

# DEENDAYAL PORT AUTHORITY



EPC (Engineering, Procurement and Construction)  
Agreement for

## **Construction of Road Over Bridge (ROB) including Roads and allied facilities at Tuna - Tekra**

EXECUTIVE ENGINEER (C-I)  
CONSTRUCTION-I DIVISION  
DEENDAYAL PORT AUTHORITY  
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## **Part 1:Preliminary**



## ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

(To be executed on Rs.300/- non – judicial stamp paper)

This agreement is entered into on this date..... day of ..... 2026,

### Between

**The Board of Deendayal Port Authority, an autonomous body of Ministry of Ports, Shipping and Waterways of the Government of India, incorporated under the Major Port Authority Act, 2021 (here in after referred as the “Authority”** which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of **One Part**;

AND

{-----}, means the selected bidder a [.....]{established/incorporated under the applicable laws of its origin} and having its head/registered office at , hereinafter referred to as the "Contractor" which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns) of the Other Part.

### WHEREAS:

- A. [The Government of India] had entrusted to the Authority for Construction of Road Over Bridge (ROB) including Roads and allied facilities at Tuna – Tekra on Engineering, Procurement and Construction (EPC) Mode” including Construction of Approaches.
- B. The Authority had resolved to undertake the Design, Engineering Construction of Road Over Bridge (ROB) including Roads and allied facilities at Tuna – Tekra on Engineering, Procurement and Construction (EPC) basis in accordance with the terms and conditions to be set forth in an agreement to be entered into.
- C. The Authority had prescribed the technical and commercial terms and conditions, and invited bids (the “**Request for Proposals**” or “**RFP**”) from the eligible bidders as per the technical and commercial terms and conditions prescribed in the RFP for undertaking the Project.
- D. After evaluation of the bids received, the Authority had accepted the bid of the selected bidder and issued its Letter of Acceptance No. .... dated .....(hereinafter called the "LOA") to the selected bidder for rehabilitation and augmentation of the above project ROB at the contract price specified hereinafter, requiring the selected bidder to inter alia:
  - i. To give his consent to enter into this Agreement and the enforceability of the provisions thereof, within 10 (ten) days of the date of issue of LOA;

- ii. Submit Performance Security and Additional Performance Security (if any) as per RFP requirements, and
- iii. Execute this Agreement within 30[thirty] days of the date of issue of LOA.

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

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

# Article 01: Definition and Interpretations

## 1.1. Definitions

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

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

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

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

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

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

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

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

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

**“Appointed Date”** means that date declared by the Authority as the project commencement date with the consent of the contractor, as per the process prescribed in Article 3 and 8 of this Agreement;

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

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

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

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

**“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 recognized by the Reserve Bank of India

**“Base Rate”** means the floor rate of interest announced by the State Bank of India for all its lending operations;

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

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

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

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

- a. the enactment of any new Indian law;
- b. the repeal, modification or re-enactment of any existing Indian law;
- c. the commencement of any Indian law which has not entered into effect until the Base Date;
- d. a change in the interpretation or application of any Indian law by a judgment of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the Base Date; or;

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

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

**“Change of Scope Request”** shall have the meaning set forth in Clause 13.2.2;

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

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

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

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

**“Construction Zone”** shall have the meaning set forth in Clause 8.3.1; **“Contract Price”**

means the amount specified in Clause 19.1.1;

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

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

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

- a. commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;
- b. not relieve any Party from liability to pay Damages or compensation 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 Contractor requires any reasonable action by the Contractor that must be approved by the Authority or the Authority's Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the Authority or the Authority's Engineer to accord their approval;

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

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

**“Defects Liability Period”** shall have the meaning set forth in Clause 17.1; **“Dispute”** shall have the meaning set forth in Clause 26.1.1;

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

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

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

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

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

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

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

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

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

**“GAD” or “General Arrangement Drawings”** shall have the meaning set forth in Clause 3.1.3 (b);

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

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

**“Government Instrumentality”** means any department, division or sub- division of the Government or the State Government and includes any commission, board, authority, agency or municipal and other local authority or statutory body including panchayat under the control of the Government or the State Government, as the case may be, and having jurisdiction over all or any part of the Project ROB or the performance of all or any of the services or obligations of the Contractor under or pursuant to this Agreement; **“Handover Memorandum”** shall have the meaning set forth in Clause 8.2;

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

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

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

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

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

**“Intellectual Property”** means all patents, trademarks, service marks, logos, getup, trade names, internet domain names, rights in designs, blue prints, programs and manuals, drawings, copyright (including rights in computer software), database rights, semi-conductor, topography rights, utility models, rights in know-how and other intellectual property rights, in

each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world;

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

**“Joint Venture”** means the group of entities which have come together for implementation of this Project;

**“Lead Member”** shall, in the case of a joint venture, mean the member of such joint venture who shall have the authority to bind the contractor and each member of the Joint venture; and shall be deemed to be the Contractor for the purposes of this Agreement; the Lead Member shall itself undertake and perform at least 51% (fifty one per cent) of the total length of the Project ROB;

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

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

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

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

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

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

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

**“Major Bridge”** means a bridge having a total length of more than 60 (sixty) meters between the inner faces of the dirt walls as specified in IRC: 5; **“Manual”** shall mean the Manual of Standards and Specifications for Project ROB;

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

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

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

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

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

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

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

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

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

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

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

**“Project Assets”** means all physical and other assets relating to (a) tangible assets such as civil works and equipment including foundations, embankments, pavements, road surface, interchanges, bridges, culverts, road over-bridges, drainage works, traffic signals, sign boards, kilometer- stones, toll plaza electrical systems, communication systems, rest areas, relief centers, maintenance depots and administrative offices; and (b) Project Facilities situated on the Site;

**“Project Completion Date”** means actual date of work Completion / completion date motioned in Completion Certificate issued by Authority.

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

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

**“Project ROB”** means the Site comprising the existing road {, proposed ROB} connecting with [NH-141] and all Project Assets, and its subsequent development and augmentation in accordance with this Agreement;

**“Project Milestone”** means the project milestone set forth in Schedule-J; “Proof Consultant” shall have the meaning set forth in Clause 10.2.2;

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

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

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

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

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

**“Safety Consultant”** shall have the meaning set forth in Clause 10.1.5;

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

**“Schedule Construction Period”** means the period commencing from the Appointed Date and ending on Schedule Completion Date;



**"Scope of the Project"** shall have the meaning set forth in Clause 2.1; **"Section"** means a part of the Project ROB;

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

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

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

**"Structures"** means an elevated road or a flyover, as the case may be;

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

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

**"Taking Over Certificate"** shall have the meaning set forth in Clause 14.10;

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

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

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

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

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

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

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

**"User"** means a person who travels or intends to travel on the Project ROB or any part thereof in/on any vehicle;

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

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

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

## **1.2. Interpretation**

- (i) 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, byelaws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;
  - c. References to a “person” and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include successors and assigns;
  - d. The table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
  - e. The words “include” and “including” are to be construed without limitation and shall be deemed to be followed by “without limitation” or “but not limited to” whether or not they are followed by such phrases;
  - f. References to “construction” or “building” include, unless the context otherwise requires, survey and investigation, design, developing, engineering, procurement, supply of plant, materials, equipment, labour, delivery, transportation, installation, processing, fabrication, testing, and commissioning of the Project ROB, including maintenance during the Construction Period, removing of defects, if any, and other activities incidental to the construction and “construct” or “build” shall be construed accordingly;
  - g. References to “development” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, up-gradation and other activities incidental thereto during the Construction Period, and “develop” shall be construed accordingly;
  - h. Any reference to any period of time shall mean a reference to that according to Indian standard time;

- i. Any reference to day shall mean a reference to a calendar day;
- j. References to a "business day" shall be constructed as a reference to a day (other than a Sunday) on which banks in Gandhidham are generally open for business;
- k. Any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- l. References to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- m. Any reference to any period commencing "from" a specified day or date and "till" or "until" a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- n. The words importing singular shall include plural and vice versa;
- o. References to any gender shall include the other and the neutral gender;
- p. Lakh" means a hundred thousand (100,000) and "crore" means ten million (10,000,000);
- q. Indebtedness" shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- r. References to the "winding-up", "dissolution", "insolvency", or "reorganization" of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganization, dissolution, arrangement, protection or relief of debtors;
- s. Save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, license or document of any description shall be construed as reference to that agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Clause shall not operate so as to increase liabilities or obligations of the Authority hereunder or pursuant hereto in any manner whatsoever;
- t. Any agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Authority's 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 Authority's Engineer, as the case may be, in this behalf and not otherwise;
- u. The Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;

- v. References to Recitals, Articles, Clauses, Sub-clauses or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses and Schedules of or to this Agreement, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a Paragraph of this Agreement or of the Schedule in which such reference appears;
  - w. The damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty or liquidated damages (the "Damages"); and
  - x. Time shall be of the essence in the performance of the Parties' respective obligations. If any time period specified herein is extended for the reasons specified in the Agreement, such extended time shall also be of the essence.
- (ii) Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Contractor to the Authority shall be provided free of cost and in three copies, and if the Authority is required to return any such Documentation with its comments and/or approval, it shall be entitled to retain two copies thereof.
  - (iii) 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.
  - (iv) Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act, 1897 shall not apply.

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

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

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

- (i) This Agreement, and all other agreements and documents forming part of or referred to in this Agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this Agreement, the priority of this Agreement and other documents and agreements forming part hereof or referred to herein shall, in the event of any conflict between them, be in the following order:
  - a. This Agreement; AND
  - b. All other agreements and documents forming part hereof or referred to herein; i.e. this Agreement at (a) above shall prevail over the agreements and documents at (b).
- (ii) Subject to the provisions of Clause 1.4.1, in case of ambiguities or discrepancies within this Agreement, the following shall apply:

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

### **1.5. Joint and several liability**

- (i) If the Contractor has formed a Joint Venture of two or more persons for implementing the Project:
  - a. These persons shall, without prejudice to the provisions of this Agreement, be deemed to be jointly and severally liable to the Authority for the performance of the Agreement; and
  - b. The Contractor shall ensure that no change in the composition of the Joint Venture is effected without the prior consent of the Authority.
- (ii) Without prejudice to the joint and several liability of all the members of the Joint Venture, the Lead Member shall represent all the members of the Joint Venture and shall at all times be liable and responsible for discharging the functions and obligations of the Contractor. The Contractor shall ensure that each member of the Joint Venture shall be bound by any decision, communication, notice, action or inaction of the Lead Member on any matter related to this Agreement and the Authority shall be entitled to rely upon any such action, decision or communication of the Lead Member. The Authority shall have the right to release payments solely to the Lead Member and shall not in any manner be responsible or liable for the inter se allocation of payments among members of the Joint venture.

## Part 2: Scope of the Project

## **Article 02: Scope of the Project**

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

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

- (a) Construction of the Project ROB (Road over Bridge) on the Site set forth in Schedule- A and as specified in Schedule-B together with provision of Project Facilities as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;
- (b) Maintenance of the Project ROB (Road over Bridge) in accordance with the provisions of this Agreement and in conformity with the requirements set forth in Schedule-E; and
- (c) Performance and fulfilment of all other obligations of the Contractor in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Contractor under this Agreement.
- (d) Project ROB means the length of ROB including merging, demerging on which, the Construction of Road over Bridges including Railway Span, Via-duct spans, Solid Approaches with RE wall and with Retaining wall if applicable, Service Road, diversion road and Traffic Signage boards etc.
- (e) The Contractor has to maintain “work zone traffic safety”, by erecting and maintaining the barricade up to height of 3.00 mts. as per drawings, Road safety signage, Construction and maintaining the diversion, Road traffic management without any obstruction etc.

#### **Additional Project-Specific Scope Requirements**

In addition to the works specifically described elsewhere in the Agreement and Schedules, the Scope of the Project shall also include the following project-specific components:

- (f) Development of a traffic island/rotary approx. 40m diameter at the Zero Chainage location, including architectural monument features, landscaping, illumination, hardscape elements and associated aesthetic development works. The conceptual design, architectural treatment and landscape proposals shall be prepared by the Contractor and submitted to the Authority/Engineer for review and approval prior to execution.
- (g) Preparation, fabrication and submission of a detailed three-dimensional physical model of the Project depicting the ROB, Viaduct, RE Walls, Creek Bridge, approaches and associated project components. The scale, level of detailing, material specifications and presentation requirements of the model shall be finalised in consultation with and subject to approval of the Authority/Engineer.

## Article 03: Obligations and Authority

### 3.1. Obligations of the Authority

- (i) 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.
- (ii) The Authority shall be responsible for the correctness of the Scope of the Project, Project Facilities, Specifications and Standards and the criteria for testing of the completed Works.
- (iii) The Authority shall, upon submission of the Performance Security as per the RFP by the Contractor, shall provide to the Contractor:
  - a. Right of Way of the Construction Zone as per Schedule A
  - b. Approval of the general arrangement drawings (the “GAD”) from railway authorities for the railway span construction to enable the Contractor to construct road over-bridge on the Project ROB in accordance with the Specifications and Standards, and subject to the terms and conditions specified in such approval, within a period of 60 (sixty) days from the Appointed Date, and

(iv) Deleted

- (v) Notwithstanding anything to the contrary contained in this Agreement, the Parties expressly agree that the aggregate Damages payable under Clause 9.5 shall not exceed 1% (one per cent) of the Contract Price.

Both the parties agree that payment of such Damages shall be full and final settlement of all claims of the Contractor and such compensation shall be the sole remedy against delays of the Authority and both parties further agree that the payment of Damages shall be the final cure for the Contractor against delays of the Authority, without recourse to any other payments.

- (vi) The Authority agrees to provide support to the Contractor and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:
  - a. Upon written request from the Contractor, and subject to the Contractor complying with Applicable Laws, provide reasonable support to the Contractor in procuring Applicable Permits required from any Government Instrumentality for implementation of the Project;
  - b. Upon written request from the Contractor, provide reasonable assistance to the Contractor in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favourable than those generally available to commercial customers receiving substantially equivalent services;
  - c. Procure that no barriers that would have a material adverse effect on the works are erected or placed on or about the Project ROB by any Government Instrumentality or persons claiming through or under it, except for reasons of Emergency, national



- security, law and order or collection of inter-state taxes;
- d. Not do or omit to do any act, deed or thing which may in any manner violate any provisions of this Agreement;
- e. Support, cooperate with and facilitate the Contractor in the implementation of the Project in accordance with the provisions of this Agreement; and
- f. Upon written request from the Contractor and subject to the provisions of Clause 4.3, provide reasonable assistance to the Contractor and any expatriate personnel of the Contractor or its Sub-contractors to obtain the applicable visas and the requisite work permits for the purposes of discharge by the Contractor or its Sub-contractors of their obligations under this Agreement and the agreements with the Sub-contractors.

### **3.2. Maintenance obligations prior to the Appointed Date**

The Authority shall, prior to the Appointed Date, maintain the Project ROB, at its own cost and expense, so that its traffic worthiness and safety are at no time materially inferior as compared to its condition 10 (ten) 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. For the avoidance of doubt, the Authority shall undertake only routine maintenance prior to the Appointed Date, and it shall undertake special repairs only in the event of excessive deterioration or damage caused due to unforeseen events such as floods or earthquake.

# Article 04: Obligations of the Contractor

## 4.1. Obligations of the Contractor

- (i) Subject to and on the terms and conditions of this Agreement, the Contractor shall undertake the survey, investigation, design, engineering, procurement, construction, and maintenance of the Project ROB and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- (ii) The Contractor shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- (iii) Subject to the provisions of Clauses 4.1 (i) and 4.1 (ii), the Contractor shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.
- (iv) The Contractor shall remedy any and all loss, defects, or damage to the Project ROB from the Appointed Date until the end of the Construction Period at the Contractor's cost, save and except to the extent that any such loss, defect, or damage shall have arisen from any wilful default or neglect of the Authority.
- (v) The Contractor shall remedy any and all loss, defect or damage to the Project ROB during the Defects Liability Period at the Contractor's cost to the extent that such loss, defect or damage shall have arisen out of the reasons specified in Clause 17.3.
- (vi) The Contractor shall remedy any and all loss or damage to the Project ROB during the Maintenance Period at the Contractor's cost, including those stated in Clause 14.1 (ii), save and except to the extent that any such loss or damage shall have arisen on account of any wilful default or neglect of the Authority or on account of a Force Majeure Event.
- (vii) The Contractor shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
  - a. Make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars and details as may be required for obtaining Applicable Permits set forth in Schedule-F and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
  - b. Procure, as required, the appropriate proprietary rights, licences, agreements and permissions for Materials, methods, processes and systems used or incorporated into the Project ROB;
  - c. Make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Sub-contractors in connection with the performance of its obligations under this Agreement;
  - d. Ensure and procure that its Sub-contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Contractor's obligations under this Agreement;
  - e. Not do or omit to do any act, deed or thing which may in any manner violate any provisions of this Agreement;

- f. Support, cooperate with and facilitate the Authority in the implementation and operation of the Project in accordance with the provisions of this Agreement;
- g. Ensure that the Contractor and its Sub-contractors comply with the safety and welfare measures for labour in accordance with the Applicable Laws and Good Industry Practice;
- h. Keep, on Site, a copy of this Agreement, publications named in this Agreement, the Drawings, Documents relating to the Project, and Change of Scope orders and other communications given under this Agreement. The Authority's Engineer and its authorised personnel shall have the right of access to all these documents at all reasonable times;
- i. Cooperate with other contractors employed by the Authority and personnel of any public authority; and
- j. Not interfere unnecessarily or improperly with the convenience of the public, or the access to and use and occupation of all roads and footpaths, irrespective of whether they are public or in the possession of the Authority or of others.
- k. Provide, maintain and operate, at its own cost and expense, suitably located and fully functional site office facilities for the Authority and the Authority's Engineer/Project Management Consultant (PMC) for the duration of the Construction Period as per Schedule C of this agreement.

Provided that the size, specifications and location of such office facilities shall be as approved by the Authority's Engineer.

The Contractor shall make the above facilities available within [30] days of the Appointed Date.

- (viii) The Contractor shall undertake all necessary superintendence to plan, arrange, direct, manage, inspect and test the Works. The Contractor shall provide all necessary superintendence of the Works for the proper fulfilling of the Contractor's obligations under the Agreement. Such superintendence shall be given by competent person having adequate knowledge of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents) for the satisfactory and safe execution of the Works.
- (ix) The Contractor shall obtain and maintain a project related bank account operational at site where all transactions related to the payment of work will be done. The Contractor shall submit a monthly account statement and a detailed report on utilization of funds transferred to this project related bank account to Authority's Engineer. Notwithstanding anything contrary to this agreement, the authority, in the interest and to ensure timely completion of the work, reserves the right to audit such bank accounts to ensure that there is no diversion of funds from this project specific account to any other project being implemented by the Contractor.
- (x) The Contractor shall provide the documents of the Contractor specified in the Agreement, and all Contractors' personnel; Goods, consumables and other things and services,

whether of a temporary or permanent nature, required in and for the execution, completion of Works and remedying defects.

- (xi) The Contractor shall perform the Works in conformity with the Project requirements and other requirements and standards prescribed under or pursuant to the Agreement.
- (xii) The Contractor shall carry out such work incidental and contingent to the original Scope of the Project to comply with Good Industry Practices.
- (xiii) The Contractor shall maintain required staff and necessary Contractor's equipment and materials within the reach of the Site during the Defects Liability Period so that any defects arising are promptly attended.

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

- (i) The Contractor, whether Consortium / Joint Venture or sole, shall not sub-contract any Works in more than **49% (forty-nine per cent)** of the Contract Price and shall carry out Works directly under its own supervision and through its own personnel and equipment in at least **51% (fifty-one per cent)** of the Contract Price. Further, in case the Contractor is a Joint Venture, then the Lead Member shall carry out Works directly through its own resources (men, material and machines etc.) in at least 51% (fifty-one per cent) of total length of the Project ROB. Provided, however, that in respect of the Works carried out directly by the Contractor, it may enter into contracts for the supply and installation of Materials, Plant, equipment, road furniture, safety devices and labour, as the case may be, for such Works. For the avoidance of doubt, the Parties agree that the Contractor may sub-divide the aforesaid length of **51% (fifty-one per cent)** in no more than 5 (five) sections of the Project ROB. The Parties further agree that all obligations and liabilities under this Agreement for the entire Project ROB shall at all times remain with the Contractor.
- (ii) In the event any sub-contract for Works, or the aggregate of such sub-contracts with any Sub-contractor, exceeds 5% (five percent) of the Contract Price, the Contractor shall communicate the name and particulars, including the relevant experience of the Sub-contractor, to the Authority prior to entering into any such sub-contract. The Authority shall examine the particulars of the Sub- contractor from the national security and public interest perspective and may require the Contractor, no later than 15 (fifteen) business days from the date of receiving the communication from the Contractor, not to proceed with the sub-contract, and the Contractor shall comply therewith.
- (iii) In the event any sub-contract referred to in Clause 4.2 (ii) relates to a Sub- contractor who has, over the preceding 3 (three) years, not undertaken at least one work of a similar nature with a contract value exceeding 40% (forty per cent) of the value of the sub-contract to be awarded hereunder, and received payments in respect thereof for an amount equal to at least such 40% (forty per cent), the Authority may, no later than 15 (fifteen) business days from the date of receiving the communication from the Contractor, require the Contractor not to proceed with such sub-contract, and the Contractor shall comply therewith without delay or demur.

(iv) It is expressly agreed that the Contractor shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the agreements with its Sub-contractors or any other agreement that may be entered into by the Contractor, and no default under any such agreement shall excuse the Contractor from its obligations or liability under this Agreement. However, in case of non-compliance of the Contractor towards his obligations for payments to the approved Sub-contractor(s), which is likely to affect the progress of works, the authority reserves the right to intervene and direct the Contractor to release such outstanding payments to approved Sub-contractor(s) out of the payments due for the completed Works in the interest of work.

#### **4.3. Employment of foreign nationals**

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

#### **4.4. Contractor's personnel**

- (i) The Contractor shall ensure that the personnel engaged by it or by its Sub- contractors in the performance of its obligations under this Agreement are at all times appropriately and adequately qualified, skilled and experienced in their respective functions in conformity with Good Industry Practice. The Contractor will try to hire at least 10% (ten percent) trained workmen as per the National Skills Qualifications Framework (NSQF). If necessary, the requisite workmen may be got trained by the Contractor at his cost through authorized training centres of the Directorate General of Training (DGT). The Contractor will organize training at project site/ sites for the trainees as and when required as per the training schedule finalized in consultation with the training centres. The trainees shall be paid stipend by the Contractor (subject to a maximum of Rs. 15,000/- per person) on the basis of minimum wages to compensate for loss of income during the training period.
- (ii) The Authority's Engineer may, for reasons to be specified in writing, direct the Contractor to remove any member of the Contractor's or Sub-contractor's personnel. Provided that any such direction issued by the Authority's Engineer shall specify the reasons for the removal of such person.
- (iii) The Contractor shall on receiving such a direction from the Authority's Engineer order for the removal of such person or persons with immediate effect. It shall be the duty of the Contractor to ensure that such persons are evicted from the Site within 10 (ten) days of

any such direction being issued in pursuance of Clause 4.4 (ii). The Contractor shall further ensure that such persons have no further connection with the Works or Maintenance under this Agreement. The Contractor shall then appoint (or cause to be appointed) a replacement.

#### **4.5. Advertisement on Project ROB**

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

#### **4.6. Contractor's care of the Works**

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

#### **4.7. Electricity, water and other services**

The Contractor shall be responsible for procuring of all utilities as may be required, including without limitation, adequate power, water and other services that it may require.

If available, electric supply will be given by DPA. The charges for electric supply consumption will be borne by contractor as per prevailing rates of DPA. The contractor shall have to make his own arrangement for water required for the work.

#### **4.8. Unforeseeable difficulties**

Except as otherwise stated in the Agreement:

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

#### **4.9. Co-ordination of the Works**

- (i) The Contractor acknowledges that in addition to the Agreement, it is also aware of terms of the other Project contracts and other agreements the Authority has negotiated and entered into for performance of its obligations under the Agreement ( copies of other contracts and other agreements are made available to the Contractor from time to time) and that the Contractor is fully aware of the consequences to the Authority which would or are likely to result from a breach by the Contractor of its obligations under the Agreement. In the event the actions of the Contractor result in the breach by the Authority of any or all of the other Project contracts and such breach imposes any liability on the Authority, the Contractor shall: (a) undertake all steps as may be possible to mitigate or neutralize the liability that has arisen, and (b) indemnify the Authority against any such liability and

compensate the Authority to that extent.

- (ii) The Contractor shall be responsible for the co-ordination and proper provision of the Works, including co-ordination of other Contractors or Sub-contractors for the Project. The Contractor shall co-operate with the Authority in the co-ordination of the Works with the works under the other Project contracts. The Contractor shall provide all reasonable support for carrying out their work to:
  - a. any other contractors employed by the Authority;
  - b. the workmen of the Authority;
  - c. the workmen of any Governmental Instrumentality who may be employed in the execution of work on or near the Site; and
  - d. such other persons as is required in the opinion of the Authority for successful completion of the Project.

#### **4.10. Environmental Measures**

- (i) The Contractor agrees to conduct its activities in connection with the Agreement in such a manner so as to comply with the environmental requirements which includes, inter alia, all the conditions required to be satisfied under the environmental clearances and applicable law, and assumes full responsibility for measures which are required to be taken to ensure such compliance.

#### **4.11. Site Data**

- (i) The Contractor shall be deemed to have inspected and examined the Site and its surroundings and to have satisfied himself before entering into the Agreement in all material respects including but not limited to:
  - a. The form and nature of the Site (including, inter-alia, the surface and sub- surface conditions and geo-technical factors);
  - b. The hydrological and climatic conditions;
  - c. The extent and nature of the works already completed and Materials necessary for the execution and completion of the Works and the remedying of any defects that includes already executed part also.
  - d. The suitability and the adequacy of the Site for the execution of the Works;
  - e. The means of access to the Site and the accommodation the Contractor may require;
  - f. Arranging permits as required as per Schedule F of the Agreement.
  - g. The requirements of operation and maintenance; and
  - h. All other factors and circumstances affecting the Contractor's rights and obligations under the Agreement, the Contract Price and Time for Completion.

#### **4.12. Sufficiency of Contract Price**

The Contractor shall have satisfied itself as to the correctness and sufficiency of the Contract Price. The Contract Price shall cover all its obligations under the Agreement, in addition to all risks the Contractor has agreed to undertake under the Agreement, including those associated with the performance of its obligations under the Agreement and all things

necessary for the provision of the Works in a manner satisfactory to the Authority and in accordance with this Agreement.

#### **4.13. Clearance of the Site**

During the provision of the Works, and as a pre-condition to the issue of the Taking- Over Certificate, the Contractor shall clear away and remove from the Site, all Contractor's equipment, surplus material, wreckage, rubbish and temporary Works, and shall keep the Site free from all unnecessary obstructions, and shall not store or dispose of any Contractor's equipment or surplus materials on the Site. The Contractor shall promptly clear away and remove from the Site any wreckage, rubbish or temporary Works no longer required and leave the Site and the Works in a clean and safe condition to the sole satisfaction of the Authority.



## **Article 05: Representations and Warranties**

### **5.1. Representations and warranties of the Contractor**

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

which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under this Agreement;

- j. No representation or warranty by it contained herein or in any other document furnished by it to the Authority or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- k. No sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the contract or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Authority in connection therewith;
- l. Nothing contained in this Agreement shall create any contractual relationship or obligation between the Authority and any Sub- contractors, designers, consultants or agents of the Contractor;
- m. It is adequately financed has the requisite knowledge, expertise, technical know-how, experience, resources, infrastructure, licenses, patents, copy rights, for designing, supplying/ procuring the goods and materials, and for providing the installation and construction services required for completing the construction of the Project Facilities; and

(ii) It represents the Authority that:

- a. It owns or has the right to use all “**Intellectual Property**” necessary to perform the contractual obligations and to carry on the Works without conflict with the right of others;
- b. All intellectual property rights necessary to perform the contractual obligations and to carry on the Works are in full force and effect and are vested in, and beneficially owned by the Contractor, and are free from encumbrances.
- c. None of the intellectual property rights is being used, claimed, or posed or attacked by any other person, nor does the use of such intellectual property rights or any part of them infringe the intellectual property rights owned or enjoyed by any third party.
- d. None of the intellectual property rights owned or used by the Contractor is the subject of any claim, opposition, attack, assertion or other arrangement of whatsoever nature which does or may impinge upon their use, validity, enforceability or ownership by the Parties, and there are no grounds or other circumstances which may give rise to the same.
- e. No licenses or registered user or other rights have been granted or agreed to be granted to any third party in respect of such intellectual property rights.
- f. No act has been done or has been omitted to be done to entitle any authority or person to cancel, forfeit or modify any intellectual property rights.
- g. The Contractor shall notify the Authority of any adverse use of the intellectual property rights or confusingly or deceptively similar to the intellectual property rights.
- h. The Contractor shall recognize the Authority's ownership and title to the intellectual

property rights and shall not at any time, either directly or indirectly, put to issue the validity or ownership of the intellectual property rights and it will not do any act or thing, either directly or indirectly, which in anyway impairs the validity and ownership of the intellectual property rights.

- i. The Contractor shall, promptly execute, acknowledge and deliver all documents which are requested by Authority to record with appropriate governmental agencies and authorities the fact that the Authority has the right to the use of the said intellectual property rights.
  - j. The Contractor shall not, for any reason, object to, or interfere in any way with the ownership, registration or use of the intellectual property rights by the Authority (or its licensee or assigns) for any purpose whatsoever.
- (iii) The Contractor is fully aware that the Agreement is inter linked with the other Project contracts and the non-performance or deficient performance or default by the Contractor and/or any of the Contractor's personnel or Subcontractors under one among the said contracts will have bearing on the other contracts and the evaluation of the Contractor's performance under the Agreement and the Project itself.
- (iv) If at any time during the Defects Liability Period any item of the Works or Project Facilities or any part thereof, do not conform to the Authority requirements and Specifications and Standards, on being so notified by the Authority, the Contractor shall promptly rectify/remedy such nonconformity to the satisfaction of the Authority solely at the Contractor's expense; failing which the Authority may reject or revoke Taking-Over Certificate, and the Authority may proceed to correct the Contractor's nonconforming Work by the most expeditious means available, the costs of which shall be to the Contractor's account; or the Authority may retain the non-conforming Work and an equitable adjustment reducing the total Contract Price to reflect the diminished value of such non-conforming Work will be made by written amendment.
- (v) In addition to the other warranties, the Contractor represents and warrants as follows:
- a. The Contractor has (or, if the technology does not currently exist, will have granted at the time of passing to The Employer) in and to the technology used in the equipment, materials, goods, Works, Contractor's documents, Drawings and Manuals ("**Technology**") –
    - i. All right, title and interest free of any lien, claim or restriction; and
    - ii. Right to grant to the Authority the right to use the Technology for the purpose of this contract, free of any lien, claim or restriction and on the terms of license as required.
  - b. The Contractor has granted (or, if the technology does not currently exist, will grant at the time of passing to the Authority the property and title in and to the equipment, materials, goods, Works, spares, Contractor's documents, Drawings and Manuals in which it is used) to the Authority the right to use the Technology, free of any lien, claim or restriction.
- (vi) In addition to the other Warranties, the Contractor represents and warrants as follows:
- a. No Technology contains any worm (i.e., a program that travels from one computer to

another computer but does not attach itself to the operating system of the computer it enters), virus (i.e., a program that travels from one computer to another computer that attaches itself to the operating system it enters) or self-destruct capability.

- b. The Technology will not abnormally end or provide invalid or incorrect results as a result of date-dependent data.
  - c. The Technology can accurately recognize, manage, accommodate, and manipulate date-dependent data, including single and multi-century formulas and leap years.
- (vii) No criminal proceedings instituted against any of the employees or Directors of the Contractor.
- (viii) Till date the services of the Contractor has not been terminated by any person for any breach or non-performance or negligence by the Contractor.

## **5.2. Representations and warranties of the Authority**

The Authority represents and warrants to the Contractor that:

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

## **5.3. Disclosure**

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

## **Article 06: Disclaimer**

### **6.1. Performance Security**

- (i) The Contractor acknowledges that prior to the execution of this Agreement, the Contractor has, after a complete and careful examination, made an independent evaluation of the Request for Proposal, Scope of the Project, Specifications and Standards of design, construction and maintenance, Site, local conditions, physical qualities of ground, subsoil and geology, traffic volumes, suitability and availability of access routes to the Site and all information provided by the Authority or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. Save as provided in Clause 3.1 and Clause 5.2, the Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Contractor confirms that it shall have no claim whatsoever against the Authority in this regard.
- (ii) The Contractor acknowledges and hereby accepts to have satisfied itself as to the correctness and sufficiency of the Contract Price.
- (iii) The Contractor acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 6.1 (i) above and hereby acknowledges and agrees that the Authority shall not be liable for the same in any manner whatsoever to the Contractor, or any person claiming through or under any of them, and shall not lead to any adjustment of Contract Price or Scheduled Completion Date.
- (iv) The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 6.1 (i) above shall not vitiate this Agreement or render it voidable.
- (v) In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 6.1 (i) above, that Party shall immediately notify the other Party, specifying the mistake or error.
- (vi) Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Contractor; and the Authority shall not be liable in any manner for such risks or the consequences thereof.

**Part 3:Construction and Maintenance**

## Article 07: Performance Security

### 7.1. Performance Security

Security deposit shall consist of two parts;

- a) Performance Guarantee to be submitted at award of work, and
- b) Retention money to be recovered from Running Bills.

Security Deposit/ Performance guarantee shall be 10% of Contract price of which 5% of contract price should be submitted as FDR or Insurance Surety Bond / Bank Guarantee of Nationalized/scheduled bank (except Co-operative) Banks having its branch at Gandhidham, and BG should remain valid for 60 (Sixty) days beyond the date of completion of all contractual obligation of the concern contract including Defect liability period or Digital transfer within (21 days in case of domestics bid and within 28 days in case of global bids) of receipt of letter of acceptance and balance 5% recovered as Retention Money from Running Bills. Recovery of 5% of Retention Money to commence from the first bill onwards @ 5% of bill value from each bill. Retention Money be refunded within 14 days from the date of payment of final bill of the construction period. Balance SD to be refunded immediately not later than 14 days from completion of defect liability period, (Subject to fulfilment of clause no 11.20), NOC from Geology and Mining Department, Bhuj/Anjar & Payment of welfare cess for final bill.)

In addition to performance security (usually five percent), contracts for works usually provide for a percentage (usually five percent) of each running bill (periodic/interim payment) to be withheld as security deposit/retention money until final acceptance. The earnest money instead of being released may form part of the security deposit.

The contractor may, at his option, replace the retention amount with an unconditional BG from a bank acceptance to the procuring entity at the following stages;

- i. After the amount reaches half of the value of the limit of retention money and
- ii. After the amount reaches the maximum limit of retention money. One-half of the retention money (of BG, which replaced retention money) shall be released on the issue of the taking-over certificates (TOCs) are issued in parts, then in such proportions as the engineer may determine, having regard to the value of such part or section. The other half of the retention money (or BG, which replaced the retention money) shall be released upon expiration of 365 days after the DLP of the work or final payment, whichever is earlier on certification by the engineer. In the event of different applicable to different defect liability periods being applicable to different sections or parts, the expiration of defect liability period shall be the latest of such periods.

In case of JV (If applicable), the BG towards performance security shall be provided by all partners in proportion to their participation.

Failure of the successful bidder to comply with the requirements of above shall constitute

sufficient grounds for cancellation of the award of work and forfeiture of the Bid security.

The documentary evidence (copy of paid Challan in Govt. Treasury) of Welfare cess @1% of work done or as amended by Statutory Authority from time to time, paid on final bill shall be submitted before releasing the Performance Guarantee.



## Article 08: Right of Way

### 8.1. The Site

The site of the Project ROB (the "Site") shall comprise the site described in Schedule-A in respect of which the Right of Way shall be provided by the Authority to the Contractor. The Authority shall be responsible for:

- (a) Acquiring and providing Right of Way on the Site in accordance with the alignment finalised by the Authority, free from all encroachments and encumbrances, and free access thereto for the execution of this Agreement; and

### 8.2. Procurement of the Site

- (i) The Authority Representative, the Contractor and Authority's Engineer shall, within 10 (ten) days of the date of this Agreement, inspect the Site and prepare a detailed memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site (hereinafter referred to as the "**Handover Memorandum**"). Subject to the provisions of Clause 8.2 (iii), the Handover Memorandum shall have appended thereto an appendix (the "**Appendix**") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been given to the Contractor along with details of hindrances in the Construction Zone. For sake of clarity the Handover Memorandum shall clearly specify the parts of Site where work can be executed. Signing of the Handover Memorandum, in three counterparts (each of which shall constitute an original), by the authorized representatives of the Authority, Contractor and Authority's Engineer shall be deemed to constitute a valid evidence of giving the Right of Way to the Contractor for discharging its obligations under and in accordance with the provisions of this Agreement and for no other purpose whatsoever.
- (ii) Whenever the Authority is ready to hand over any part or parts of the Site included in the Appendix, it shall inform the Contractor, by notice, of the proposed date and time such of hand over. The Authority Representative and the Contractor shall, on the date so notified, inspect the specified parts of the Site, and prepare a memorandum containing an inventory of the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site so handed over. The signing of the memorandum, in three (3) counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall be deemed to constitute valid evidence of giving the relevant Right of Way to the Contractor.

If the contractor fails to join for site inspection or disputes the parts of the site available for work, the Authority's Engineer shall decide the parts of the site where work can be executed and notify to both the parties within 3 days of the proposed date of inspection. The parties agree that such notification of the Authority's Engineer as mentioned hereinabove shall be final and binding on the parties.

- (iii) The Authority shall provide the Right of Way to the Contractor in respect of all land included in the Appendix by the date specified in Schedule-A for those parts of the Site referred to therein, and in the event of delay for any reason other than Force Majeure or breach of this Agreement by the Contractor, it shall pay to the Contractor, Damages in a sum calculated in accordance with Clause 8.3. The Contractor agrees that it shall not be entitled to claim any other damages on account of any such delay by the Authority.
- (iv) Notwithstanding anything to the contrary contained in this Clause 8.2, the Authority shall specify the parts of the Site, if any, for which Right of Way shall be provided to the Contractor on the dates specified in Schedule-A. Such parts shall also be included in the Appendix prepared in pursuance of Clause 8.2 (i).
- (v) The Authority further acknowledges and agrees that prior to the Appointed Date, it shall have procured issuance of the statutory notification under Applicable Laws for vesting of all the land comprising the Project in the Authority and has taken possession of area for Construction Zone for at least 90% (ninety per cent) of the total length of the Project ROB. The Parties also acknowledge and agree that the conditions specified in this Clause 8.2 (iii) shall not be modified or waived by either Party.
- (vi) For the avoidance of doubt, the Parties expressly agree that the Appendix shall in no event contain sections of the Project ROB the cumulative length of which exceeds 10% (ten percent) of the total length of the Project ROB.
- (vii) Pursuant to signing of Handover Memorandum under clause 8.2 (i), Contractor shall submit to the Authority's Engineer, a monthly land possession report till expiry of 180 (one hundred and eighty) days from Appointed Date, in respect of those parts of the site to which vacant access and right of way was not given to the contractor and included in Appendix to the memorandum signed under clause 8.2 (i), duly specifying the part of the site, if any, for which the right of way is yet to be handed over.
- (viii) The Authority shall give possession of the Site to the Contractor.

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

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

$$\text{Amount of damages in Rs. per day per metre} = 0.05 \times C \times \frac{1}{L} \times \frac{1}{N}$$

Where,

C = the Contract Price;

L = length of the Project ROB in metres; and

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

In the event that any Damages are due and payable to the Contractor under the

provisions of this Clause 8.3 (i) for delay in providing the Right of Way, the Contractor shall, subject to the provisions of Clause 10.5, be entitled to Time Extension equal to the period for which the Damages have become due and payable under this Clause 8.3 (i), save and except that:

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

For the avoidance of doubt, the Parties expressly agree that the Damages specified hereunder and the Time Extension specified in Clause 10.5 shall be restricted only to failure of the Authority to provide the Right of Way for and in respect of the "Construction Zone" which shall comprise the following components:

- Main in carriageway
- Median (for 4 lane carriageway or more)
- Paved and earthen shoulders
- Area for Structures including ROB/RUBs.
- Safety measures including Roadside Drains and Furniture.
- A parallel working space for accommodating slopes/retaining structures etc.

Note: - If site could not be handed over due to any statutory clearances, then above damages will be Not applicable.

- (ii) Notwithstanding anything to the contrary contained in this Agreement, the Contractor expressly agrees that Works on all parts of the Site for which Right of Way of Construction Zone is granted on the Appointed Date, or with respect to the parts of the Site provided in Schedule-A, no later than the date(s) specified therein, as the case may be, shall be completed before the Scheduled Completion Date and shall not qualify for any Time Extension under the provisions of Clause 8.3 (iii).

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

(b) Provided that if any Works cannot be undertaken within the municipal limits of a town or within any area falling in a reserved forest or wildlife sanctuary or the stretches where vacant access and Right of Way could not be handed over, as the case may be, because the requisite clearances or approvals or affected land parcels for commencing construction of Works therein have not been given within 180 (one hundred and eighty) days of the Appointed date, the affected Works shall be deemed to be withdrawn under the provisions of this Clause 8.3.(iii). Such Works shall not be computed for the purposes of the aforesaid ceiling of 10% (ten per cent) hereunder.

(c) Provided further that in case such stretches (as mentioned in Sub-Clause (b) above) can be handed over to the Contractor before the expiry of the original Scheduled Construction Period of the Project ROB, and the Contractor agrees to take up the work,

the same may be allowed to be executed by him with corresponding Extension of Time, subject to the condition that the Contractor shall not be entitled to raise any claims on account of prolongation costs in this behalf.

- (iv) In the event of withdrawal of Works under Clause 8.3 (iii) (a), the Contract Price shall be reduced by an amount equal to 90 (ninety) per cent of the value of the Works withdrawn and the Contractor shall not be entitled to any other compensation or Damages for the withdrawal of Works.

Values of work withdrawn	Percentage of value of the works to be reduced from contract price
Up to Rs. 100 Crore	90%
More than Rs. 100 Crore	Rs. 90 crores plus 95% of the amount greater than Rs. 100 crores.

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

The parties expressly agree that the value of the Works withdrawn shall be determined from the details available in Schedule-H. In the event that it is impossible to determine the value from Schedule-H, then the value shall be determined in accordance with the provisions of Clause 13.2 (iii).

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

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

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

On and after signing the memorandum and/or subsequent memorandum referred to in Clause 8.2, and until the issue of the Completion Certificate, the Contractor shall maintain a round-the-clock vigil over the Site and shall ensure and procure that no encroachment takes place thereon. During the Construction Period, the Contractor shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Sub-contractor or other person claiming through or under the Agreement to place or create any Encumbrance or security threat over all or any part of the Site or the Project Assets, or on any rights of the Contractor therein or under this Agreement, save and

except as otherwise expressly set forth in this Agreement. In the event of any encroachment or occupation on any part of the Site, the Contractor shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its own cost and expenses.

#### **8.6. Special/ temporary Right of Way**

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

#### **8.7. Access to the Authority and the Authority's Engineer**

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

#### **8.8. Geological and archaeological finds**

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

## **Article 09: Utilities and Trees**

### **9.1. Existing utilities and roads**

Notwithstanding anything to the contrary contained herein, it shall be the responsibility of the Contractor to ensure that the respective entities owning the existing roads, right of way, level crossings, structures, or utilities on, under or above the Site are enabled by it to keep them in continuous satisfactory use, if necessary, by providing suitable temporary diversions with the authority of the controlling body of that road, right of way or utility.

### **9.2. Shifting of obstructing utilities**

The Contractor shall, in accordance with Applicable Laws and with assistance of the Authority, undertake the work of shifting of any utility (including electric lines, water pipes, and telephone cables) to an appropriate location or alignment, if such utility or obstruction adversely affects the execution of works or maintenance of the Project ROB in accordance with this Agreement, as per the scope given in Schedule B and in accordance with applicable standards and specifications of concerned utility owning entity. The cost of such shifting indicated in schedule B is payable to contractor as per Schedule H. Cost of shifting such utilities not included in Schedule B, if any shall be treated as Change of Scope. The Authority will provide assistance to the Contractor for obtaining the estimates for shifting of such utilities from the entity owning such electric lines, water pipes or telephone cables, as the case may be. The Contractor shall execute such utility shifting works under the supervision of utility owning agency and Authority Engineer (AE) in accordance with the provision of agreement. The supervision charges shall also be paid by the EPC contractor to the Utility Owning Entity. In the event of any delay in shifting thereof, the Contractor shall be responsible for failure to perform any of its obligations here under if such failure is not as 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. he dismantled material/scrap of existing Utility to be shifted dismantled shall belong to the Contractor who would be free to dispose-off the dismantled materials as deemed fit by them.

In the event of any delay of such shifting on the part of the contractor, no extension of time for completion of the project and no claims, in any manner, shall be admissible on this account against the Authority. The work of shifting of Utilities can be taken up by the Contractor any time after signing of the Agreement.

### **9.3. New utilities**

- (i) The Contractor shall allow, subject to the permission from the Authority and such conditions as the Authority may specify, access to, and use of the Site for laying telephone lines, water pipes, electricity lines/ cables or other public utilities. Where such access or use causes any financial loss to the Contractor, it may require the user of the Site to pay compensation or damages as per Applicable Laws. For the avoidance of doubt, it is agreed that use of the Site under this Clause 9.3 shall not in any manner

relieve the Contractor of its obligation to construct and maintain the Project ROB in accordance with this Agreement and any damage caused by such use shall be restored forthwith at the cost of the Authority.

- (ii) The Authority may, by notice, require the Contractor to connect any adjoining road to the Project ROB, and the connecting portion thereof falling within the Site shall be constructed by the Contractor at the Authority's cost in accordance with Article 10.
- (iii) The Authority may by notice require the Contractor to connect, through a paved road, any adjoining service station, hotel, motel or any other public facility or amenity to the Project ROB, whereupon the connecting portion thereof that falls within the Site shall be constructed by the Contractor on payment of the cost. The cost to be paid by the Authority to the Contractor shall be determined by the Authority's Engineer. For the avoidance of doubt, in the event such road is to be constructed for the benefit of any entity, the Authority may require such entity to make an advance deposit with the Contractor or the Authority, as the case may be, of an amount equal to the estimated cost as determined by the Authority's Engineer and such advance shall be adjusted against the cost of construction as determined by the Authority's Engineer hereunder.
- (iv) In the event construction of any Works is affected by a new utility or works undertaken in accordance with this Clause 9.3, the Contractor shall be entitled to a reasonable Time Extension as determined by the Authority's Engineer.

#### **9.4. Felling of trees**

The Authority shall assist the Contractor in obtaining the Applicable Permits for felling of trees in non-forest area to be identified by the Authority for this purpose if, and only if, such trees cause a Material Adverse Effect on the construction or maintenance of the Project ROB. The Contractor shall fell these trees as per the Permits obtained. The cost of such felling shall be borne by the EPC Contractor and in the event of any delay in felling thereof for reasons beyond the control of the Contractor; it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. The Parties hereto agree that the felled trees shall be deemed to be owned by the Authority and shall be disposed in such manner and subject to such conditions as the Authority may in its sole discretion deem appropriate. For the avoidance of doubt, the Parties agree that if any felling of trees hereunder is in a forest area, the Applicable Permit thereof shall be procured by the Authority within the time specified in the Agreement.

#### **9.5. Dismantling of structures**

The Contractor shall at its own cost dismantle the structures in the acquired lands including those on patta lands, abadi lands, assigned lands, etc. the compensation for which, was paid by the Authority to the landowners and the lands were handed over to the Contractor. The Contractor shall, at its own cost, dispose off the dismantled material in its sole discretion as deemed appropriate, while complying with all environmental guidelines and regulations and clear the Site for undertaking construction. In the event of any delay in dismantling of structures thereof for reasons beyond the control of the Contractor, the

Contractor shall be entitled to Damages in a sum calculated in accordance with the formula specified in Clause 8.3 (i) for the period of delay, and to the Time Extension in accordance with Clause 10.5 for and in respect of the part(s) of the Works affected by such delay; provided that if the delays involve any time overlaps, the overlaps shall not be additive.

#### **9.6. Development Period**

The Contractor may commence pre-construction activities like utility shifting, boundary wall construction or any other activity assigned to the Contractor by the Authority to enable construction of the Project ROB immediately after signing of the Agreement, to the extent that such work is ready for execution. The Parties agree that these works may be taken up and completed to the extent feasible by the Contractor, before declaration of the Appointed Date, but no claim against the Authority for delay shall survive during this period and that the undertaking of these works by the Contractor shall not count towards the Scheduled Construction Period of the project which starts counting only from the Appointed Date. No construction activity of the Project ROB shall be undertaken during the development period.



# Article 10: Design and Construction of the Project ROB

## 10.1. Obligations prior to commencement of Works

- (i) Within 20 (twenty) days of the Appointed Date, the Contractor shall:
  - a. Appoint its representative, duly authorised to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;
  - b. Appoint a design director (the “**Design Director**”) who will head the Contractor's design unit and shall be responsible for surveys, investigations, collection of data, and preparation of preliminary and detailed designs;
  - c. Undertake and perform all such acts, deeds and things as may be necessary or required before commencement of Works under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and
  - d. Make its own arrangements for quarrying of materials needed for the Project ROB under and in accordance with the Applicable Laws and Applicable Permits.
- (ii) The Authority shall, appoint an engineer (the “Authority's Engineer” / “PMC”) before the Appointed Date to discharge the functions and duties specified in this Agreement, and shall notify to the Contractor the name, address and the date of appointment of the Authority's Engineer forthwith.
- (iii) Within 30 (thirty) days of the Appointed Date, the Contractor shall submit to the Authority and the Authority's Engineer a programme (the “Programme”) for the Works, developed using networking techniques, for review and consent of the Engineer, giving the following details:
  - a. **Part I:** Contractor's organisation for the Project, the general methods and arrangements for design and construction, environmental management plan, Quality Assurance Plan including design quality plan, traffic management and safety plan covering safety of users and workers during construction (including use of ‘ROBOTS’ for diversion and control of traffic), Contractor's key personnel and equipment.
  - b. **Part II :** Programme for completion of all stages of construction given in Schedule-H and Project Milestones of the Works as specified in Project Completion Schedule set forth in Schedule-J. The Programme shall include:
    - i. The order in which the Contractor intends to carry out the Works, including the anticipated timing of design and stages of Works;
    - ii. The periods for reviews under Clause 10.2;
    - iii. The sequence and timing of inspections and tests specified in this Agreement; and
    - iv. The particulars for the pre-construction reviews and for any other submissions, approvals and consents specified in the Agreement.

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

c. **Part III** : Monthly cash flow forecast.

- (iv) The Contractor shall compute, on the basis of the Drawings prepared in accordance with Clause 10.2 (iv), and provide to the Authority's Engineer, the length, area and numbers, as the case may be, in respect of the various items of work specified in Schedule-H and comprising the Scope of the Project. The Parties expressly agree that these details shall form the basis for estimating the interim payments for the Works in accordance with the provisions of Clause 19.3. For the avoidance of doubt, the sum of payments to be computed in respect of all the items of work shall not exceed the Contract Price, as may be adjusted in accordance with the provisions of this Agreement.
- (v) The Contractor shall appoint a safety consultant (the "**Safety Consultant**") to carry out a safety audit at the design stage of the Project ROB in accordance with the Applicable Laws and Good Industry Practice. The Safety Consultant shall be appointed after proposing to the Authority a panel of three (3) names of qualified and experienced firms from which the Authority may choose one (1) to be the Safety Consultant. Provided, however, that if the panel is not acceptable to the Authority and the reasons for the same are furnished to the Contractor, the Contractor shall propose to the Authority a revised panel of three (3) names from the firms empanelled as safety consultants by the [Ministry of Road Transport and Highways] for obtaining the consent of the Authority. The Contractor shall also obtain the consent of the Authority for the key personnel of the Safety Consultant who shall have adequate experience and qualifications in safety audit of the highway projects. The Authority shall, within 15 (fifteen) days of receiving a proposal from the Contractor hereunder, convey its decision, with reasons, to the Contractor, and if no such decision is conveyed within the said period, the Contractor may proceed with engaging of the Safety Consultant.
- (vi) The safety audit pursuant to Clause 10.1 (v) shall be carried out by the Safety Consultant in respect of all such design details that have a bearing on safety of Users as well as pedestrians and animals involved in or associated with accidents. The recommendations of the Safety Consultant shall be incorporated in the design of the Project ROB and the Contractor shall forward to the Authority's Engineer a certificate to this effect together with the recommendations of the Safety Consultant. In the event that any works required by the Safety Consultant shall fall beyond the scope of Schedule-B, Schedule-C or Schedule-D, the Contractor shall make a report thereon and seek the instructions of the Authority for Change in Scope. For the avoidance of doubt, the Safety Consultant to be engaged by the Contractor shall be independent of the design and implementation team of the Contractor.

## **10.2. Design and Drawings**

- (i) Design and Drawings shall be developed in conformity with the Specifications and Standards set forth in Schedule-D. In the event, the Contractor requires any relaxation in design standards due to restricted Right of Way in any section, the alternative design criteria for such section shall be provided for review and approval of the Authority's

Engineer / PMC.

- (ii) The Contractor shall appoint a proof check consultant (the **“Proof Consultant”**) after proposing to the Authority a panel of three (3) names of qualified and experienced firms from any of the IIT/NITs whom the Authority may choose one (1) to be the Proof Consultant. Provided, however, that if the panel is not acceptable to the Authority and the reasons for the same are furnished to the Contractor, the Contractor shall propose to the Authority a revised panel of three (3) names from the firms empanelled as proof consultants by the [Ministry of Road Transport and Highways] for obtaining the consent of the Authority. The Contractor shall also obtain the consent of the Authority for two (2) key personnel of the Proof Consultant who shall have adequate experience and qualifications in highways and bridges respectively. The Authority shall, within 15 (fifteen) days of receiving a proposal from the Contractor hereunder, convey its decision, with reasons, to the Contractor, and if no such decision is conveyed within the said period, the Contractor may proceed with engaging of the Proof Consultant.

**The contractor shall get ROB Design and Drawings proof checked and approved from concerned Railway Department only** and the applicable charges shall have to borne by the contractor. The Contractor shall ensure that the Design - Drawing submission by the Design Consultant shall be submitted well in advance such as minimum 15 days' time shall be available for the proof checking after complete design submission.

- (iii) The Proof Consultant shall:

- a. evolve a systems approach with the Design Director so as to minimise the time required for final designs and construction drawings; and
- b. proof check the detailed calculations, drawings and designs, which have been approved by the Design Director.

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

- a. The Contractor shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three (3) copies each of the design and Drawings, duly certified by the Proof Consultant, to the Authority's Engineer for its approval. Provided, however, that in respect of Major Bridges and Structures, the Authority's Engineer may require additional drawings for approval in accordance with Good Industry Practice.
- b. By submitting the Drawings for review and approval to the Authority's Engineer, the Contractor shall be deemed to have represented that it has determined and verified that the design and engineering, including field construction criteria related thereto, are in conformity with the Scope of the Project, the Specifications and Standards and the Applicable Laws;
- c. Within 15 (fifteen) days of the receipt of the Drawings, the Authority's Engineer shall review the same and convey its approval/observations to the Contractor with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. Provided, however that in case of a major bridge

or structure, the aforesaid period of 15 (fifteen) days may be extended up to 30 (thirty) days;

- d. If the aforesaid observations of the Authority's Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Contractor in conformity with the provisions of this Agreement and resubmitted to the Authority's Engineer for review and approval. The Authority's Engineer shall give its observations, if any, within 10 (ten) days of receipt of the revised Drawings. In the event the Contractor fails to revise and resubmit such Drawings to the Authority's Engineer for review/approval as aforesaid, the Authority's Engineer may withhold the payment for the affected works in accordance with the provisions of Clause 19.5 (iv). If the Contractor disputes any decision, direction or determination of the Authority's Engineer hereunder, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure;
  - e. No review/approval and/or observation of the Authority's Engineer and/or its failure to review/approval and/or convey its observations on any Drawings shall not relieve the Contractor of its obligations and liabilities under this Agreement in any manner nor shall the Authority's Engineer or the Authority be liable for the same in any manner; and if errors, omissions, ambiguities, inconsistencies, inadequacies or other Defects are found in the Drawings, they and the construction works shall be corrected at the Contractor's cost, notwithstanding any approval under this Article 10;
  - f. The Contractor shall be responsible for delays in submitting the Drawing as set forth in Schedule-I caused by reason of delays in surveys and field investigations, and shall not be entitled to seek any relief in that regard from the Authority; and
  - g. The Contractor warrants that its designers, including any third parties engaged by it, shall have the required experience and capability in accordance with Good Industry Practice and it shall indemnify the Authority against any damage, expense, liability, loss or claim, which the Authority might incur, sustain or be subject to arising from any breach of the Contractor's design responsibility and/or warranty set out in this Clause.
  - h. The Contractor shall ensure that all the designs and drawings shall be approved from the Authority's Engineer within 90 days (ninety) from the Appointed Date.
- (v) Any cost or delay in construction arising from review/approval by the Authority's Engineer shall be borne by the Contractor.
- (vi) Works shall be executed in accordance with the Drawings provided by the Contractor in accordance with the provisions of this Clause 10.2 and the approval of the Authority's Engineer thereon as communicated pursuant to the provisions of sub- Clause (c) & (d) of Clause 10.2 (iv). Such Drawings shall not be amended or altered without prior written notice to the Authority's Engineer. If a Party becomes aware of an error or defect of a technical nature in the design or Drawings, that Party shall promptly give notice to the other Party of such error or defect.
- (vii) Within 90 (ninety) days of the Project Completion Date, the Contractor shall furnish to the

Authority and the Authority's Engineer a complete set of as- built Drawings, in 2 (two) hard copies and in micro film form or in such other medium as may be acceptable to the Authority, reflecting the Project ROB as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Project ROB and setback lines, if any, of the buildings and structures forming part of Project Facilities.

### **10.3. Construction of the Project ROB**

- (i) The Contractor shall construct the Project ROB as specified in Schedule- B and Schedule- C, and in conformity with the Specifications and Standards set forth in Schedule-D. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works. The **720<sup>th</sup> (seven hundred and thirtieth) day** from the Appointed Date shall be the scheduled completion date (the “**Scheduled Completion Date**”) and the Contractor agrees and undertakes that the construction shall be completed on or before the Scheduled Completion Date, including any extension thereof.
- (ii) The Contractor shall construct the Project ROB in accordance with the Project Completion Schedule set forth in Schedule-J. In the event that the Contractor fails to achieve any Project Milestone or the Scheduled Completion Date within a period of 30 (thirty) days from the date set forth in Schedule-J, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Authority, it shall pay Damages to the Authority of a sum calculated at the rate of 0.05% (zero point zero five percent) of the Contract Price for delay of each day reckoned from the date specified in Schedule –J and until such Project Milestone is achieved or the Project ROB is completed; provided that if the period for any or all Project Milestones or the Scheduled Completion Date is extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-J shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-J has been amended as above; provided further that in the event the Project ROB is completed within or before the Scheduled Completion Date including any Time Extension, applicable for that work or section, the Damages paid under this Clause 10.3 (ii) shall be refunded by the Authority to the Contractor, but without any interest thereon.

The Parties agree that for determining achievement or delays in completion of the Project Milestones or the Project on the due date, the works affected due to delay in providing the site for which time extension has been granted beyond the Scheduled Completion Date will be excluded. For example on the due date to achieve the Project Milestone-I (i.e., Stage Payments of 10% (ten percent) of Contract Price on 180<sup>th</sup>(one hundred and eighty) day from the Appointed Date), if 5% (five percent) of the project length corresponding to the Project Milestone-I is not handed over or lately handed over resulting in the extension of completion of this 5% (five percent) length beyond Scheduled Completion Date, Stage Payment of 10% X 0.95 = 9.5% only is to be achieved by 180<sup>th</sup>(one hundred and eighty) day.

For the avoidance of doubt, it is agreed that recovery of Damages under this Clause10.3

- (ii) shall be without prejudice to the rights of the Authority under this Agreement including the right of Termination thereof. The Parties further agree that Time Extension hereunder shall only be reckoned for and in respect of the affected Works as specified in Clause 10.5(ii).
- (iii) The Authority shall notify the Contractor of its decision to impose Damages in pursuance with the provisions of this Clause 10.3. Provided that no deduction on account of Damages shall be effected by the Authority without notifying the Contractor of its decision to impose the Damages, and taking into consideration the representation, if any, made by the Contractor within 20 (twenty) days of such notice. The Parties expressly agree that the total amount of Damages under Clause 10.3 (ii) shall not exceed 10% (ten percent) of the Contract Price. If the damages exceed 10% (ten percent) of the Contract Price, the Contractor shall be deemed to be in default of this agreement having no cure and the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice in accordance with the provisions of Clause 23.1 (ii).
- (iv) In the event that the Contractor fails to achieve the Project Completion within a period of 90 (ninety) days from the Schedule Completion Date set forth in Schedule-J, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Authority, the contractor shall be deemed to be ineligible for bidding any future projects of the Authority, both as the sole party or as one of the parties of Joint Venture/ Consortium during the period from Scheduled Completion Date to issuance of Completion Certificate. This restriction is applicable if the contract value of the delayed project is not less than Rs. 300 Crore.

#### **10.4. Maintenance during Construction Period**

- (i) During the Construction Period, the Contractor shall maintain, at its cost, the existing lane(s) of the Project ROB so that the traffic worthiness and safety thereof are at no time materially inferior as compared to their condition on Appointed Date, and shall undertake the necessary repair and maintenance works for this purpose; provided that the Contractor may, at its cost, interrupt and divert the flow of traffic if such interruption and diversion is necessary for the efficient progress of Works and conforms to Good Industry Practice; provided further that such interruption and diversion shall be undertaken by the Contractor only with the prior written approval of the Authority's Engineer which approval shall not be unreasonably withheld. For the avoidance of doubt, it is agreed that the Contractor shall at all times be responsible for ensuring safe operation of the Project ROB. It is further agreed that in the event the Project includes construction of a bypass or tunnel and realignment of the existing carriageway, the Contractor shall maintain the existing highway in such sections until the new Works are open to traffic.
- (ii) Notwithstanding anything to the contrary contained in this Agreement, in the event of default by the Contractor in discharging the obligations specified in Clause 10.4 (i) above, the Authority shall get these maintenance works completed in the manner recommended by the Authority's Engineer to avoid public inconvenience at the risk and cost of the

Contractor in order to keep the road in traffic worthy condition.

## **10.5. Extension of time for completion**

- (i) Without prejudice to any other provision of this Agreement for and in respect of extension of time, the Contractor shall be entitled to extension of time in the Project Completion Schedule (the “**Time Extension**”) to the extent that completion of any Project Milestone is or will be delayed by any of the following, namely:
  - a. Delay in providing the Right of Way of Construction Zone or approval of railway authorities,
  - b. Change of Scope (unless an adjustment to the Scheduled Completion Date has been agreed under Article 13);
  - c. Occurrence of a Force Majeure Event;
  - d. Any delay, impediment or prevention caused by or attributable to the Authority, the Authority's personnel or the Authority's other contractors on the Site; and
  - e. Any other cause or delay which entitles the Contractor to Time Extension in accordance with the provisions of this Agreement.
- (ii) The Contractor shall, no later than 15 (fifteen) business days from the occurrence of an event or circumstance specified in Clause 10.5 (i), inform the Authority's Engineer by notice in writing, with a copy to the Authority, stating in reasonable detail with supporting particulars, the event or circumstances giving rise to the claim for Time Extension in accordance with the provisions of this Agreement. Provided that the period of 15 (fifteen) business days shall be calculated from the date on which the Contractor became aware, or should have become aware, of the occurrence of such an event or circumstance. Provided further that notwithstanding anything to the contrary contained in this Agreement, Time Extension shall be due and applicable only for the Works which are affected by the aforesaid events or circumstances and shall not in any manner affect the Project Completion Schedule for and in respect of the Works which are not affected hereunder.
- (iii) On the failure of the Contractor to issue to the Authority's Engineer a notice in accordance with the provisions of Clause 10.5 (ii) within the time specified therein, the Contractor shall not be entitled to any Time Extension and shall forfeit its right for any such claims in future. For the avoidance of doubt, in the event of failure of the Contractor to issue notice as specified in this clause 10.5 (iii), the Authority shall be discharged from all liability in connection with the claim.
- (iv) The Authority's Engineer shall, on receipt of the claim in accordance with the provisions of Clause 10.5 (ii), examine the claim expeditiously within the time frame specified herein. In the event the Authority's Engineer requires any clarifications to examine the claim, the Authority's Engineer shall seek the same within 15 (fifteen) days from the date of receiving the claim. The Contractor shall, on receipt of the communication of the Authority's Engineer requesting for clarification, furnish the same to the Authority's

Engineer within 10 (ten) days thereof. The Authority's Engineer shall, within a period of 30 (thirty) days from the date of receipt of such clarifications, forward in writing to the Contractor its determination of Time Extension. Provided that when determining each extension of time under this Clause 10.5, the Authority's Engineer shall review previous determinations and may increase, but shall not decrease, the total Time Extension.

(v) If the event or circumstance giving rise to the notice has a continuing effect:

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

Upon receipt of the claim hereunder, the Authority's Engineer shall examine the same in accordance with the provisions of Clause 10.5 (iv) within a period of 30 (thirty) days of the receipt thereof.

#### **10.6. Incomplete Works**

In the event the Contractor fails to complete the Works in accordance with the Project Completion Schedule, including any Time Extension granted under this Agreement, the Contractor shall endeavour to complete the balance work expeditiously and shall pay Damages to the Authority in accordance with the provisions of Clause 10.3 (ii) for delay of each day until the Works are completed in accordance with the provisions of this Agreement. Recovery of Damages under this Clause shall be without prejudice to the rights of the Authority under this Agreement including the right to termination under Clause 23.1.

#### **10.7. Maintenance Manual**

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

#### **10.8. As-Built Records**

The Contractor shall prepare, and keep up to date, a complete set of as-built records of the execution of the Works, showing the exact as-built locations, sizes and details on the Works as executed with cross references to all relevant specifications and data sheets. These records shall be kept on the Site and shall be used exclusively for the purpose of this Sub-Clause 10.8. The Contractor shall provide 2 (two) copies of as-built records to the Authority prior to the commencement of the Tests on Completion.



## **10.9. Contractor's Use of Authority's Documents**

Intellectual property in the Authority's requirements and Specifications and Standards and all other documents and materials issued by the Authority or the Authority's Representative to the Contractor shall (as between the parties) remain the property of the Authority. The Contractor may, at its cost, copy, use and communicate any such documents for the purposes of the Contract. They shall not, without the consent of the Authority, be used, copied or communicated to a third party by the Contractor, except as necessary for the purposes of the Works under the Agreement.

# **Article 11: Quality Assurance, Monitoring and Supervision**

## **11.1. Quality of Materials and workmanship**

The Contractor shall ensure that the Construction, Materials and workmanship are in accordance with the requirements specified in this Agreement, Specifications and Standards and Good Industry Practice. Also, the stipulations in Ministry's "Guidelines and SOP for Quality Control/ Assurance in construction of National Highways No. RW/NH-34066/01/2020-QCZ dated 01.10.2020" should be strictly adhered to.

## **11.2. Quality control system**

- (i) The Contractor shall establish a quality control mechanism to ensure compliance with the provisions of this Agreement (**the "Quality Assurance Plan" or "QAP"**).
- (ii) The Contractor shall, within 30 (thirty) days of the Appointed Date, submit to the Authority's Engineer its Quality Assurance Plan which shall include the following:
  - a. Organisation, duties and responsibilities, procedures, inspections and documentation;
  - b. Quality control mechanism including sampling and testing of Materials, test frequencies, standards, acceptance criteria, testing facilities, reporting, recording and interpretation of test results, approvals, check list for site activities, and proforma for testing and calibration in accordance with the Specifications for Road and Bridge Works issued by MORTH, relevant IRC specifications and Good Industry Practice; and
  - c. Internal quality audit system.

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

- (iii) The Contractor shall procure all documents, apparatus and instruments, fuel, consumables, water, electricity, labour, Materials, samples, and qualified personnel as are necessary for examining and testing the Project Assets and workmanship in accordance with the Quality Assurance Plan.
- (iv) The cost of testing of Construction, Materials and workmanship under this Article 11 shall be borne by the Contractor.

## **11.3. Methodology**

The Contractor shall, at least 15 (fifteen) days prior to the commencement of the construction, submit to the Authority's Engineer for review and consent the methodology proposed to be adopted for executing the Works, giving details of equipment to be deployed, traffic management and measures for ensuring safety. The Authority's Engineer

shall complete the review and convey its consent to the Contractor within a period of 10 (ten) days from the date of receipt of the proposed methodology from the Contractor.

#### **11.4. Inspection and technical audit by the Authority**

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

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

- (i) At any time during construction, the Authority may appoint an external technical auditor to conduct an audit of the quality of the Works. The Auditor in the presence of the representatives of the Contractor and the Authority's Engineer shall carry out the tests and/ or collect samples for testing in the laboratory. The timing, the testing equipment and the sample size of this audit shall be as decided by the Authority. The findings of the audit, to the extent accepted by the Authority, shall be notified to the Contractor and the Authority's Engineer for taking remedial action in accordance with this Agreement.
- (ii) After completion of the remedial measures by the Contractor, the Auditor shall undertake a closure audit and this process will continue till the remedial measures have brought the works into compliance with the Specifications and Standards. The Contractor shall provide all assistance as may be required by the auditor in the conduct of its audit hereunder. Notwithstanding anything contained in this Clause 11.5, the external technical audit shall not affect any obligations of the Contractor or the Authority's Engineer under this Agreement.

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

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

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

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

The Contractor agrees that reporting under this Clause 11.7 shall continue until the date of the completion of the Works. Each report shall include:

- (a) An executive summary;
- (b) Charts showing the status of Contractor's documents, construction and manufacturing and environmental works;
- (c) Details of work subcontracted and the performance of Sub-contractors;
- (d) For the construction of each main part of the Works, the extent of progress (both quantity and percentage of the whole), the actual or expected dates of commencement, anticipated completion date of the activity, Contractor's inspections and tests;

- (e) Records of manpower and Contractor's equipment on the Site;
- (f) Copies for that month of quality assurance documents, test results and certificates;
- (g) Safety statistics, accident data collection including details of any hazardous incidents and activities relating to environmental aspects and public relations;
- (h) Comparisons of actual and planned progress, with details of any aspects which may jeopardise the completion in accordance with the Agreement, and the measures being (or to be) adopted to overcome such aspects;
- (i) Details of any unresolved disputes or claims, in relation to the Project;
- (j) Details of any revision to the cash flow estimate, together with a copy of the revised cash flow estimate;
- (k) Status of various Applicable Permits and compliance of conditions therein;
- (l) Details of various royalty payment and insurances required to be taken by the Contractor; and
- (m) Such other reports as may be required by the Authority for enabling the Authority to comply with its obligations under the other Project contracts.
- (n) Details of defects by the Authority;
- (o) Change in emission of any sewage or effluent of any nature whatsoever, whether qualitatively or quantitatively;
- (p) Any Material Adverse Effect;
- (q) Declaration towards compliance with Applicable Laws including but not limited to environmental and labour legislations;
- (r) Declaration specifying compliance with all Manuals provided to the Contractor; and
- (s) Any change in the flow of traffic in the existing Project ROB.

### **11.8. Inspection**

- (i) The Authority's Engineer and its authorised representative shall at all reasonable times:
  - a. Have full access to all parts of the Site and to all places from which natural Materials are being obtained for use in the Works; and
  - b. During production, manufacture and construction at the Site and at the place of production, be entitled to examine, inspect, measure and test the Materials and workmanship, and to check the progress of manufacture of Materials.
- (ii) The Contractor shall give the Authority's Engineer and its authorised agents access, facilities and safety equipment for carrying out their obligations under this Agreement.
- (iii) The Authority's Engineer shall submit a monthly inspection report (the "Inspection Report") to the Authority and the Contractor bringing out the results of inspections and the remedial action taken by the Contractor in respect of Defects or deficiencies. For the avoidance of doubt, such inspection or submission of Inspection Report by the Authority's Engineer shall not relieve or absolve the Contractor of its obligations and liabilities under this Agreement in any manner whatsoever.

## **11.9. Samples**

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

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

## **11.10. Tests**

- (i) For determining that the Works conform to the Specifications and Standards, the Authority's Engineer shall require the Contractor to carry out or cause to be carried out tests, at such time and frequency and in such manner as specified in this Agreement, and in accordance with Good Industry Practice for quality assurance. The test checks by the Authority's Engineer shall comprise at least 50% (fifty percent) of the quantity or number of tests prescribed for each category or type of test for quality control by the Contractor.
- (ii) In the event that results of any tests conducted under this Clause 11.10 establish any Defects or deficiencies in the Works, the Contractor shall carry out remedial measures and furnish a report to the Authority's Engineer in this behalf. The Authority's Engineer shall require the Contractor to carry out or cause to be carried out tests to determine that such remedial measures have brought the Works into compliance with the Specifications and Standards, and the procedure shall be repeated until such Works conform to the Specifications and Standards. For the avoidance of doubt, the cost of such tests and remedial measures in pursuance thereof shall be solely borne by the Contractor.
- (iii) In order to document the status/ condition and quality of road, the Contractor shall carry out survey using Network Survey Vehicle (NSV) by engaging Consultant from the MoRTH list of Empanelled NSV Consultants, under the supervision of Authority's Engineer, at the following intervals:
  - (a) Before start of the work,
  - (b) Before issue of provisional/ final completion certificate,
  - (c) Every 6 months after completion of work until completion of Defect Liability Period,
  - (d) The output of the NSV test should be reported in the format enclosed with this Agreement.

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

In respect of the work which the Authority's Engineer is entitled to examine, inspect, measure and/or test before it is covered up or put out of view or any part of the work is placed thereon, the Contractor shall give notice to the Authority's Engineer whenever any such work is ready and before it is covered up. The Authority's Engineer shall then either carry out the examination, inspection or testing without unreasonable delay, or promptly give notice to the Contractor that the Authority's Engineer does not require to do so. Provided, however, that if any work is of a continuous nature where it is not possible or prudent to keep it uncovered or incomplete, the Contractor shall notify the schedule of

carrying out such work to give sufficient opportunity, not being less than 3 (three) business days' notice, to the Authority's Engineer to conduct its inspection, measurement or test while the work is continuing. Provided further that in the event the Contractor receives no response from the Authority's Engineer within a period of 3 (three) business days from the date on which the Contractor's notice hereunder is delivered to the Authority's Engineer, the Contractor shall be entitled to assume that the Authority's Engineer would not undertake the said inspection.

#### **11.12. Rejection**

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

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

#### **11.13. Remedial work**

- (i) Notwithstanding any previous test or certification, the Authority's Engineer may instruct the Contractor to:
  - a. remove from the Site and replace any Plant or Materials which are not in accordance with the provisions of this Agreement;
  - b. remove and re-execute any work which is not in accordance with the provisions of this Agreement and the Specification and Standards; and
  - c. execute any work which is urgently required for the safety of the Project ROB, whether because of an accident, unforeseeable event or otherwise; provided that in case of any work required on account of a Force Majeure Event, the provisions of Clause 21.6 shall apply.
- (ii) If the Contractor fails to comply with the instructions issued by the Authority's Engineer under Clause 11.13 (i), within the time specified in the Authority's Engineer's notice or as mutually agreed, the Authority's Engineer may advise the Authority to have the work executed by another agency. The cost so incurred by the Authority for undertaking such work shall, without prejudice to the rights of the Authority to recover Damages in accordance with the provisions of this Agreement, be recoverable from the Contractor and may be deducted by the Authority from any monies due to be paid to the Contractor.

#### **11.14. Delays during construction**

Without prejudice to the provisions of Clause 10.3 (ii), in the event the Contractor does not achieve any of the Project Milestones or the Authority's Engineer shall have reasonably determined that the rate of progress of Works is such that Completion of the Project ROB is not likely to be achieved by the end of the Scheduled Completion Date, it shall notify the same to the Contractor, and the Contractor shall, within 15 (fifteen) days of such notice, by a communication inform the Authority's Engineer in reasonable detail about the steps it proposes to take to expedite progress and the period within which it shall achieve the Project Completion Date.

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

The Contractor shall hand over a copy of all its quality control records and documents to the Authority's Engineer before the Completion Certificate is issued pursuant to Clause 12.2. The Contractor shall submit Road Signage Plans to the Authority Engineer for approval at least 6 (six) months prior to expected completion of Project ROB.

#### **11.16. Video recording/Photos**

During the Construction Period, the Contractor shall provide to the Authority for every calendar quarter or as directed by Authority, a video recording, which will be compiled into a 3 (three)- hour video digital file on an external drive, as the case may be, covering the status and progress of Works in that quarter. The video recording shall be provided to the Authority no later than 15 (fifteen) days after the close of each quarter after the Appointed Date. Further, the NOC for using Drone from respective agencies shall be taken by the Contractor.

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

- (i) Upon recommendation of the Authority's Engineer to this effect, the Authority may by notice require the Contractor to suspend forthwith the whole or any part of the Works if, in the reasonable opinion of the Authority's Engineer, such work threatens the safety of the Users and pedestrians.
- (ii) The Contractor shall, pursuant to the notice under Clause 11.17 (i), suspend the 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, the Users and pedestrians. The Contractor may by notice require the Authority's 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 Authority's Engineer, the Authority shall either revoke such suspension or instruct the Contractor to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 11.17 shall be repeated until the suspension hereunder is revoked.
- (iii) Subject to the provisions of Clause 21.6, all reasonable costs incurred for maintaining and protecting the Works or part thereof during the period of suspension (the "Preservation Costs"), shall be borne by the Contractor; provided that if the suspension has occurred as

a result of any breach of this Agreement by the Authority, the Preservation Costs shall be borne by the Authority.

- (iv) If suspension of Works is for reasons not attributable to the Contractor, the Authority's Engineer shall determine any Time Extension to which the Contractor is reasonably entitled.

## **11.18. Staff and Labour**

### **(i) Engagement of Staff and Labour**

- a. The Contractor shall make its own arrangements for the engagement of all personnel and labour, local or otherwise, and for their payment, housing, feeding and transport.
- b. The Contractor has verified/ shall verify the identity and address of all its employees and officials related to the Works by collecting necessary documentary proof.
- c. The Contractor shall conduct pre-employment police verification of the employees and other staffs and shall furnish the police verification report of all such staff/ employees, if requested by the Employer who shall be performing the Works or any part thereof;
- d. The Contractor hereby confirms that the Contractor shall not engage any person with a criminal record / conviction and shall bar any such person from participating directly or indirectly in performing the Works.
- e. The employees and personnel of the Contractor shall work under the supervision, control and direction of the Contractor and the Contractor shall be solely responsible for all negotiations with our employees and personnel relating to their salaries and benefits, and shall be responsible for assessments and monitoring of performance and for all disciplinary matters. All employees / personnel, executives engaged by the Contractor shall be in sole employment of the Contractor and the Contractor shall be solely responsible for their salaries, wages, statutory payments, etc and under no circumstances the personnel shall be deemed to be the employees of the Employer. Under no circumstances the Authority shall be liable for any payment or claim or compensation of any nature to the employees and personnel of the Contractor.

### **(ii) Returns of Labour**

- a. The Contractor shall deliver to the Authority a detailed return in such form and at such intervals as the Authority may prescribe, showing the details including names, payment details and terms of appointment of the several classes of labour employed by the Contractor from time to time for the Works. The Contractor shall, in its returns certify that all dues of the workers or labour have been fully paid.
- b. The Authority is entitled to witness labour payments made or to be made by the Contractor. If the Contractor defaults in its obligations for making any payments under the labour laws, the Employer may make the relevant payments. Any sum equal to any amount paid by the Employer under this Sub-Clause 9.2 shall be immediately due as a debt from the Contractor to the Employer and until payment/ set off shall carry interest at 18% per annum. For this purpose it is agreed between



the parties that debt due aforesaid shall be set off immediately out the running account bills of the Contractor under this Agreement.

(iii) Persons in the Service of Others

The Contractor shall not recruit, or attempt to recruit from amongst persons in the service of the Authority.

(iv) Labour Laws

- a. The Contractor shall obtain all relevant labour registrations and comply with all relevant labour laws applying to its employees, and shall duly pay them and afford to them all their legal rights.
- b. The Contractor shall make all deductions of tax at source and all contributions to the Payment of Gratuity, Provident Fund (including Employees' contribution) and Employees' State Insurance Scheme as may be required by Applicable Laws and deposit the aforesaid contributed amount with the appropriate authority/(s).
- c. The Contractor shall require all personnel engaged in the Works to obey all Applicable Laws and regulations. The Contractor shall permit Authority to witness labour payments for the Contractors direct labour, or the Subcontractors labour. The Contractor shall ensure that all its Subcontractors strictly comply with all labour laws.
- d. Documentary evidence as may be required from time to time, shall be provided to the Employer's Representative.
- e. The Employer shall not be liable for any delay/default of the Contractor in compliance of the labour laws.

(v) Facilities for Staff and Labour

The Contractor shall provide and maintain all necessary accommodation and welfare facilities for personnel engaged for the Works. The Contractor shall not permit any personnel engaged for the Works to maintain any temporary or permanent living quarters within the structures forming part of the Works.

(vi) Health And Safety

All necessary precautions shall be taken by the Contractor to ensure the health and safety of staff and labour engaged for the Works. The Contractor shall, in collaboration with and to the requirements of the local health authorities, ensure that para-medical staff, first aid facilities, ambulance service are always available on the Site, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics. The Contractor shall appoint a safety officer to be responsible for the safety of personnel on the Site. This safety officer shall be qualified for his work and shall have the authority to issue instructions concerning safety and take protective measures to prevent accidents. The Contractor shall maintain records and make reports concerning health, safety and welfare of personnel, and damage to property, in such manner as the Authority may reasonably require.

(vii) Contractor's Personnel

The Contractor shall employ only personnel who are appropriately qualified, skilled and experienced in their respective trades or occupations. The Authority may require the

Contractor to remove any personnel engaged for the Works, who in the opinion of the Authority:

- a. Has engaged in any misconduct;
- b. Is incompetent or negligent in the performance of his duties;
- c. Fails to conform with any provisions of the Contract;
- d. Engages in any conduct which is prejudicial to safety, health, or the protection of the environment; or
- e. Makes errors in the discharge of his functions.

If appropriate and required by the Employer, the Contractor shall then appoint (or cause to be appointed) a suitable replacement person.

(viii) **Disorderly Conduct**

The Contractor shall at all times take all reasonable precautions to prevent any unlawful, riotous or disorderly conduct by or amongst its personnel, and to preserve peace and protection of people and property in the neighbourhood of the Works.

## **11.19. Special Conditions of Contract**

- (i) **Labour** - The contractor shall, unless otherwise provided in the Contract, make his own arrangements for the engagement of all staff and labour, local or other, and for their payment, housing, feeding and transport. The Contractor shall, if required by the Nodal Officer or his nominee, deliver to the Nodal Officer or his nominee a return in detail, in such form and at such intervals as the Nodal Officer or his nominee may prescribe, showing the staff and numbers of the several classes of labour from time to time employed by the Contractor on the Site and such other information as the Nodal Officer or his nominee may require.
- (ii) **Compliance with Labour Regulations:** During continuance of the contract, the Contractor and his sub-contractors shall abide at all times by all existing labour enactment and rules made there under, regulations, Notifications and by laws of the State or Central Government or local authority and any other labour law (including rules) regulations, bye laws that may be passed or notification that may be issued under any labour law in future either by the State or Central Government or the local authority. Salient features of some of the major labour laws that are applicable to construction industry are given below. The Contractor shall keep the Employer indemnified in case any action is taken against the employer by competent authority on account of contravention of any of the provisions of any Act or rules made there under, regulations or notifications including amendments. If the Employer is caused to pay or reimburse such amounts as may be necessary to cause or observe, or for non-observance of the provisions stipulated in the notifications/bye laws/Acts/Rules /regulations including amendments, if any, on the part of the Contractor the Nodal Officer or his nominee/Employer shall have the right to deduct any money due to the Contractor including his amount of performance security. The Employer/Nodal Officer or his nominee shall also have right to recover from the Contractor any sum required or estimated to be required for making good the loss or

damage suffered by the Employer. The employees of the Contractor and the Sub-Contractor in no case shall be treated as the employees of the Employer at any point of time.

**Salient features of some major laws applicable to Establishments Engaged in Building and other Construction Work.**

- a. **Workmen Compensation Act 1923:** - The act provides for compensation in case of injury by accident arising out of and during the course of employment.
- b. **Payment of Gratuity Act 1972:** - Gratuity is payable to an employee under the Act on satisfaction of certain conditions on separation if an employee has completed 5 years' service or more on death at the rate of 15 days' wages for every completed year of service. Act is applicable to all establishments employing 10 or more employees.
- c. **Employees P.F and Miscellaneous Provision Act 1952:** - The Act Provides for monthly contribution by the employer plus workers @ 12%/8.33%. the benefits payable under the Act are Pension to family pension retirement or death, as the case may be. (ii) Deposit linked insurance on the death in harness of the worker, (iii) payment of P.F accumulation on retirement/death etc.
- d. **Maternity Benefit Act 1951:** - The Act provides for leave and some other benefits to workmen/ employees in case of confinement or miscarriage etc.
- e. **Contract Labour (Regulation & Abolition) Act 1970:** - The Act provides for certain welfare measures to be provided by the Contractor to contract labour and in case the Contractor fails to provide, the same are required to be provided, by the 72Principal Employer by Law. The Principal Employer is required to take Certificate of Registration, and the Contractor is required to take license from the designated Officer. The Act is applicable to the establishments or Contractor of Principal Employer if they employ 20 or more contract labour.
- f. **Minimum Wages Act 1948:** - The Employer is supposed to pay not less than the Minimum Wages fixed by appropriate Government as per provisions of the Act if the employment is a scheduled employment Construction of Buildings, Roads, Runways are scheduled employment.
- g. **Payment of Wages Act 1936:** - It lays down as to by what date the wages are to be paid when it will be paid and what deductions can be made from the wages of the workers.
- h. **Equal Remuneration Act 1979:** - The Act provides for payment of equal wages for work of equal nature to Male and Female workers and for not making discrimination against Female employees in the matters of transfers, training and promotions etc.
- i. **Payment of Bonus Act 1965:** - The Act is applicable to all establishments employing 20 or more employees. The Act provides for payments of annual bonus subject to a minimum of 8.33% of wages and maximum of 20% of wages to employees drawing Rs.3500/- per month or less. The bonus to be paid to employees getting Rs.2500/- per month or above up to 3500/- per month shall be worked out by taking wages as Rs.2500/- per month only. The Act does not apply to certain establishments. The newly

set-up establishments are exempted for five years in certain circumstances. Some of the State Governments have reduced the employment size from 20 to 10 for the purpose of applicability of this Act.

- j. **Industrial Disputes Act 1947:** - The Act lays down the machinery and procedure for resolution of industrial disputes, in what situations a strike or lockout becomes illegal and what are the requirements for laying off or retrenching the employees or closing down the establishment.
- k. **Industrial Employment's (Standing Orders) Act 1946:** - It is applicable to all establishments employing 100 or more workmen (employment size reduced by some of the States and Central Government to 50). The provisions for laying down rules governing the conditions of employment by the Employer on matters provided in the Act and get same certified by the designated Authority.
- l. **Trade Unions Act 1926:** - The Act lays down the procedure for registration of trade union of workmen and employers. The Trade Union registered under the Act have been certain immunities from civil and criminal liabilities.
- m. **Child Labour (Prohibition & Regulation) Act 1986:** - The Act prohibits employment of children below 14 years of age in certain occupations and processes and provides for regulation of employment of Children in all other occupations and processes. Employment of Child Labor is prohibited in Building and Construction Industry.
- n. **Inter-State Migrant Workmen's (Regulation of Employment & Conditions of Service) Act 1979:** - The Act is applicable to an establishment which employs 5 or more inter-state migrant workmen through an intermediary (who has recruited workmen in one state for employment in the establishment situated in another state). The Inter-State migrant workmen, in establishment to which this Act becomes applicable, are required to be provided certain facilities such as housing, medical aid, travelling expenses from home upon the establishment and back, etc.
- o. **The Building and Other Construction workers (Regulation of Employment and Conditions of Service Act 1996 and the Cess Act of 1996:** - All the establishments who carry on any building or other construction work and employ 10 or more workers are covered under this Act. All such establishments are required to pay cess at the rate not exceeding 2% of the cost of construction as may be modified by the Government. The Employer of the establishment is required to provide safety measures at the Building or Construction work and other welfare measures, such as Canteens, First-Aid facilities. Ambulance, Housing accommodations for workers near the work place etc. The Employer to whom the Act applies has to obtain a registration certificate from the Registering Officer appointed by the Government.
- p. **Factories Act 1948:** - The Act lays down the procedure for approval of plans before setting up a factory, health and safety provisions, welfare provisions, working hours, annual earned leave and rendering information regarding accidents or dangerous occurrence to designated authorities. It is applicable to premises employing 10

persons or more with aid of power or 20 more persons without the aid of power engaged in manufacturing process.

#### **11.20. Royalty**

All the royalties of the materials, quarry fees, octroi, charges, sales tax etc. are payable by the contractor directly to the authorities concerned and the rates tendered shall be deemed to be inclusive of all such charges. All royalties of materials, quarry fees, etc., payable by the contractor directly to the authority concern and rates tendered shall be deemed to be inclusive of all charges. Before claiming security deposit, contractor shall produce "No dues certificate" from the Geologist, Geology and mining department of Bhuj.

# **Article 12: Completion Certificate**

## **12.1. Tests on Completion**

- (i) At least 30 (thirty) days prior to the likely completion of the Project ROB, or a Section thereof, the Contractor shall notify the Authority's Engineer of its intent to subject the Project ROB or a Section thereof, to Tests. The date and time of each of the Tests shall be determined by the Authority's Engineer in consultation with the Contractor and notified to the Authority who may designate its representative to witness the Tests. The Contractor shall either conduct the Tests as directed by the Authority's Engineer or provide such assistance as the Authority's Engineer may reasonably require for conducting the Tests. In the event of the Contractor and the Authority's Engineer failing to mutually agree on the dates for conducting the Tests, the Contractor shall fix the dates by giving not less than 10 (ten) days' notice to the Authority's Engineer.
- (ii) All Tests shall be conducted in accordance with Schedule-K. The Authority's Engineer shall either conduct or observe, monitor and review the Tests conducted by the Contractor, as the case may be, and review the results of the Tests to determine compliance of the Project ROB or a Section thereof, with Specifications and Standards and if it is reasonably anticipated or determined by the Authority's Engineer during the course of any Test that the performance of the Project ROB or Section or any part thereof, does not meet the Specifications and Standards, it shall have the right to suspend or delay such Test and require the Contractor to remedy and rectify the Defect or deficiencies. Upon completion of each Test, the Authority's Engineer shall provide to the Contractor and the Authority copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Authority's Engineer may require the Contractor to carry out or cause to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Project ROB or Section thereof with the Specifications and Standards.

## **12.2. Completion Certificate**

- (i) Upon completion of all Works forming part of the Project ROB, and the Authority's Engineer determining the Tests to be successful and after the receipt of notarized true copies of the certificate(s) of insurance, copies of insurance policies and premium payment receipts in respect of the insurance defined in Article 20 and Schedule P of this Agreement, it shall, at the request of the Contractor forthwith issue to the Contractor and the Authority a certificate substantially in the form set forth in Schedule-L (the "Completion Certificate").
- (ii) Upon receiving the Completion Certificate, the Contractor shall remove its equipment, materials, debris and temporary works from the Site within a period of 30 (thirty) days thereof, failing which the Authority may remove or cause to be removed, such equipment, materials, debris and temporary works and recover from the Contractor an amount equal

to 120% (one hundred and twenty per cent) of the actual cost of removal incurred by the Authority.

- (iii) Without prejudice to the obligations of the Contractor specified in Articles 14 and 17, the property and ownership of all the completed Works forming part of the Project ROB shall vest in the Authority.

### **12.3. Rescheduling of Tests**

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

## Article 13: Change of Scope

### 13.1. Change of Scope

- (i) The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the Contractor to make modifications/ alterations to the Works (**“Change of Scope”**) within a period of six months counted from the Appointed Date. Upon the Authority making its intention known to the Contractor for the specific Change of Scope, be it positive or negative, the Contractor shall submit his proposal for the said Change of Scope involving additional cost or reduction in cost. Any such Change of Scope shall be made and valued in accordance with the provisions of this Article 13.
- (ii) Provided that any such Change of Scope, excluding major structures (e.g. Major Bridge/ ROB/ RUB/ Flyover/ elevated road of more than 50 m length) may be required and agreed to be executed between the parties beyond the period of six months of the Appointed Date but before expiry of 50% of the original Scheduled Construction Period of the Project ROB, subject to the condition that it shall not entail any claims (e.g. Extension of Time/ Prolongation related claims), against the Authority.
- (iii) The Change of Scope shall mean the following:
  - a. Change in specifications of any item of Works;
  - b. Omission of any work from the Scope of the Project except under Clause 8.3 (iii); provided that, subject to Clause 13.5, the Authority shall not omit any Work under this Clause in order to get it executed by any other authority; and/ or
  - c. Any additional Work, Plant, Materials or services which are not included in the Scope of the Project, including any associated Tests on completion of construction.

### 13.2. Procedure for Change of Scope

- (i) In the event of the Authority determining that a Change of Scope is necessary, it may direct the Authority's Engineer to issue to the Contractor a notice specifying in reasonable detail the Works and services contemplated thereunder (the **“Change of Scope Notice”**). The Contractor shall submit a detailed proposal as per Clause 13.2(iii) within 15 days from the receipt of Change of Scope Notice.
- (ii) If the Contractor determines, not later than 90 days from the Appointed Date, that a Change of Scope to the Works is required, it shall prepare a proposal with relevant details as per Clause 13.2 (iii) at its own cost and shall submit to the Authority to consider such Change of Scope (the **“Change of Scope Request”**).
- (iii) Upon receipt of a Change of Scope Notice, the Contractor shall, with due diligence, provide to the Authority and the Authority's Engineer such information as is necessary, together with detailed proposal in support of:
  - a. The impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period; and



- b. The options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including the following details:

- i. Break-up of the quantities, unit rates and cost for different items of work; and
- ii. Proposed design for the Change of Scope;
- iii. Proposed modifications, if any, to the Project Completion Schedule of the Project ROB.

For the avoidance of doubt, the Parties expressly agree that, subject to the provisions of Clause 13.4 (ii), the Contract Price shall be increased or decreased, as the case may be, on account of any such Change of Scope.

- (iv) The parties agree that costs and time for implementation of the proposed Change of Scope shall be determined as per the following:

- a. For works DPA SOR -2022 or latest are applicable for determination of costs. In case of non-availability of Schedule of Rates, the available Schedule of Rates shall be applied by updating the same based on WPI. In case the Contract Price is lower/higher than the Estimated Project Cost as per RFP, then the SOR rates shall be reduced/ increased in the same proportion accordingly.
- b. For item of Works not included in Schedule of Rates as mentioned in sub-para (a) of Clause 13.2 (iv) above, the cost of same shall be derived on the basis of MORTH Standard Data Book and the Authority's Engineer shall determine the prevailing market rates and discount the same considering WPI to achieve the prevailing rate at the Base Date, and for any item in respect of which MORTH Standard Data Book does not provide the requisite details, the Authority's Engineer shall determine the rate in accordance with Good Industry Practice.

For the avoidance of doubt, in case the cost as determined by the Contractor and the Authority reveals a difference of more than 10% (ten per cent), the cost as determined by the Authority shall be considered as final and binding on the Contractor.

- c. The design charges shall be considered only for new works or items (i.e. the Works or items not similar to the works or items in the original scope) @ 1% (one per cent) of cost of such new works or items.
- d. The costs of existing works or items, which are being changed/ omitted shall also be valued as per above procedure and only net cost shall be considered.
- e. The reasonable time for completion of works to be taken under Change of Scope shall be determined by the Authority's Engineer on the basis of Good Industry Practice and if such time exceeds the Scheduled Completion Date, the issue of Completion Certificate shall not be affected or delayed on account of construction of Change of Scope items/ works remaining incomplete on the date of Tests.

- (v) Upon consideration of the detailed proposal submitted by the Contractor under the Clause 13.2 (iii), the Authority, within 15 (fifteen) days of receipt of such proposal, may in its sole discretion either accept such Change of Scope with modifications, if any, and initiate

proceedings thereof in accordance with this Article 13 or reject the proposal and inform the Contractor of its decision and shall issue an order (the "Change of Scope Order") requiring the Contractor to proceed with the performance thereof.

For the avoidance of doubt, the Parties agree that the Contractor shall not undertake any Change of Scope without the express consent of the Authority, save and except any works necessary for meeting any Emergency, that too with verbal approval of Authority which shall be confirmed in writing in next 3 (three) days. In the event that the Parties are unable to agree, the Authority may:

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

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

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

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

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

- (i) No Change of Scope shall be executed unless the Authority has issued the Change of Scope Order save and except any Works necessary for meeting any Emergency.
- (ii) The total value of all Change of Scope Orders shall not exceed 10% (ten per cent) of the Contract Price.
- (iii) Notwithstanding anything to the contrary in this Article 13, if any change is necessitated because of any default of the Contractor in the performance of its obligations under this Agreement, the same shall not be deemed to be Change of Scope, and shall not result in any adjustment of the Contract Price or the Project Completion Schedule.

### **13.5. Power of the Authority to undertake Works**

- (i) In the event the Parties are unable to agree to the proposed Change of Scope Orders in accordance with Clause 13.2, the Authority may, after giving notice to the Contractor and considering its reply thereto, award such Works or services to any person or agency on the basis of open competitive bidding. It is also agreed that the Contractor shall provide assistance and cooperation to the person or agency who undertakes the works or services hereunder. The Contractor shall not be responsible for rectification of any Defects, but the Contractor shall carry out maintenance of such works after completion of Defect Liability Period of work by other person or agency during the remaining period of this agreement without any extra payment.
- (ii) The Works undertaken in accordance with this Clause 13.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimises the

disruption in operation of the Project ROB. The provisions of this Agreement, insofar as they relate to Works and Tests, shall apply mutatis mutandis to the Works carried out under this Clause 13.5.

## Article 14: Maintenance

### 14.1. Maintenance obligations of the Contractor

- (i) The Contractor shall, at its own cost and expense, maintain the Project ROB, including all its components and appurtenant works, for a period of 10 (ten) years commencing from the date of issue of the Completion Certificate (the "Maintenance Period").
- (ii) The scope of Maintenance shall cover the entire Project as an integrated asset and shall include, without limitation:
  - a. Bridge structures including deck, piers, abutments, bearings, expansion joints and all structural elements
  - b. Approach roads including RE walls, pavement, shoulders, embankments and retaining structures
  - c. Drainage systems, slope protection works and erosion control measures
  - d. Road furniture including crash barriers, railings, signage, road markings, delineators and lighting (where provided)
  - e. Any other civil, structural, or ancillary works forming part of the Project
- (iii) In consideration of the performance of its Maintenance obligations, the Contractor shall be paid a total amount equivalent to 3.75% (three-point seven five percent) of the Contract Price over the Maintenance Period.
- (iv) The payment towards Maintenance shall be made on a yearly basis in the following manner:
  - a. Year 1 to Year 5: 0.25% of the Contract Price per year
  - b. Year 6 to Year 10: 0.50% of the Contract Price per year
- (v) The Contractor shall provide a renewal layer over the existing carriageway in the seventh year from issue of completion certificate. The requirement for this renewal layer shall be worked out based on the survey and investigation of the existing pavement and the cost of such renewal works shall be determined based on the principles defined under clause 13.2(iii). After the laying of the renewal layer in the 7<sup>th</sup> year, the Contractor shall be paid @ 0.50% of the original Contract Price each for the seventh, eighth, ninth and tenth year.
- (vi) The Maintenance obligations of the Contractor shall be performance-based, and the Contractor shall ensure that the Project at all times meets the Maintenance Requirements and Performance Standards specified in the Contract.
- (vii) In the event that the Contractor fails to meet the prescribed Maintenance Requirements and Performance Standards, the Authority shall be entitled to levy appropriate damages or deductions from the Maintenance payments in accordance with the provisions of the Contract.
- (viii) Above amount for the performance of Contractors' Maintenance obligations shall be, inclusive of all taxes. The amount payable for maintenance shall be adjusted to reflect any increase or decrease arising out of variation in WPI to be determined in accordance with the provisions of Clause 19.12. It is further agreed that the Contract Price hereunder

shall be reckoned with reference to the amount specified in Clause 19.1 (i), which shall be adjusted to the extent of Change of Scope and the works withdrawn under the provisions of Clause 8.3 (iii), but shall not include any price adjustments in pursuance of Clause 19.10.

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

- a. Permitting safe, smooth and uninterrupted flow of traffic on the Project ROB;
- b. Undertaking routine maintenance including prompt repairs of potholes, cracks, joints, drains, embankments, structures, pavement markings, lighting, road signs and other traffic control devices;
- c. Undertaking repairs to structures;
- d. Informing the Authority of any unauthorised use of the Project ROB;
- e. Informing the Authority of any encroachments on the Project ROB; and
- f. Operation and maintenance of all communication, patrolling, and administrative systems necessary for the efficient maintenance of the Project ROB in accordance with the provisions of this Agreement.

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

(xi) The Contractor shall remove promptly from the Project ROB any waste materials (including hazardous materials and wastewater), rubbish and other debris (including, without limitation, accident debris) and keep the Project ROB in a clean, tidy and orderly condition, and in conformity with the Applicable Laws, Applicable Permits and Good Industry Practice.

## **14.2. Maintenance Requirements**

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

## **14.3. Maintenance Programme**

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

- a. The condition of the road in the format prescribed by the Authority;
- b. The proposed maintenance Works; and
- c. Deployment of resources for maintenance Works.

#### **14.4. Safety, vehicle breakdowns and accidents**

- (i) The Contractor shall ensure safe conditions for the Users, and in the event of unsafe conditions, lane closures, diversions, vehicle breakdowns and accidents, it shall follow the relevant operating procedures for removal of obstruction and debris without delay. Such procedures shall conform to the provisions of this Agreement, Applicable Laws, Applicable Permits and Good Industry Practice.
- (ii) The Contractor shall maintain and operate a round-the-clock vehicle rescue post with 1 (one) mobile crane having the capacity to lift a truck with a Gross Vehicle Weight of 30,000 (thirty thousand) kilograms; and such post shall be located at locations to be decided by the authority. The Contractor shall promptly remove any damaged vehicles and debris from the Project ROB to enable safe movement of traffic and shall report all accidents to the police forthwith.

#### **14.5. Lane closure**

- (i) The Contractor shall not close any lane of the Project ROB for undertaking maintenance works except with the prior written approval of the Authority's Engineer. Such approval shall be sought by the Contractor through a written request to be made at least 10 (ten) days before the proposed closure of lane and shall be accompanied by particulars thereof. Within 5 (five) business days of receiving such request, the Authority's Engineer shall grant permission with such modifications as it may deem necessary and a copy of such permission shall be sent to the Authority.
- (ii) Upon receiving the permission pursuant to Clause 14.5 (i), the Contractor shall be entitled to close the designated lane for the period specified therein, and for all lane closures extending a continuous period of 48 (forty-eight) hours, the Contractor shall, in the event of any delay in re-opening such lane, for every stretch of 250 (two hundred and fifty) metres, or part thereof, pay Damages to the Authority calculated at the rate of 0.1% (zero point one per cent) of the monthly maintenance payment for each day of delay until the lane has been re-opened for traffic. In the event of any delay in re-opening such lanes or in the event of emergency decommissioning and closure to traffic of the whole or any part of the Project ROB due to failure of the Contractor, the Contractor shall pay damages to the Authority at double the above rate, without prejudice the rights of the Authority under this Agreement including Termination thereof.

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

- (i) In the event that the Contractor fails to repair or rectify any Defect or deficiency set forth in Schedule-E within the period specified therein, it shall be deemed as failure of performance of Maintenance obligations by the Contractor and the Authority shall be entitled to effect reduction in monthly lump sum payment for maintenance in accordance with Clause 19.7 and Schedule-M, without prejudice to the rights of the Authority under this Agreement, including Termination thereof.
- (ii) If the nature and extent of any Defect justifies more time for its repair or rectification than

the time specified in Schedule-E, the Contractor shall be entitled to additional time in conformity with Good Industry Practice. Such additional time shall be determined by the Authority's Engineer and conveyed to the Contractor and the Authority with reasons thereof.

#### **14.7. Authority's right to take remedial measures**

In the event the Contractor does not maintain and/or repair the Project ROB or any part thereof in conformity with the Maintenance Requirements, the Maintenance Manual or the Maintenance Programme, as the case may be, and fails to commence remedial works within 15 (fifteen) days of receipt of the Maintenance Inspection Report under Clause 15.2 or a notice in this behalf from the Authority or the Authority's Engineer, as the case may be, the Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the cost of the Contractor, and to recover its cost from the Contractor. In addition to recovery of the aforesaid cost, a sum equal to 20% (twenty per cent) of such cost shall be paid by the Contractor to the Authority as Damages.

#### **14.8. Restoration of loss or damage to Project ROB**

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

#### **14.9. Overriding powers of the Authority**

- (i) If in the reasonable opinion of the Authority, the Contractor is in material breach of its obligations under this Agreement and, in particular, the Maintenance Requirements, and such breach is causing or likely to cause material hardship or danger to the Users and pedestrians, the Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Contractor to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.
- (ii) In the event that the Contractor, upon notice under Clause 14.9 (i), fails to rectify or remove any hardship or danger within a reasonable period, the Authority may exercise overriding powers under this Clause 14.9 (ii) and take over the performance of any or all the obligations of the Contractor to the extent deemed necessary by it for rectifying or removing such hardship or danger; provided that the exercise of such overriding powers by the Authority shall be of no greater scope and of no longer duration than is reasonably required hereunder; provided further that any costs and expenses incurred by the Authority in discharge of its obligations hereunder shall be recovered by the Authority from the Contractor, and the Authority shall be entitled to deduct any such costs and expenses incurred from the payments due to the Contractor under Clause 19.7 for the performance of its Maintenance obligations.

(iii) In the event of a national emergency, civil commotion or any other circumstances specified in Clause 21.3, the Authority may take over the performance of any or all the obligations of the Contractor to the extent deemed necessary by it, and exercise such control over the Project ROB or give such directions to the Contractor as may be deemed necessary; provided that the exercise of such overriding powers by the Authority shall be of no greater scope and of no longer duration than is reasonably required in the circumstances which caused the exercise of such overriding power by the Authority. For the avoidance of doubt, it is agreed that the consequences of such action shall be dealt in accordance with the provisions of Article 21. It is also agreed that the Contractor shall comply with such instructions as the Authority may issue in pursuance of the provisions of this Clause 14.9 (iii), and shall provide assistance and cooperation to the Authority, on a best effort basis, for performance of its obligations hereunder.

#### **14.10. Taking over Certificate**

The Maintenance Requirements set forth in Schedule-E having been duly carried out, Maintenance Period as set forth in Clause 14.1 (i) having been expired and Authority's Engineer determining the Tests on Completion of Maintenance to be successful in accordance with Schedule-Q, the Authority will issue Taking Over Certificate to the Contractor substantially in the format set forth in Schedule-R.



## **Article 15: Supervision and Monitoring**

### **15.1. Inspection by the Contractor**

- (i) The Authority's Engineer shall undertake regular inspections to evaluate continuously the compliance with the Maintenance Requirements.
- (ii) The Contractor shall carry out a detailed pre-monsoon inspection of all bridges, culverts and drainage system in accordance with the guidelines contained in IRC: SP35. Report of this inspection together with details of proposed maintenance works as required shall be conveyed to the Authority's Engineer forthwith. The Contractor shall complete the proposed maintenance works before the onset of the monsoon and send a compliance report to the Authority's Engineer. Post monsoon inspection shall be undertaken by the Contractor and the inspection report together with details of any damages observed and proposed action to remedy the same shall be conveyed to the Authority's Engineer forthwith.

### **15.2. Inspection and payments**

- (i) The Authority's Engineer may inspect the Project ROB at any time, but at least once every month, to ensure compliance with the Maintenance Requirements. It shall make a report of such inspection ("**Maintenance Inspection Report**") stating in reasonable detail the Defects or deficiencies, if any, with particular reference to the Maintenance Requirements, the Maintenance Manual, and the Maintenance Programme, and send a copy thereof to the Authority and the Contractor within 10 (ten) days of such inspection.
- (ii) After the Contractor submits to the Authority's Engineer the Monthly Maintenance Statement for the Project ROB pursuant to Clause 19.6, the Authority's Engineer shall carry out an inspection within 10 (ten) days to certify the amount payable to the Contractor. The Authority's Engineer shall inform the Contractor of its intention to carry out the inspection at least 3 (three) business days in advance of such inspection. The Contractor shall assist the Authority's Engineer in verifying compliance with the Maintenance Requirements.
- (iii) For each case of non-compliance of Maintenance Requirements as specified in the inspection report of the Authority's Engineer, the Authority's Engineer shall calculate the amount of reduction in payment in accordance with the formula specified in Schedule-M.
- (iv) Any deduction made on account of non-compliance will not be paid subsequently even after establishing the compliance thereof. Such deductions will continue to be made every month until the compliance is procured.

### **15.3. Tests**

For determining that the Project ROB conforms to the Maintenance Requirements, the Authority's Engineer shall require the Contractor to carry out, or cause to be carried out, Tests specified by it in accordance with Good Industry Practice. The Contractor shall, with

due diligence, carry out or cause to be carried out all such Tests in accordance with the instructions of the Authority's Engineer and furnish the results of such Tests forthwith to the Authority' Engineer.

At any time during Maintenance Period, the Authority may appoint an external technical auditor to conduct an audit of the quality of the Works. The Auditor in the presence of the representatives of the Contractor and the Authority's Engineer shall carry out the Tests and/or collect samples for testing in the laboratory. The timing, the testing equipment and the sample size of this audit shall be as decided by the Authority. The findings of the audit, to the extent accepted by the Authority, shall be notified to the Contractor and the Authority's Engineer for taking remedial measures. After completion of the remedial measures by the Contractor, the auditor shall undertake a closure audit and this process will continue till the remedial measures have brought the maintenance works into compliance with the Specifications and Standards. The Contractor shall provide all assistance as may be required by the auditor in the conduct of its audit hereunder. Notwithstanding anything contained in this Clause 15.3, the external technical audit shall not affect any obligations of the Contractor or the Authority's Engineer under this Agreement.

#### **15.4. Reports of unusual occurrence**

The Contractor shall, during the Maintenance Period, prior to the close of each day, send to the Authority and the Authority's Engineer, by facsimile or e- mail, a report stating accidents and unusual occurrences on the Project ROB relating to the safety and security of the Users and Project ROB. A monthly summary of such reports shall also be sent within 3 (three) business days of the closing of month. For the purposes of this Clause 15.4, accidents and unusual occurrences on the Project ROB shall include:

- (a) Accident, death or severe injury to any person;
- (b) Damaged or dislodged fixed equipment;
- (c) Flooding of Project ROB; and
- (d) Any other unusual occurrence.

## **Article 16: Traffic Regulation**

### **16.1. Traffic regulation by the Contractor**

- (i) The Contractor shall take all the required measures and make arrangements for the safety of Users during the Construction and Maintenance of the Project ROB or a Section thereof in accordance with the provisions of MORTH Specifications. It shall provide, erect and maintain all such barricades, signs, markings, flags, and lights as may be required by Good Industry Practice for the safety of the traffic passing through the Section under construction or maintenance.
- (ii) All works shall be carried out in a manner creating least interference to traffic passing through the Project ROB or a Section thereof. In sections where construction or maintenance Works on the carriageway are taken up, the Contractor shall ensure that proper passage is provided for the traffic. Where it is not possible or safe to allow traffic on part width of the carriageway, a temporary diversion of proper specifications shall be constructed by the Contractor at its own cost. 'ROBOTS' may be used for diversion and control of traffic during Construction. The Contractor shall take prior approval of the Authority's Engineer for any proposed arrangement for traffic regulation during Construction and Maintenance, which approval shall not be unreasonably withheld.

# **Article 17: Defects Liability**

## **17.1. Defects Liability Period**

(i) The Contractor shall be responsible for all the Defects and deficiencies, except usual wear and tear in the Project ROB or any Section thereof, till the expiry of a period of commencing from the date of Completion Certificate (the "Defects Liability Period") as specified below:

- a. 10 (ten) years from the date of completion in case of road being constructed with flexible pavement.
- b. 10 (ten) years from the date of completion in case of all stand-alone structures, e.g. Creek Bridge, RoB / viaduct / RE Wall;

The Defects Liability Period shall commence from actual date of work Completion. For the avoidance of any doubt, any repairs or restoration because of usual wear or tear in the Project ROB or any Section thereof shall form a part of the Maintenance obligations of the Contractor as specified in Article 14.

## **17.2. Remedying Defects**

Save and except as provided in Clause 14.1 (iii), the Contractor shall repair or rectify all Defects and deficiencies observed by the Authority or Authority's Engineer during the Defects Liability Period within a period of 15 (fifteen) days from the date of notice issued by the Authority or Authority's Engineer in this behalf, or within such reasonable period as may be determined by the Authority or Authority's Engineer at the request of the Contractor, in accordance with Good Industry Practice.

## **17.3. Cost of remedying Defects**

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

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

## **17.4. Contractor's failure to rectify Defects**

If the Contractor fails to repair or rectify such Defect or deficiency within the period specified in Clause 17.2, the Authority shall be entitled to get the same repaired, rectified or remedied at the Contractor's cost to make the Project ROB conform to the Specifications and Standards and the provisions of this Agreement. All costs consequent thereon shall, after due consultation with the Authority and the Contractor, be determined by the Authority's Engineer. The cost so determined and an amount equal to 20% (twenty percent) of the cost as Damages shall be recoverable by the Authority from the Contractor and may be

deducted by the Authority from any monies due to the Contractor.

#### **17.5. Extension of Defects Liability Period**

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

## **Article 18: Authority's Engineer**

### **18.1. Appointment of the Authority's Engineer**

- (i) The officer in-charge of the Authority (e.g. Executive Engineer - DPA / Chief Engineer - DPA) is responsible for the overall supervision and monitoring of the execution of project as the representative of the owner of the project. The Authority's Engineer is appointed to assist the Authority for carrying out the functions as detailed under clause 18.2. As such, an officer of the Authority is vested with all such powers and responsibilities as are enjoined upon the Authority's Engineer and is fully competent to issue any instructions for proper monitoring and supervision of the project, either by himself or through the Authority's Engineer. Instructions issued by the concerned officer of the Authority shall have the same effect as that of the Authority's Engineer in terms of this Agreement. Wherever such concerned officer issues any instructions or notice to the Contractor, he shall endorse a copy thereof to the Authority's Engineer.
- (ii) The staff of the Authority's Engineer shall include suitably qualified engineers and other professionals who are competent to assist the Authority's Engineer to carry out its duties.
- (iii) Authority Engineer definition for the maintenance period shall be read as Authority Engineer or Authority. Authority may appoint an officer to act as Authority's Engineer for Maintenance Period.

### **18.2. Duties and authority of the Authority's Engineer**

- (i) The Authority's Engineer shall perform the duties and exercise the authority in accordance with the provisions of this Agreement and substantially in accordance with the terms of reference ("Terms of Reference" or "TOR") set forth in Schedule N, but subject to obtaining prior written approval of the Authority before determining:
  - a. Any Time Extension;
  - b. Any additional cost to be paid by the Authority to the Contractor;
  - c. The Termination Payment;
  - d. Issuance of Completion Certificate; or
  - e. Any other matter which is not specified in (a), (b), (c) or (d) above and which creates financial liability on either Party.
- (ii) No decision or communication of the Authority's Engineer shall be effective or valid unless it is accompanied by an attested true copy of the approval of the Authority for and in respect of any matter specified in Clause 18.2 (i).
- (iii) The Authority's Engineer shall submit regular periodic reports, at least once every month, to the Authority in respect of its duties and functions under this Agreement. Such reports shall be submitted by the Authority's Engineer within 10 (ten) days of the beginning of every month. For the avoidance of doubt, the Authority's Engineer shall include in its report, compliance of the recommendations of the Safety Consultant.
- (iv) The Authority's Engineer shall ensure that NSV survey shall be conducted at the following

intervals:

- (a) Before start of the work,
  - (b) Before issue of provisional/ final completion certificate,
  - (c) Every 6 months after completion of work
- (v) The Authority's Engineer in consultation with the Authority shall update Online Portal of the Authority/Ministry (if any) and also ensure uploading Monthly and Quarterly Progress Report along with Strip Chart. Such up-dations shall be done on the last date of every month/ quarter and if required, on a weekly basis as advised by the Authority. Monthly invoices towards services of the Authority's Engineer shall not be admitted for payment in case of non-compliance of the above.

### **18.3. Delegation by the Authority's Engineer**

- (i) The Authority's Engineer may, by order in writing, delegate any of his duties and responsibilities to suitably qualified and experienced personnel who are accountable to Authority's Engineer, or may revoke any such delegation, under intimation to the Authority and the Contractor. Provided, however, that the Authority's Engineer shall be responsible and liable for all actions and omissions of such personnel.
- (ii) Any failure of the Authority's Engineer to disapprove any work, Plant or Materials shall not constitute approval, and shall, therefore, not prejudice the right of the Authority to reject the work, Plant or Materials, which is not in accordance with the provisions of this Agreement and the Specifications and Standards.
- (iii) Notwithstanding anything stated in Clause 18.3 (i) above, the Authority's Engineer shall not delegate the authority to refer any matter for the Authority's prior approval wherever required in accordance with the provisions of Clause 18.2.

### **18.4. Instructions of the Authority's Engineer**

- (i) The Authority's Engineer may issue instructions for remedying any Defect(s) to the Contractor. The Contractor shall take such instructions from the Authority's Engineer, or from an assistant to whom appropriate authority has been delegated under Clause 18.3.
- (ii) The instructions issued by the Authority's Engineer shall be in writing. However, if the Authority's Engineer issues any oral instructions to the Contractor, it shall confirm the oral instructions in writing within 2 (two) working days of issuing them.
- (iii) In case the Contractor does not receive the confirmation of the oral instructions within the time specified in Clause 18.4 (ii), the Contractor shall seek the written confirmation of the oral instructions from the Authority's Engineer. The Contractor shall obtain acknowledgement from the Authority's Engineer of the communication seeking written confirmation. In case of failure of the Authority's Engineer or its delegated assistant to reply to the Contractor within 2 (two) days of the receipt of the communication from the Contractor, the Contractor may not carry out the instructions.
- (iv) In case of any dispute on any of the instructions issued by the delegated assistant, the Contractor may refer the dispute to the Authority's Engineer, who shall then confirm, reverse or vary the instructions within 3 (three) business days of the dispute being

referred.

### **18.5. Determination by the Authority's Engineer**

- (i) The Authority's Engineer shall consult with each Party in an endeavour to reach agreement wherever this Agreement provides for the determination of any matter by the Authority's Engineer. If such agreement is not achieved, the Authority's Engineer shall make a fair determination in accordance with this Agreement having due regard to all relevant circumstances. The Authority's Engineer shall give notice to both the Parties of each agreement or determination, with supporting particulars.
- (ii) Each Party shall give effect to each agreement or determination made by the Authority's Engineer in accordance with the provisions of this Agreement. Provided, however, that if any Party disputes any instruction, decision, direction or determination of the Authority's Engineer, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.

### **18.6. Remuneration of the Authority's Engineer**

The remuneration, costs and expenses of the Authority's Engineer shall be paid by the Authority.

### **18.7. Termination of the Authority's Engineer**

- (i) The Authority may, in its discretion, replace the Authority's Engineer at any time. However, the Authority shall ensure that alternative arrangements for appointment of another Authority's Engineer or designation of its own officer as the Authority Engineer for the intervening period are made simultaneously.
- (ii) If the Contractor has reasons to believe that the Authority's Engineer is not discharging its duties and functions in accordance with the provisions of this Agreement, it may make a written representation to the Authority and seek termination of the appointment of the Authority's Engineer. Upon receipt of such representation, the Authority shall hold a tripartite meeting with the Contractor and the Authority's Engineer and make best efforts for an amicable resolution of the representation. In the event that the appointment of the Authority's Engineer is terminated hereunder, the Authority shall appoint forthwith another Authority's Engineer in accordance with Clause 18.1 and 18.7(i).



## **Part 4:Financial Covenants**

## Article 19: Payments

### 19.1. Contract Price

- (i) The Authority shall make payments to the Contractor for the Works on the basis of the lumpsum price accepted by the Authority in consideration of the obligations specified in this Agreement for an amount of INR ... .. (INR     ), (the "Contract Price"), which shall be subject to adjustments in accordance with the provisions of this Agreement. For the avoidance of doubt, the Parties expressly agree that the Contract Price shall not include the cost of Maintenance, which shall be paid separately in accordance with the provisions of Clause 19.7. The Parties further agree that save and except as provided in this Agreement, the Contract Price shall be valid and effective until issue of Completion Certificate.
- (ii) The Contract Price includes all duties, taxes, royalty, cess, charges, and fees that may be levied in accordance with the laws and regulations in force as on the Base Date on the Contractor's equipment, Plant, Materials and supplies acquired for the purpose of this Agreement and on the services performed under this Agreement. Nothing in this Agreement shall relieve the Contractor from its responsibility to pay any tax including any tax that may be levied in India on profits made by it in respect of this Agreement.
- (iii) The Contract Price shall not be adjusted for any change in costs stated in Clause 19.1(ii) above, except as stated in Clauses 19.10 and 19.17.
- (iv) The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs, unless otherwise provided for in this Agreement.
- (v) Unless otherwise stated in this Agreement, the Contract Price covers all the Contractor's obligations for the Works under this Agreement and all things necessary for the Construction and the remedying of any Defects in the Project ROB.
- (vi) All payments under this Agreement shall be made in Indian Rupees.

### 19.2. Advance Payment

The Authority shall make an interest-bearing advance payment (the "Advance Payment") @ "SBI PLR+ 3%", equal to 10 % (ten percent) of the Contract Price, exclusively for mobilisation expenses. The Advance Payment for mobilisation expenses shall be made in two instalments each equal to 5% (five percent) of the Contract Price. The second 5% (five percent) mobilization advance would be released after submission of utilization certificate by the Contractor for the first 5% (five per cent) advance already released earlier.

In addition to above, the Authority shall make an additional interest-bearing Advance Payment against newly purchased key Construction equipment required for the works as per agreed Construction programme and brought to the site, if so requested by the Contractor subject to the same terms and conditions specified for Advance Payment for mobilisation expenses in this Agreement. The maximum of such advance shall be 5% (five

per cent) of the Contract Price against Bank Guarantee. This advance shall be further subject to the condition that: such new equipment are considered by the Authority's Engineer to be necessary for the works and this new equipment should be procured in the name of Contractor and is verified by Authority's Engineer to have been brought to site.

The Advance Payment for mobilization expenses and for acquisition of key new Construction equipment would be deemed as interest bearing advance at the applicable interest rate (@ "SBI PLR + 3%"), to be compounded annually on a reducing balance basis. The interest would be recovered along with the recovery of mobilization Advance Payment as per provision laid down for the mobilization advance recovery.

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

At any time, after 60 (sixty) days from the Appointed Date, the Contractor may apply to the Authority for the second instalment of the Advance Payment along with an irrevocable and unconditional guarantee from a Bank for an amount equivalent to 110% (one hundred and ten per cent) of such instalment, substantially in the form provided at Annex-III of Schedule-G, to remain effective till the complete and full repayment thereof.

The Contractor has the option of splitting the Bank Guarantee against Advance Payment for mobilization expenses into parts, each not less than 2.75% (two points even five per cent) of the Contract Price. Each part of the guarantee shall remain effective till full repayment of such part advance corresponding to this bank guarantee. Such part of Bank Guarantee shall be returned to the Contractor on recovery under the Agreement of the full amount of such part guarantee within 30 (thirty) days of the said recovery.

The Advance Payment shall be paid by the Authority to the Contractor within 15 (fifteen) days of the receipt of its respective requests in accordance with the provisions of this Clause 19.2.

The Advance Payment shall be repaid through percentage deductions from the stage payments determined by the Authority's Engineer in accordance with Clause 19.5, as follows:

deductions shall commence in the first Stage Payment Statement;

deductions shall be made at the rate of 15% (fifteen percent) of each Stage Payment Statement until such time as the advance payment has been repaid; provided that the advance payment shall be completely repaid prior to the time when 80% (eighty percent) of the Schedule Construction Period is over;

if total certified stage payments (excluding the Advance Payment and deductions and repayments of retention) does not exceed 20% (twenty percent) of the Contract Price within

[50% of the Scheduled Construction Period] from the Appointed Date then the Advance Payment including interest shall be recovered by encashment of the Bank Guarantee for the Advance Payment.

If the Advance Payment has not been fully repaid prior to Termination under Clause 21.7 or Article 23, as the case may be, the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Authority. Without prejudice to the provisions of Clause 19.2 (vi), in the event of Termination for Contractor Default, the Advance Payment shall be deemed to carry interest @ "SBI PLR+5%" per annum from the date of Advance Payment to the date of recovery by encashment of the Bank Guarantee for the Advance Payment. For the avoidance of doubt, the aforesaid interest shall be payable on the unrecovered balance.

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

- (i) The Authority shall make interim payments to the Contractor as certified by the Authority's Engineer on completion of a stage, in a length, number or area as specified and valued in accordance with the proportion of the Contract Price assigned to each item and its stage in Schedule-H.
- (ii) The Contractor shall base its claim for interim payment for the stages completed till the end of the month for which the payment is claimed, valued in accordance with Clause 19.3 (i), supported with necessary particulars and documents in accordance with this Agreement.
- (iii) Any reduction in the Contract Price arising out of Change of Scope or the works withdrawn under Clause 8.3 shall not affect the amounts payable for the items or stage payments thereof which are not affected by such Change of Scope or withdrawal. For avoidance of doubt and by way of illustration, the Parties agree that if the amount assigned to Major Bridges is reduced from Rs. 100 crore to Rs. 80 crore owing to Change of Scope or withdrawal of work, the reduction in payment shall be restricted to relevant payments for Major Bridges only and the payment due in respect of all other stage payments under the item Major Bridges shall not be affected in any manner. The Parties further agree that the adjustments arising out of the aforesaid modifications shall be carried out in a manner that the impact of such modifications is restricted to the said Change of Scope or withdrawal, as the case may be, and does not alter the payments due for and in respect of items or stage payments which do not form part of such Change of Scope or withdrawal.

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

The Contractor shall submit a statement (the "Stage Payment Statement"), in 3 (three) copies, by the 7<sup>th</sup>(seventh) day of the month to the Authority's Engineer in the form set forth in Schedule-O, showing the amount calculated in accordance with Clause 19.3 to which the Contractor considers himself entitled for completed stage(s) of the Works. The Stage

Payment Statement shall be accompanied with the progress reports and any other supporting documents. The Contractor shall not submit any claim for payment of incomplete stages of work.

The payment from 2<sup>nd</sup> bill to pre-final bill, shall be released, subject to the condition that the documentary evidence (copy of paid Challan in govt. Treasury) of the Welfare Cess @1% of work done or as amended by Statutory Authority from time to time, paid concerned authority is submitted for the previous bill.

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

- (i) Within 10 (ten) days of receipt of the Stage Payment Statement from the Contractor pursuant to Clause 19.4, the Authority's Engineer shall broadly determine the amount due to the Contractor and recommend the release of 90 (ninety) percent of the amount so determined as part payment against the Stage Payment Statement, pending issue of the Interim Payment Certificate by the Authority's Engineer. Within 10 (ten) days of the receipt of recommendation of the Authority's Engineer, the Authority shall make electronic payment directly to the Contractor's bank account.
- (ii) Within 15 (fifteen) days of the receipt of the Stage Payment Statement referred to in Clause 19.4, the Authority's Engineer shall determine and shall deliver to the Authority and the Contractor an IPC certifying the amount due and payable to the Contractor, after adjusting the payments already released to the Contractor against the said statement. For the avoidance of doubt, the Parties agree that the IPC shall specify all the amounts that have been deducted from the Stage Payment Statement and the reasons therefore.
- (iii) In cases where there is a difference of opinion as to the value of any stage, the Authority's Engineer's view shall prevail and interim payments shall be made to the Contractor on this basis; provided that the foregoing shall be without prejudice to the Contractor's right to raise a Dispute.
- (iv) The Authority's Engineer may, for reasons to be recorded, withhold from payment:
  - a. The estimated value of work or obligation that the Contractor has failed to perform in accordance with this Agreement and the Authority's Engineer had notified the Contractor; and
  - b. The estimated cost of rectification of work done being not in accordance with this Agreement.
- (v) Payment by the Authority shall not be deemed to indicate the Authority's acceptance, approval, consent or satisfaction with the work done.

### **19.6. Monthly Maintenance Statement of the Project ROB**

- (i) The Contractor shall submit to the Authority's Engineer a monthly maintenance statement ("Monthly Maintenance Statement") in 3 (three) copies by the 7<sup>th</sup> (seventh) day of each month in the format set forth in Schedule-O for the Maintenance of the Project ROB during the previous month.
- (ii) The monthly lump sum amount payable for Maintenance shall be 1/12<sup>th</sup> (one- twelfth) of

the annual cost of Maintenance as specified in Clause 14.1 (i).

### **19.7. Payment for Maintenance of the Project ROB**

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

- a. Compliance with the Maintenance Requirements; and
- b. Reduction for non-compliance with the Maintenance Requirement in accordance with Clause 19.7 (ii).

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

- (ii) Maintenance shall be measured in units of one kilometre each; provided, however, that payment thereof shall be made in fixed monthly amounts in accordance with this Agreement. If the Maintenance Requirements set forth in Schedule-E are not met, reduction in payments shall be made in accordance with the provisions of Schedule-M. The reductions for non-compliance with the Maintenance Requirements shall be applied on the basis of monthly inspections by the Authority's Engineer.
- (iii) The deduction made on account of non-compliance with the Maintenance Requirements shall not be subsequently considered for payment after the compliance is achieved by repair or rectification.
- (iv) The Authority shall pay to the Contractor every quarter any amount due under any IPC under this Clause 19.7. The payment shall be made no later than 30 (thirty) days from the date of submission of the last IPC for the relevant quarter.

### **19.8. Payment of Damages**

- (i) The Contractor may claim Damages due and payable to it in accordance with the provisions of this Agreement.
- (ii) The Authority's Engineer shall issue the IPC within 15 (fifteen) days of the receipt of the claim under Clause 19.8 (i), after making adjustments in accordance with the provisions of this Agreement. The Authority shall pay to the Contractor the amount due under any IPC within a period of 30 (thirty) days from the date of the submission of the claim under this Clause 19.8.

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

- (i) The Authority shall pay to the Contractor any amount due under any payment certificate issued by the Authority's Engineer in accordance with the provisions of this Article 19, or in accordance with any other clause of this Agreement as follows:
  - a. Payment shall be made no later than 30 (thirty) days from the date of submission of the Stage Payment Statement by the Contractor to the Authority's Engineer for certification in accordance with the provisions of Clause 19.4 for an IPC; provided

that, in the event the IPC is not issued by the Authority's Engineer within the aforesaid period of 30 (thirty) days, the Authority shall pay the amount shown in the Contractor's Stage Payment Statement and any discrepancy therein shall be added to, or deducted from, the next payment certificate issued to the Contractor; and

- b. Payment shall be made no later than 30 (thirty) days from the date of submission of the Final Payment Certificate for Works along with the discharge submitted to the Authority's Engineer in accordance with the provisions of Clause 19.15 for certification.

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

- (i) The amounts payable to the Contractor for Works shall be adjusted in accordance with the provisions of this Clause 19.10
- (ii) Subject to the provisions of Clause 19.10 (iii), the amounts payable to the Contractor for Works, shall be adjusted in the IPC issued by the Authority's Engineer for the increase or decrease in the index cost of inputs for the Works, by the addition or subtraction of the amounts determined by the formulae prescribed in Clause 19.10 (iv).
- (iii) To the extent that full compensation for any increase or decrease in costs to the Contractor is not covered by the provisions of this or other Clauses in this Agreement, the costs and prices payable under this Agreement shall be deemed to include the amounts required to cover the contingency of such other increase or decrease of costs and prices.
- (iv) The Contract Price shall be adjusted for increase or decrease in rates and price of labour, cement, steel, Plant, machinery and spares, bitumen, fuel and lubricants, and other material inputs in accordance with the principles, procedures and formulae specified below:
  - a. Price adjustment shall be applied on completion of the specified stage of the respective item of work in accordance with Schedule-H;
  - b. Adjustment for each item of work/stage shall be made separately;
  - c. The following expressions and meanings are assigned to the value of the work done:  
 RW= Value of work done for the completion of a stage under the following items of Schedule-H:
    - i. Road works; and
    - ii. Other works
 BR = Value of work done for the completion of a stage under the items Major Bridges and Structures (Schedule-H)
  - d. Price adjustment for changes in cost shall be paid in accordance with the following formulae:

$$VRW = 0.85RW \times \left[ PL \times \frac{L_I - L_o}{L_o} + PA \times \frac{A_I - A_o}{A_o} + PF \times \frac{F_I - F_o}{F_o} + PB \times \frac{B_I - B_o}{B_o} + PM \times \frac{M_I - M_o}{M_o} + PC \times \frac{C_I - C_o}{C_o} + PS \times \frac{S_I - S_o}{S_o} \right]$$

- i.

$$VBR = 0.85BR \times \left[ PL \times \frac{L_1 - L_0}{L_0} + PA \times \frac{A_1 - A_0}{A_0} + PF \times \frac{F_1 - F_0}{F_0} + PB \times \frac{B_1 - B_0}{B_0} + PM \times \frac{M_1 - M_0}{M_0} + PC \times \frac{C_1 - C_0}{C_0} + PS \times \frac{S_1 - S_0}{S_0} \right]$$

ii.

Where,

VRW = Increase or decrease in the cost of road works/other works during the period under consideration due to changes in the rates for relevant components as stated in sub-paragraph (e).

VBR = Increase or decrease in the cost of Major Bridges and Structures during the period under consideration due to changes in the rates for relevant components as stated in sub-paragraph (e).

PB, PC, PL, PM, and PS are the percentages of bitumen, cement, labour, other materials, and steel/components (including strands and cables) respectively for the relevant item as stated in sub-paragraph (e).

PA is the percentage of Plant, machinery and spares component for the relevant item as stated in sub-paragraph (e).

PF is the percentage of fuel and lubricants for the relevant items as stated in sub-paragraph (e).

A<sub>0</sub> = The wholesale price index as published by the Ministry of Commerce & Industry, Government of India (hereinafter called "WPI") for "Manufacture of machinery for mining, quarrying and construction" for the month of the Base Date.

A<sub>1</sub> = The WPI for construction machinery for the month three months prior to the month to which the IPC relates.

B<sub>0</sub> = The official retail price of bitumen at the nearest refinery at Koyali on the Base Date.

B<sub>1</sub> = The official retail price of bitumen at nearest refinery at Koyali on the first day of the month three months prior to the month to which the IPC relates.

C<sub>0</sub> = The WPI for Ordinary Portland Cement for the month of the Base Date.

C<sub>1</sub> = The WPI for Ordinary Portland Cement for the month three months prior to the month to which the IPC relates.

F<sub>0</sub> = The official retail price of high speed diesel (HSD) oil at the existing consumer pumps of Indian Oil Corporation ("IOC") in Gandhidham on the Base Date.

F<sub>1</sub> = The official retail price of HSD at the existing consumer pumps of IOC in the State of [Haryana] on the first day of the month three months prior to the month to which the IPC relates.

L<sub>0</sub> = The consumer price index for industrial workers for the circle Kutchchh in the state of Gujarat, published by Labour Bureau, Ministry of Labour, Government of India, (hereinafter called "CPI") for the month of the Base Date.

L<sub>1</sub> = The CPI for the month three months prior to the month to which the IPC relates.

M<sub>0</sub> = The WPI for all commodities for the month of the Base Date.

M<sub>1</sub> = The WPI for all commodities for the month three months prior to the month to which the IPC relates.

S<sub>0</sub> = The WPI for Mild Steel –Long Products for the month of the Base Date.



SI = The WPI for Mild Steel –Long Products for the month three months prior to the month to which the IPC relates.

e. The following percentages shall govern the price adjustment of the Contract Price:

Component	Item				
	Road Works				Major Bridges and Structures
	Earth work, Granular work, and Other works	Bituminous work	Cement Concrete Pavement	Cement Concrete Pavement Culverts, minor bridges and other structures	
Labour (PL)	20%	20%	20%	15%	15%
Cement (PC)	5%	Nil	20%	15%	15%
Steel (PS)	Nil	Nil	Nil	15%	20%
Bitumen (PB)	Nil	15%	Nil	Nil	Nil
Fuel and lubricants (PF)	10%	10%	10%	10%	10%
Other Materials (PM)	50%	40%	35%	30%	25%
Plant, machinery and spares. (PA)	15%	15%	15%	15%	15%
Total	100%	100%	100%	100%	100%

#### 19.11. Restrictions on price adjustment

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

#### 19.12. Price adjustment for Maintenance of Project ROB

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

$$V = P \times \frac{W_I - W_o}{W_o}$$

Where,

V=Increase or decrease in the quarterly lump sum payment

P=Quarterly lump sum payment due to the Contractor after adjusting any reduction in

payment for non-compliance of the Maintenance Requirements

$W_0$ =The wholesale price index (all commodities) for the month of the Base Date.

$W_1$ =The wholesale price index (all commodities) for the first day of the quarter under consideration for determining the price adjustment.

### **19.13. Final Payment Statement**

- (i) Within 60 (sixty) days after receiving the Completion Certificate under Clause 12.2, the Contractor shall submit to the Authority's Engineer for consideration 6 (six) copies of a Final Payment Statement (the "Final Payment Statement") for Works, with supporting documents showing in detail, in the form prescribed by the Authority's Engineer:
  - a. The summary of Contractor's Stage Payment claims for Works as submitted in accordance with Clause 19.4;
  - b. The amounts received from the Authority against each claim; and
  - c. Any further sums which the Contractor considers due to it from the Authority.

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

- i. An IPC for those parts of the Final Payment Statement which are not in dispute, along with a list of disputed items which shall then be settled in accordance with the provisions of Article 26; or
  - ii. A Final Payment Certificate in accordance with Clause 19.15 if there are no disputed items.
- (ii) If the Authority's Engineer does not prescribe the form referred to in Clause 19.13 (i) within 15 (fifteen) of the date of issue of the Completion Certificate, the Contractor shall submit the statement in such form as it deems fit.

### **19.14. Discharge**

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

### **19.15. Final Payment Certificate**

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

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

- (ii) The Authority shall, in accordance with the provisions of Clause 19.9, pay to the Contractor the amount which is stated as being finally due in the Final Payment Certificate.

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

- (i) Within 30 (thirty) days after completion of the Maintenance Period, the Contractor shall submit to the Authority's Engineer 6 (six) copies of the final payment statement for Maintenance of the Project ROB, with supporting documents showing the details set forth below in the form prescribed by the Authority's Engineer:
  - a. The total amount claimed in accordance with clause 19.7 (i) and
  - b. Any sums which the Contractor considers to be due to it, with supporting documents.
- (ii) The Authority's Engineer shall certify final payment within 30 (thirty) days of the receipt of the final payment statement of Maintenance under Clause 19.16 (i), segregating the items of amount payable from the items of amount disallowed. The Authority shall make payment on the basis of the final payment authorised by the Authority's Engineer within a period of 30 (thirty) days of the receipt of the Final Payment Statement from the Authority's Engineer.
- (iii) If the Authority's Engineer does not prescribe the form within 15 (fifteen) days of the date of issue of the Completion Certificate, the Contractor shall submit the statement in such form as it deems fit.

#### **19.17. Change in law**

- (i) If as a result of Change in Law, the Contractor suffers any additional costs in the execution of the Works or in relation to the performance of its other obligations under this Agreement, the Contractor shall, within 15 (fifteen) days from the date it becomes reasonably aware of such addition in cost, notify the Authority with a copy to the Authority's Engineer of such additional cost due to Change in Law.
- (ii) If as a result of Change in Law, the Contractor benefits from any reduction in costs for the execution of this Agreement or in accordance with the provisions of this Agreement, either Party shall, within 15 (fifteen) days from the date it becomes reasonably aware of such reduction in cost, notify the other Party with a copy to the Authority's Engineer of such reduction in cost due to Change in Law.
- (iii) The Authority's Engineer shall, within 15 (fifteen) days from the date of receipt of the notice from the Contractor or the Authority, determine any addition or reduction to the Contract Price, as the case may be, due to the Change in Law.

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

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

#### **19.19. Authority's claims**

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

#### **19.20. DELETED**

#### **19.21. GST Clause**

- (a) The contractor shall quote the price exclusive of GST. The contractor shall quote prevailing GST rate separately which shall be reimbursed by DPA after ascertaining necessary compliance as per Goods & Service Tax – 2017. The contractors should have valid GST registration number to become eligible for Participating in the bid. However, GST will not be considered for evaluation of bid Price. All other duties, taxes, cesses applicable if any, shall be borne by the contractor.
- (b) GST Registration should be invariably mentioned in the bid / tender, failing which the bid / tender will be treated as non-responsive and liable to be discharged.
- (c) GST & PAN No. may be furnished with documentary evidence along with the Tender.
- (d) It is mandatory to upload scanned copies of all the documents including GST registration certificate as stipulated in the bid document. If such document is not uploaded his bid will become invalid and cost of bid document shall not be refunded.
- (e) The TDS under GST Act is required to be deducted @ 2% (1% CGST and 1% SGST or 2% IGST) from payment / credit given to contractors/professionals and others for work order/contracts exceeding Rs. 2,50,000.00.
- (f) Contractor/service provider/supplier etc. has to ensure timely and proper filling of GSTR 1 so that Deendayal Port Authority can avail input tax credit in timely manner. In case DPA not allowed input tax credit due to failure on part of the contractor/service provider/supplier etc., it will be a financial loss to the DPA and therefore same shall be recovered from the payment/deposit of the contractor/service provider/supplier.

# Article 20 Insurance

## 20.1. Insurance for Works and Maintenance

- (i) The Contractor shall effect and maintain at its own cost the insurances specified in Schedule-P and as per the requirements under the Applicable Laws.
- (ii) Subject to the provisions of Clause 21.6, the Authority and the Contractor shall, in accordance with its obligations as provided for in this Agreement, be liable to bear the cost of any loss or damage that does not fall within the scope of this Article 20 or cannot be recovered from the insurers.
- (iii) Subject to the exceptions specified in Clause 20.1 (iv) below, the Contractor shall, save and except as provided for in this Agreement, fully indemnify, hold harmless and defend the Authority from and against any and all losses, damages, costs, charges and/or claims with respect to:
  - a. The death of or injury to any person; or
  - b. The loss of or damage to any property (other than the Works);that may arise out of or in consequence of any breach by the Contractor of this Agreement during the execution of the Works or the remedying of any Defects therein.
- (iv) Notwithstanding anything stated above in Clause 20.1 (iii), the Authority shall fully indemnify the Contractor from and against any and all losses, damages, costs, charges, proceedings and/or claims arising out of or with respect to:
  - a. The use or occupation of land or any part thereof by the Authority;
  - b. The right of the Authority to execute the Works, or any part thereof, on, over, under, in or through any land;
  - c. The damage to property which is the unavoidable result of the execution and completion of the Works, or the remedying of any Defects therein, in accordance with this Agreement; and
  - d. The death of or injury to persons or loss of or damage to property resulting from any act or neglect of the Authority, its agents, servants or other contractors, not being employed by the Contractor.Provided that, in the event of any injury or damage as a result of the contributory negligence of the Contractor, the Authority shall be liable to indemnify the Contractor from and against any and all losses, damages, costs, charges, proceedings and/or claims to the extent as may be proportionately determined to be the liability of the Authority, its servants or agents or other contractors not associated with the Contractor in such injury or damage.
- (v) Without prejudice to the obligations of the Parties as specified under Clauses 20.1 (iii) and 20.1 (iv), the Contractor shall maintain or effect such third party insurances as may be required under the Applicable Laws.
- (vi) The Contractor shall provide to the Authority, within 30 days of the Appointed Date,

evidence of professional liability insurance maintained by its Design Director and/or consultants to cover the risk of professional negligence in the design of Works. The professional liability coverage shall be for a sum of not less than [3% (three per cent)] of the Contract Price and shall be maintained until the end of the Defects Liability Period.

#### **20.2. Notice to the Authority**

No later than 15 (fifteen) days after the date of this Agreement, the Contractor 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 20. Within 15 (fifteen) days of receipt of such notice, the Authority may require the Contractor to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

#### **20.3. Evidence of Insurance Cover**

- (i) All insurances obtained by the Contractor in accordance with this Article 20 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 10 (ten) days from the Appointed Date, the Contractor shall furnish to the Authority notarised 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 Contractor to the Authority. The Contractor shall act in accordance with the directions of the Authority. Provided that the Contractor shall produce to the Authority the insurance policies in force and the receipts for payment of the current premia.
- (ii) The Contractor shall ensure the adequacy of the insurances at all times in accordance with the provisions of this Agreement.

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

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

#### **20.5. Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Contractor pursuant to this Article 20 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, inter alia, the 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.

#### **20.6. Contractor's waiver**

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

#### **20.7. Cross liabilities**

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

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

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

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

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

#### **20.10. Application of insurance proceeds**

The proceeds from all insurance claims, except for life and injury, shall be applied for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project ROB and the provisions of this Agreement in respect of

construction of works shall apply mutatis mutandis to the works undertaken out of the proceeds of insurance.

#### **20.11. Compliance with policy conditions**

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

#### **20.12. General Requirements of Insurance Policies**

The Contractor must:

- (a) Immediately deposit copies of the policies or certificates of any insurance which it is required to effect under the Contract, together with receipts for the premiums;
- (b) Effect all insurances for which the Contractor is responsible with an insurer approved by the Authority;
- (c) Make no material changes to the terms of any insurance without the Authority's approval;
- (d) In all respects comply with any conditions stipulated in the insurance policies which the Contractor is required to effect under the Agreement or which the Authority has effected in relation to the Facility and notified to the Contractor; and shall provide all assistance to the Authority in the application for, and finalization of, such comprehensive insurance package;
- (e) Regardless of the extent of settlement of claims by the underwriters or the time taken for settlement of claims, the Contractor shall make good any loss, or damage at its own cost promptly;
- (f) Provide all assistance to the Authority in the application for, and finalization of, such comprehensive insurance package;
- (g) Pay the Contractor's share of the insurance premiums for insurance premiums allocated under such comprehensive insurance package policy to the insurances directly to the insurance provider promptly on demand. In case the Contractor fails to make such payment in time, the Authority may elect to pay the Contractor's share and adjust it against amounts payable to the Contractor under this Agreement;
- (h) In the case of occurrence of any event leading to an insurance claim, promptly follow the procedures specified by the insurance provider, and provide full cooperation and access to the insurance provider or its representative, to settle the claim expeditiously;
- (i) Require all the Sub-Contractors providing equipment and materials or services to the Contractor or the Authority to obtain, maintain and keep in force during the time in which they are involved in the performance of the Works hereunder insurance coverage consistent with the Contractor's insurance obligations hereunder and the Contractor shall also be responsible for fulfilment of this requirement; and
- (j) The required insurance coverage and the Contractor's obligations-referred to shall in no way affect or limit the Contractor's liability with respect to its performance of the Works. Nothing in this Section shall limit or relieve the Contractor of its liabilities and obligations under this Agreement.



## **Part 5: Force Majeure and Termination**

# Article 21: Force Majeure

## 21.1. Force Majeure

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

## 21.2. Non-Political Event

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

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

## 21.3. Indirect Political Event

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

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

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

#### **21.4. Political Event**

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

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

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

- (i) Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:
  - a. The nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 21 with evidence in support thereof;
  - b. The estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
  - c. The measures which the Affected Party is taking or proposes to

take for alleviating the impact of such Force Majeure Event; and

d. Any other information relevant to the Affected Party's claim.

- (ii) The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 10 (ten) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.
- (iii) For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 21.5 (i), and such other information as the other Party may reasonably request the Affected Party to provide.

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

- (i) Upon the occurrence of any Force Majeure after the Appointed Date, the costs incurred and attributable to such event and directly relating to this Agreement (the "Force Majeure costs") shall be allocated and paid as follows:
  - a. Upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure costs and neither Party shall be required to pay to the other Party any costs thereof;
  - b. Upon occurrence of an Indirect Political Event, all Force Majeure costs attributable to such Indirect Political Event, and not exceeding the Insurance Cover for such Indirect Political Event, shall be borne by the Contractor, and to the extent Force Majeure costs exceed such Insurance Cover, one half of such excess amount shall be reimbursed by the Authority to the Contractor for the Force Majeure events; and
  - c. Upon occurrence of a Political Event, all Force Majeure costs attributable to such Political Event shall be reimbursed by the Authority to the Contractor.
  - d. For the avoidance of doubt, Force Majeure costs may include costs directly attributable to the Force Majeure Event, but shall not include debt repayment obligations, if any, of the Contractor.
- (ii) Save and except as expressly provided in this Article 21, neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.
- (iii) Upon the occurrence of any Force Majeure Event during the Construction Period, the Project Completion Schedule for and in respect of the affected Works shall be extended on a day for day basis for such period as performance of the Contractor's obligations is affected on account of the Force Majeure Event or its subsisting effects.

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

- (i) If a Force Majeure Event subsists for a period of 60 (sixty) days or more within a continuous period of 120 (one hundred and twenty) days, either Party may in its discretion

terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 21, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days' time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

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

(i) In the event of this Agreement being terminated on account of a Non-Political Event, the Termination Payment shall be an amount equal to the sum payable under Clause 23.5. Provided that in the event Termination occurs during the Maintenance Period, the Authority's Engineer shall only determine the value of Works associated with Maintenance.

(ii) If Termination is on account of an Indirect Political Event, the Termination Payment shall include:

- a. Any sums due and payable under Clause 23.5; and
- b. The reasonable cost, as determined by the Authority's Engineer, of the Plant and Materials procured by the Contractor and transferred to the Authority for use in Construction or Maintenance, only if such Plant and Materials are in conformity with the Specifications and Standards;

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

(iii) If Termination is on account of a Political Event, the Authority shall make a Termination Payment to the Contractor in an amount that would be payable under Clause 23.6 (ii) as if it were an Authority Default.

#### **21.9. Dispute resolution**

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

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

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

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

- (b) The Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) When the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

## **Article 22: Suspension of Contractor's Right**

### **22.1. Suspension upon Contractor Default**

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

### **22.2. Authority to act on behalf of Contractor**

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

### **22.3. Revocation of Suspension**

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

### **22.4. Termination**

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

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



## Article 23: Termination

### 23.1. Termination for Contractor Default

- (i) Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the "Contractor Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:
- a. The Contractor fails to provide, extend or replenish, as the case may be, the Performance Security in accordance with this Agreement;
  - b. After the replenishment or furnishing of fresh Performance Security in accordance with Clause 7.1, the Contractor fails to cure, within a Cure Period of 30 (thirty) days, the Contractor Default for which the whole or part of the Performance Security was appropriated;
  - c. The Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, subject to any Time Extension, and continues to be in default for 45 (forty five) days;
  - d. The Contractor abandons or manifests intention to abandon the construction or Maintenance of the Project ROB without the prior written consent of the Authority;
  - e. The Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/or the Maintenance for 30 (thirty) days without reflecting the same in the current programme and such stoppage has not been authorised by the Authority's Engineer;
  - f. The Project Completion Date does not occur within the period specified in Schedule-J for the Scheduled Completion Date, or any extension thereof;
  - g. The Contractor fails to rectify any Defect, the non-rectification of which shall have a Material Adverse Effect on the Project, within the time specified in this Agreement or as directed by the Authority's Engineer;
  - h. The Contractor subcontracts the Works or any part thereof in violation of this Agreement or assigns any part of the Works or the Maintenance without the prior approval of the Authority;
  - i. The Contractor creates any Encumbrance in breach of this Agreement;
  - j. An execution levied on any of the assets of the Contractor has caused a Material Adverse Effect;
  - k. The Contractor is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Contractor or for the whole or material part of its assets that has a material bearing on the Project;
  - l. The Contractor has been, or is in the process of being liquidated, dissolved, wound-

up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;

- m. A resolution for winding up or insolvency of the Contractor is passed, or any petition for winding up or insolvency of the Contractor is admitted by a court of competent jurisdiction and a provisional liquidator or receiver or interim resolution professional, as the case may be, is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Contractor is ordered to be wound up by court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Contractor are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Contractor under this Agreement; and provided that:
    - I. The amalgamated or reconstructed entity has the capability and experience necessary for the performance of its obligations under this Agreement; and
    - II. The amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and has a credit worthiness at least as good as that of the Contractor as at the Appointed Date;
  - n. Any representation or warranty of the Contractor herein contained which is, as of the date hereof, found to be false or the Contractor is at any time hereafter found to be in breach or non-compliance thereof;
  - o. The Contractor submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;
  - p. The Contractor has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
  - q. The Contractor commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Project or on the Authority.
  - r. Gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:
    - I. For doing or forbearing to do any action in relation to the Contract, or
    - II. For showing or forbearing to show favour or disfavour to any person in relation to the Contract,or if any of the Contractor's personnel, agents or subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (s). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination.
- (ii) Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the

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

(iii) The following shall apply in respect of cure of any of the defaults and/ or breaches of the Agreement:

- a. The Cure Period shall commence from the date of the notice by the Authority to the Contractor asking the latter to cure the breach or default specified in such notice;
- b. The Cure Period provided in the Agreement shall not relieve the Contractor 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 the Agreement;
- d. If the cure of any breach by the Contractor requires any reasonable action by the Contractor that must be approved by the Authority hereunder the applicable Cure Period (and any liability of the Contractor for damages incurred) shall be extended by the period taken by the Authority to accord its required approval.

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

### **23.2. Termination for Authority Default**

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

- a. The Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Contractor;
- b. The Authority has failed to make payment of any amount due and payable to the Contractor within the period specified in this Agreement;
- c. The Authority has failed to provide, within a period of 180 (one hundred and eighty) days from the Appointed Date, the environmental clearances required for construction of the Project ROB;
- d. The Authority becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with its creditors, or carries on business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or event occurs which (under Applicable Laws) has a similar effect;
- e. The Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement;
- f. The Authority's Engineer fails to issue the relevant Interim Payment Certificate within

60 (sixty) days after receiving a statement and supporting documents; or

- g. The whole work is suspended by Authority beyond 120 (one hundred twenty) days for any reason which is not attributed to the Contractor.

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

If on the consideration of the Authority's representation or otherwise, the contractor does not issue the Termination Notice on such 15th (fifteenth) day and prefers to continue with the project, it is deemed that the cause of action of the Termination Notice has been condoned by the Contractor and he would be deemed to have waived any claim and forfeited any right to any other remedy on that count or in relation to such action or omission.

### **23.3. Termination for Authority's convenience**

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

### **23.4. Requirements after Termination**

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

- (a) Deliver all relevant records, reports, Intellectual Property and other licences pertaining to the Works, Maintenance, other design documents;
- (b) Transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws; and
- (c) Vacate the Site within 15 (fifteen) days.

### **23.5. Valuation of Unpaid Works**

- (i) Within a period of 45 (forty-five) days after Termination under Clause 23.1, 23.2 or 23.3, as the case may be, has taken effect, the Authority's Engineer shall proceed in accordance with Clause 18.5 to determine as follows the valuation of unpaid Works (the "Valuation of Unpaid Works"):
  - a. Value of the completed stage of the Works, less payments already made;
  - b. Reasonable value of the partially completed stages of works as on the date of Termination, only if such works conform with the Specifications and Standards; and
  - c. Value of Maintenance, if any, for completed months, less payments already made, and shall adjust from the sum thereof (i) any other amounts payable or recoverable, as the case may be, in accordance with the provisions of this Agreement; and (ii) all taxes due to be deducted at source.
- (ii) The Valuation of Unpaid Works shall be communicated to the Authority, with a copy to the

Contractor, within a period of 30 (thirty) days from the date of Termination.

### **23.6. Termination Payment**

- (i) Upon Termination on account of Contractor's Default under Clause 23.1, the Authority shall:
  - a. Encash and appropriate the Performance Security, Additional Performance Security if any and Retention Money, or in the event the Contractor has failed to replenish or extend the Performance Security and Additional Performance Security if any, claim the amount stipulated in Clause 7.1, as agreed pre- determined compensation to the Authority for any losses, delays and cost of completing the Works and Maintenance, if any;
  - b. Encash and appropriate the Bank Guarantee, if any, for and in respect of the outstanding Advance Payment and interest thereon; and
  - c. Pay to the Contractor, by way of Termination Payment, an amount equivalent to the Valuation of Unpaid Works after adjusting any other sums payable or recoverable, as the case may be, in accordance with the provisions of this Agreement.
- (ii) Upon Termination on account of an Authority Default under Clause 23.2 or for Authority's convenience under Clause 23.3, the Authority shall:
  - a. return the Performance Security, Additional Performance Security and Retention Money forthwith;
  - b. encash and appropriate the bank guarantee, if any, for and in respect of the outstanding Advance Payment; and
  - c. pay to the Contractor, by way of Termination Payment, an amount equal to:
    - I. Valuation of Unpaid Works;
    - II. the reasonable cost of temporary works, as determined by the Authority's Engineer; and
    - III. 10% (ten per cent) of the cost of the Works and Maintenance that are not commenced or not completed, and shall adjust from the sum thereof (i) any other amounts payable or recoverable, as the case may be, in accordance with the provisions of this Agreement, and (ii) all taxes due to be deducted at source.
- (iii) Termination Payment shall become due and payable to the Contractor within 30 (thirty) days of a demand being made by the Contractor to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at 9% (nine per cent) per annum, on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.
- (iv) The Contractor expressly agrees that Termination Payment under this Article 23 shall constitute a full and final settlement of all claims of the Contractor on account of Termination of this Agreement and that it shall not have any further right or claim under

any law, treaty, convention, contract or otherwise.

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

Upon Termination for any reason whatsoever:

- (a) Property and ownership in all Materials, Plant and Works and the Project ROB shall, as between the Contractor and the Authority, vest in the Authority in whole; provided that the foregoing shall be without prejudice to Clause 23.6;
- (b) Risk of loss or damage to any Materials, Plant or Works and the care and custody thereof shall pass from the Contractor to the Authority; and
- (c) The Authority shall be entitled to restrain the Contractor and any person claiming through or under the Agreement from entering upon the Site or any part of the Project, which have not been vested in the Authority in accordance with the provisions of this Agreement.

### **23.8. Survival of rights**

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

### **23.9. Foreclosure with mutual consent**

- (i) Without prejudice to any provision of this Agreement, the Authority and Contractor may foreclose this Agreement by mutual consent in circumstances which does not constitute either party's default without any liability or consequential future liability for either party.
- (ii) Should a Party intend to foreclose this Agreement by mutual consent, the intending Party shall issue a notice to the other Party and upon issuance of such notice, the other Party may within 15 days from receipt of such notice either agree to such foreclosure or raise objection(s) to the same by intimating either of the two possible positions to the intending Party in writing.
- (iii) In either case of the other Party agreeing to the proposed foreclosure or otherwise, the Parties may negotiate the proposed foreclosure and sign a Supplementary Agreement for foreclosure to the main Contract Agreement within 30 (thirty) days of the date agreeing by both Parties. Foreclosure shall not come into effect unless and otherwise Supplementary Agreement is signed.
- (iv) Any attempt or endeavour for foreclosure by mutual agreement shall be without prejudice to the rights and obligations of the Parties herein and the factum of such an attempt or exercise shall not stop either of the Parties from discharging their contractual obligations under this Agreement.
- (v) For the avoidance of doubt, it is clarified that such foreclosure will be without prejudice to the Contractor and shall not affect the Contractor in any way if it wishes to bid in the future

projects of the Authority.

## **Part 6:Other Provisions**

## **Article 24: Assignment and Charges**

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

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

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

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



## **Article 25 Liability and Indemnity**

### **25.1. General indemnity**

- (i) The Contractor 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 third party claims for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Contractor of any of its obligations under this Agreement or from any negligence under the Agreement, including any errors or deficiencies in the design documents, or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Authority Indemnified Persons.

### **25.2. Indemnity by the Contractor**

- (i) Without limiting the generality of Clause 25.1, the Contractor 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 Contractor to comply with Applicable Laws and Applicable Permits;
  - b. Payment of taxes required to be made by the Contractor in respect of the income or other taxes of the Sub-contractors, suppliers and representatives; or
  - c. Non-payment of amounts due because of Materials or services furnished to the Contractor or any of its Sub-contractors which are payable by the Contractor or any of its Sub-contractors.
- (ii) Without limiting the generality of the provisions of this Article 25, the Contractor 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 Contractor or by the Sub-contractors in performing the Contractor’s obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Contractor shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Project ROB, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Contractor shall promptly make every reasonable effort to secure for the Authority a licence, at no cost to the Authority, authorising continued use of the infringing work. If the Contractor is unable to secure such licence within a reasonable time, the Contractor shall,

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

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

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

### **25.4. Defence of claims**

- (i) The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 25, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.
- (ii) If the Indemnifying Party has exercised its rights under Clause 25.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).
- (iii) If the Indemnifying Party exercises its rights under Clause 25.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:
  - a. The employment of counsel by such party has been authorised in writing by the Indemnifying Party; or

- b. The Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
- c. The Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defence of such action and shall have been so notified by the Indemnified Party; or
- d. The Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
  - I. That there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
  - II. That such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 25.4 (iii) shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

#### **25.5. Survival on Termination**

The provisions of this Article 25 shall survive Termination.

## Article 26 Dispute Resolution (Arbitration)

### 26.1. Arbitration

- (i) Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions here in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim right, matter or any other thing what so ever, in any way arising out of or relating to the contract, design, drawings, specifications, estimates, instructions, order or to the condition or otherwise concerning the work or regarding the execution or failure to execute the same whether arising during the progress of work or after the completion thereof as described here in after shall be referred to the Chairman for sole arbitration by himself or by any Office appointed by him.
- (ii) It will be no objection to any such appointment that the arbitrator is an employee of the Board or the Government, that he had to deal with the matter to which the contract relates and that in course of his duties as an employee of the Board or the Government, he had expressed views on all or any of the matters in dispute or of different.
- (iii) The arbitrator, who has been dealing with the arbitration case, being transferred or vacating his office or in the event of his death or being unable to act for any reason, the Chairman then holding the office shall arbitrate himself or appoint any officer to act as arbitrator.
- (iv) It is also a term of the contract that no person other than the Chairman himself for any officer appointed by him shall act as arbitrator.
- (v) It is a term of the contract that only such question and disputes as were raised during progress of work till its completion and not there after shall be referred to arbitration. However, this would not apply to the questions and disputes relating to liabilities of parties during the guarantee period after completion of the work.
- (vi) It is a term of the contract that the party invoking arbitration shall give a list of disputes with amounts of claim in respect of each said disputes along with the notice seeking appointment of arbitrator.
- (vii) It is also a term of the contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims/disputes in writing, as aforesaid, within 120 days of receiving the intimation from the Nodal officer or his nominee that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Port Authority shall be discharged and released of all liabilities under the contract in respect of these claims.
- (viii) It is also a term of the contract that the arbitrator shall adjudicate only such disputes/claims as referred to him by the appointing authority and give separate award against each dispute/claim referred to him. The arbitrator will be bound to give claim wise detail and speaking award and it should be supported by reasoning.
- (ix) The award of the arbitrator shall be final, conclusive and binding on all the parties to the

contract.

- (x) The arbitrator from time to time, with the consent of both the parties, enlarges the time for making and publishing the award.
- (xi) Arbitration shall be conducted in accordance with the provision of Indian Arbitration Act, 1996 or any statutory modifications or re-enactment thereof and rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause.
- (xii) It is also a term of the contract that if any fees are payable to the arbitrator, this shall be paid equally by both the parties.
- (xiii) It is also a term of the contract that the arbitration shall be deemed to have been entered on the reference on the date he issued the first notice to both the parties calling them to submit their statement of claims and counter statement of claims.
- (xiv) Venue of the arbitration shall be such place as may be fixed by the arbitrator at his sole discretion".

## **Article 27 Miscellaneous**

### **27.1. Governing law and jurisdiction**

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

### **27.2. Waiver of immunity**

Each Party unconditionally and irrevocably:

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

### **27.3. Delayed payments**

The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, under Article 19.

### **27.4. Waiver**

- (i) Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:-
  - a. Shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
  - b. Shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
  - c. Shall not affect the validity or enforceability of this Agreement in any manner.
- (ii) Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as

waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

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

Except to the extent expressly provided in this Agreement:

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

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

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

#### **27.7. Survival**

- (i) Termination shall:
  - a. Not relieve the Contractor 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.
- (ii) All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.

#### **27.8. Entire Agreement**

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

#### **27.9. Severability**

If for any reason whatever, any provision of this Agreement is or becomes invalid, illegal or

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

**27.10. No partnership**

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

**27.11. Third parties**

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

**27.12. Successors and assigns**

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

**27.13. Notices**

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

- (a) In the case of the Contractor, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Contractor may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside [Gandhidham] may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the person as the Contractor may from time to time designate by notice to the Authority;
- (b) In the case of the Authority, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the [Chief Engineer] 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 Contractor; provided that if the Contractor does not have an office in [Gandhidham] it may send such notice by facsimile or e-mail and by registered acknowledgement due, air mail or by courier; and
- (c) Any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to



have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date and time of delivery; provided that in the case of facsimile or e- mail, it shall be deemed to have been delivered on the working day following the date of its delivery.

#### **27.14. Language**

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

#### **27.15. Counterparts**

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

#### **27.16. Confidentiality**

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

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

- (i) As between the Parties, the Contractor shall retain the copyright and other Intellectual Property rights in the Contractor's documents and other design documents made by (or on behalf of) the Contractor. The Contractor shall be deemed (by signing this Agreement) to give to the Authority a non-terminable transferable non-exclusive royalty-free licence to copy, use and communicate the Contractor's documents, including making and using modifications of them. This licence shall:
  - a. Apply throughout the actual or intended working life (whichever is longer) of the relevant parts of the Works;
  - b. Entitle any person in proper possession of the relevant part of the Works to copy, use and communicate the Contractor's documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing and demolishing the Works; and
  - c. In the case of Contractor's documents which are in the form of computer programs and other software, permit their use on any computer on the Site and other places as envisaged by this Agreement, including replacements of any computers supplied by the Contractor.
- (ii) The Contractor's documents and other design documents made by (or on behalf of) the Contractor shall not, without the Contractor's consent, be used, copied or communicated to a third party by (or on behalf of) the Authority for purposes other than those permitted under this Clause 27.17.
- (iii) As between the Parties, the Authority shall retain the copyright and other intellectual property rights in this Agreement and other documents made by (or on behalf of) the Authority. The Contractor may, at its cost, copy, use, and obtain communication of these

documents for the purposes of this Agreement. They shall not, without the Authority's consent, be copied, used or communicated to a third party by the Contractor, except as necessary for the purposes of the contract.

**27.18. Limitation of Liability**

- (i) Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with this Agreement, save and except as provided under Articles 23 and 25.
- (ii) The total liability of one Party to the other Party under and in accordance with the provisions of this Agreement, save and except as provided in Articles 23 and 25, shall not exceed the Contract Price. For the avoidance of doubt, this Clause shall not limit the liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.

**27.19. Care and Supply of Documents**

- (i) Each of the Contractor's documents shall be in the custody and care of the Contractor, unless and until taken over by the Authority. Unless otherwise stated in the Agreement, the Contractor shall supply to the Authority 2 (two) copies of the each of the Contractor's documents.
- (ii) The Contractor shall keep, on the Site, a copy of the Agreement, publication named in the Authority's requirements, the Contractor's documents, and variations and other communications given under the Agreement. The Authority's personnel shall have the right of access to all these documents at all reasonable times.
- (iii) If a Party becomes aware of an error or defect of a technical nature in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other party of such error or defect.

**27.20. Authority's Use of Contractor's Documents.**

- (i) As between the Parties, the Contractor shall retain the copyright and other Intellectual Property rights in the Contractor's Documents and other design documents made by (or on behalf of) the Contractor.
- (ii) The Contractor hereby gives to the Authority a non-terminable transferable nonexclusive royalty-free license to copy, use and communicate the Contractor's Documents, including making and using modifications of them. This license shall:
  - a. Apply through out the actual or intended working life (whichever is longer) of the relevant parts of the Works,
  - b. Entitle any person in proper possession of the relevant part of the Works to copy, use and communicate the Contractor's Documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing and demolishing the Works, and
  - c. In the case of Contractor's Documents which are in the form of computer programs and other software, permit their use on any computer on the Site and other places as

envisaged by the Contractor, including replacements of any computers supplied by the Contractor.

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

#### **27.21. Contractor's Use of Authority's Documents**

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

#### **27.22. Access to the Site by Others**

The Contractor shall, at all times, afford access to the Site to the authorized representatives of the Authority, the Authority's Engineer and anyone else authorized by the Authority to access the site 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 ROB and to investigate any matter within their authority and upon reasonable notice, the Contractor 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 ROB consistent with the purpose for which such persons have gained such access to the Site.

#### **27.23. Term**

This Agreement shall come into force and effect from the date first hereinabove written and shall remain in force and effect till the Termination Date i.e. the Parties perform all their respective obligations or is terminated by any of the Parties for the reasons and in the manner provided for in the Agreement.

#### **27.24. Amendments**

The Agreement may not be supplemented, amended, modified or changed except by an instrument in writing signed by the Contractor and the Authority and expressed to be a supplement, modification or change to the Agreement.

#### **27.25. Representation and Bribes**

The Contractor represents and warrants to the Authority that:

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

(b) It warrants that no sums, in cash or kind, have been paid or will be paid by or on behalf of the Contractor, to any person by way of fees, commission or otherwise for securing or entering into the Contractor for influencing or attempting to influence any officer or employee of the Authority or GOI in connection therewith.

**27.26. No Agency**

The Agreement does not constitute either Party as the agent, partner or legal representative of the other for any purposes whatsoever, and neither Party shall have any express or implied right or authority to assume or to create any obligation or responsibility on behalf of or in the name of the other Party.