Concessionaire to the Authority.

33.3.2 If following the Second Inspection, it is agreed or determined that no renewal works are required, then within 14 days of such agreement, 50% of the sums retained in accordance with Clause 33.3.1 shall be released from the Escrow Account to the Concessionaire.

33.3.3 Within 14 days after the issue of the Vesting Certificate issued in accordance with Article 32, the sums retained in accordance with Clause 33.3.2 shall be released from the Escrow Account to the Concessionaire.

### **33.4 Retention in Escrow Account in case of Termination**

- 33.4.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 33.3, a sum equal to the Performance Security shall be retained in the Escrow Account for a period of 120 (ninety) days after Termination for meeting the liabilities, if any, arising out of or in connection with the provisions of Clause 33.4.1.
- 33.4.2 Without prejudice to the provisions of Clause 33.4.1, the Authority shall carry out an inspection of the Project at any time between 150 (two hundred and ten) and 180 (one hundred and eighty) days prior to the Termination and if it recommends that the status of the Project is such that a sum larger than the amount stipulated in Clause 33.4.1 should be retained in the Escrow Account and for a period longer than the aforesaid 120 (one hundred and twenty) days, the amount recommended by the Authority shall be retained in the Escrow Account for the period specified by it.
- 33.4.3 Within 14 days after the issue of the Vesting Certificate issued in accordance with Article 32, the sums retained in accordance with Clause 33.4.2 shall be released from the Escrow Account to the Concessionaire.
- Provided in the event that the sum recoverable is more than the sum retained in accordance with clause 33.3.1, the balance recoverable shall be considered as an acknowledged debt for the Concessionaire.

## **Part VI- Other Provisions**



## **ARTICLE 34: ASSIGNMENT AND CHARGES**

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

34.1.1 Subject to Clauses 34.2 and 34.3, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

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

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

The restraints set forth in Clause 34.1 shall not apply to, subject to the prior consent in writing of the Authority:

a) liens arising by operation of law (or by an Agreement evidencing the same) in the ordinary course of business of the Project;

b) mortgages/pledges/hypothecation of goods/assets other than Project Assets and their related documents of title, arising or created in the ordinary course of business of the Project, and as security only for indebtedness to the Senior Lenders under the Financing Agreements and/or for working capital arrangements for the Project. For the avoidance of doubt, the Senior Lenders would be entitled to create a lien on the Escrow Account, subject to and without prejudice to the rights of the Authority under this Agreement;

c) assignment of rights, interest and obligations of the Concessionaire to or in favor of the Lenders' Representative as nominee and for the benefit of the Senior Lenders, to the extent covered by and in accordance with the Substitution Agreement as security for Financing provided by Senior Lenders under the Financing Agreements; and

d) liens or encumbrances required by any Applicable Law.

### **34.3 Substitution Agreement**

34.3.1 The Senior Lenders/Lender's Representative may exercise the rights of step-in or substitution as provided in the Substitution Agreement to be entered into among the Concessionaire, the Authority and the Senior Lenders in the form set forth in Schedule 'S' provided that the person substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all

obligations under this Agreement as if it were the Concessionaire. Provided, however, that in the event of such step-in or substitution, an additional Cure Period of 90 (ninety) days shall be provided by the Authority to enable the Concessionaire to cure any breach or default subsisting on the day of such step-in or substitution. Provided further that if the Senior Lenders step in to operate and manage the Concession for a period not exceeding 90 (ninety) days, their liabilities shall be restricted to the obligations relating to and arising during such 90 (ninety) days period.

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

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

## **ARTICLE 35: CHANGE IN LAW**

- 35.1.1 In the event of a Change in Law results in a Material Adverse Effect, the Authority or the Concessionaire may by notice in writing to the other party request such modifications to the terms of this Agreement as the requesting party reasonably believes is necessary to place it in substantially the same legal, commercial and economic position as it was prior to such Change in Law. The Concessionaire and the Authority shall thereafter consult in good faith to agree to such modifications and in the event Agreement cannot be reached, either of them may refer the matter for determination in accordance with the Dispute Resolution Procedure. It is hereby clarified that the Parties shall continue to fulfill their obligations under this Agreement during pending resolution of any Dispute under this clause 35.1.1
- 35.1.2 For the avoidance of doubt, a change in the rate of any Tax or the imposition of a new Tax shall not constitute a Change in Law and the Parties shall be liable to bear the impact and incidence thereof at their cost and risk.

## **ARTICLE 36: LIABILITY AND INDEMNITY**

### **36.1 Liability in respect of the Project**

36.1.1 Concessionaire shall be solely responsible for the construction, operation and management of the Project, and shall have the overall responsibility and liability with respect to the Project and all Projects Assets located upon the Project Site. In no event shall the Authority have any liability or be subject to any claim for damages arising out of the design, development, financing, construction, operation, maintenance or management of the Project and the Project Assets located upon the Project Site.

### **36.2 General indemnity**

36.2.1 The Concessionaire will indemnify, defend, save and hold harmless the Authority and its officers, servants, agents, Government Instrumentalities and Government owned and/or controlled entities/enterprises, (the “**Authority Indemnified Persons**”) against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Concessionaire of any of its obligations under this Agreement or any related agreement or on account of any defect or deficiency in the provision of services by the Concessionaire to the Authority or to any user or from any negligence of the Concessionaire under contract or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Authority Indemnified Persons.

36.2.2 The Authority will indemnify, defend, save and hold harmless the Concessionaire and its officers, servants and agents against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature arising out of (a) defect in title and/or the rights of the Authority in the land comprised in the Site, and/or (b) breach by the Authority of any of its obligations under this Agreement or any related agreement, which materially and adversely affect the performance by the Concessionaire of its obligations under this Agreement, save and except that where any such claim, suit, proceeding, action, and/or demand has arisen due to a negligent act or omission, or breach of any of its obligations under any provision of this Agreement or any related agreement and/or breach of its statutory duty on the part of the Concessionaire, its subsidiaries, affiliates, contractors, servants or agents, the same shall be the liability of the Concessionaire.

### **36.3 Indemnity by the Concessionaire**

36.3.1 Without limiting the generality of Clause 36.2.1, the Concessionaire shall

fully indemnify, hold harmless and defend the Authority and the Authority Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

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

36.3.2 Without limiting the generality of the provisions of this Article 36, the Concessionaire shall fully indemnify, hold harmless and defend the Authority Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Authority Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or Suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Project, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for the Authority a license, at no cost to the Authority, authorizing continued use of the infringing work. If the Concessionaire is unable to secure such license within a reasonable time, the Concessionaire shall, at its own expense, and without impairing the Specifications and Standards, either replace the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

#### **36.4 Notice and contest of claims**

36.4.1 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 36 (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.

### **36.5 Defense of claims**

- 36.5.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and 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 36, the Indemnifying Party shall be entitled, at its option, to assume and control the defense 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 defense. 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.
- 36.5.2 If the Indemnifying Party has exercised its rights under Clause 36.4, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).
- 36.5.3 If the Indemnifying Party exercises its rights under Clause 36.4, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:
- a) the employment of counsel by such party has been authorized in writing by the Indemnifying Party;
  - 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 defense of such action;

c) the Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defense 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 defenses 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 36.5.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defense 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.

### **36.6 No consequential claims**

Notwithstanding anything to the contrary contained in this Agreement, in no event shall any Party, its officers, employees or agents be liable to indemnify the other Party for any matter arising out of or in connection with this Agreement in respect of any indirect or consequential loss, including loss of profit, suffered by such other Party.

### **36.7 Survival on Termination/Expiry**

It is expressly understood by the Parties that this Article shall survive the termination or expiry hereof.

### **36.8 Authority's Limitation of Liability**

Notwithstanding anything contained in the Agreement, the maximum liability of Authority towards the Concessionaire in respect of the Project resulting out of any default of Authority as provided in Article 36.2.2 of this Agreement or any Dispute and subsequent claim by the Concessionaire in terms of the Agreement shall not exceed the Termination Payment payable to the Concessionaire in terms of Agreement or aggregate amount already paid by the Concessionaire to the Authority towards the consideration, whichever is higher.

## **ARTICLE 37: RIGHTS AND TITLE OVER THE SITE**

### **37.1 Licensee rights**

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

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

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

### **37.3 Taxes and charges**

The Concessionaire shall:

a) Pay all property taxes or any such taxes under Applicable Laws on the site shall be payable by the Concessionaire post the issuance of Certificate of Compliance by the Concessionaire, which shall not be reimbursed or payable by the Authority. Any pending payment, pertaining to property tax or any such taxes under Applicable Laws on the Site, prior to Handover of the Site shall be payable by the Authority.

b) Pay all charges, taxes, fines, late fees and other outgoings in relation to the use of utilities and services by the Authority or its contractors and agents during the implementation and operation of the Project such as water supply, sewage disposal, fuel, garbage collection and disposal, electric power, gas, telephone and other utilities and ensure avoidance of any disruption thereof due to disconnection or withdrawal of the facility.

### **37.4 Restriction on sub-letting**

The Concessionaire shall not sub-license or sub-let the whole or any part of the Site, save and except as may be expressly set forth in this Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint Contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project.



## ARTICLE 38: DISPUTE RESOLUTION

### 38.1 Dispute Resolution

38.1.1 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 38.2.

38.1.2 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.

### 38.2 Conciliation

38.2.1 In the event of any Dispute between the Parties, either Party may require such Dispute to be referred to the **Additional Secretary (Revenue), Department of Revenue, Ministry of Finance – Government of India** and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) 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) 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 38.1.1 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 38.3.

### 38.3 Arbitration

38.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 38.2, shall be finally decided by reference to arbitration by an arbitral tribunal constituted in accordance with Clause 38.3.2. 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 place of such arbitration shall be Bhopal, and the language of arbitration proceedings shall be English.

38.3.2 There shall be an arbitral tribunal comprising 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.

38.3.3 The arbitral tribunal shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Article 38 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

38.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective Project Assets wherever situated.

38.3.5 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.

#### **38.4 Continued performance**

While any Dispute under this Agreement is pending, including the commencement and pendency of any Dispute referred to arbitration, the Parties shall continue to perform all of their respective obligations under this Agreement without prejudice to the final determination in accordance with the provisions under this Article 38.

## **ARTICLE 39: DISCLOSURE AND CONFIDENTIALITY**

### **39.1 Confidentiality**

- 39.1.1 Each Party hereby agree and undertake to keep all information received by the other Party (and/or its employees, directors, officers or authorized representatives), confidential.
- 39.1.2 Further, each Party hereby agrees that this Agreement and/or all Project Agreements or the contents thereof shall not be disclosed by either Party to any third party without the prior written consent of the other Party.

### **39.2 Disclosure**

- 39.2.1 Provided however that nothing contained hereinabove, shall apply to any disclosure by either Party of any information received from the other Party if
- a) Such disclosure is required by Applicable Law or requested by Governmental Authority or required to be made under the Agreement; or
  - b) Such information being available in the public domain, other than by a breach of the Agreement by the party seeking to make such disclosure;
  - c) Such information being made available to the consultants and professional advisers of either Party; or
  - d) Such information is disclosed by a Party with the prior written consent of the other Party, provided the disclosure is made strictly in accordance with such written consent.

## **ARTICLE 40: INDEPENDENT TESTING LABORATORY**

### **40.1 Appointment of Independent Testing Agency**

- 40.1.1 The Authority shall appoint an independent testing agency selected by the Authority in accordance with the selection process set forth in Schedule P.
- 40.1.2 The appointment of the independent testing agency under Clause 40.1.1 shall be for entire Concession period from the date of its appointment. The date of such appointment shall be no later than 120 (one hundred twenty) days from the date of this Agreement.

### **40.2 Duties and functions**

- 40.2.1 The independent testing agency shall discharge its duties and functions substantially in accordance with the terms of reference set forth in **Schedule P-1**.
- 40.2.2 The independent testing agency shall submit regular periodic reports (at least once every month) to the Authority in respect of its duties and functions set forth in Schedule P-1.
- 40.2.3 A true copy of all communications sent by the Authority to the independent testing agency and by the independent testing agency to the Authority shall be sent forthwith by the independent testing agency to the Concessionaire.
- 40.2.4 A true copy of all communications sent by the independent testing agency to the Concessionaire and by the Concessionaire to the independent testing agency shall be sent forthwith by the independent testing agency to the Authority.

### **40.3 Remuneration**

The remuneration, cost and expenses of the Independent Testing Laboratory shall be paid by the Authority and subject to the limits set forth in **Schedule P-1**, one-half of such remuneration, cost and expenses shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receiving a statement of expenditure from the Authority.

## **ARTICLE 41: DELETED**

## **ARTICLE 42: TRANSFER PROVISIONS**

**42.1** Upon termination of this Agreement and consequent obligation/right of Authority to acquire the Project Assets under Article 31 at nil value without the Authority required to pay any amount to the Concessionaire, the Concessionaire shall ensure that on the Transfer Date, the interest of Concessionaire in:

a) all immovable property, assets, structures, buildings, plant and machinery, ways, walls, compounds relating to the Project Assets shall be transferred to Authority or its nominee, clear of any Encumbrances and with good title (other than any encroachments existing on the date hereof), except to the extent such encroachments have been removed after Effective Date;

b) the rights and obligations under or pursuant to all contracts relating to the Project Assets and other arrangements entered into in accordance with the provisions of this Agreement between Concessionaire and any third party shall (in consideration of Authority's assumption of the obligations under or pursuant to the contracts and other arrangements), at the option of Authority, be vested in Authority or its nominee, clear of any Encumbrance and with good title. The Concessionaire shall ensure such rights of Authority are incorporated in all contracts between Concessionaire and third party(ies) with a specific obligation on the parties to such contracts to enter into novation agreement with Authority upon exercise of its option by Authority;

Notwithstanding anything contained in Clause 42.1 (a) and (b), prior to any transfer of the Project Assets, Authority shall have the right to conduct a due diligence of the contracts and agreements, the rights and obligations of which it is assuming and shall not be bound to assume the rights and obligations of contracts that, in the sole opinion of Authority are unreasonably onerous, and would be considered onerous at the time that the contracts were entered into. In relation to all such contracts that are not transferred to Authority, no third entity, including the counter-party of such contract shall have any right, license title, interest, benefit, claim or demand against or over any Project Assets and such Project Assets shall be transferred to Authority or its nominee, clear of any Encumbrance and with good title.

**42.2** Furthermore, notwithstanding anything contained in the Clause 42.1, no liability (accrued or contingent) of Concessionaire or relating to the Project Assets arising on account of actions or inactions prior to the Transfer Date shall be assumed or transferred to Authority or its nominees. Authority or its nominees shall only be liable for liabilities in relation to the Project Assets arising pursuant to the Transfer Date. In the event of any such liability being

assumed or transferred to Authority or its nominee or any Encumbrance existing on any of the Project Assets, the quantum of such liability and/or amount corresponding to such Encumbrance, shall be deducted from the Performance Security.

- 42.3** Without prejudice to the foregoing, Concessionaire agrees to indemnify and keep indemnified Authority from and against all actions, proceedings, losses, damages, liabilities, claims, costs and expenses whatsoever which may be sustained or suffered by Authority as a result of any actions or omissions of Concessionaire prior to the transfer of the Project Assets. It is expressly understood by the Parties that this Article shall survive the Termination or expiry of this Agreement.
- 42.4** Concessionaire shall in accordance with Good Industry Practice ensure that all property, assets, rights and other items (constituting Assets) which are vested in or transferred to Authority shall be in good working order and in a good state of repair. For this purpose, the Parties shall appoint an independent engineer to conduct an audit of the Project Assets being transferred. In the event any of Project Assets which are vested in or transferred to Authority are not fit for purpose/ in a good state of repair/ as would be expected of an international world class assets, as certified by such independent engineer, then the cost or capital expenditure required to be incurred to bring it to good state of repair of all such Project Assets shall be payable by the Concessionaire to Authority, and the same may be deducted from the Performance Security.
- 42.5** Expiry or Termination of this Agreement shall be without prejudice to all rights and obligations then having accrued to Authority and/or Concessionaire (or which may thereafter accrue in respect of any act or omission prior to such expiry or Termination) and without prejudice to those provisions which expressly provide for continuing obligations or which are required to give effect to such expiry or Termination or the consequences of such expiry or Termination.
- 42.6** The Parties' rights to terminate this Agreement shall be limited to those expressly set out in this Agreement.

## **ARTICLE 43: MISCELLANEOUS**

### **43.1 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 Jabalpur shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

### **43.2 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).

### **43.3 Delayed payments**

43.3.1 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. Unless otherwise specified in this Agreement, 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 SBI PLR plus 2% (two per cent) and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

43.3.2 Unless otherwise specified, any interest payable under this Agreement



shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.

#### **43.4 Waiver**

43.4.1 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 authorized representative of the Party; and

c) shall not affect the validity or enforceability of this Agreement in any manner.

43.4.2 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.

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

Except to the extent expressly provided in this Agreement:

a) no review, comment or approval by the Authority or the Independent Engineer of any Project Agreement, Document or Drawing submitted by the Concessionaire nor any observation or inspection of the construction, operation or maintenance of the Project nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Concessionaire from its obligations, duties and liabilities under this Agreement, Applicable Laws and Applicable Permits; and

b) the Authority shall not be liable to the Concessionaire by reason of any review, comment, approval, observation or inspection referred to in Sub-clause (a) above.

#### **43.6 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.

#### **43.7 Survival**

43.7.1 Termination shall:

a) not relieve the Concessionaire or the Authority, as the case may be, of any obligations hereunder which expressly or by implication survive Termination hereof; and

b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

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

**43.8 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 Concessionaire arising from the Request for Proposal shall be deemed to form part of this Agreement and treated as such.

**43.9 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.

**43.10 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.

**43.11 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.

**43.12 Successors and assigns**

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

**43.13 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 Concessionaire, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Concessionaire may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside Bhopal may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number as the Concessionaire may from time to time designate by notice to the Authority.

Attention:  
{Designation:  
Address:  
Fax No:  
Email:}

b) in the case of the Authority, be given by facsimile or e-mail and by letter delivered by hand at the address given below and be addressed to the Chairman of the Authority with a copy delivered to the Authority Representative or such other person as the Authority may from time to time designate by notice to the Concessionaire; provided that if the Concessionaire does not have an office in ..... it may send such notice by facsimile or e-mail and by registered acknowledgement due, air mail or by courier.

{Address:  
Fax No:

Email:}; 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.

**43.14 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.

**43.15 Counterparts**

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

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

SIGNED, SEALED AND DELIVERED

For and on behalf of

THE AUTHORITY by:

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

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

((e-mail address)

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

((e-mail address)

2.

---

§To be affixed in accordance with the articles of association of the Concessionaire and the resolution passed by its Board of Directors.

## **Appendix: Schedules**

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

*(See Clause 10.1)*

**Indicative map of the Site (25 acres of land would be provided to the Concessionaire in Neemuch or Mandsaur district) with good road connectivity**

## **SCHEDULE B – SCOPE OF THE PROJECT**

*(See Clause 2.1)*

### **1 Scope of the Project:**

The Scope of the Project include planning, designing, financing, constructing, operating, maintaining and transfer of the Project as specified in Schedule B and Schedule C on the Site set forth in Schedule A, and in conformity with the Specifications and Standards set forth in Schedule D. These broad scope activities shall include the following and all other provisions of this Agreement, but not be limited to:

- The Concessionaire shall set up a new plant with minimum capacity of 100 MT per annum of alkaloid extraction (Morphine / Codeine / Thebaine / Noscapine / Papaverine/ Oripavine) from concentrated poppy straw (CPS) produced from opium poppy crop. Also, the Concessionaire shall be obliged to expand the Plant capacity at its own cost and expense during the Concession Period on the directions of the Authority;
- The Concessionaire shall create production block, enough storage space for all raw material and finished products as part of its design (for minimum storage capacity for two years requirement) for storage of poppy straw;
- Create facilities for conversion of poppy straw into husk;
- Create facilities for production of concentrated poppy straw from husks and further extraction of alkaloids and conversion of same in other forms of alkaloids (for example – conversion of morphine to codeine, etc.), in the ratio as instructed by Authority at the end of each quarter;
- Construct the premises for setting up an Independent Testing Laboratory to test the quality of poppy straw at a place designated by the Authority;
- Provide office space for two designated officials of the Authority at all times during the concession period, within the project area;
- Ensure that the equipment used in the Project are in good condition and conform to the international specifications and efficiency standards;
- The Concessionaire shall, from time to time, undertake upgradation of the Project Assets in accordance with the provisions of this Agreement and Good Industry Practice;



- The Concessionaire must utilise the minimum assured raw material of 6,000 MT per annum as provided by the Authority;
- Produce a minimum quantity equivalent to 60% - 65% of the total alkaloid content available in the poppy straw, as certified by the independent testing agency;
- Minimise variations in the quantity of Alkaloids produced during each month of the year;
- Ensure safety of the raw materials, semi processed and finished products stocked in its warehouse and of the entire Project and project facilities;
- Ensure that the raw materials, semi processed and finished products stocked in its warehouse are not misused, diverted, pilfered, etc.;
- The Concessionaire needs to abide by all building bye laws and environmental laws while creating the design;
- Ensure that the alkaloids extracts meet the international quality norms/standards/certification as followed in United States of America, United Kingdom, Europe, Australia, etc.;
- Ensure compliance to internationally established and accepted good manufacturing practices through approvals from United States Food and Drug Administration (USFDA) / United Kingdom's Medicines and Healthcare products Regulatory Agency (UK MHRA) / European Directorate for the Quality of Medicines & HealthCare (EDQM) / Australian Therapeutic Goods Administration (TGA) / Brazilian Health Regulatory Agency (ANVISA), etc.; and
- Ensure that the premises are used only for lawful and permitted activities.

## **SCHEDULE C – PROJECT FACILITIES**

*(See Clause 2.1)*

[to be defined based on the Concessionaire's Project Implementation Plan subject to compliance of the Terms and Conditions as mentioned in the Concession Agreement and guidance from the Authority and/ or Independent Engineer]

The Concessionaire shall construct or install, the Project including all the amenities and facilities alongwith required and support infrastructure for Project, for the optimal functioning thereof.

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

*(See Clause 2.1)*

## **SCHEDULE E – APPLICABLE PERMITS**

*(See Clause 4.1.3)*

The Concessionaire shall obtain, as required under the Applicable Laws, the following Applicable Permits on or before the Appointed Date, save and except to the extent of a waiver granted by the Authority in accordance with Clause 4.1.3 of the Agreement. An indicative list of approvals is detailed below, however the Concessionaire needs to ensure all other approvals not mentioned in the list but applicable under the law are also procured:

Sr. No.	Indicative list of approvals required
1	Excise Registration
2	Conversion of Land for Factory use
3	Pollution Consent to establish
4	Consent to Operate
5	Professional Tax Registration
6	GST Registration
7	Water Connectivity
8	Environmental Clearance
9	Permission for connection of Power
10	Building Plan Approval from Panchayat
11	Final NOC from Fire Department
12	Registration of unit with the District Industries Centre
13	Site and building plan approval
14	Registration of manufacturing capacity
15	Certificate of registration for employment of contract labour
16	License to work a factory
17	Boiler inspection and certification
18	Petroleum & Explosive Safety License
19	Approvals from USFDA / UK MHRA / EDQM / Australian TGA / Brazilian ANVISA, etc. for good manufacturing practices

Nothing in this Concession Agreement shall relieve the Concessionaire from also securing relevant approval(s), permit(s), licenses and clearances of any and all Governmental Authorities or entities having jurisdiction over the development activities and the use of Project Site.

## SCHEDULE F – PERFORMANCE SECURITY

(See Clause 9.1)

*The* .....,  
.....  
.....

WHEREAS:

- (A) ..... (the “**Concessionaire**”) and the ....., ..... (the “**Authority**”) have entered into a Concession Agreement dated ..... (the “**Agreement**”) whereby the Authority has agreed to the Concessionaire undertaking the development of the Project on design, build, finance, operate and transfer (the “**DBFOT**”) basis, subject to and in accordance with the provisions of the Agreement.
- (B) The Agreement requires the Concessionaire to furnish a Performance Security to the Authority in a sum of Rs. .... cr. (Rupees ..... crore) (the “**Guarantee Amount**”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the Concession Period (as defined in the Agreement).
- (C) We, ..... through our Branch at ..... (the “**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance Security.

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

1. The Bank hereby unconditionally and irrevocably guarantees and undertakes to pay to the Authority upon occurrence of any failure or default in due and faithful performance of all or any of the Concessionaire’s obligations, under and in accordance with the provisions of the Agreement, on its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Concessionaire, such sum or sums up to an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of an Officer not below the rank of ..... in the Authority, that the Concessionaire has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Concession Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any Dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Concessionaire for any reason whatsoever.

3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfilment and/ or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.
6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for .... days during the Concession Period and unless a demand or claim in writing is made by the Authority on the Bank under this Guarantee, no later than 6 (six) months from the date of expiry of this Guarantee, all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.
8. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
9. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorized to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the

Authority that the envelope was so posted shall be conclusive.

10. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of .... Days as mentioned in the Concession Agreement or until it is released earlier by the Authority pursuant to the provisions of the Agreement.

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

SIGNED, SEALED AND DELIVERED

For and on behalf of

the BANK by:

(Signature)

(Name)

(Designation)

(Code Number)

(Address)

NOTES:

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

**SCHEDULE G – PROCESSING FEE**  
**( Price quoted by successful bidder form part )**



## **SCHEDULE H -PROJECT COMPLETION SCHEDULE**

*(See Clause 14.1)*

### **Project Completion Schedule**

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

#### **Project Milestone-I**

Project Milestone-I shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-I**”).

Prior to the occurrence of Project Milestone-I, the Concessionaire shall have completed all the excavation works and expended not less than 10% (ten per cent) of the total capital cost set forth in the Agreement

#### **Project Milestone-II**

Project Milestone-II shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-II**”).

Prior to the occurrence of Project Milestone-II, the Concessionaire shall have completed all the foundation works, built at least 15% of the building structure (built up area) and expended not less than 25% (twenty-five per cent) of the total capital cost set forth in the Agreement

#### **Project Milestone-III**

Project Milestone-III shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-III**”).

Prior to the occurrence of Project Milestone-III, the Concessionaire shall have built at least 30% of the building structure (built up area) and expended not less than 40% (forty-five per cent) of the total capital cost set forth in the Agreement

#### **Project Milestone-IV**

Project Milestone-IV shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-IV**”).

Prior to the occurrence of Project Milestone-IV, the Concessionaire shall have built at least 45% of the building structure (built up area) and have initiated the process of procurement of machineries and expended not less than 55% (Fifty-five per cent) of the total capital cost set forth in the Agreement

### **Project Milestone-V**

Project Milestone-V shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-V**”).

Prior to the occurrence of Project Milestone-V, the Concessionaire shall have built at least 70% of the building structure (built up area) and expended not less than 75% (seventy-five per cent) of the total capital cost set forth in the Agreement

### **Project Milestone-VI**

Project Milestone-VI shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-VI**”).

Prior to the occurrence of Project Milestone-VI, the Concessionaire shall have built at least 100% of the building structure (built up area) and have installed all machineries and expended not less than 100% (hundred per cent) of the total capital cost set forth in the Agreement

### **Scheduled Project Completion Date**

The Scheduled Project Completion Date shall occur on the 1095th (one thousand and ninety five) day from the Appointed Date.

On or before the Scheduled Project Completion Date, the Concessionaire shall have completed the project construction and installed necessary machinery as proposed in Schedule-I in accordance with this Agreement.

## **SCHEDULE I – DETAILED PROJECT REPORT**

*(See Clause 14.3)*

### **1. Detailed Project Report**

In compliance of the obligations set forth in Clause 14.3 of this Agreement, the Concessionaire shall furnish to the Authority and Independent Engineer, free of cost, Detailed Project Report constituted of Site Plan, Cost details, plant capacity, equipment details, drawings.

The Authority would not provide any comments/ suggestions/ approval to the Detailed Project Report. The Concessionaire would be responsible for ensuring that all design and specifications are as per Applicable Laws.

### **2. Additional Drawings/Report**

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

## **SCHEDULE J– TESTS**

*(See Clause 15.2, 20.3, 16)*

### **1 Schedule for Tests**

- 1.1 The Concessionaire shall, no later than 30 (thirty) days prior to the likely completion of the Project, notify the Independent Engineer and the Authority of its intent to subject the Project to Tests, and no later than 7 (seven) days prior to the actual date of Tests, furnish to the Independent Engineer and the Authority detailed inventory and particulars of all works and equipment forming part of the Project.
- 1.2 The Concessionaire shall notify the Independent Engineer of its readiness to subject the Project to Tests at any time after 7 (seven) days from the date of such notice, and upon receipt of such notice, the Independent Engineer shall, in consultation with the Concessionaire, determine the date and time for each Test and notify the same to the Authority who may designate its representative to witness the Tests. The Independent Engineer shall thereupon conduct the Tests itself or cause any of the Tests to be conducted in accordance with Article 16 and this Schedule-J.

### **2 Tests**

[Note: The Authority, in consultation with the Independent Engineer shall hereunder describe all the Tests that are required to be performed]

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

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

### **4 Completion/Provisional Certificate**

Upon successful completion of Tests, the Independent Engineer shall issue the Completion Certificate or the Provisional Certificate, as the case may be, in accordance with the provisions of Article 16.

### **5 Tests during construction**

Without prejudice to the provisions of this Schedule-J, Tests during construction shall be conducted in accordance with the provisions of Clause 15.2 & 20.3.

## **SCHEDULE K – COMPLETION CERTIFICATE**

*(See Clause 16.1)*

1. I/We, ..... (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated ..... (the “**Agreement**”), for the Project (the “**Project**”) on design, build, finance, operate and transfer (the “DBFOT”) basis, through ..... (Name of Concessionaire), hereby certify that the Tests specified in Article 16 and Schedule-J of the Agreement have been successfully undertaken to determine compliance of the Project with the provisions of the Agreement, and I/We am/are satisfied that the Project can be safely and reliably placed in commercial service of the Users thereof.
2. It is certified that, in terms of the aforesaid Agreement, all works forming part of the Project have been completed, and the Project is hereby declared fit for entry into commercial operation on this the ..... day of ..... 20.....

SIGNED, SEALED AND DELIVERED

For and on behalf of

the INDEPENDENT ENGINEER by:

(Signature)

(Name)

(Designation)

(Address)

**PROVISIONAL CERTIFICATE**

- 1 I/We, ..... (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated ..... (the “Agreement”), for the Project (the “**Project**”) on design, build, finance, operate and transfer (the “DBFOT”) basis through ..... (Name of Concessionaire), hereby certify that the Tests specified in Article 16 and Schedule-J of the Agreement have been undertaken for the Project Component ..... to determine compliance thereof with the provisions of the Agreement.
  
- 2 Construction Works forming part of the Project Components ..... of the Project that were found to be incomplete and/or deficient have been specified and appended hereto, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. (Some of the incomplete works have been delayed as a result of reasons attributable to the Authority or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire) I/We am/are satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Project Component ..... of the Project, pending completion thereof.
  
- 3 In view of the foregoing, I/We am/are satisfied that the Project Components ..... of the Project can be safely and reliably placed in commercial service thereof, and in terms of the Agreement, the Project Component ..... of the Project is hereby provisionally declared fit for entry into commercial operation on this the ..... day of ..... 20.....

ACCEPTED, SIGNED, SEALED  
SIGNED, SEALED AND  
AND DELIVERED  
DELIVERED  
For and on behalf of  
and on behalf of  
CONCESSIONAIRE by:  
INDEPENDENT ENGINEER by:

For

(Signature)  
(Signature)  
(Name and Designation)  
(Name and Designation)  
(Address)

(Address)

## **SCHEDULE L – MAINTENANCE REQUIREMENTS**

*(See Clause 18.2)*

## **SCHEDULE M - SAFETY REQUIREMENTS**

*(See Clause 19.1.1)*

### **1 Guiding principles**

- 1.1 Safety Requirement aim at reduction in injuries, loss of life and damage to property resulting from accidents on or about the Project, irrespective of the person(s) at fault.
- 1.2 Safety Requirements apply to all phases of operation, management and development with emphasis on identification of factors associated with accidents, consideration of the same, and implementation of appropriate remedial measures.
- 1.3 Safety Requirement include measures associated with safe movement, safety management, safety equipment, fire safety, enforcement and Emergency response.

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

- 2.1 The Concessionaire shall abide by the following in so far as they related to safety of the Users:
  - d) Applicable Laws and Applicable Permits;
  - e) Manual for Safety, issued by the Authority;
  - f) Provision of this Agreement;
  - g) Good Industry Practice

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

- 3.1 For carrying out safety audit of the Project, Authority shall appoint from time to time, one or more qualified firms or organization as its consultant (the "Safety Consultant").
- 3.2 Once in every Accounting Year, a safety audit shall be carried out by the Safety Consultant. It shall review, compile and analyze the annual report and accident data of the preceding year, and undertake an inspection of the Project. The Safety Consultant shall complete the audit within a period of 1(one) month and submit a Safety Report (the "Safety Report") recommending specific improvements, if any, required to be made in the Project. The Safety Report shall be submitted to Authority, in 5 (five) copies. One copy each of the Safety Report shall be forwarded by the Authority to the Concessionaire and the Independent Engineer forthwith.

### **4 Safety measures during Concession Period**



- 4.1 The Concessionaire shall develop, implement and administer a surveillance and safety Programme for the Project.
- 4.2 The Concessionaire shall keep a copy of every first information report (the “FIR”) recorded by Police with respect to any accident occurring in the Project. In addition, the Concessionaire shall also collect data for all cases of accidents not recorded by the Police. The information so collected shall be summarized in the form prescribed by the Authority for this purpose. The Concessionaire shall also record the exact location of each accident on the Layout plans and aforesaid data shall be submitted to Authority at the conclusion of every quarter.
- 4.3 The Concessionaire shall submit to the Authority before 31<sup>st</sup> (thirty first) May of each year, an annual report (in ten copies) containing, without limitation, a detailed listing and analysis of all accidents of the preceding Accounting Year and the measures taken by the Concessionaire pursuant to the provisions of Paragraph 4.1 of this Schedule for averting or minimizing such accidents in future.
- 4.4 Once in every Accounting Year, a safety audit shall be carried out by the Safety Consultant to be appointed by the Authority. It shall review and analyze annual report and accident data of the preceding year, and undertake an inspection of the Terminal. The Safety Consultant shall complete the safety audit within a period of 1 (one) month and submit a Safety Report recommending specific improvements, if any, required to be made in the Project. Such recommendations shall be processed, mutatis mutandis, and acted upon in the manner set forth in Paragraphs 4.2, 4.3 and 4.4 of this Schedule—M

## **5 Costs and expenses**

Costs and expenses incurred in connection with the Safety Requirements set forth herein, including the provisions of Paragraph 2 of this Schedule, shall be met in accordance with Article 19.

## **SCHEDULE N – SELECTION OF INDEPENDENT ENGINEER**

*(See Clause 21.1)*

### **1 Selection of Independent Engineer**

- 1.1 The Authority shall follow the selection process specified in the Model RFP Document for Selection of Technical Consultants as published by the Ministry of Finance/Planning Commission or any substitute thereof for selection of an experienced firm to discharge the functions and duties of an Independent Engineer.
- 1.2 In the event of Termination of an Independent Engineer appointed in accordance with the provisions of paragraph 1.1, the Authority shall appoint another firm of Technical Consultants forthwith or may engage a Government-owned entity in accordance with the provisions of paragraph 5 of this Schedule-N.
- 1.3 The Concessionaire may, in its discretion, nominate a representative to participate in the process of selection to be undertaken by the Authority under this Schedule-N.

### **2 Terms of Reference**

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

### **3 Fee and expenses**

- 3.1 In determining the nature and quantum of duties and services to be performed by the Independent Engineer during the Development Period and Construction Period, the Authority shall endeavor that payments to the Independent Engineer on account of fee and expenses do not exceed 2% (two per cent) of the Total Project Cost. Payments not exceeding such 2% (two per cent) shall be borne equally by the Authority and the Concessionaire in accordance with the provisions of this Agreement.

### **4 Appointment of Government entity as Independent Engineer**

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

## **SCHEDULE O – TERMS OF REFERENCE FOR INDEPENDENT ENGINEER**

*(See Clause 21.2.1)*

### **1 Scope**

1.1 These Terms of Reference for the Independent Engineer (the “**TOR**”) are being specified pursuant to the Concession Agreement dated ..... (the “**Agreement**”), which has been entered into between the Authority and ..... (the “**Concessionaire**”) for the Project on design, build, finance, operate and transfer (the “**DBFOT**”) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this TOR.

1.2 This TOR shall apply to construction of the Project.

### **2 Definitions and interpretation**

2.1 The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.

2.2 References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.

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

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

3.1 The role and functions of the Independent Engineer shall include the following:

- (i) review of the Drawings and Documents as set forth in Paragraph 4;
- (ii) review, inspection and monitoring of Construction Works as set forth in Paragraph 5;
- (iii) conducting Tests on completion of construction and issuing Completion/Provisional Certificate as set forth in Paragraph 5;
- (iv) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
- (v) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (vi) assisting the Parties in resolution of Disputes as set forth in Paragraph 7; and

(ix) undertaking all other duties and functions in accordance with the Agreement.

3.2 The Independent Engineer shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

#### **4 Development Period**

4.1 During the Development Period, the Independent Engineer shall undertake a detailed review of the Drawings and Detailed Project Report to be furnished by the Concessionaire along with supporting data, including the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites and topographical surveys. The Independent Engineer shall complete such review and send its comments/observations to the Authority and the Concessionaire within 15 (fifteen) days of receipt of such Drawings. In particular, such comments shall specify the conformity or otherwise of such Drawings and Detailed Project Report with the Scope of the Project and Specifications and Standards.

4.2 The Independent Engineer shall review any modified Drawings or supporting Documents sent to it by the Concessionaire and furnish its comments within 7 (seven) days of receiving such Drawings or Documents.

4.3 The Independent Engineer shall review the Drawings sent to it by the Safety Consultant in accordance with Schedule-M and furnish its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receiving such Drawings. The Independent Engineer shall also review the Safety Report and furnish its comments thereon to the Authority within 15 (fifteen) days of receiving such report.

4.4 The Independent Engineer shall review the detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments within 15 (fifteen) days of receipt thereof.

4.5 Upon reference by the Authority, the Independent Engineer shall review and comment on the EPC Contract or any other contract for construction, operation and maintenance of the Project, and furnish its comments within 7 (seven) days from receipt of such reference from the Authority.

#### **5 Construction Period**

5.1 In respect of the Drawings, Detailed Project Report, Documents and Safety Report received by the Independent Engineer for its review and comments during the Construction Period, the provisions of Paragraph 4 shall apply, *mutatis mutandis*.

- 5.2 The Independent Engineer shall review the monthly progress report furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receipt of such report.
- 5.3 The Independent Engineer shall inspect the Construction Works and the Project once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20<sup>th</sup> (twentieth) day of each month in any case, and make out a report of such inspection (the “**Inspection Report**”) setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works with the Scope of the Project and the Specifications and Standards. In a separate section of the Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in the construction of the Project. The Independent Engineer shall send a copy of its Inspection Report to the Authority and the Concessionaire within 7 (seven) days of the inspection.
- 5.4 The Independent Engineer may inspect the Project Site more than once in a month if any lapses, defects or deficiencies require such inspections.
- 5.5 For determining that the Construction Works conform to Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, Tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the Tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- 5.6 The sample size of the Tests, to be specified by the Independent Engineer under Paragraph 5.5, shall comprise 10% (ten per cent) of the quantity or number of Tests prescribed for each category or type of Tests in the Quality Control Manuals; provided that the Independent Engineer may, for reasons to be recorded in writing, increase the aforesaid sample size by up to 10% (ten per cent) for certain categories or types of Tests.
- 5.7 The timing of Tests referred to in Paragraph 5.5, and the criteria for acceptance/ rejection of their results shall be determined by the Independent Engineer in accordance with the Quality Control Manuals. The Tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the Tests that may be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice.
- 5.8 In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried

out, Tests to determine that such remedial works have brought the Construction Works into conformity with the Specifications and Standards, and the provisions of this Paragraph 5 shall apply to such Tests.

- 5.9 In the event that the Concessionaire fails to achieve any of the Project Milestones, the Independent Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Independent Engineer shall determine that completion of the Project is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within 15 (fifteen) days the steps proposed to be taken to expedite progress, and the period within which Scheduled Project Completion Date shall be achieved. Upon receipt of a report from the Concessionaire, the Independent Engineer shall review the same and send its comments to the Authority and the Concessionaire forthwith.
- 5.10 If at any time during the Construction Period, the Independent Engineer determines that the Concessionaire has not made adequate arrangements for the safety of workers and Users in the zone of construction or that any work is being carried out in a manner that threatens the safety of the workers and the Users, it shall make a recommendation to the Authority forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- 5.11 In the event that the Concessionaire carries out any remedial measures to secure the safety of suspended works and Users, it may, by notice in writing, require the Independent Engineer to inspect such works, and within 3 (three) days of receiving such notice, the Independent Engineer shall inspect the suspended works and make a report to the Authority forthwith, recommending whether or not such Suspension may be revoked by the Authority.
- 5.12 If Suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of dates set forth in the Project Completion Schedule, to which the Concessionaire is reasonably entitled, and shall notify the Authority and the Concessionaire of the same.
- 5.13 The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in Schedule-J and issue a Completion Certificate or Provisional Certificate, as the case may be. For carrying out its functions under this Paragraph 5.13 and all matters incidental thereto, the Independent Engineer shall act under and in accordance with the provisions of Article 16 and Schedule-J.
- 5.14 Upon reference from the Authority, the Independent Engineer shall make a fair and reasonable assessment of the costs of providing information, works

and services as set forth in Article 17 and certify the reasonableness of such costs for payment by the Authority to the Concessionaire.

- 5.15 The Independent Engineer shall aid and advise the Concessionaire in preparing the Maintenance Manual.

## **6 Determination of costs and time**

- 6.1 The Independent Engineer shall determine the costs, and/or their reasonableness, that are required to be determined by it under the Agreement.

- 6.2 The Independent Engineer shall determine the period, or any extension thereof, that is required to be determined by it under the Agreement.

## **7 Assistance in Dispute resolution**

- 7.1 When called upon by either Party in the event of any Dispute, the Independent Engineer shall mediate and assist the Parties in arriving at an amicable settlement.

- 7.2 In the event of any disagreement between the Parties regarding the meaning, scope and nature of Good Industry Practice, as set forth in any provision of the Agreement, the Independent Engineer shall specify such meaning, scope and nature by issuing a reasoned written statement relying on Good Industry Practice and authentic literature.

## **8 Other duties and functions**

The Independent Engineer shall perform all other duties and functions specified in the Agreement.

## **9 Miscellaneous**

- 9.1 The Independent Engineer shall notify its Programme of inspection to the Authority and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection.

- 9.2 A copy of all communications, comments, instructions, Drawings or Documents sent by the Independent Engineer to the Concessionaire pursuant to this TOR, and a copy of all the test results with comments of the Independent Engineer thereon shall be furnished by the Independent Engineer to the Authority forthwith.

- 9.3 The Independent Engineer shall obtain, and the Concessionaire shall furnish in 2 (two) copies thereof, all communications and reports required to be submitted, under this Agreement, by the Concessionaire to the Independent Engineer, whereupon the Independent Engineer shall send 1 (one) of the copies to the Authority along with its comments thereon.

- 9.4 The Independent Engineer shall retain at least one copy each of all Drawings, Detailed Project Report and Documents received by it, including 'as-built' Drawings, and keep them in its safe custody.
- 9.5 Upon completion of its assignment hereunder, the Independent Engineer shall duly classify and list all Drawings, Detailed Project Report, Documents, results of Tests and other relevant records, and hand them over to the Authority or such other person as the Authority may specify, and obtain written receipt thereof. 2 (two) copies of the said documents shall also be furnished in editable digital format or in such other medium as may be acceptable to the Authority.

Wherever no period has been specified for delivery of services by the Independent Engineer, the Independent Engineer shall act with the efficiency and urgency necessary for discharging its functions in accordance with Good Industry Practice.



## **SCHEDULE – P: SELECTION OF INDEPENDENT TESTING AGENCY**

### **1 Selection of independent testing agency (ITA)**

- 1.1 The Authority shall follow an open competitive bidding process, as mutually agreeable to both the parties, for selection of an experienced firm to set up and discharge the functions and duties of an Independent Testing Laboratory.
- 1.2 In the event of Termination of an independent testing agency, appointed in accordance with the provisions of paragraph 1.1, the Authority shall appoint another entity as independent testing agency.
- 1.3 The Concessionaire shall make provision in the plant, a physical space, for setting up of independent testing laboratory.
- 1.4 The ITA shall be an accredited agency

### **2 Fee and expenses**

- 2.1 The cost of sample testing shall be borne by the party requested for sample testing.
- 2.2 Concessionaire shall pay/ bear the expense towards water and electricity of the laboratory

### **3 Appointment of Government entity as independent testing agency**

- 3.1 Notwithstanding anything to the contrary contained in this Schedule, the Authority may in its discretion appoint a Government-owned entity as the independent testing agency; provided that such entity shall be a body corporate having as one of its primary function the provision of testing alkaloid contents from poppy straw; provided further that a Government-owned entity which is owned or controlled by the Authority shall not be eligible for appointment as independent testing agency.

## **SCHEDULE P- 1: TERMS OF REFERENCE FOR INDEPENDENT TESTING AGENCY**

### **1 Scope**

1.1 These Terms of Reference for the Independent Testing Agency (the “**TOR**”) are being specified pursuant to the Concession Agreement dated ..... (the “**Agreement**”), which has been entered into between the Authority and ..... (the “**Concessionaire**”) for the Project on design, build, finance, operate and transfer (the “**DBFOT**”) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this TOR.

1.2 This TOR shall apply to operation of the Project.

### **2 Definitions and interpretation**

2.1 The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.

2.2 References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.

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

### **3 Role and functions of the Independent Testing Agency**

3.1 The role and functions of the Independent Testing Agency shall include the following:

- (i) set up laboratory in the space provided by the Concessionaire inside the Project
- (ii) bring testing machines, equipment, instruments, safety gears, required for running, operation and maintenance of the testing laboratory
- (iii) deploy qualified personnel, technician, scientist, staff in fulfillment of its obligations as an ITA
- (iv) develop the sample for testing from CPS Husk provided by the Authority,
- (v) issue certificate against each of the sample tested,
- (vi) maintain data of all the samples developed,
- (vii) develop standardized forms of reporting which can withstand legal scrutiny

- (viii) ensure laboratory quality management system as per International standards, in accordance with the latest version of ISO / IEC 17025 'General requirements for the competence of Testing and Calibration laboratories' and concerned NABL guidelines
  - (ix) ensure different analytical techniques for example colour tests, chromatography (TLC, GLC, HPLC) and spectroscopy (IR or UV) for more accuracy in results
  - (x) ensure operation of laboratory as per Quality manual
  - (xi) the test results must show the content of alkaloids such as morphine, codeine, thebaine, papaverine, noscapine etc,
  - (xii) ensure the sample testing as instructed by Authority
  - (xiii) ensure the raw material, chips, and other requirement for smooth functioning of testing machines,
  - (xiv) ensure the accuracy of testing results by deploying validated techniques and advanced techniques such as impurity profiling
  - (xv) ensure the waste material generated from laboratory operations are disposed scientifically,
  - (xvi) ensure safety precautions / protocol of running, operation and management of scientific laboratory
  - (xvii) the ITA staff concerned with sampling and testing must be familiarize with I.S.I procedures on drawl of samples published by I.S.I and for this purpose ITA should make adequate amenities
- 3.2 The ITA shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

#### **4 Determination of costs and time**

- 4.1 The ITA shall be paid the costs towards sample testing determined by tender appointing the ITA followed by the Agreement.
- 4.2 The ITA shall be paid on quarterly basis upon raising the invoice to the respective party,
- 4.3 The ITA shall function during the concession period, or any extension thereof, or as per the period agreed in the Agreement pursuant to the appointment of ITA.

#### **5 Other duties and functions**

- 5.1 The ITA shall perform all other duties and functions specified in the Agreement executed with the Authority pursuant to its appointment.
- 5.2 The chemical examiner who performed the test shall not be the certifying expert

5.3 Ensure the process for registration, analysis, testing, and reporting of samples as per international norms and guidelines

**6 Miscellaneous**

6.1 Ensure the safe keeping of chemical and hazardous material in the laboratory

## SCHEDULE Q – ESCROW AGREEMENT

(See Clause 25.1.2)

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

AMONGST

- 1 ..... LIMITED, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at ..... (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
- 2 .....name and particulars of Lenders’ Representative and having its registered office at .....acting for and on behalf of the Senior Lenders as their duly authorized agent with regard to matters arising out of or in relation to this Agreement (herein after referred to as the “**Lenders’ Representative**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
- 3 .....name and particulars of the Escrow Bank and having its registered office at .....(hereinafter referred to as the “**Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
- 4 The ..... represented by ..... and having its principal offices at ..... (hereinafter referred to as the “**Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).

WHEREAS:

- (A) The Authority has entered into a Concession Agreement dated ..... with the Concessionaire (the “**Concession Agreement**”) for **Development, Operation and Maintenance of** ..... on PPP (the “**DBFOT**”) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement
- (B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (C) The Concession Agreement requires the Concessionaire to establish an Escrow Account, inter alia, on the terms and conditions stated therein.

NOW, THEREFORE, in consideration of the foregoing and the respective covenants and agreements set forth in this Agreement, the receipt and

sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

## 1 DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

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

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

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

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

a notice is delivered by the Authority or the Lenders’ Representative, as the case may be, to the Concessionaire asking the latter to cure the breach or default specified in such notice;

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

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

**“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;

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

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

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

### 1.2 Interpretation

- 1.2.1 References to Lenders' Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders' Representative, acting for and on behalf of Senior Lenders.
- 1.2.2 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.
- 1.2.3 References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.
- 1.2.4 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

## **2 ESCROW ACCOUNT**

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

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

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

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

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

2.3 Establishment and operation of Escrow Account

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

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

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

2.4 Escrow Bank's fee

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

2.5 Rights of the Parties

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

2.6 Substitution of the Concessionaire

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

**3 DEPOSITS INTO ESCROW ACCOUNT**

3.1 Deposits by the Concessionaire



3.1.1 The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

- a) all money received in relation to the Project from any source, including the Senior Lenders, Lenders of Subordinated Debt and the Authority;
- b) all funds received by the Concessionaire from its share-holders, in any manner or form;
- c) all Processing Fee levied/ revenue received and collected by the Concessionaire;
- d) any other revenues, rentals, deposits or capital receipts, as the case may be, from or in respect of the Project; and
- e) all proceeds received pursuant to any insurance claims.

3.1.2 The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

3.2 Deposits by the Authority

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

- a) all Processing Fee collected by the Authority in exercise of its rights under the Concession Agreement; and
- b) Termination Payments

Provided that, notwithstanding the provisions of Clause 4.1.1, the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire, and the balance remaining shall be deposited into the Escrow Account.

3.3 Deposits by Senior Lenders

The Lenders' Representative agrees, confirms and undertakes that the Senior Lenders shall deposit into and/or credit the Escrow Account with all disbursements made by them in relation to or in respect of the Project; provided that notwithstanding anything to the contrary contained in this Agreement, the Senior Lenders shall be entitled to make direct payments to the EPC Contractor under and in accordance with the express provisions contained in this behalf in the Financing Agreements.

3.4 Interest on deposits

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account; provided that the Escrow Bank shall be entitled to appropriate therefrom the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

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

##### **4.1 Withdrawals during Concession Period**

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date(s):

- a) all Taxes due and payable by the Concessionaire for and in respect of the Project;
- b) all Concession Fee payable to Authority;
- c) all payments relating to construction of the Project, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- d) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- e) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- f) monthly proportionate provision of Debt Service due in an Accounting Year;
- g) all payments, interests and Damages certified by the Authority as due and payable to it by the Concessionaire;
- h) monthly proportionate provision of Debt Service payments due in an Accounting Year in respect of Subordinated Debt;
- i) any reserve requirements set forth in the Financing Agreements; and
- j) balance, if any, in accordance with the instructions of the Concessionaire.

4.1.2 No later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

4.2 Withdrawals upon Termination

Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:

- a) all Taxes due and payable by the Concessionaire for and in respect of the Project;
- b) all Concession Fee payable to Authority;
- c) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire;
- e) retention and payments relating to the liability for defects and deficiencies set forth in Article 33;
- f) outstanding Subordinated Debt;
- g) incurred or accrued O&M Expenses;
- h) any other payments required to be made under this Agreement; and
- i) balance, if any, in accordance with the instructions of the Concessionaire:

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

4.3 Application of insufficient funds

Funds in the Escrow Account shall be applied in the serial order of priority set forth in Clauses 4.1 and 4.2, as the case may be. If the funds available are not sufficient to meet all the requirements, the Escrow Bank shall apply such funds in the serial order of priority until exhaustion thereof.

4.4 Application of insurance proceeds

Notwithstanding anything in this Agreement, the proceeds from all insurance claims, except life and injury, shall be deposited into and/or credited to the Escrow Account and utilized for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

#### 4.5 Withdrawals during Suspension

Notwithstanding anything to the contrary contained in this Agreement, the Authority may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 30 of the Concession Agreement. Any instructions given by the Authority to the Escrow Bank during such period shall be complied with as if such instructions were given by the Concessionaire under this Agreement and all actions of the Authority hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

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

#### 5.1 Segregation of funds

Monies and other property received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received, and shall be segregated from other funds and property of the Escrow Bank.

#### 5.2 Notification of balances

7 (seven) business days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the Concessionaire and/or the Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Lenders' Representative of the balances in the Escrow Account and Sub-Accounts as at the close of business on the immediately preceding business day.

#### 5.3 Communications and notices

In discharge of its duties and obligations hereunder, the Escrow Bank:

a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;

b) may, in the absence of bad faith or gross negligence on its part, rely

upon the authenticity of any communication or document believed by it to be authentic;

c) shall, within 5 (five) business days after receipt, deliver a copy to the Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and

d) shall, within 5 (five) business days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Lenders' Representative in connection herewith.

#### 5.4 No set off

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies and properties held by the Escrow Bank in the Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

#### 5.5 Regulatory approvals

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

### **6 ESCROW DEFAULT**

#### 6.1 Escrow Default

6.1.1 Following events shall constitute an event of default by the Concessionaire (an "**Escrow Default**") unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority or the Lenders' Representative:

a) the Concessionaire commits breach of this Agreement by failing to deposit any receipts into the Escrow Account as provided herein and fails to cure such breach by depositing the same into the Escrow Account within a Cure Period of 5 (five) business days;

b) the Concessionaire causes the Escrow Bank to transfer funds to any account of the Concessionaire in breach of the terms of this Agreement and

fails to cure such breach by depositing the relevant funds into the Escrow Account or any Sub-Account in which such transfer should have been made, within a Cure Period of 5 (five) business days; or

c) the Concessionaire commits or causes any other breach of the provisions of this Agreement and fails to cure the same within a Cure Period of 5 (five) business days.

6.1.2 Upon occurrence of an Escrow Default, the consequences thereof shall be dealt with under and in accordance with the provisions of the Concession Agreement.

## **7 TERMINATION OF ESCROW AGREEMENT**

### **7.1 Duration of the Escrow Agreement**

This Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Concessionaire in respect of the debt, guarantee or Financial Assistance received by it from the Senior Lenders, or any of its obligations to the Authority remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

### **7.2 Substitution of Escrow Bank**

The Concessionaire may, by not less than 45 (forty five) days prior notice to the Escrow Bank, the Authority and the Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders' Representative and arrangements are made satisfactory to the Lenders' Representative for transfer of amounts deposited in the Escrow Account to a new Escrow Account established with the successor Escrow Bank. The Termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

### **7.3 Closure of Escrow Account**

The Escrow Bank shall, at the request of the Concessionaire and the Lenders' Representative made on or after the payment by the Concessionaire of all outstanding amounts under the Concession Agreement and the Financing Agreements including the payments specified in Clause 4.2, and upon confirmation of receipt of such payments, close the Escrow Account and Sub-Accounts and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Escrow Account hereunder, the Escrow Agreement shall be deemed to be terminated.

## **8 SUPPLEMENTARY ESCROW AGREEMENT**

## 8.1 Supplementary Escrow Agreement

The Lenders' Representative and the Concessionaire shall be entitled to enter into a supplementary escrow Agreement with the Escrow Bank providing, inter alia, for detailed procedures and documentation for withdrawals from Sub-Accounts pursuant to Clause 4.1.1 and for matters not covered under this Agreement such as the rights and obligations of Senior Lenders and Lenders of Subordinated Debt, investment of surplus funds, restrictions on withdrawals by the Concessionaire in the event of breach of this Agreement or upon occurrence of an Escrow Default, procedures relating to operation of the Escrow Account and withdrawal therefrom, reporting requirements and any matters incidental thereto; provided that such supplementary escrow Agreement shall not contain any provision which is inconsistent with this Agreement and in the event of any conflict or inconsistency between provisions of this Agreement and such supplementary escrow Agreement, the provisions of this Agreement shall prevail.

## 9 **INDEMNITY**

### 9.1 General indemnity

- 9.1.1 The Concessionaire will indemnify, defend and hold the Authority, Escrow Bank and the Senior Lenders, acting through the Lenders' Representative, harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.
- 9.1.2 The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.
- 9.1.3 The Escrow Bank will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfil its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement other than any loss, damage, cost and expense, arising out of

acts done in discharge of their lawful functions by the Escrow Bank, its officers, servants and agents.

## 9.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a Third Party in respect of which it is entitled to the benefit of an indemnity under Clause 5.1 or in respect of which it is entitled to reimbursement (the “**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “**Indemnifying Party**”) within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or Dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

## 10 **DISPUTE RESOLUTION**

### 10.1 Dispute resolution

10.1.1 Any Dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be decided finally by reference to arbitration to a Board of Arbitrators comprising one nominee of each Party to the Dispute, and where the number of such nominees is an even number, the nominees shall elect another person to such Board. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for 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.

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

## 11 **MISCELLANEOUS PROVISIONS**

### 11.1 Governing law and jurisdiction

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

### 11.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:



a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;

b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;

c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and

d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

### 11.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

### 11.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorized representatives of the Parties.

### 11.5 Waiver

#### 11.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;

b) shall not be effective unless it is in writing and executed by a duly authorized representative of the Party; and

c) shall not affect the validity or enforceability of this Agreement in any manner.

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

11.6 No Third Party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

11.7 Survival

11.7.1 Termination of this Agreement:

a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive Termination hereof; and

b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

11.7.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such Termination or expiry of this Agreement.

11.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to Dispute resolution under Clause 12.1 of this Agreement or otherwise.

11.9 Successors and assigns

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

11.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number or e-mail are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on a business day, or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

11.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

11.12 Authorized representatives

Each of the Parties shall, by notice in writing, designate their respective authorized representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorized representative by similar notice.

11.13 Original Document

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

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

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

- (Signature)
- (Name)
- (Designation)
- (Address)
- (Fax No.)
- (e-mail address)

SIGNED, SEALED AND DELIVERED For and on behalf of ESCROW BANK by:

- (Signature)
- (Name)
- (Designation)
- (Address)
- (Fax No.)
- (e-mail address)

In the presence of:

1.

SIGNED, SEALED AND DELIVERED

For and on behalf of SENIOR LENDERS by the Lenders' Representative:

- (Signature)
- (Name)
- (Designation)
- (Address)
- (Fax No.)
- (e-mail address)

SIGNED, SEALED AND DELIVERED For and on behalf of Department of ..... by:

- (Signature)
- (Name)
- (Designation)
- (Address)
- (Fax No.)
- (e-mail address)

In the presence of:

2.

§ To be affixed in accordance with the articles of association of the Concessionaire and the resolution passed by its Board of Directors.

## **SCHEDULE R– PANEL OF CHARTERED ACCOUNTANTS**

*(See Clause 27.2.1)*

### **1 Panel of Chartered Accountants**

Pursuant to the provisions of Clause 27.2.1 of the Agreement, the Authority and the Concessionaire shall prepare a mutually agreed panel of 5 (five) reputable firms of Chartered Accountants having their registered offices in India (the “**Panel of Chartered Accountants**”). The criteria for preparing such Panel and the procedure to be adopted in this behalf shall be as set forth in this Schedule-R.

### **2 Invitation for empanelment**

2.1 The Authority shall invite offers from all reputed firms of Chartered Accountants who fulfil the following eligibility criteria, namely:

c) the firm should have conducted statutory audit of the annual accounts of at least one hundred companies registered under the Companies Act, 1956, including any re-enactment or modification thereof, of which at least ten should have been public sector undertakings;

d) the firm should have at least 5 (five) practicing Chartered Accountants on its rolls, each with a minimum experience of ten years in the profession;

e) the firm or any of its partners should not have been disqualified or black-listed by the Comptroller and Auditor General of India or the Authority; and

f) the firm should have an office in the State or in an adjacent State with at least 2 (two) practicing Chartered Accountants on its rolls in such State.

2.2 Interested firms meeting the eligibility criteria shall be required to submit a statement of their capability including the bio-data of all the practicing Chartered Accountants on its rolls. In particular, each firm shall be required to furnish year-wise information relating to the names of all the companies with an annual turnover exceeding Rs. 100,00,00,000 (Rs. one hundred crore) whose annual accounts were audited by such firm in any of the preceding 5 (five) Accounting Years.

### **3 Evaluation and selection**

3.1 The information furnished by each firm shall be scrutinized and evaluated by the Authority and 1 (one) point shall be awarded for each annual audit of the companies specified in Paragraph 2.2 above. (For the avoidance of doubt and by way of illustration, a firm which has conducted audit of the annual accounts of any such Company for five years shall be awarded five points).

- 3.2 The Authority shall prepare a list of all the eligible firms along with the points scored by each such firm and 5 (five) firms scoring the highest points shall be identified and included in the draft Panel of Chartered Accountants.

#### **4 Consultation with the Concessionaire**

The Authority shall convey the aforesaid panel of firms to the Concessionaire for scrutiny and comments, if any. The Concessionaire shall be entitled to scrutinize the relevant records of the Authority to ascertain whether the selection of firms has been undertaken in accordance with the prescribed procedure and it shall send its comments, if any, to the Authority within 15 (fifteen) days of receiving the aforesaid panel.

#### **5 Mutually agreed panel**

- 5.1 The Authority shall, after considering all relevant factors including the comments, if any, of the Concessionaire, finalize and constitute a panel of 5 (five) firms which shall be deemed to be the mutually agreed Panel of Chartered Accountants.
- 5.2 After completion of every 5 (five) years from the date of preparing the mutually agreed Panel of Chartered Accountants, or such earlier period as may be agreed between the Authority and the Concessionaire, a new panel shall be prepared in accordance with the provisions of this Schedule-R.

## SCHEDULE S – SUBSTITUTION AGREEMENT

(See Clause 34.3.1)

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

### AMONGST

- 1 The ....., represented by its ..... and having its principal offices at ..... (hereinafter referred to as the “**Authority**” which expression shall unless repugnant to the context or meaning thereof include its administrators, successors and assigns);
- 2 ..... LIMITED, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at ....., (hereinafter referred to as the “**Concessionaire**” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns and substitutes);
- 3 ..... name and particulars of Lenders’ Representative and having its registered office at ....., acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**”, which expression shall unless repugnant to the context or meaning thereof include its successors and substitutes);

### WHEREAS:

- (A) The Authority has entered into a Concession Agreement dated ..... with the Concessionaire (the “**Concession Agreement**”) for **Development, Operation and Maintenance of .....** on PPP basis (the “**DBFOT**”), and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.
- (B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (C) Senior Lenders have requested the Authority to enter into this Substitution Agreement for securing their interests through assignment, transfer and substitution of the Concession to a Nominated Company in accordance with the provisions of this Agreement and the Concession Agreement.
- (D) In order to enable implementation of the Project including its financing, construction, operation and maintenance, the Authority has agreed and undertaken to transfer and assign the Concession to a Nominated

Company in accordance with the terms and conditions set forth in this Agreement and the Concession Agreement.

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

## 1 DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

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

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

**“Financial Default”** means occurrence of a Material Breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 3 (three) months;

**“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;

**“Nominated Company”** means a company, incorporated under the provisions of the Companies Act, 1956, including any re-enactment or modification thereof, selected by the Lenders’ Representative, on behalf of Senior Lenders, and proposed to the Authority for assignment/transfer of the Concession as provided in this Agreement;

**“Notice of Financial Default”** shall have the meaning ascribed thereto in Clause 3.2.1; and

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

### 1.2 Interpretation

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

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



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

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

## **2 ASSIGNMENT**

### **2.1 Assignment of rights and title**

The Concessionaire hereby agrees to assign the rights, title and interest in the Concession to, and in favour of, the Lenders' Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of Financing by the Senior Lenders under the Financing Agreements.

## **3 SUBSTITUTION OF THE CONCESSIONAIRE**

### **3.1 Rights of substitution**

3.1.1 Pursuant to the rights, title and interest assigned under Clause 2.1, the Lenders' Representative shall be entitled to substitute the Concessionaire by a Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.

3.1.2 The Authority hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Nominated Company selected by the Lenders' Representative in accordance with this Agreement. For the avoidance of doubt, the Senior Lenders or the Lenders' Representative shall not be entitled to operate and maintain the Project as Concessionaire either individually or collectively.

### **3.2 Substitution upon occurrence of Financial Default**

3.2.1 Upon occurrence of a Financial Default, the Lenders' Representative may issue a notice to the Concessionaire (the "**Notice of Financial Default**") along with particulars thereof, and send a copy to the Authority for its information and record. A Notice of Financial Default under this Clause 3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.

3.2.2 Upon issue of a Notice of Financial Default hereunder, the Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Agreements, substitute the Concessionaire

by a Nominated Company in accordance with the provisions of this Agreement.

3.2.3 At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project in accordance with the provisions of Article 30 of the Concession Agreement, and upon receipt of such notice, the Authority shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority may extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days. For the avoidance of doubt, the Authority expressly agrees and undertakes to terminate the Concession Agreement forthwith, upon receipt of a written request from the Lenders' Representative at any time after 240 (two hundred and forty) days from the date of Suspension hereunder.

### 3.3 Substitution upon occurrence of Concessionaire Default

3.3.1 Upon occurrence of a Concessionaire Default, the Authority shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days time to the Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.

3.3.2 In the event that the Lenders' Representative makes a representation to the Authority within the period of 15 (fifteen) days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the Authority shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days; provided further that the Lenders' Representative may at any time withdraw its representation hereunder and upon such withdrawal, the Authority may terminate this Agreement in accordance with the provisions hereof.

### 3.4 Procedure for substitution

- 3.4.1 The Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Authority under Clause 3.3.2, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the take over and transfer of the Project including the Concession to the Nominated Company upon such Nominated Company's assumption of the liabilities and obligations of the Concessionaire towards the Authority under the Concession Agreement and towards the Senior Lenders under the Financing Agreements.
- 3.4.2 To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfil the eligibility criteria that were laid down by the Authority for shortlisting the bidders for award of the Concession; provided that the Lenders' Representative may represent to the Authority that all or any of such criteria may be waived in the interest of the Project, and if the Authority determines that such waiver shall not have any Material Adverse Effect on the Project, it may waive all or any of such eligibility criteria.
- 3.4.3 Upon selection of a Nominated Company, the Lenders' Representative shall request the Authority to:
- g) accede to transfer to the Nominated Company the right to construct, operate and maintain the Project in accordance with the provisions of the Concession Agreement;
  - h) endorse and transfer the Concession to the Nominated Company, on the same terms and conditions, for the residual Concession Period; and
  - i) enter into a Substitution Agreement with the Lenders' Representative and the Nominated Company on the same terms as are contained in this Agreement.
- 3.4.4 If the Authority has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 15 (fifteen) days from the date of proposal made by the Lenders' Representative, give a reasoned order after hearing the Lenders' Representative. If no such objection is raised by the Authority, the Nominated Company shall be deemed to have been accepted. The Authority shall thereupon transfer and endorse the Concession within 15 (fifteen) days of its acceptance/deemed acceptance of the Nominated Company; provided that in the event of such objection by the Authority, the Lenders' Representative may propose another Nominated Company whereupon the procedure set

forth in this Clause 3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire.

- 3.4.5 The transfer of Concession hereunder to a Nominated Company may, notwithstanding anything to the contrary in this Agreement and the Concession Agreement, be undertaken by transfer of no less than 75% (seventy five per cent) of the Equity of the Concessionaire to the Nominated Company, and upon such transfer hereunder, the Concessionaire shall be deemed to be the Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.

3.5 Selection to be binding

The decision of the Lenders' Representative and the Authority in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Lenders' Representative or the Senior Lenders or the Authority taken pursuant to this Agreement including the transfer/assignment of the Concession in favour of the Nominated Company. The Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assets of the Project or the Concessionaire's shares. It is hereby acknowledged by the Parties that the rights of the Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or Authority and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the Authority or the Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders' Representative.

**4 PROJECT AGREEMENTS**

4.1 Substitution of Nominated Company in Project Agreements

The Concessionaire shall ensure and procure that each Project Agreement contains provisions that entitle the Nominated Company to step into such Project Agreement, in its discretion, in place and substitution of the Concessionaire in the event of such Nominated Company's assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

**5 TERMINATION OF CONCESSION AGREEMENT**

5.1 Termination upon occurrence of Financial Default

At any time after issue of a Notice of Financial Default, the Lenders' Representative may by a notice in writing require the Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the

Authority shall undertake Termination under and in accordance with the provisions of Article 30 of the Concession Agreement.

## 5.2 Termination when no Nominated Company is selected

In the event that no Nominated Company acceptable to the Authority is selected and recommended by the Lenders' Representative within the period of 180 (one hundred and eighty) days or any extension thereof as set forth in Clause 3.3.2, the Authority may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

## 5.3 Realisation of Debt Due

The Authority and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realisation of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Escrow Account in accordance with the provisions of the Concession Agreement and the Escrow Agreement.

## **6 DURATION OF THE AGREEMENT**

### 6.1 Duration of the Agreement

This Agreement shall come into force from the date hereof and shall expire at the earliest to occur of the following events:

1. Termination of the Agreement; or
2. no sum remains to be advanced and no sum is outstanding to the Senior Lenders, under the Financing Agreements.

## **7 INDEMNITY**

### 7.1 General indemnity

7.1.1 The Concessionaire will indemnify, defend and hold the Authority and the Lenders' Representative harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

7.1.2 The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession

Agreement or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.

7.1.3 The Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lenders' Representative, its officers, servants and agents.

## 7.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a Third Party in respect of which it is entitled to the benefit of an indemnity under Clause 10.1 or in respect of which it is entitled to reimbursement (the "**Indemnified Party**"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or Dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

## 8 DISPUTE RESOLUTION

### 8.1 Dispute resolution

8.1.1 Any Dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably shall be decided by reference to arbitration to a Board of Arbitrators comprising one nominee each of the Authority, Concessionaire and the Lenders' Representative. 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 provisions of the Arbitration and Conciliation Act, 1996.

8.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The place of arbitration shall be Bhopal and the language of arbitration shall be English.

## 9 MISCELLANEOUS PROVISIONS

## 9.1 Governing law and jurisdiction

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

## 9.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

1. agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
2. agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;
3. 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
4. consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

## 9.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

## 9.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

## 9.5 Waiver

### 9.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

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

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

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

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

#### 9.6 No Third Party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

#### 9.7 Survival

##### 9.7.1 Termination of this Agreement:

- 1. shall not relieve the Parties of any obligations hereunder which expressly or by implication survive Termination hereof; and
- 2. except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

9.7.2 All obligations surviving the cancellation, expiration or Termination of this Agreement shall only survive for a period of 3 (three) years following the date of such Termination or expiry of this Agreement.

#### 9.8 Severability

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



shall not be subject to Dispute resolution under Clause 11 of this Agreement or otherwise.

9.9 Successors and assigns

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

9.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and e-mail address are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on any day, or on a day that is a public holiday, the notice shall be deemed to be received on the first working day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

9.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

9.12 Authorised representatives

Each of the Parties shall by notice in writing designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

9.13 Original Document

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

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

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

(Signature)

SIGNED, SEALED AND  
DELIVERED

For and on

SENIOR LENDERS by the Lenders' Representative:

(Signature)

(Name)

(Designation)

(Address)

(Fax)

(e-mail

In the

presence of:

1.

2.

SIGNED, SEALED  
AND DELIVERED

For and on behalf of

.....Authority by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(e-mail address)

## SCHEDULE T-VESTING CERTIFICATE

*(See Clause 32.4)*

- 1 The ....., (the “**Authority**”) refers to the **Concession Agreement dated** ..... (the “**Agreement**”) entered into between the Authority and ..... (the “**Concessionaire**”) for **Selection of the Concessionaire for**.....(the “**Project**”) on design, build, finance, operate and transfer (the “**DBFOT**”) basis.
  
- 2 The Authority hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 32.1 of the Agreement on the basis that upon issue of this Vesting Certificate, the Authority shall be deemed to have acquired, and all title and interest of the Concessionaire in or about the Project shall be deemed to have vested unto the Authority, free from any Encumbrances, charges and liens whatsoever.
  
- 3 Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

Signed this ..... day of ....., 20..... at .....

AGREED, ACCEPTED AND  
SIGNED

For and on behalf of  
CONCESSIONAIRE by: .....

(Signature)  
(Name)  
(Designation)  
(Address)

SIGNED, SEALED

AND DELIVERED  
For and on behalf of  
Authority by: .....

(Signature)  
(Name)  
(Designation)  
(Address)

In the presence of:

1.

2.

## **SCHEDULE U– DELETED**

## **SCHEDULE V- REPORTING AND RECORD REQUIREMENTS**

*(See Clause 5.1.1 and 20.1)*

***[The above Schedule shall be filled prior to signing of the  
Concession Agreement]***

## **SCHEDULE W– FORMAT OF ACKNOWLEDGEMENT OF PROJECT SITE**

*(Clause 4.1.3)*

FORMAT OF ACKNOWLEDGEMENT OF PROJECT SITE [•]

[on the letter head of the Concessionaire]

Date:

To:

[insert]

Re:       Handing over of Project Site [•]

Dear Sir,

We write in reference to the Concession Agreement dated, entered into by us with authority. As per the requirements of Article 4.1.3(b) of the said Concession Agreement, this is to acknowledge receipt of Project Site from the Authority. We further acknowledge that the Project Site is unencumbered and is fit and immediately available for the purpose of development of Assets thereon.

We have undertaken a due diligence over the Project Site, ourselves/through our shareholders.

We further acknowledge that we, or any entity claiming under us, shall have no recourse against the Authority if it is, at a later date, found that the Project Site is deficient in any manner whatsoever, and in the event of any mistake made or misapprehension harbored by us in relation to any of the foregoing provisions mentioned above (deficiency). If a Deficiency is found, we acknowledge and agree that we shall, at our own cost, take all appropriate measures to remedy the same in order to undertake the Project.

It is clarified that all fossils, antiquities, structures and/or other remains or things either of archaeological or of particular geological interest discovered at Project Site or in the course of carrying out any work shall not be our property and we shall have no right or interest in such fossils, antiquities and structures.

For and on behalf of

Signature of Authorized Representative Seal/Stamp