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# Template for Draft Concession Agreement

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## Addendum 5

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## CONCESSION AGREEMENT

This Agreement is entered into on this the ..... day of ....., 20.....  
BETWEEN

1. **[Insert Institution's full name]**, a statutory body constituted under the provisions of [Insert relevant legislation reference] {insert short description instead if this is not applicable}, and having its principal office at [Insert address of Institution] (hereinafter referred to as "[Insert abbreviation]" which expression shall include its administrators, successors and assigns).

AND

2. **[Insert Company's full name]**, a company incorporated under the provisions of [insert relevant legislation reference] and having its registered office at .....  
(hereinafter referred to as the "Concessionaire" or "Company" which expression shall include its successors and permitted substitutes).

WHEREAS

- A. The Government of [Insert country's name] in the [Insert name of Ministry or Department] (hereinafter referred to as "[Insert abbreviation]") had authorised [Insert Institution's (abbreviated) name] for the [Insert short description of required project] through a concession on build, operate and transfer ("BOT") basis {amend as required} and has by its Notification No..... dated ..... issued pursuant to [insert relevant legislation reference if necessary] vested the said [Insert required project description] in [Insert Institution's (abbreviated) name] as set forth in the said Notification dated .....
- B. [Insert Institution's (abbreviated) name] had accordingly invited Proposals for shortlisting of bidders for the aforesaid under its Notice inviting Proposals No..... dated ..... ("the Tender Notice"), inter alia, for [Insert project description] subject to and on the terms and conditions contained in the Tender Notice and had pursuant thereto shortlisted certain bidders including, inter alia, the consortium comprising ....., ..... and ..... (collectively the "Consortium").
- C. [Insert Institution's (abbreviated) name] had, pursuant to the Tender Notice, laid down and prescribed the technical and commercial terms and conditions and had invited Bids from the bidders shortlisted pursuant to the Tender Notice for undertaking, inter alia, the work referred to in Recital 'A' above on BOT {amend as required} basis.
- D. After evaluation of the Bids so received [Insert Institution's (abbreviated) name] accepted the Bid of the Consortium and issued its Letter of Acceptance No..... dated ..... ("LOA") to the Consortium requiring, inter alia, the execution of this Concession Agreement within [enter number of days in words] (enter number of days in numerals) days of the date thereof. The Concessionaire acknowledges that the LOA is subject to the conditions precedent contained in this Concession Agreement.
- E. The Consortium has promoted and incorporated the Concessionaire as a limited liability company to enter into this Concession Agreement pursuant to the LOA for undertaking, inter alia, [Insert description of project] on BOT basis {amend as required} as referred to in Recital 'A' and to fulfil other obligations of the Concessionaire pursuant to the LOA and has requested [Insert Institution's (abbreviated) name] to accept the Concessionaire as the entity which shall undertake and fulfil and perform the obligations and exercise any rights of the Consortium under the LOA, including the obligation to enter into this Concession Agreement for the [Insert project description] on BOT basis {amend as required}.
- F. [Insert Institution's (abbreviated) name] has agreed to the said request of the Consortium and has accordingly agreed to enter into this Concession Agreement with the Concessionaire pursuant to the LOA for, inter alia, [Insert description of project] on BOT basis {amend as required}.

G. It is deemed necessary and expedient to enter into this Agreement to record the terms of the said Agreement between the Parties.

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

## 1. DEFINITIONS AND INTERPRETATION

### 1.1. Definitions

In this Agreement, the following words and expressions shall have the meaning hereinafter respectively assigned to them:

“Accounting Year” means the financial year commencing from [Insert date] of any calendar year and ending on [Insert date] of the next calendar year.

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

“Affected Party” shall have the meaning set out in Clause 27.1.

“Agreement” means this Agreement, the Schedules ‘A’ through ‘[Insert last schedule letter]’ hereto and any amendments thereto made in accordance with the provisions contained in this Agreement.

“Applicable Laws” means all laws, promulgated or brought into force and effect by the Government of [Insert country name] and/or the Government of [Insert province or territory name if applicable] including regulations and rules made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, as may be in force and effect during the subsistence of this Agreement.

“Applicable Permits” means all clearances, permits, authorisations, consents and approvals required to be obtained or maintained under Applicable Laws in connection with the [Insert project description] during the subsistence of this Agreement.

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

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

“Auditors” means a firm of chartered accountant as indicated in Clause 26.2.

“Bank” means a bank incorporated in [Insert country name] and having a minimum credit rating of **[enter rating]** by a Credit Rating Agency [Insert amount] (Insert amount in words) and having a branch in the proximity of the Project or at any other place acceptable to [Insert Institution’s (abbreviated) name].

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

“Bid Security” means the security provided by the Bidder to [Insert Institution’s (abbreviated) name] along with the Bid in the sum of [Insert amount] (Insert amount in words) in accordance with the Tender Notice and which is to remain in force until substituted by the Performance Security.

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

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

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

- (i) the enactment of any new applicable law;
- (ii) the repeal, modification or re-enactment of any existing applicable law;



- (iii) the commencement of any applicable law which has not entered into effect until the date of this Agreement;
- (iv) a change in the interpretation or application of any applicable law by a court of record as compared to such interpretation or application by a court of record prior to the date of this Agreement by the last Party signing in time; or
- (v) any change in the rates of any of the Taxes.

“Change of Scope” shall have the meaning ascribed thereto in Clause 16.1.

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

“Completion Certificate” means the Certificate issued by the Independent Consultant pursuant to Clause 15.4.

“Concession” shall have the meaning ascribed thereto in Clause 3.

“Concession Fee” shall have the meaning ascribed thereto in Clause 7.

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

“Concessionaire” means ..... and its successors and substitutes expressly approved in writing by [Insert Institution’s (abbreviated) name].

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

“Consortium Members” means ....., ....., ..... and .....

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

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

“Constitution Documents” means the documentation evidencing the manner in which the Concessionaire is legally constituted as a legal entity in its jurisdiction.

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

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

“Credit Rating Agency” means ***[Discuss: to decide whether this definition is limited to Standard & Poor, Fitch and Moody’s only or other rating agencies].***

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

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

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

the Termination Date, and (b) penal interest or charges, payable under the Financing Documents to any Senior Lender.

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

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

“Dispute” shall have the meaning set forth in Clause 37.1(a).

“Dispute Resolution Procedure” means the procedure for Dispute resolution set forth in Clause 37.

“Divestment Requirements” means the obligations of the Concessionaire and [Insert Institution’s (abbreviated) name] for and in respect of the Termination of this Agreement as set forth in Clause 31.

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

“Drawings” means all the drawings, calculations and documents pertaining to the Project Infrastructure as set forth in Schedule [enter relevant schedule] and shall include “as built” drawings of the Project Infrastructure.

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

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

“Encumbrances” means any encumbrances such as mortgage, charge, pledge, lien, hypothecation, indemnity, suretyship, guarantee security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations and shall include without limitation any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances and encroachments on the Site where applicable herein.

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

“Equity Support” shall have the meaning ascribed thereto in Clause 21.3.

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

“Escrow Agreement” shall have the meaning ascribed thereto in Clause 23.2.

“Fee” means the charge levied on and payable for use of the Project Infrastructure {can define more clearly in terms of the specific project} in accordance with the Fee Notification and this Agreement.

“Fee Notification” means the Notification No..... dated..... issued by the Government of [Insert country or territory name] in exercise of the powers conferred by [Insert relevant legislation

reference] in respect of the levy and collection of the Fees and a copy of which is at Schedule “[Insert relevant schedule]” and includes any such subsequent notifications issued from time to time to give effect to the provisions of this Agreement.

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

“Financing Documents” means the documents executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Project and includes amendments or modifications made in accordance with Clause 8.1(iv).

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

“Force Majeure” or “Force Majeure Event” shall mean an act, event, condition or occurrence specified in Clause 27.

“Good Industry Practice” means those practices, methods, techniques, standards, skills, diligence and prudence which are generally and reasonably expected of and accepted internationally from a reasonably skilled and experienced operator engaged in a similar type of Project as envisaged under this Agreement and acting generally in accordance with the provisions of the [Insert Institution’s (abbreviated) name] Act, and entails best practice engineering practices in the design, engineering, construction and project management and which is expected to result in the performance of its obligations by the Concessionaire and in the operation and maintenance of the Project Infrastructure in accordance with this Agreement, Applicable Laws, Applicable Permits, reliability, safety, environment protection, economy and efficiency.

“Governmental Agency” means Government of [Insert country], Government of [Insert territory name] or any ministry, department, commission, board, authority, instrumentality or agency, under the control of Government of [Insert country] or Government of [Insert territory name] having jurisdiction over all or any part of the Project Infrastructure or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement.

“Grant” shall have the meaning ascribed thereto in Clause 21.1.

“Indemnifying Party” means the Party obligated to indemnify the other Party pursuant to Clause 35.

“Independent Consultant” shall have the meaning ascribed thereto in Clause 19.1.

“Indirect Political Event” shall have the meaning ascribed thereto in Clause 27.3.

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

“Maintenance Manual” shall have the meaning ascribed to it in Clause 17.2.

“Maintenance Programme” shall have the meaning ascribed to it in Clause 17.3.

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

“Material Breach” means a breach by either Party of any of its obligations in this Agreement which shall be deemed to have a Material Adverse Effect on the Project and which it shall have failed to cure within the Cure Period.

“[Insert Institution’s (abbreviated) name] Representative” means such person or persons as may be authorised in writing by [Insert Institution’s (abbreviated) name] 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 [Insert Institution’s (abbreviated) name] under this Agreement.

“Net Cash Flow” means in any Accounting Year revenue income less tax payments, O&M Expense, Concession Fee, Negative Grant and Debt Service Payments to Senior Lenders.

“Non Political Event” shall have the meaning ascribed thereto in Clause 27.2.

“O&M” means the operation and maintenance of the Project Infrastructure during the Operations Period and includes but is not limited to functions of maintenance, collection and appropriation of Fees and performance of other services incidental thereto.

“O&M Contract” means the Operation and Maintenance Contract that may be entered into between the Concessionaire and the O&M Contractor for O&M of the Project Infrastructure.

“O&M Contractor” means the person or entity with whom the Concessionaire has entered into an O&M Contract for discharging O&M functions for and on behalf of the Concessionaire.

“O&M Expense” means expenses incurred by or on behalf of the Concessionaire duly certified by its Auditors or by [Insert Institution’s (abbreviated) name], as the case may be, for all regularly scheduled and reasonably anticipated O&M during Operations Period, including, without limitation (a) all cost of salaries and other employee compensation and contract fee payable to the O&M Contractor, if any (b) cost of materials, supplies, utilities and other services (c) premia for insurance (d) all franchise, excise, property and other similar taxes and all costs and fees incurred in order to obtain and maintain all Applicable Permits necessary for the O&M of the Project Infrastructure at its full design capacity, (e) all repair, replacement and maintenance costs of the Project Infrastructure, and (f) all other expenditures required to be incurred under Applicable Law or under Applicable Permits necessary for the operation and maintenance of the Project Infrastructure according to the Specifications and Standards at its full design capacity.

“O&M Support” shall have the meaning ascribed thereto in Clause 21.5.

“O&M Works” means all works necessary to keep the Project Infrastructure in operation during the Operations Period.

“Operations Period” means the period commencing from COD and ending on the Termination Date.

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

“Performance Security” shall have the meaning ascribed thereto in Clause 5.1

“Political Event” shall have the meaning ascribed thereto in Clause 27.4.

“Preliminary Notice” shall have the meaning attributed thereto in Clause 30.1.2.

“Project” means the development, design, financing, procurement, engineering and construction, operation and maintenance of the Project Infrastructure in accordance with the provisions of this Agreement and shall include all works relating to or in respect of the Project Infrastructure as described in Clause 2.

“Project Agreements” means this Agreement, the Financing Documents, the EPC Contract, if any, the O&M Contract, if any, and any other agreements or contracts entered into by the Concessionaire with

[Insert Institution's (abbreviated) name] or others relating to the Project during the subsistence of this Agreement.

"Project Assets" means all physical and other assets relating to and forming part of the Project Infrastructure including but not limited to (i) rights over the Site in the form of license, right of way or otherwise, (ii) tangible assets such as civil works including the foundation, drainage works, lighting facilities, sign boards, milestones, electrical works for lighting on the Project Infrastructure, telephone and other communication systems and equipment for the Project, rest areas, administration and maintenance depots, relief centres, service facilities etc. {amend as required}, (iii) Project Facilities situated on the Site (iv) the rights of the Concessionaire under the Project Agreements, (v) financial assets, such as security deposits for electricity supply, telephone etc., (vi) insurance proceeds and (vii) Applicable Permits and authorisations relating to or in respect of the Project Infrastructure, but does not include Additional Facilities.

"Project Completion" shall have the meaning ascribed thereto in Clause 14.1.

"Project Completion Schedule" means the progressive Project milestone set forth in Schedule '[Insert relevant schedule]' for the realization of the Project Infrastructure complete in all respects by the Scheduled Project Completion Date.

"Project Facilities" means all the amenities and facilities situated on the Site, as described in Schedule '[Insert relevant schedule]'.

"Project Infrastructure" means {Insert description of the required infrastructure} and shall include the Project Assets and the Project Facilities to be designed, engineered and built on Site and to be operated and maintained during the Concession Period in accordance with the provisions of this Agreement.

"Provisional Certificate" shall have the meaning ascribed to it in Clause 15.5.

"Punch List" shall have the meaning ascribed to it in Clause 15.5.

"[Insert relevant abbreviation]" means the Reserve Bank of [Insert country's name] as constituted and existing under the [Insert relevant legislation reference] including any statutory modification or replacement thereof, and its successors and assigns.

"Realisable Fee" means all the Fees due and realisable under this Agreement but does not include Fees that the Concessionaire has not been able to realise after due diligence and best efforts.

"Revenue Shortfall Loan" shall have the meaning ascribed to it in Clause 22.1.

"Subordinated Debt" means any borrowings by the Concessionaire subordinated to the financial assistance provided by the Senior Lenders for meeting the Total Project Cost but does not include any interest thereon.

"Subsistence Revenue Level" means the total amount of Fee revenue that is required by the Concessionaire in an Accounting Year to meet the sum of (a) the O&M Expense subject to an annual ceiling of 1.5% (one and a half percent) of the Total Project Cost in the first operations year, to be revised each year to reflect the variations in the WPI in each subsequent years and (b) Debt Service Payments due to the Senior Lenders in an Accounting Year.

"Substitution Agreement" means the agreement referred to in Clause 33 and to be entered into among the Concessionaire, [Insert Institution's (abbreviated) name] and the Senior Lenders in the form set forth in Schedule '[Insert relevant schedule]' providing, inter alia, for the substitution of the Concessionaire by any other person subject to and in accordance with the provisions of this Agreement and the Substitution Agreement.

"State Support Agreement" means the agreement referred to in Clause 24 and to be entered into among the Concessionaire and [Insert Institution's (abbreviated) name].

“Taxes” means any applicable taxes on corporate income, sales tax, excise duties, customs duties and local taxes and any impost of like nature charged, levied or imposed on the goods, materials, equipment and services incorporated in and forming part of the Project Infrastructure, on the construction, operation and maintenance thereof and on the Project Assets, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever.

“Termination” means the expiry or termination of this Agreement and the Concession hereunder.

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

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

“Termination Payment” means the amounts payable by [Insert Institution’s (abbreviated) name] to the Concessionaire under this Agreement upon the Termination of this Agreement and shall consist of payments relating to Debt Due, Subordinated Debt and Equity, as the case may be, and such other amounts as are expressly provided for under this Agreement. Provided, however, that for purposes of determining Termination Payments to be made by [Insert Institution’s (abbreviated) name] under this Agreement, the capital cost of the Project Infrastructure shall at all times be reckoned as an amount not exceeding the Total Project Cost and the liability of [Insert Institution’s (abbreviated) name] to make such Termination Payments relating to Debt Due, Subordinated Debt and Equity shall be determined as if such capital cost was restricted to Total Project Cost.

“Tests” mean the tests to be carried out as set forth in and in accordance with Schedule ‘[Insert relevant schedule]’ to determine the Project Completion and its certification by the Independent Consultant for commencement of commercial operation of the Project Infrastructure.

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

- a. a sum of [Insert amount];
- b. actual capital cost of the Project upon completion of the Project Infrastructure as certified by the Auditors; or
- c. total project cost as set forth in Financing Documents.

Provided further that if part of the Total Project Cost is funded in foreign currency, in accordance with the Financing Package, then the rate of exchange shall be determined as on the date of Bid, and the Total Project Cost shall be computed as if such foreign currency were converted with reference to such exchange rate. In the event of Termination of this Agreement requiring [Insert Institution’s (abbreviated) name] to make Termination Payments, the liability of [Insert Institution’s (abbreviated) name] shall be determined on basis of the rate of exchange prevailing on the date of Termination Notice and the amounts payable by [Insert Institution’s (abbreviated) name] for Debt Due and Subordinated Debt , as the case may be, shall be computed accordingly.

“Vesting Certificate” shall have the meaning attributed to it in Clause 31.4.

[Insert relevant currency definition]

[Insert relevant price index definition]

{Insert any other important definitions that are used in the agreement}

1.2. In this Agreement, unless the context otherwise requires,

- (a) any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- (b) references to [Insert country’s name] law shall include the laws, acts, ordinances, rules, regulations, or by-laws which have the force of law in any State or Territory forming part of [Insert official name of the country];

- (c) the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organizations or other entities (whether or not having a separate legal entity);
- (d) the headings are for convenience of reference only and shall not be used in and shall not affect the construction or interpretation of this Agreement;
- (e) terms and words beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein and the terms and words defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules;
- (f) the words "include" and "including" are to be construed without limitation;
- (g) references to "construction" include, unless the context otherwise requires, investigation, design, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction;
- (h) any reference to any period of time shall mean a reference to that according to Central African Time {amend if required};
- (i) any reference to day shall mean a reference to a calendar day;
- (j) any reference to month shall mean a reference to a calendar month;
- (k) the Schedules to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (l) any reference at any time to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or suspended at the time of such reference provided that this clause shall not operate so as to increase liabilities or obligations of [Insert Institution's (abbreviated) name] hereunder or pursuant hereto in any manner whatsoever;
- (m) references to Recitals, Articles, Clauses, Sub-clauses, Paragraphs, or Schedules in this Agreement shall, except where the context otherwise requires, be deemed to be references to Recitals, Articles, Clauses, Subclauses, paragraphs, and Schedules of or to this Agreement;
- (n) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Consultant shall be valid and effectual only if it is in writing under the hands of duly authorised representative of such Party or the Independent Consultant, as the case may be, in this behalf and not otherwise;
- (o) any reference to any period commencing "from" a specified day or date and "till" or "until" a specified day or date shall include both such days or dates;
- (p) the damages payable by either Party to the other of them as set forth in this Agreement, whether on per diem basis or otherwise, are direct damages, and not consequential damages, suffered and incurred by the Party entitled to receive the same (the "Damages"); and
- (q) unless otherwise expressly provided in this Agreement any Documentation required to be provided or furnished by the Concessionaire to [Insert Institution's (abbreviated) name] and/or the Independent Consultant shall be provided free of cost and in three copies and if [Insert Institution's (abbreviated) name] and/or the Independent Consultant are required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.

### 1.3. Measurement and Arithmetic Conventions

{This section may be included if required. The relevant conventions should be set out here.}

## 2. SCOPE OF PROJECT

- 2.1. The Project shall be executed on the Site, which is described in Schedule '[Insert relevant schedule]' of this Agreement. The scope of the Project shall include performance and execution by the Concessionaire of all design, engineering, financing, procurement, construction, completion, operation and maintenance of the Project infrastructure as described in Schedule [Insert relevant schedules] of this Agreement. The Project Infrastructure shall be delivered in accordance with the Specifications and Standards set forth in Schedule '[Insert relevant schedule]' and operation and maintenance thereof in accordance with Schedule '[Insert relevant schedule]'. It shall also include the performance and fulfilment of other obligations by the Concessionaire under this Agreement.

The Concessionaire shall undertake its obligations at its own cost and risk.

## **CHAPTER II GRANT OF CONCESSION**

### **3. GRANT OF CONCESSION**

- 3.1. Subject to and in accordance with the terms and conditions set forth in this Agreement, [Insert Institution's (abbreviated) name] hereby grants to the Concessionaire and the Concessionaire hereby accepts the Concession for a period of [Insert number](Insert number in words) years commencing from the Appointed Date, including the exclusive right, licence and authority during the subsistence of this Agreement to implement the Project and the Concession in respect of the Project Infrastructure.
- 3.2. Subject to and in accordance with the terms and conditions set forth in this Agreement, the Concession hereby granted shall entitle the Concessionaire to enjoy, and oblige the Concessionaire to undertake the following in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits:
- (i) to develop, design, engineer, finance, procure, construct, operate and maintain {amend as required} the Project Infrastructure during the Concession Period;
  - (ii) upon completion of the Project Infrastructure and during the Operations Period to manage, operate & maintain the Project Infrastructure and manage the use thereof by third parties;
  - (iii) levy, demand, collect and appropriate the Fees from persons liable to payment of Fees for using the Project Infrastructure or any part thereof and refuse access of any persons to the Project Infrastructure if the due Fee is not paid; {include if required; amend as required if this is relevant}
  - (iv) perform and fulfil all of the Concessionaire's obligations under this Agreement;
  - (v) bear and pay all expenses, costs and charges incurred in the fulfilment of all the Concessionaire's obligations under this Agreement; and
  - (vi) not assign or create any lien or Encumbrance on the Concession hereby granted or on the whole or any part of the Project Infrastructure nor transfer, lease or part possession therewith save and except as expressly permitted by this Agreement or the Substitution Agreement.
- 3.3. The Concession Period shall commence on the Appointed Date and shall end on the Termination Date.

### **4. CONDITIONS PRECEDENT**

- 4.1. Save and except as provided in Clauses 4, 5 and 20, the rights and obligations of the Concessionaire under this Agreement are subject to the satisfaction in full of the following conditions precedent to be fulfilled on or before Financial Close unless any such condition has been waived as provided in Clause 4.2:
- (a) Concessionaire shall have obtained all such Applicable Permits as listed in Schedule '[Insert relevant schedule]' unconditionally or if subject to conditions then all such conditions have been satisfied in full and such Applicable Permits are and shall be kept in full force and effect for the relevant period during the subsistence of this Agreement;
  - (b) the Concessionaire shall have been granted way leaves required in connection with the Project including:
    - (i) rights of way for the alignment of the Project Infrastructure free from all Encumbrances;
    - (ii) permission/licence to enter upon and utilise the Site for the construction pursuant to and in accordance with this Agreement; and
    - (iii) {Insert any other relevant way leaves}
  - (c) the Concessionaire shall have been granted all clearances and permits under the Applicable Laws relating to environmental protection and conservation from the [Insert relevant department or authority name];



- (d) the Concessionaire shall have entered into the State Support Agreement with [Insert Institution's (abbreviated) name] and the Government of [Insert country and/or territory name];
- (e) certified true copies of all valid, effective and unconditional Project Agreements, in particular, the Financing Documents, the EPC Contract, O&M Contract, if any, as well as the shareholders funding agreement have been delivered by the Concessionaire to [Insert Institution's (abbreviated) name];
- (f) the Performance Security in full has been provided by the Concessionaire to [Insert Institution's (abbreviated) name] in accordance with Clause 5.1;
- (g) all of the representations and warranties of the Concessionaire set forth in Clause 8 are true and correct as on date of this Agreement and as on the Appointed Date;
- (h) [Insert Institution's (abbreviated) name] shall have received from the Concessionaire copies (certified as true copies by an authorised officer of the Concessionaire) of the constitutional documents of the Concessionaire;
- (i) [Insert Institution's (abbreviated) name] shall have received copies (certified as true copies by a Director of the Concessionaire) of all resolutions adopted by the Board of Directors of the Concessionaire authorising the execution, delivery and performance by the Concessionaire of this Agreement and each of the Project Agreements;
- (j) [Insert Institution's (abbreviated) name] shall have received from the external legal counsel of the Concessionaire a legal opinion with respect to the authority of the Concessionaire to enter into this Agreement and the Project Agreements and the Financing Documents and the enforceability of the provisions thereof; and
- (k) [Insert relevant Department or Ministry name] shall have issued a Fee Notification substantially in the form at Schedule '[Insert relevant schedule]'.

4.2. Any of the conditions precedent set forth in Clause 4.1, save and except condition of Sub-clause (b), (c) and (e) thereof, may be waived fully or partially by [Insert Institution's (abbreviated) name] at any time in its sole discretion.

4.3. The Concessionaire shall make all reasonable endeavours to procure the satisfaction in full of the Conditions Precedent set out in Clause 4.1 above and [Insert Institution's (abbreviated) name] shall make all reasonable endeavours to procure fulfilment of the conditions set forth in Sub-clauses (b), (c), (d) and (k) of Clause 4.1. Each Party shall bear its respective cost and expense of satisfying such Conditions Precedent.

4.4. If the Conditions Precedent set forth in Clause 4.1 have not been satisfied on or before the Financial Close and the [Insert Institution's (abbreviated) name] has not waived, fully or partially, such conditions under Clause 4.1, [Insert Institution's (abbreviated) name] may, notwithstanding anything to the contrary contained in this Agreement, terminate this Agreement in accordance with provisions of Clause 30.2 without being liable in any manner whatsoever to the Concessionaire and forfeit the Bid Security and/or the Performance Security by way of Damages but only to the extent of Damages actually suffered and incurred therein, provided that where [Insert Institution's (abbreviated) name] does not fulfil its obligations under Clause 4.3 and terminates this Agreement under this Clause 4.4, it shall refund in full Bid Security or the Performance Security, as the case may be.

## 5. PERFORMANCE SECURITY

5.1. The Concessionaire shall for due and faithful performance of its obligations during the Construction Period provide to [Insert Institution's (abbreviated) name] a bank guarantee from any Bank in the form set forth in Schedule '[Insert relevant schedule]' (the "Performance Security") for a sum equivalent to [Insert amount] (Insert amount in words) within 120 (one hundred and twenty) days of the date of this Agreement. Until such time the Concessionaire provides to [Insert Institution's (abbreviated) name] the Performance Security pursuant hereto, the Bid Security shall remain in full force and effect. Failure of the Concessionaire to provide the Performance Security in accordance with this Clause 5.1, shall entitle [Insert Institution's (abbreviated) name] to terminate this Agreement in accordance with the provisions of Clause 30.2 without being liable in any manner whatsoever to the Concessionaire and to appropriate the Bid Security as Damages.

5.2. The Performance Security shall be released by [Insert Institution's (abbreviated) name] to the Concessionaire upon contribution of the Equity (excluding Equity Support, if any) by the shareholders of the Concessionaire to the extent of 100% and upon the Concessionaire

having expended on the Project and paid out an aggregate sum of not less than 20% (twenty percent) of the Total Project Cost as certified by the Auditors of the Concessionaire and provided the Concessionaire is not in breach of this Agreement. If the Concessionaire is in breach of this Agreement, the Performance Security shall be continued until the COD or until the breach is cured; whichever is earlier.

- 5.3. In the event of the Concessionaire being in default in the due and faithful performance of its obligations under this Agreement and failing to remedy such default within the Cure Period, the [Insert Institution's (abbreviated) name] shall without prejudice to its other rights and remedies hereunder be entitled to encash and appropriate the Performance Security as Damages for such default but only to the extent of Damages actually suffered and incurred therein. Upon such encashment and appropriation of the Performance Security, [Insert Institution's (abbreviated) name] shall grant a period of 15 (fifteen) days to the Concessionaire to provide fresh Performance Security and the Concessionaire shall within the time so granted furnish to [Insert Institution's (abbreviated) name] such Performance Security failing which [Insert Institution's (abbreviated) name] shall be entitled to Terminate this Agreement under clause 32.2. The provision set forth in Clause 5.2 and this Clause 5.3 shall apply mutatis-mutandis to such fresh Performance Security.
- 5.4. Notwithstanding anything to the contrary contained in clause 5.3, upon furnishing of fresh Performance Security in accordance with clause 5.3, the Concessionaire shall be granted an additional period of 60 (Sixty) days as Cure Period for remedying the defaults and complying with its obligations under this Agreement. In the event of the Concessionaire continuing to be in breach of the provisions of this Agreement after such Cure Period, [Insert Institution's (abbreviated) name] shall be entitled to terminate this Agreement under the provisions of Clause 30.2.

## 6. FEES

- 6.1. The Concessionaire shall be entitled during the Operations Period to levy and collect the Fees from the users of the Project Infrastructure pursuant to and in accordance with the Fee Notification set forth in Schedule '[Insert relevant schedule]' and this Agreement.
- 6.2. The Concessionaire acknowledges that the Fee Notification, inter alia, provides for annual revision in the Fees linked to the extent of variation in [Insert relevant price index] as per the Fee Notification, and hereby confirms that save and except as provided in the Fee Notification, the Concessionaire is not entitled to and shall not seek any relief whatsoever from [Insert Institution's (abbreviated) name], the Government of [Insert territory name] or the Government of [Insert country name] on account of increase or otherwise in [Insert relevant price index] or on any other account except in accordance with the express provisions of this Agreement.
- 6.3. The Fees collected by the Concessionaire or [Insert Institution's (abbreviated) name] or [Insert Institution's (abbreviated) name]'s nominee pursuant hereto shall be deposited in the Escrow Account and appropriated in accordance with the provisions of Clause 23.
- 6.4. The Concessionaire may delegate its right to collect Fees to the O&M Contractor or to any other person provided, however, that notwithstanding such delegation, the Concessionaire shall be and remain solely liable and responsible for the collection of Fees in accordance with this Agreement and its deposit into the Escrow Account.

{Insert any other provisions which may be relevant as far as fees are concerned here. These could include any possible discounts or exclusions, for example.}

## 7. CONCESSION FEE

- 7.1. In consideration of the grant of Concession under this Agreement, the Concession Fee payable by the Concessionaire to the [Insert Institution's (abbreviated) name] shall be [Insert amount] (insert amount in words) per year during the term of this Agreement.
- 7.2. The Concession Fee shall be paid in advance within 90 (ninety) days of the commencement of the year for which it is due and payable.

### CHAPTER III OBLIGATIONS AND UNDERTAKINGS

#### 8. OBLIGATIONS OF THE CONCESSIONAIRE

- 8.1. The Concessionaire shall at its own cost and expense observe, undertake, comply with and perform, in addition to and not in derogation of its obligations elsewhere set out in this Agreement, the following:
- (i) make, or cause to be made, necessary applications to the relevant Governmental Agencies with such particulars and details, as may be necessary for obtaining all Applicable Permits, and obtain such Applicable Permits in conformity with the Applicable Laws;
  - (ii) notify to [Insert Institution's (abbreviated) name] forthwith the occurrence of Financial Close;
  - (iii) submit to [Insert Institution's (abbreviated) name] certified true copies of each of the Project Agreements within 7 (seven) days of their execution;
  - (iv) not make any replacement, amendment or modifications to any of the Project Agreements without the prior written consent of [Insert Institution's (abbreviated) name], where such replacement, amendment or modification has or may have the effect of increasing or imposing any financial liability or obligation on [Insert Institution's (abbreviated) name] in any manner, and where such amendment or modification is made without such consent, not to enforce such amendment or modification nor permit enforcement thereof against [Insert Institution's (abbreviated) name] in any manner whatsoever;
  - (v) give [Insert Institution's (abbreviated) name] not less than 30 (thirty) days written notice prior to entering into, amending or replacing any Project Agreement so as to enable [Insert Institution's (abbreviated) name] to provide its consent or offer its comments, if any thereon which, if made, shall be duly considered and given effect to by the Concessionaire before entering into, amending or replacing such Project Agreement;
  - (vi) remove promptly from the Project Infrastructure all surplus construction machinery and materials, waste materials (including, without limitation, hazardous materials and waste water), rubbish and other debris (including without limitation accident debris) and shall keep the Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable Permits;
  - (vii) procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project Infrastructure;
  - (viii) provide all assistance to the Independent Consultant as it may require for the performance of its duties and services;
  - (ix) provide to [Insert Institution's (abbreviated) name] reports on regular basis during the Construction Period and the Operations Period in the form and manner set forth in this Agreement and Schedule '[Insert relevant schedule]';
  - (x) obtain and maintain in force on and from the Appointed Date all insurance in accordance with the provisions of this Agreement and Good Industry Practice;
  - (xi) acquire such real estate and/or equipment, as the Concessionaire may deem appropriate for the Additional Facilities and to indemnify and save harmless and defend the Government of [Insert country name], [Insert Institution's (abbreviated) name], and the Government of [Insert territory's name] from and against all proceedings, claims, demands, costs, expenses, losses and damages arising out of or relating to the securing of rights to use such real estate by the Concessionaire or any person claiming through or under the Concessionaire;\*
  - (xii) undertake Debt Service Payments in accordance with the Financing Documents;
  - (xiii) levy and collect Fees from users of the Project Infrastructure at the rates set forth in the Fee Notification and in accordance with this Agreement;
  - (xiv) ensure and procure that each Project Agreement contains provisions that entitle [Insert Institution's (abbreviated) name] to step into such agreement in its discretion in place and substitution of the Concessionaire in the event of Termination of this Agreement on account of default or breach by the Concessionaire, where in such

- instance the Senior Lenders opt to not exercise any right to step into such agreement as may be contained in any Project Agreement;
- (xv) appoint, supervise, monitor and control the activities of Contractors under their respective Project Agreements as may be necessary;
  - (xvi) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire's obligations under this Agreement;
  - (xvii) comply with all Applicable Permits and Applicable Laws in the performance of the Concessionaire's obligations under this Agreement including those being performed by any of the Contractors;
  - (xviii) develop, implement and administer a surveillance and safety program for the Project Infrastructure, the users thereof, and the Contractors' personnel engaged in the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Schedule '[Insert relevant schedule]', Applicable Laws and Good Industry Practice;
  - (xix) take all reasonable precautions for the prevention of accidents on or about the Project Infrastructure and provide all reasonable assistance and emergency medical aid to accident victims;
  - (xx) not to place or create and nor permit any Contractor or other person claiming through or under the Concessionaire to create or place any Encumbrance or security interest over all or any part of Site or the Project Assets, or on any rights of the Concessionaire therein or under this Agreement, save and except as expressly set forth in this Agreement or other Project Agreements;
  - (xxi) make its own arrangements for quarrying, and observe and fulfil the environmental and other requirements under the Applicable Laws and Applicable Permits at Concessionaire's own cost and expense;
  - (xxii) be responsible for safety, soundness and durability of the Project infrastructure including other structures forming part thereof and their compliance with the Specifications and Standards;
  - (xxiii) not claim or demand possession or control of any structures or real estate which do not form part of the Project Infrastructure save as may be provided for in any Project Agreement;
  - (xxiv) after receiving vacant possession of the Site or part thereof, ensure that such Site remains free from all encroachments and take all steps necessary to remove encroachments, if any;
  - (xxv) make payment to Police department or any Government Agency, if required, for provision of such services as are not provided in the normal course or are available on payment;
  - (xxvi) indemnify the [Insert Institution's (abbreviated) name] against all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be suffered by them on account of anything done or omitted to be done by the Concessionaire in connection with the performance of its obligations under this Agreement; and
  - (xxvii) comply with the Divestment Requirements and hand over the Project infrastructure to [Insert Institution's (abbreviated) name] upon Termination of the Agreement.

8.2. Subject to the terms and conditions of this Agreement the Concessionaire shall at its cost and expense:

- (i) undertake the design, engineering, procurement and construction and financing {amend as required} of the Project Infrastructure in accordance with this Agreement;
- (ii) operate and maintain the Project Infrastructure at all times in conformity with this Agreement including but not limited to the Specifications and Standards set forth in Schedule '[Insert relevant schedule]', Schedule '[Insert relevant schedule]', the Maintenance Programme and Good Industry Practice.

8.3. The Concessionaire shall, before commencement of construction of the Project infrastructure:

- (i) submit to [Insert Institution's (abbreviated) name] with due regard to Project Completion Schedule as set forth in Schedule '[Insert relevant schedule]' and Scheduled Project Completion Date, its design, engineering and construction time

schedule and shall formulate and provide charts for the completion of the said activities;

- (ii) finalise the design and detailed engineering basis;
- (iii) have requisite organisation and designate and appoint a Project manager and such other managers, officers and representatives as it may deem appropriate to supervise the Project and to deal with the [Insert Institution's (abbreviated) name] Representative and be responsible for all necessary exchanges of information required pursuant to this Agreement; and
- (iv) undertake, do and perform such acts, deeds and things as may be necessary or required for construction and Project completion under and in accordance with this Agreement.

8.4. In respect of the Concessionaire's obligations with respect to the Drawings of the Project Infrastructure as set forth in Schedule '[Insert relevant schedule]', the following shall apply:

- (i) The Concessionaire shall prepare and submit with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of all Drawings to [Insert Institution's (abbreviated) name] and the Independent Consultant for review and comments.
- (ii) By forwarding the Drawings for review and comment to [Insert Institution's (abbreviated) name], the Concessionaire represents that it has determined and verified that the design and engineering including field construction criteria related thereto is in conformity with the Specifications, Standards and quality set forth in this Agreement for and in respect of the Project Infrastructure.
- (iii) Within 30 (thirty) days of the receipt of the Drawings, [Insert Institution's (abbreviated) name] shall review the same and convey its comments/observations to the Concessionaire with particular reference to the conformity or otherwise with the Specifications and Standards set forth in this Agreement. It is expressly agreed that notwithstanding any review and comment/observations of [Insert Institution's (abbreviated) name] on any Drawings or failure of [Insert Institution's (abbreviated) name] to provide comments/observations thereon, [Insert Institution's (abbreviated) name] shall not be liable for the same in any manner whatsoever and the Concessionaire shall remain solely responsible for and shall not be relieved or absolved in any manner whatsoever of its obligations, duties and liabilities as set forth in this Agreement. The Concessionaire shall not be obliged to await the comments/observations of [Insert Institution's (abbreviated) name] on the Drawings submitted pursuant hereto beyond the period set forth hereinabove.
- (iv) If the comments/observations of [Insert Institution's (abbreviated) name] indicate that the Drawings are not in conformity with the Specifications and Standards set forth in this Agreement, such Drawings shall be revised by the Concessionaire to the extent necessary and resubmitted to [Insert Institution's (abbreviated) name] for review, observations and comments. [Insert Institution's (abbreviated) name] shall give its observations and comments, if any, within 15 (fifteen) days of the receipt of such revised Drawings provided, however, that any observations or comments of [Insert Institution's (abbreviated) name] or failure of [Insert Institution's (abbreviated) name] to give any observations or comments on such revised drawings shall not relieve or absolve the Concessionaire of its obligation to conform to such Specifications and Standards.
- (v) The Concessionaire shall be responsible for delays in Project Completion Schedule caused by reasons of any Drawings not being in conformity with the Specifications and Standards, and the Concession Period shall not be extended in any manner whatsoever on account of submission or revision of any Drawings.
- (vi) Within 90 (ninety) days of the COD, the Concessionaire shall furnish [Insert Institution's (abbreviated) name] with "as built" Drawings reflecting the Project Infrastructure as actually designed, engineered and constructed, including without limitation an "as built" survey illustrating the layout of the Project Infrastructure and setback lines, if any, of the buildings and structures forming part of Project Facilities.

8.5. The Concessionaire shall submit to [Insert Institution's (abbreviated) name] the drafts of the Project Agreements including in particular the EPC Contract, the Financing Documents and the O&M Contract for its review. [Insert Institution's (abbreviated) name] shall have the right

but not the obligation to provide its comments and observations, if any, in respect of the Project Agreements within 30 (thirty) days of the receipt thereof by [Insert Institution's (abbreviated) name] and the Concessionaire shall consider all such comments/observations. Any such comments/observations by [Insert Institution's (abbreviated) name] on any Project Agreements or the failure to provide such comments shall not relieve or absolve in any manner whatsoever the Concessionaire of its obligations, duties and liabilities under this Agreement nor shall it make [Insert Institution's (abbreviated) name] and/or Independent Consultant liable to the Concessionaire in any manner whatsoever and shall be without prejudice to the rights of [Insert Institution's (abbreviated) name] hereunder.

- 8.6. During the Construction Period, the Concessionaire shall be responsible for maintaining the Site including any existing components of the Project Infrastructure at its own cost and expense. During this period, the Concessionaire shall modify, repair or otherwise make improvements to the existing components before expiry of six months from the Appointed Date so that the existing components comply with the requirements provided in Schedule '[Insert relevant schedule]' The Concessionaire shall promptly undertake all such repairs and maintenance works as may be necessary to keep the Project Infrastructure safe during the Construction Period.
- 8.7. The Concessionaire shall, at all times, afford access to the Site to the authorised representatives of [Insert Institution's (abbreviated) name], Senior Lenders, and the Independent Consultant and to the persons duly authorised by any Governmental Agency having jurisdiction over the Project, including those concerned with safety, security, labour or environmental protection to inspect the Project Infrastructure and to investigate any matter within their authority and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions with minimum disruption to the construction, operation and maintenance of the Project Infrastructure consistent with the purpose for which such persons have gained such access to the Site.

## 9. OBLIGATIONS OF [Insert Institution's (abbreviated) name]

- 9.1. [Insert Institution's (abbreviated) name] agrees to observe, comply and perform the following :
- (i) enable access to the Site, free from Encumbrances, in accordance with this Agreement;
  - (ii) permit peaceful use of the Site by the Concessionaire as licensee under and in accordance with the provisions of this Agreement without any let or hindrance from [Insert Institution's (abbreviated) name] or persons claiming through or under it;
  - (iii) assist and provide all reasonable support to the Concessionaire in obtaining Applicable Permits;
  - (iv) upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
  - (v) procure that no barriers are erected or placed by the Government of [Insert territory name] or any Governmental Agency on the Project Infrastructure except on account of any law and order situation or upon national security considerations;
  - (vi) enter into the State Support Agreement with the Concessionaire and the Government of [Insert territory name];
  - (vii) assist the Concessionaire in obtaining Police assistance from the Government of [Insert territory name] against payment of prescribed costs and charges, if any, for patrolling and provision of security on the Project Infrastructure;
  - (viii) operate and maintain the Project Infrastructure during the Development Period, at its own cost and expense, in a manner that the level of service is at no time inferior to the level prevailing on the date when bids were received for this Concession; and
  - (ix) Observe and comply with its obligations set forth in this Agreement.

## 10. REPRESENTATIONS AND WARRANTIES

- 10.1. The Concessionaire represents and warrants to [Insert Institution's (abbreviated) name] that:
- (i) It is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;
  - (ii) It has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
  - (iii) It has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement;
  - (iv) It has the financial standing and capacity to undertake the Project;
  - (v) This Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
  - (vi) It is subject to civil and commercial laws of [Insert country's name] with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
  - (vii) All the information furnished in the Bid is, and shall be, true and correct as on the Appointed Date and COD and the Balance Sheet and Profit and Loss Account of the Concessionaire for each of its Accounting Years after the Appointed Date furnished to [Insert Institution's (abbreviated) name] shall give true and fair view of the affairs of the Concessionaire;
  - (viii) It shall furnish a copy of the audited accounts of the Company within 120 (one hundred and twenty) days of the close of its each Accounting Year after the Appointed Date and any material change subsequent to the date of such accounts shall be notified in writing to [Insert Institution's (abbreviated) name] by the Concessionaire within 30 (thirty) days of its occurrence and warrants that the accounts and the information furnished as aforesaid shall be true and correct;
  - (ix) The execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under or accelerate performance required by any of the terms of the Constitution Documents of the Concessionaire or any Member of the Consortium or any Applicable Laws or any covenant, agreement, understanding, decree or order to which, it is a Party or by which it or any of its properties or assets is bound or affected;
  - (x) There are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect on its business, properties or assets or its condition, financial or otherwise, or in any impairment of its ability to perform its obligations and duties under this Agreement;
  - (xi) It has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Governmental Agency which may result in any Material Adverse Effect or impairment of the Concessionaire's ability to perform its obligations and duties under this Agreement;
  - (xii) It has complied with all Applicable Laws and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have Material Adverse Effect on its financial condition or its ability to perform its obligations and duties under this Agreement;
  - (xiii) The aggregate equity share holding of the Consortium Members and their Associates in the issued and paid up equity share capital of the Concessionaire shall not be less than (a) 51% (fifty one percent) during the Construction Period and for 3 (three) years following COD, and (b) 26% (twenty six per cent) during the balance remaining Operations Period. For the avoidance of doubt, any such changes in equity shareholding shall require the prior written approval of [Insert Institution's (abbreviated) name];
  - (xiv) Each Consortium Member was and is duly organised and existing under the laws of the jurisdiction of its incorporation and has full power and authority to consent to and has validly consented to and requested [Insert Institution's (abbreviated) name] to enter into this Agreement with the Concessionaire pursuant to the LOA and has

agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;

- (xv) All rights and interests of the Concessionaire in and to the Project infrastructure shall pass to and vest in [Insert Institution's (abbreviated) name] on the Termination Date free and clear of all liens, claims, and Encumbrances without any further act or deed on the part of the Concessionaire or [Insert Institution's (abbreviated) name] and that none of Project Assets including materials, supplies or equipment forming part thereof shall be acquired by the Concessionaire subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person save and except as expressly provided in this Agreement;
- (xvi) No representation or warranty by the Concessionaire contained herein or in any other document furnished by it to [Insert Institution's (abbreviated) name], or to any Governmental Agency in relation to Applicable Permits contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading; and
- (xvii) It warrants that no sums, in cash or kind, have been paid or will be paid by or on behalf of the Concessionaire, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for unduly influencing or attempting to unduly influence any officer or employee of [Insert Institution's (abbreviated) name], the Government of [Insert country name] or the Government of [Insert territory name] in connection therewith.

- 10.2. [Insert Institution's (abbreviated) name] represents and warrants to the Concessionaire that:
- (i) [Insert Institution's (abbreviated) name] is duly organised and validly existing under the laws of [Insert country name];
  - (ii) [Insert Institution's (abbreviated) name] has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
  - (iii) [Insert Institution's (abbreviated) name] has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
  - (iv) This Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof; and
  - (v) [Insert Institution's (abbreviated) name] is subject to civil and commercial laws of [Insert country name] with respect to this Agreement and it hereby expressly and irrevocably waives any sovereign immunity in any jurisdiction in regard to matters set forth in this Agreement.

## 11. DISCLAIMER

- 11.1. The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has after a complete and careful examination made an independent evaluation of the Specifications and Standards, Site and all the information provided by [Insert Institution's (abbreviated) name] and has determined to the Concessionaire's satisfaction the nature and extent of such difficulties, risks and hazards as are likely to arise or may be faced by the Concessionaire in the course of performance of its obligations hereunder.
- 11.2. The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 11.1 above and hereby confirms that [Insert Institution's (abbreviated) name] shall not be liable for the same in any manner whatsoever to the Concessionaire, the Consortium Members or their Associates.



**CHAPTER IV  
PROJECT DEVELOPMENT AND OPERATIONS**

**12. USE AND DEVELOPMENT OF THE SITE**

- 12.1. [Insert Institution's (abbreviated) name] hereby grants to the Concessionaire for the Development Period access to the Site for carrying out such surveys, investigations and soil tests as the Concessionaire may deem necessary at the Concessionaire's cost, expense and risk.
- 12.2. [Insert Institution's (abbreviated) name] hereby grants to the Concessionaire for the Concession Period the right and licence to enter upon all real estate comprised in the Site as described in Schedule '[Insert relevant schedule]' and to survey design, engineer, procure, construct, operate and maintain {amend as required} the Project Infrastructure including the Project Facilities in accordance with the provisions of this Agreement. Such right and licence of the Concessionaire to the use of the Site shall be subject to:
- 12.2.1. Any existing utilities on, under or above the Site are kept in continuous satisfactory use, if necessary by the use of suitable temporary or permanent diversions with the authority of the controlling body of that utility;
- 12.2.2. A right of access by the [Insert Institution's (abbreviated) name] itself and any of its agents to perform their obligations and rights under the Concession Agreement or any other functions that they have, and to conduct any study or trial for the purpose of research;
- {Insert any other relevant provisions here}
- 12.3. The license and the right to use the Site shall be granted for the purpose of carrying out the functions placed upon the Concessionaire under the Agreement and not for any other purposes;
- 12.4. The Concessionaire shall bear all costs and charges for special and temporary rights of way required by it in connection with access to the Site. The Concessionaire shall obtain at its cost such facilities on or outside the Site as may be required by it for the purposes of the Project Infrastructure and the performance of its obligations under this Agreement.
- 12.5. The Site shall be made available to the Concessionaire pursuant hereto by [Insert Institution's (abbreviated) name] free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to [Insert Institution's (abbreviated) name] on account of any costs, expenses and charges for the use of such Site for the duration of the Concession Period save and except as otherwise expressly provided in this Agreement. [Insert Institution's (abbreviated) name] shall procure for the Concessionaire access to the Site, free of Encumbrances, not later than 150 (one hundred and fifty) days from the date of this Agreement. Provided, however, that if [Insert Institution's (abbreviated) name] does not enable such access to any part or parts of the Site for any reason other than a Force Majeure Event or breach of this Agreement by the Concessionaire, [Insert Institution's (abbreviated) name] shall pay to the Concessionaire Damages at the rate of [Insert amount] (Insert amount in words) per month per 1000 (one thousand) sq. meters or part thereof if such area is required by the Concessionaire for Construction Works. Such Damages shall be raised to [Insert amount] (Insert amount in words) per month after COD if such area is reasonably essential for the smooth and efficient operation of the Project Infrastructure. Provided further that the Completion Certificate or the Provisional Certificate, as the case may be, for the Project Infrastructure shall not be affected or delayed as a consequence of such parts of the Site remaining under construction even after the Scheduled Project Completion Date.
- 12.6. On or after the Appointed Date, the Concessionaire shall commence, with a view to undertaking and completing all Construction Works on the Project Infrastructure in accordance with this Agreement.
- 12.7. Construction of the Project Infrastructure shall be undertaken by the Concessionaire in conformity with the Project Completion Schedule '[Insert relevant schedule]' and the Project milestones set forth in Schedule 'H' for completion of the Project Infrastructure on or before

the Scheduled Project Completion Date. If the Concessionaire fails to achieve any such Project milestone other than Project Completion, within a period of 90 (ninety) days from the date set forth in Schedule "[Insert relevant schedule]" then it shall pay Damages to [Insert Institution's (abbreviated) name] at the rate of [Insert amount] (Insert amount in words) per day until such milestone is achieved. [Insert Institution's (abbreviated) name] may either recover such Damages from the Performance Security or demand payment thereof from the Concessionaire. The Concessionaire shall make such payment within 7 (seven) days of receiving such demand from [Insert Institution's (abbreviated) name] and any delay in making such payment shall attract interest at [Insert rate at which interest will accrue]. If the Concessionaire fails to achieve Project completion as per the Scheduled Project Completion Date as set forth in Schedule "[Insert relevant schedule]", then it shall pay damages to [Insert Institution's (abbreviated) name] as per Clause 14.

### 13. MONITORING AND SUPERVISION OF CONSTRUCTION

- 13.1. During the Construction Period, the Concessionaire shall furnish to [Insert Institution's (abbreviated) name] and the Independent Consultant monthly progress reports of actual progress of the Construction Works comprised in the Project Infrastructure and shall give all such other relevant information as may be required by [Insert Institution's (abbreviated) name] and/or the Independent Consultant.
- 13.2. The Independent Consultant shall inspect the Construction Works and the Project Infrastructure at least once a month during the Construction Period and make out an Inspection Report of such inspection (the "Inspection Report"). It shall send a copy of its Inspection Report to [Insert Institution's (abbreviated) name] and the Concessionaire. The Concessionaire shall take necessary action to remedy the lapses within a reasonable period in accordance with Good Industry Practice, if any, stated in the Inspection Report for ensuring compliance with the provisions of this Agreement. Such inspection or submission of Inspection Report by the Independent Consultant shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.
- 13.3. For the purposes of determining that Construction Works are being undertaken in accordance with Specifications and Standards and Good Industry Practice, the Independent Consultant shall require the Concessionaire to carry out such Tests at such time and frequency and in such manner as may be necessary in accordance with Good Industry Practice for quality assurance. The Concessionaire shall with due diligence carry out, or cause to be carried out, all such tests in accordance with the instructions of the Independent Consultant and furnish the results of such tests forthwith to the Independent Consultant. The Concessionaire shall promptly carry out such remedial measures as may be necessary to cure the defects or deficiencies, if any, indicated in such test results and furnish a report to the Independent Consultant in this behalf.
- 13.4. If the Independent Consultant or [Insert Institution's (abbreviated) name] shall reasonably determine that the rate of progress of the Construction of the Project Infrastructure is such that the Project Completion is not feasible on or before the Scheduled Project Completion Date by the Concessionaire, it shall so notify the Concessionaire about the same and the Concessionaire shall within 15 (fifteen) days thereof notify the [Insert Institution's (abbreviated) name] and the Independent Consultant in writing about the steps it proposes to take to expedite progress and the period within which it shall achieve COD.
- 13.5.
  - (a) Upon recommendation of the Independent Consultant or on its own, [Insert Institution's (abbreviated) name] may by written notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if in the reasonable opinion of the [Insert Institution's (abbreviated) name] such work is being carried on in a manner which threatens the safety of the works or of the users of the Project Infrastructure.
  - (b) The Concessionaire, shall upon instructions of the [Insert Institution's (abbreviated) name] pursuant to subclause (a) above suspend the Construction Works or any part thereof for such time and in such manner as may be specified by [Insert Institution's (abbreviated) name] and subject to sub-clause (c) below, the costs incurred during such suspension to properly protect and secure the Construction Works or such part thereof as is necessary in the opinion of the Independent Consultant ("Preservation Costs"), shall be borne by the Concessionaire.
  - (c) If the suspension pursuant to Sub-clause (a) above, is caused by:

- (i) any reason other than default or breach of this Agreement by the Concessionaire including breach of any of the obligations of the Concessionaire under this Agreement, the Preservation Costs shall be borne by [Insert Institution's (abbreviated) name];
  - (ii) reason of default or breach of this Agreement by [Insert Institution's (abbreviated) name] the Preservation Costs shall be borne by [Insert Institution's (abbreviated) name]; or
  - (iii) reason of any Force Majeure Event, the Preservation Costs shall be borne by the Concessionaire save and except to the extent otherwise expressly provided in Clause 27.
- (d) If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Consultant shall determine any extension to the Project Completion Schedule, the Scheduled Project Completion Date and the Concession Period, to which the Concessionaire is reasonably entitled and shall notify [Insert Institution's (abbreviated) name] accordingly. [Insert Institution's (abbreviated) name] shall extend the Project Completion Schedule, the Scheduled Project Completion Date and the Concession Period in accordance with the recommendations of the Independent Consultant.

#### 14. COMPLETION

- 14.1. The Project shall be deemed to be complete only when the Completion Certificate or the Provisional Certificate is issued in accordance with the provisions of Clause 15 (the "Project Completion").
- 14.2. COD of the Project shall be the date on which the Independent Consultant has issued the Completion Certificate or the Provisional Certificate, as the case may be, under this Agreement and the Concessionaire shall not levy and collect any Fee until it has received such Completion Certificate or the Provisional Certificate.
- 14.3. The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the provisions of this Agreement on a date not later than 30 (thirty) months from the Appointed Date ("Scheduled Project Completion Date").
- 14.4. If the Project Completion is not achieved by the Scheduled Project Completion Date for any reason other than conditions constituting Force Majeure or for reasons attributable to [Insert Institution's (abbreviated) name] or any Governmental Agency, the Concessionaire shall pay to [Insert Institution's (abbreviated) name] as weekly Damages for delay in the achievement of the COD, an amount calculated at the rate of [Insert rate e.g. 0.01%] (insert rate in words) of the Total Project Cost per week or part thereof.
- 14.5. If the COD does not occur within 12 (twelve) months from the Scheduled Project Completion Date, [Insert Institution's (abbreviated) name] shall be entitled to Terminate this Agreement in accordance with the provisions of Clause 30.2.

#### 15. TESTS

- 15.1. All Tests shall be conducted in accordance with Schedule '[Insert relevant schedule]' and the Applicable Laws and Applicable Permits. [Insert Institution's (abbreviated) name] shall designate a [Insert Institution's (abbreviated) name] Representative to witness and observe the Tests. All Tests shall be held in accordance with the schedule notified by the Concessionaire to the Independent Consultant and the [Insert Institution's (abbreviated) name] Representative who may either witness the Tests themselves or designate their representatives for this purpose, if they choose.
- 15.2. The Independent Consultant shall monitor the results of the Tests to determine the compliance of the Project Infrastructure with the Specifications and Standards. The Concessionaire shall provide to the Independent Consultant and the [Insert Institution's (abbreviated) name] with copies of all Test data including detailed Test results.
- 15.3. At least 30 (thirty) days prior to the likely completion of the Project Infrastructure, the Concessionaire shall notify the Independent Consultant and [Insert Institution's (abbreviated) name] of the same and shall give notice of its intent to conduct any final Tests. The Concessionaire shall give to [Insert Institution's (abbreviated) name] and the Independent Consultant at least 10 (ten) days' prior notice of the actual date on which it intends to commence the Tests and at least 7 (seven) days' prior notice of the commencement date of any subsequent Tests. The Independent Consultant shall have the right to suspend or delay

any Test if it is reasonably anticipated or determined during the course of the Test that the performance of the Project Infrastructure or any part thereof does not meet the Specifications and Standards.

- 15.4. Upon the Independent Consultant determining the Tests to be successful and all parts of the Project Infrastructure to have been completed and the Project Infrastructure can be legally, safely and reliably placed in commercial operations, the Independent Consultant shall forthwith issue to the Concessionaire and [Insert Institution's (abbreviated) name] a Certificate substantially in the form set forth in Schedule [Insert relevant schedule] (the "Completion Certificate").
- 15.5. The Independent Consultant may at the request of the Concessionaire issue a provisional certificate of completion ("Provisional Certificate") if the Tests are successful and all parts of Project Infrastructure can be legally, safely and reliably placed in commercial operation though certain works or things forming part thereof are not yet complete. In such an event such Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Consultant and the Concessionaire ("Punch List"). All Punch List items shall be completed by the Concessionaire within 120 (one hundred twenty) days of the date of issue of such Provisional Certificate. Subject to payment of Damages equal to [Insert amount] (insert amount in words) per week or part thereof on account of any delay beyond the aforesaid period of 120 (one hundred twenty) days, the Concessionaire shall be entitled to a further period of up to 180 (one hundred eighty) days for completion of Punch List items. Upon completion of all Punch List items to the satisfaction of the Independent Consultant, the Independent Consultant shall issue the Completion Certificate to the Concessionaire. Failure to complete the Punch List items in the manner set forth in this Clause 15.5 shall entitle [Insert Institution's (abbreviated) name] to Terminate this Agreement in accordance with the provisions of Clause 30.2.
- 15.6. If the Independent Consultant certifies to [Insert Institution's (abbreviated) name] and the Concessionaire that it is unable to issue the Completion Certificate or Provisional Certificate because of events or circumstances which excuse the performance of the Concessionaire's obligations in accordance with this Agreement and as a consequence thereof the Tests could not be held or had to be suspended, the Concessionaire shall reschedule the Tests and hold the same as soon as reasonably practicable.
- 15.7. Upon receipt of a report from the Independent Consultant or after conducting its own review or inspection, if [Insert Institution's (abbreviated) name] is not satisfied with the results of any Tests, it shall within 7 (seven) days thereof notify the Concessionaire of its reasons to conclude that the Completion Certificate should not be issued, in which case the Concessionaire shall promptly take such action as will achieve such satisfaction. Without prejudice to the right of the [Insert Institution's (abbreviated) name] to Terminate this Agreement in accordance with the provisions of Clause 30.2, such procedure shall be repeated as necessary after rectification and remedy of reasons/causes by the Concessionaire on account of which the Tests were unsuccessful, until the Completion Certificate or Provisional Certificate has been issued in accordance with this Agreement by the Independent Consultant.
- 15.8. The Concessionaire shall bear all the expenses relating to Tests under this Agreement. Provided, however, that if the [Insert Institution's (abbreviated) name] Representative requires any Test to be conducted which is not specified in this Agreement and such Test is not necessary in the opinion of the Independent Consultant, then the expenses on such Test shall be reimbursed by [Insert Institution's (abbreviated) name] to the Concessionaire.

## 16. CHANGE OF SCOPE

- 16.1. [Insert Institution's (abbreviated) name] may, notwithstanding anything to the contrary contained in this Agreement, require provision of such additional works and services on or about the Project infrastructure which are beyond the scope of the Project as contemplated by this Agreement ("Change of Scope"), provided such changes do not require expenditure exceeding 5% (five per cent) of the Total Project Cost and do not adversely affect the COD. All such changes shall be made by [Insert Institution's (abbreviated) name] by an order (the "Change of Scope Order") issued in accordance with the procedure set forth in this Clause 16.
- 16.2. Procedure for Change of Scope

- (a) [Insert Institution's (abbreviated) name] shall whenever it desires provision of additional works and services referred to in Clause 16.1, issue to the Concessionaire a notice of change of scope (the "Change of Scope Notice").
  - (b) Upon receipt of such Change of Scope Notice, the Concessionaire shall provide to [Insert Institution's (abbreviated) name] and the Independent Consultant such information as is necessary and reasonable together with preliminary documentation in support of the following:
    - (i) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the work is required to be carried out before COD, and
    - (ii) the cost to the Concessionaire of complying with such Change of Scope Notice (including, without limitation, material and labour cost information furnished in accordance with the current schedule of rates applicable to the works assigned by [Insert Institution's (abbreviated) name] to its contractors, including the premium on such rates).
    - (iii) the options suggested for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time for the implementation thereof including a detailed breakdown by work classifications. Provided, however, that the costs of providing such information shall be reimbursed to the Concessionaire by [Insert Institution's (abbreviated) name] to the extent such costs are certified to be reasonable by the Independent Consultant.
  - (c) If [Insert Institution's (abbreviated) name] desires, after receipt of information set forth in sub-clause (b) to proceed with the Change of Scope, it shall convey the desired option to the Concessionaire by issuing a Change of Scope Order and thereupon the Parties shall make good faith efforts to mutually agree upon the costs and time for implementing of the same. Upon reaching an agreement relating to such costs and time, [Insert Institution's (abbreviated) name] shall issue a written confirmation of the Change of Scope Order and thereupon the Concessionaire shall proceed with performance of such order. In the event, the Parties are unable to agree, [Insert Institution's (abbreviated) name] may, by issuing a confirmation in writing of such Change of Scope Order, require the Concessionaire to proceed with the performance of the Change in Scope Order pending resolution of such dispute.
- 16.3. A change of Scope Order will be effective and binding upon issuance of a confirmation of such Change of Scope Order by [Insert Institution's (abbreviated) name]. Notwithstanding a dispute regarding cost and time for implementation of such Change of Scope Order, the Concessionaire shall proceed with the performance of such Change of Scope Order promptly following [Insert Institution's (abbreviated) name]'s confirmation pursuant to Clause 16.2(c). Pending resolution of such dispute, [Insert Institution's (abbreviated) name] shall pay to the Concessionaire an amount equal to the costs that are certified by the Independent Consultant to be reasonable plus half the difference between the amount certified by the Independent Consultant and the amount claimed by the Concessionaire with final adjustments to be made in accordance with the resolution of dispute under the Dispute Resolution Procedure.
- 16.4. All claims by the Concessionaire pursuant to this Clause 16 shall be supported by such documentation as is reasonably sufficient for [Insert Institution's (abbreviated) name] to determine the accuracy thereof, including invoices from Contractors and subcontractors and certification of such claims by the Auditors.

## 17. OPERATION AND MAINTENANCE

- 17.1. The Concessionaire shall operate and maintain the Project Infrastructure itself, or through O&M Contractors and if required, modify, repair or otherwise make improvements to the Project Infrastructure to comply with Specifications and Standards, and other requirements set forth in this Agreement, Good Industry Practice, Applicable laws and Applicable Permits and manufacturer's guidelines and instructions with respect to the Project Infrastructure, and more specifically:
- (i) {insert list of concerns specific to the type of infrastructure required in terms of the Project e.g. charging, collecting and retaining the Fees in accordance with this Agreement; undertaking routine maintenance; undertaking major maintenance; carrying out periodic preventive maintenance to Project Infrastructure; maintaining a public relations unit to interface with and attend to suggestions from users of the

Project Infrastructure, the media, Government Agencies, and other external agencies; adherence to the safety standards set out in Schedule '[Insert relevant schedule]' etc.)

- (ii) ....
  - (iii) ....
- 17.2. The Concessionaire shall in consultation with the Independent Consultant prepare not later than 180 (one hundred and eighty) days before the Scheduled Project Completion Date, the repair and maintenance manual (the "Maintenance Manual") for the regular and periodic maintenance, and shall ensure and procure that at all times during the Operations Period, the Project Infrastructure is maintained in a manner that it complies with the Specifications and Standards and the minimum maintenance requirements set forth in Schedule '[Insert relevant schedule]'. The Concessionaire shall supply, at least two months before the COD, 10 (ten) copies of the Maintenance Manual to [Insert Institution's (abbreviated) name] and 3 (three) copies each to the Government of [Insert country name], the Government of [Insert territory name] and Independent Consultant. Copies of the Maintenance Manual shall also be made available by the Concessionaire for public inspection during office hours at the head office of the Concessionaire.
- 17.3. Not later than forty five (45) days before the beginning of each Accounting Year, the Concessionaire, shall in consultation with the Independent Consultant prepare and provide to [Insert Institution's (abbreviated) name], its proposed programme of preventive and other scheduled maintenance of the Project Infrastructure subject to the minimum maintenance requirements set forth in Maintenance Manual and in Schedule [Insert relevant schedule] necessary to maintain the Project Infrastructure at all times in conformity with the Specifications and Standards (the "Maintenance Programme"). Such Maintenance Programme shall include but not be limited to the following:
- (i) intervals and procedures for the carrying out of inspection of all elements of the Project Infrastructure;
  - (ii) criteria to be adopted for deciding maintenance needs;
  - (iii) preventive maintenance schedule;
  - (iv) intervals at which the Concessionaire shall carry out periodic maintenance; and
  - (v) intervals for major maintenance and the scope thereof.
- 17.4. Maintenance shall include replacement of equipment/consumables, horticultural maintenance and upkeep of all Project Assets in good order and working condition. Maintenance shall not include the extension of any existing infrastructure or civil works unless part of the Project.
- 17.5. The Concessionaire shall keep the Project Facilities in a clean, tidy and orderly condition free of litter and debris.
- 17.6. During the Operations Period, the Concessionaire shall not carry out any material modifications to the Project Infrastructure save and except where such (i) modification is required by Good Industry Practice; or (ii) modification is necessary for the Project Infrastructure to operate in conformity with the Specifications and Standards prescribed under this Agreement. Provided that the Concessionaire shall notify [Insert Institution's (abbreviated) name] of the proposed modifications along with details thereof at least 15 (fifteen) days before commencing work on such modifications and shall reasonably consider such suggestions as [Insert Institution's (abbreviated) name] may make within 15 (fifteen) days of receipt of such details by [Insert Institution's (abbreviated) name].
- 17.7. Save and except as otherwise be expressly provided in this Agreement, if the Project Infrastructure including Construction Works or any part thereof shall suffer any loss or damage during the Concession Period, from any cause whatsoever, the Concessionaire shall, at its cost and expense rectify and remedy such loss or damage forthwith in a manner so as to make the Project Infrastructure conform in every respect to the Specifications and Standards, quality and performance as prescribed by this Agreement.
- 17.8. In the event the Concessionaire does not maintain and/or repair the Project infrastructure or a part thereof up to and in accordance with the Specifications and Standards and/or in accordance with the Maintenance Programme or the Maintenance Manual, and shall have failed to commence remedial works within 30 (thirty) days of receipt of notice in this behalf from [Insert Institution's (abbreviated) name] or the Independent Consultant, or the O&M Inspection Report, as the case may be, [Insert Institution's (abbreviated) name] shall, without prejudice to its rights under this Agreement, including Termination thereof, be entitled to undertake the repair and maintenance of the Project infrastructure at the risk and cost of the Concessionaire and to recover the same from the Concessionaire. In addition to recovery of

the aforesaid cost of repair and maintenance by [Insert Institution's (abbreviated) name], a sum equal to 25% (twenty five per cent) of such cost shall also be recovered by [Insert Institution's (abbreviated) name] from the Concessionaire as Damages. [Insert Institution's (abbreviated) name] shall have the right and the Concessionaire hereby expressly grants to [Insert Institution's (abbreviated) name] the right to recover the same directly from the Escrow Account and for that purpose the Concessionaire hereby expressly authorises [Insert Institution's (abbreviated) name] and hereby gives irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of [Insert Institution's (abbreviated) name] under this Clause.

- 17.9. In the event [Insert Institution's (abbreviated) name] does not exercise its option to undertake the required repair and maintenance after expiry of the 30 (thirty) days period stipulated in Clause 17.8 it shall recover Damages from the Concessionaire for default in operating and maintaining the Project Infrastructure in conformity with this Agreement. Such Damages shall be payable after the aforesaid period of 30 (thirty) days and until the default is cured. The amount of Damages shall be calculated for each day of default at the higher of the following, namely (a) [Insert amount] (Insert amount in words) and (b) [Insert rate e.g. 0.01%] (Insert rate in words) of the cost of such repair as estimated by the Independent Consultant. Recovery of such Damages shall be without prejudice to the rights of [Insert Institution's (abbreviated) name] under this Agreement, including Termination thereof.
- 17.10. If the Concessionaire commences any works for curing any defects or deficiencies in the Project Infrastructure, it shall complete such works expeditiously in accordance with Good Industry Practice. If such works are carried out in a manner that results in a delay of more than 30 (thirty) days as compared to the time required in accordance with Good Industry Practice, [Insert Institution's (abbreviated) name] shall recover Damages from the Concessionaire as if a default had occurred under Clause 17.10.
- 17.11. The Concessionaire shall not be considered in breach of its obligations under this Agreement if any part of the Project Infrastructure is not available after the COD on account of any of the following for the duration thereof:
- (i) an event of Force Majeure;
  - (ii) measures taken to ensure the safe use of the Project Infrastructure except when unsafe conditions occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
  - (iii) compliance with a request from [Insert Institution's (abbreviated) name] or the directions of any Governmental Agency the effect of which is to close all or any part of the Project Infrastructure.

Notwithstanding the above, the Concessionaire shall keep all unaffected parts of the Project Infrastructure open to use provided they can be safely operated.

## 18. MONITORING AND SUPERVISION DURING OPERATION

- 18.1. The Concessionaire shall undertake periodic (at least once every calendar month) inspection of the Project Infrastructure to determine the condition of the Project Infrastructure including its compliance or otherwise with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and the maintenance required and shall submit reports of such inspection ("Maintenance Reports") to [Insert Institution's (abbreviated) name] and the Independent Consultant.
- 18.2. The Independent Consultant shall review the Maintenance Reports and inspect the Project Infrastructure at least once a month during the Operations Period and make out an Inspection Report of such inspection (the "O&M Inspection Report"). The Independent Consultant shall send a copy of its O&M Inspection Report to [Insert Institution's (abbreviated) name] and the Concessionaire. The Concessionaire shall within 30 (thirty) days of the receipt of the O&M Inspection Report remedy the defects and deficiencies, if any, set forth in such O&M Inspection Report and submit its report in respect thereof to the Independent Consultant and [Insert Institution's (abbreviated) name] within the said 30 (thirty) days period. Where the remedying of such defects or deficiencies is likely to take more than 30 (thirty) days in accordance with Good Industry Practice, the [Insert Institution's (abbreviated) name] in consultation with the Independent Consultant shall impose a rectification period in line with Good Industry Practice and the Concessionaire shall undertake the works in accordance with such rectification period and Good Industry Practice and submit progress reports of such

works every fortnight. The O&M Inspection Report may also require the Concessionaire to undertake such tests as may be specified by the Independent Consultant for the purpose of determining that the Project Infrastructure is at all times in conformity with the Specifications and Standards. The Concessionaire shall undertake such Tests without any delay and furnish a copy of the results thereof to the Independent Consultant and [Insert Institution's (abbreviated) name] along with a written statement specifying in reasonable detail the measures, if any, that it proposes to undertake for curing the defaults or deficiencies indicated in such results. Such inspection or submission of O&M Inspection Report by the Independent Consultant or submission of O&M Inspection Compliance Report by the Concessionaire shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.

- 18.3. [Insert Institution's (abbreviated) name] may inspect the Project Infrastructure at any time for a review of the compliance by the Concessionaire with its maintenance obligations under this Agreement.
- 18.4. The Concessionaire shall furnish to [Insert Institution's (abbreviated) name] within 7 (seven) days of completion of each calendar month during the Operations Period, a statement of Fees in the form set forth in Schedule [insert relevant schedule] (the "Monthly Fee Statement").

## 19. INDEPENDENT CONSULTANT

- 19.1. [Insert Institution's (abbreviated) name] shall appoint a consulting engineering firm or body corporate out of the 3 (three) names proposed by the Concessionaire from the panel of 5 (five) consultants selected by [Insert Institution's (abbreviated) name] in accordance with the selection process set forth in Schedule [insert relevant schedule] to be the Independent Consultant to undertake and perform the duties, work, services and activities set forth in Schedule [insert relevant schedule].
- 19.2. The appointment of the Independent Consultant pursuant to Clause 19.1 shall initially be for a period of four years from the date of its appointment. The date of such appointment shall be no later than 120 (one hundred twenty) days from the date of this Agreement. After the expiry of the aforesaid appointment, [Insert Institution's (abbreviated) name] shall appoint for a term of 3 (three) years as Independent Consultant such person as it may deem appropriate from the list drawn in accordance with Schedule [insert relevant schedule] as amended from time to time by mutual consent of [Insert Institution's (abbreviated) name] and the Concessionaire and who may or may not be the same person, who was Independent Consultant during the initial term. [Insert Institution's (abbreviated) name] may in its discretion thereafter renew such appointment or appoint another person out of the list determined pursuant to Schedule [insert relevant schedule], as [Insert Institution's (abbreviated) name] may deem appropriate to be the Independent Consultant for a term of three years at a time.
- 19.3. The Independent Consultant shall report to [Insert Institution's (abbreviated) name] about their work, services, and activities pursuant hereto through regular periodic reports (at least once every month) as the situation may warrant. Such report of Independent Consultant shall include but not be limited to the matters and things set forth in said Schedule 'O'.
- 19.4. The remuneration, cost and expenses of the Independent Consultant shall be paid by [Insert Institution's (abbreviated) name]. Half of such remuneration, cost and expenses shall be reimbursed by the Concessionaire to [Insert Institution's (abbreviated) name] within 15 (fifteen) days of receiving a statement of expenditure from [Insert Institution's (abbreviated) name].
- 19.5. [Insert Institution's (abbreviated) name] may terminate the appointment of the Independent Consultant at any time subject to appointment of their replacement by another Independent Consultant in accordance with this Clause 19.
- 19.6. If the Concessionaire has reason to believe that the Independent Consultant is not discharging its duties in a fair, efficient and diligent manner, it may make a written representation to [Insert Institution's (abbreviated) name], stating its reasons in detail, seeking termination of the appointment of the Independent Consultant. Upon receipt of such representation, [Insert Institution's (abbreviated) name] shall hold a tripartite meeting with the Concessionaire and Independent Consultant for amicable resolution of the dispute. If the dispute remains unresolved, it shall be resolved in accordance with the Dispute Resolution Procedure. In case the appointment of Independent Consultant is terminated under this Clause, it shall be replaced by another Independent Consultant in accordance with this Clause 19.



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

## **CHAPTER V FINANCING ARRANGEMENTS**

### **20. FINANCIAL CLOSE**

- 20.1. The Concessionaire shall provide to [Insert Institution's (abbreviated) name] for information purposes only, a copy of the Financing Package furnished by it to the prospective Senior Lenders. As and when such Financing Package is approved by the Senior Lenders, with or without modifications, a copy of the same shall be furnished by the Concessionaire to [Insert Institution's (abbreviated) name] forthwith.
- 20.2. Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire covenants with [Insert Institution's (abbreviated) name] that it shall achieve Financial Close within 180 (one hundred and eighty) days from the date of this Agreement. If the Concessionaire shall fail to achieve Financial Close within the said 180 (one hundred and eighty) days period, the Concessionaire shall be entitled to a further period of 90 (ninety) days subject to an advance weekly payment by the Concessionaire to [Insert Institution's (abbreviated) name] of a sum of [insert amount and currency in figures] (insert amount and currency in words) per week or part thereof for any delay beyond the said 180 (one hundred and eighty) day period, as Damages on account of such delay in achieving Financial Close within the said 180 (one hundred eighty) day period by the Concessionaire.
- 20.3. Notwithstanding anything to the contrary contained in this Agreement, [Insert Institution's (abbreviated) name] shall be entitled to terminate this Agreement forthwith, without being liable in any manner whatsoever to the Concessionaire, by a communication in writing to the Concessionaire pursuant to Clause 30.2 if the Concessionaire shall have failed to pay in advance the Damages to [Insert Institution's (abbreviated) name] under and in accordance with Clause 20.2 above.
- 20.4. Notwithstanding anything to the contrary contained in this Agreement, if the Financial Close shall not occur within 270 (two hundred seventy) days as set forth in Clause 20.2 above, all rights, privileges, claims and entitlements, if any, of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties.
- 20.5. Upon Termination of this Agreement under Clauses 20.2 and 20.3, [Insert Institution's (abbreviated) name] shall be entitled to encash the Bid Security or the Performance Security, as the case may be, and appropriate the proceeds thereof as Damages but only to the extent of Damages actually suffered and incurred therein.

### **21. NEGATIVE GRANT/GRANTS**

- 21.1. The Concessionaire agrees to provide to [Insert Institution's (abbreviated) name] cash payment (the "Negative Grant") or [Insert Institution's (abbreviated) name] agrees to provide to the Concessionaire cash support by way of an outright Grant (the "Grant") equal to the sum, if any, set forth in the Bid of the Bidder and accepted by [Insert Institution's (abbreviated) name] namely, [enter amount and currency in numerals] (enter amount and currency in words) in accordance with the provisions of this Clause 21.
- 21.2. The Concessionaire shall pay to [Insert Institution's (abbreviated) name] the Negative Grant proposed in its Bid as set out below:  
{Insert details here}  
Negative Grant shall be paid in advance within 90 (ninety) days of the commencement of the year for which it is due and payable.
- 21.3. Subject to provisions of the Clause 21.4, the Grant shall be applied by the Concessionaire for meeting the capital cost of the Project and shall be treated as part of the shareholders' funds (the "Equity Support").
- 21.4. The Equity Support shall:  
(a) not exceed 25% of the Total Project Cost; and

- (b) in no case be greater than total equity capital actually subscribed and paid in cash by the shareholders for meeting the Total Project Cost as set forth in the Financing Package.
- 21.5. The balance of the Grant (if any) available after deducting therefrom the amount of Equity Support shall be provided to the Concessionaire in accordance with this Clause 21 for meeting O&M Expenses of the Project (the "O&M Support").
- 21.6. The whole or any part of the Grant shall be disbursed by [Insert Institution's (abbreviated) name] to the Concessionaire if and only if
- 21.6.1. the Concessionaire is not in Material Breach of this Agreement at the time of such disbursement; and
- 21.6.2. the Concessionaire has contributed and spent on the Project at least 80% (eighty percent) of the total Equity (excluding Equity Support) required to be provided as part of the Total Project Cost.
- 21.7. The disbursement of the Equity Support pursuant to this Clause 21 shall be made by [Insert Institution's (abbreviated) name] to the Concessionaire proportionately along with the balance loan funds to be disbursed by the Senior Lenders under the Financing Documents for meeting the Total Project Cost. [Insert Institution's (abbreviated) name] shall disburse each tranche of the Equity Support as aforesaid by credit to the Escrow Account within 15 (fifteen) days of the release of each loan instalment by the Senior Lenders to the Concessionaire provided the Concessionaire has submitted to [Insert Institution's (abbreviated) name] along with each disbursement request a certificate from its Auditors certifying the above particulars and has given at least 7 (seven) days to [Insert Institution's (abbreviated) name] for processing such request.
- 21.8. The O&M Support shall be disbursed by [Insert Institution's (abbreviated) name] to the Concessionaire by credit to the Escrow Account in quarterly instalments and the first such instalment shall be released within 30 (thirty) days of the COD. Each such instalment shall be a sum equal to 1 (one) per cent of the Total Project Cost and such instalments shall be paid by [Insert Institution's (abbreviated) name] until the Grant is fully disbursed to the Concessionaire.
- 21.9. If [Insert Institution's (abbreviated) name] shall fail to disburse any tranche of the Equity Support or the O&M Support within the periods set forth for the payment thereof to the Concessionaire, [Insert Institution's (abbreviated) name] shall pay interest on such delayed tranche @ SBI PLR plus two per cent.

## 22. REVENUE SHORTFALL LOAN

- 22.1. If the Realisable Fees in any Accounting Year during the Concession Period shall fall below the Subsistence Revenue Level as a result of an Indirect Political Event, or a Political Event as set forth in Clause 27, [Insert Institution's (abbreviated) name] agrees to provide to the Concessionaire such shortfall support, by way of a loan ("Revenue Shortfall Loan") with interest thereon @ SBI PLR per annum. Provided, however, that any reserves of the Concessionaire and any sums received or likely to be received by the Concessionaire through insurance claims (except insurance payments for physical loss used to carry out requisite repairs) or payments by [Insert Institution's (abbreviated) name] under Clause 27 shall first be deducted and only the balance remaining shall be disbursed as the Revenue Shortfall Loan.
- 22.2. For the purposes of claiming disbursements on account of Revenue Shortfall loan pursuant to Clause 22.1 above in any Accounting Year, the Concessionaire shall:
- (a) Submit a detailed account of the Indirect Political Event or the Political Event, as the case may be, and its impact on total revenues of the Concessionaire as soon as feasible and submit weekly reports thereafter;
  - (b) Provide to [Insert Institution's (abbreviated) name], the Schedule of Debt Service Payments under the Financing Documents for the Accounting year for which Revenue Shortfall Loan are claimed;
  - (c) Provide to [Insert Institution's (abbreviated) name] the details of O&M Expense budget for such Accounting Year and the expenditure incurred in that year out of such budget;
  - (d) Within 15 (fifteen) days of the close of each Accounting Year in which the shortfall in the referred to in Clause 22.1 shall occur, provide a certificate from the Auditors of the Concessionaire certifying the Subsistence Revenue Level, the Realisable Fees and the Revenue Shortfall Loan requirement after deducting reserves of the Concessionaire, if any; and

- (e) Submit a written request to [Insert Institution's (abbreviated) name] under the hands of a Director of the Concessionaire requesting for disbursement of the Revenue Shortfall Loan to the Concessionaire by payment thereof into the Escrow Account.
- 22.3. Upon the receipt of the request and documents as set forth in Clause 22.2 above and provided the same is not found by [Insert Institution's (abbreviated) name] to be wrong or incorrect, [Insert Institution's (abbreviated) name] shall disburse the Revenue Shortfall Loan within 30 days (thirty) thereof.
- 22.4. In the event Realisable Fees during the first six months of an Accounting Year shall fall as a result of an Indirect Political Event or a Political Event and the amount of such Realisable Fees is less than the Debt Service Payments due for the first six months of such Accounting Year, [Insert Institution's (abbreviated) name] shall upon request provide an advance to the Concessionaire for meeting the shortfall in such Debt Service Payments. For claiming such advance, the Concessionaire shall make a demand to [Insert Institution's (abbreviated) name] accompanied by a certificate from the Auditors setting forth the Realisable Fees during the first six months of the Accounting Year, the reserves of the Concessionaire and the outstanding amount on account of Debt Service Payments due in the first six months of such year. The Auditors shall also certify the amount of advance required by the Concessionaire from [Insert Institution's (abbreviated) name] for meeting such Debt Service Payments after deducting such Realisable Fees and the reserves of the Concessionaire. Within 15 (fifteen) days of receiving such demand, [Insert Institution's (abbreviated) name] shall disburse the advance due to the Concessionaire at an interest rate equal to SBI PLR. Not later than 15 (fifteen) days after completion of such Accounting Year, the Concessionaire shall either refund such advance with interest to [Insert Institution's (abbreviated) name] or adjust it against such Revenue Shortfall Loan as may be due to the Concessionaire under this Article.
- 22.5. The Revenue Shortfall Loan disbursed by [Insert Institution's (abbreviated) name] pursuant hereto and the interest thereon shall be repaid by the Concessionaire in a sum equal to 50% (fifty per cent) of the Net Cash flow of the Concessionaire as and when made and such repayments shall be made in one or more years as necessary.
- 22.6. Notwithstanding anything to the contrary contained in Clause 22.5, the Concessionaire shall repay the entire Revenue Shortfall Loan and interest thereon at least two years before the expiry of the Concession Period. If any sum remains due or outstanding from the Concessionaire under this Clause 22 at any time during a period of two years preceding the Termination Date, it shall constitute a Concessionaire Event of Default under Clause 30 and [Insert Institution's (abbreviated) name] shall be entitled to Terminate this Agreement under Clause 30.2.

### 23. ESCROW ACCOUNT

- 23.1. The Concessionaire shall within 60 days from the date of this Agreement open and establish the Escrow Account with a Bank (the "Escrow Bank") and all funds constituting the Financing Package for meeting the Total Project Cost shall be credited to such Escrow Account. During Operations Period all Fees collected by the Concessionaire from the users of the Project Infrastructure shall be exclusively deposited therein. In addition, all Fees collected by [Insert Institution's (abbreviated) name] in exercise of its rights under this Agreement during the Concession Period and all disbursements or payments by [Insert Institution's (abbreviated) name] pursuant hereto shall also, subject to the rights of deductions and appropriations therefrom of [Insert Institution's (abbreviated) name] under this Agreement, be deposited by [Insert Institution's (abbreviated) name] in the Escrow Account.
- 23.2. Disbursements from Escrow Account
- 23.2.1. The Concessionaire shall give, at the time of the opening of the Escrow Account, irrevocable instructions by way of an Escrow Agreement substantially in form set forth in Schedule [insert relevant schedule] (the "Escrow Agreement") to the Escrow Bank instructing, inter alia, that the deposits into the Escrow Account shall subject to Clause 23.2.3, be appropriated in the following order every month and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due unless otherwise expressly provided in the instruction letter:
- (i) All taxes due and payable by the Concessionaire;
  - (ii) All expenses in connection with and relevant to the Construction of Project Infrastructure by way of payment to the EPC Contractor and such other persons as may be specified in the Financing Documents;

- (iii) O&M Expenses including Fees collection expenses incurred by the Concessionaire directly or through O&M Contractor and/or Tolling Contractor, if any, subject to the items and ceiling in respect thereof as set out in the Financing Documents but not exceeding 1/12 (one twelfth) of the annual liability on this account;
  - (iv) The whole or part of the expense on repair work or O&M Expense including Fees collection expenses incurred by [Insert Institution's (abbreviated) name] on account of exercise of any of its rights under this Agreement provided [Insert Institution's (abbreviated) name] certifies to the Escrow Bank that [Insert Institution's (abbreviated) name] had incurred such expenses in accordance with the provisions of this Agreement;
  - (v) All Concession Fees and any Negative Grant due to [Insert Institution's (abbreviated) name] from the Concessionaire under this Agreement;
  - (vi) Monthly proportionate provision of Debt Service Payments due in an Accounting Year and payment of Debt Service Payments in the month when due;
  - (vii) Any payments and Damages due and payable by the Concessionaire to [Insert Institution's (abbreviated) name] pursuant to this Agreement, including repayment of Revenue Shortfall Loans; and
  - (viii) Balance in accordance with the instructions of the Concessionaire.
- 23.2.2. The Concessionaire shall not in any manner modify the order of payment specified in this clause 23.2 except with the prior written approval of [Insert Institution's (abbreviated) name].
- 23.2.3. In the event the Grant, if any, to the Concessionaire shall exceed 10% of the Total Project Cost, all disbursements on account of Total Project Cost other than those to the EPC Contractor in accordance with the EPC Agreement, shall be made in accordance with the express provisions contained in that behalf in the Financing Documents. Provided, however, that if the total of such disbursements exceed 10% of the Total Project Cost, prior written consent of [Insert Institution's (abbreviated) name] shall be required in respect of the disbursement arrangements for such excess amounts, and such consent shall not be unreasonably withheld by [Insert Institution's (abbreviated) name].
- 23.3. Notwithstanding anything to the contrary contained in the Escrow Agreement and subject to the provisions contained in Clauses 31.5 and Clause 32, upon Termination of this Agreement, all amounts standing to the credit of the Project Escrow Account shall be appropriated and dealt with in the following order:
- (i) all Taxes due and payable by the Concessionaire;
  - (ii) all Concession Fees (including Negative Grant) due and payable to [Insert Institution's (abbreviated) name] under this Agreement;
  - (iii) all accrued Debt Service Payment;
  - (iv) any payments and Damages due and payable by the Concessionaire to [Insert Institution's (abbreviated) name] pursuant to this Agreement, including Termination claims and repayment of Revenue Shortfall Loans;
  - (v) all accrued O&M Expenses;
  - (vi) any other payments required to be made under this Agreement; and
  - (vii) balance, if any, on the instructions of the Concessionaire.
- 23.4. The instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 23.3 have been discharged.

## 24. STATE SUPPORT AGREEMENT

- 24.1. The Concessionaire acknowledges that for the performance of its obligations under this Agreement, it requires support and certain services from the Government of [enter country name]. The nature and scope of such support and services required by the Concessionaire from the Government of [enter country name] are fully described in the draft State Support Agreement set forth at Schedule [insert relevant schedule].
- 24.2. The Concessionaire acknowledges its obligation to enter into the State Support Agreement and accordingly the Concessionaire agrees and undertakes to enter into at its cost and expense the State Support Agreement with [Insert Institution's (abbreviated) name] and Government of [enter country name] substantially in form and content as set forth in Schedule [insert relevant schedule].

## 25. INSURANCE

- 25.1. Insurance during the Construction Period: The Concessionaire shall effect and maintain, or cause to be effected and maintained, at no cost to [Insert Institution's (abbreviated) name] during the Construction Period such insurances up to such maximum sums as may be required under and in accordance with the Financing Documents, Applicable Laws and such insurance as the Concessionaire may reasonably consider necessary or desirable in accordance with Good Industry Practice. The Concessionaire shall also effect and maintain such insurance as may be necessary for mitigating the risks that may devolve on [Insert Institution's (abbreviated) name] as a consequence of any act of omission by the Concessionaire during the Construction Period.
- 25.2. Insurance during the Operations Period: Not later than 4 months prior to the anticipated Completion of the Project Infrastructure, the Concessionaire shall obtain and maintain at no cost to [Insert Institution's (abbreviated) name] during the Operations Period in respect of the Project Infrastructure and its operations such insurance as may be required under any of the Financing Documents, Applicable Laws and such insurance as the Concessionaire may reasonably consider necessary or desirable in accordance with Good Industry Practice. Provided, however, the level of insurance to be maintained after satisfaction of Senior Lenders' dues in full, shall be determined on the same principles as applicable for determining the level of Insurance prior to such date. This level shall be agreed with [Insert Institution's (abbreviated) name] within 120 days of date of this Agreement. For the sake of brevity, the aggregate of the maximum sums insured under the insurance taken out by the Concessionaire pursuant to this Clause 25 are herein referred to as the "Insurance Cover".
- 25.3. Evidence of Insurance Cover: All insurance obtained by the Concessionaire in accordance with this Clause 25 shall be maintained with insurer or reinsurers, and on terms consistent with Good Industry Practice. Within thirty days of obtaining any insurance cover, the Concessionaire shall furnish to [Insert Institution's (abbreviated) name], copies of certificates of insurance, copies of the insurance policies signed by an authorised representative of the insurer and copies of all premia payment receipts in respect of such insurance received from each insurance carrier, and such insurance will not be cancelled, changed or not renewed until the expiration of at least 45 (forty five) days after written notice of such cancellation, change of non-renewal has been received by [Insert Institution's (abbreviated) name].
- 25.4. Remedy on Failure to Insure: If the Concessionaire shall fail to effect and keep in force the insurance for which it is responsible pursuant hereto, [Insert Institution's (abbreviated) name] shall have the option to keep in force any such insurance, and pay such premia and recover the costs thereof from the Concessionaire, or for the purposes of computation of payments to the Concessionaire pursuant to Clause 27 treat the insurance cover i.e. the maximum sums which such insurance was providing for had it been in force and effect as being deemed to have been received by the Concessionaire.
- 25.5. Waiver of Subrogation: All insurance policies supplied by the Concessionaire shall include a waiver of any right of subrogation of the insurers thereunder against, inter alia, [Insert Institution's (abbreviated) name], and its assigns, subsidiaries, affiliates, employees, insurers and underwriters and of any right of the insurers of any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy.
- 25.6. Concessionaire Waiver: The Concessionaire hereby further releases, assigns and waives any and all rights of recovery against, inter alia, the [Insert Institution's (abbreviated) name], and its affiliates, subsidiaries, employees, successors, permitted assigns, insurers and underwriters, which the Concessionaire may otherwise have or acquire in or from or in any way connected with any loss covered by policies of insurance maintained or required to be maintained by the Concessionaire pursuant to this Agreement (other than third party liability insurance policies) or because of deductible clauses in or inadequacy of limits of any such policies of insurance.
- 25.7. Application of Insurance Proceeds: The proceeds from all insurance claims, except life and injury, shall be paid to the Concessionaire by credit to the Escrow Account (unless otherwise required by the Financing Documents) who shall, subject to its obligations under the Financing Documents, and notwithstanding anything contained in Clause 23, apply such proceeds for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project Infrastructure.

## 26. ACCOUNTS AND AUDIT

- 26.1. The Concessionaire shall maintain full accounts of all Fees including Realisable Fees and other revenues derived/collected by it from and on account of use of the Project Infrastructure and of O&M Expenses and other costs paid out of the Project Escrow Account and shall provide copies of the said accounts duly audited and certified by the Concessionaire's Auditors within 120 (one hundred and twenty) days of the close of each Accounting Year to which they pertain, during the subsistence of this Agreement. Such audited accounts shall form the basis of various payments by either Party under this Agreement. The Concessionaire shall also furnish, within one week of its publication, a certified copy of the audited accounts and annual report published by the Company under the Applicable Laws.
- 26.2. The Concessionaire shall appoint and have during the subsistence of this Agreement as its Auditors a firm of Chartered Accountants duly licensed to practice in [Insert country name] out of the mutually agreed list of 10 (ten) independent and reputable firms of Chartered Accountants in [Insert country name] (the "List of Chartered Accountants"). The criteria for preparing the List of Chartered Accountants are set forth in Schedule [insert relevant schedule]. Subject to a 30 days' notice to [Insert Institution's (abbreviated) name] and the replacement Auditors being appointed from the List of Chartered Accountants, the Concessionaire may terminate the appointment of any Auditor appointed in accordance with this Article. The fees and expenses of the Auditors shall be borne by the Concessionaire.
- 26.3. On or before the fifteenth day of April each Year, the Concessionaire shall provide for the preceding Accounting Year a statement duly audited by its Auditors giving summarised vehicle/user wise information on (i) the traffic count for each category of vehicles using the Project Infrastructure and liable for payment of Fees therefore, and (ii) Fees charged and the amount of Fees received, Realizable Fees and other revenues derived from the Project Infrastructure and such other information as [Insert Institution's (abbreviated) name] may reasonably require.
- 26.4. Notwithstanding anything to the contrary contained in this Agreement, [Insert Institution's (abbreviated) name] shall have the right but not the obligation to appoint at its cost another firm of chartered accountants from the List of Chartered Accountants (the "Additional Auditor") to audit and verify all those matters, expense, costs, realisations and things which the Auditors of the Concessionaire, are required to do, undertake or certify pursuant to this Agreement.
- 26.5. Where a Grant has been provided, [Insert Institution's (abbreviated) name] shall have the right to appoint for the duration of the Construction Period as Concurrent Auditor a firm of Chartered Accountants from the List of Chartered Accountants (the "Concurrent Auditor") who shall undertake concurrent audit of the Concessionaire during the Construction Period. The charges and expenses of such Concurrent Auditor shall be borne by the [Insert Institution's (abbreviated) name]. After such Construction Period, [Insert Institution's (abbreviated) name] may at its option have concurrent audit done at such time and for such period as [Insert Institution's (abbreviated) name] may deem appropriate at its cost and expenses.
- 26.6. In the event of their being any difference between the finding of the Additional Auditor or the Concurrent Auditor, as the case may be, and the certification provided by the Auditors of the Concessionaire, such Auditors shall meet to resolve such differences and if they are unable to resolve the same such disputed certification shall be resolved by recourse to the Dispute Resolution Procedure.

## CHAPTER VI FORCE MAJEURE

### 27. FORCE MAJEURE

- 27.1. Force Majeure Event: As used in this Agreement, a Force Majeure Event shall mean occurrence in [Insert country name] of any or all of Non Political Event, Indirect Political Event and/or Political Event as defined in Clauses 27.2, 27.3, and 27.4 respectively hereinafter which prevent the Party claiming Force Majeure (the "Affected Party") from performing its obligations under this Agreement and which act or event is (i) beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money and (iii) has a Material Adverse Effect on the Project.
- 27.2. Non Political Force Majeure Events: For purposes of Clause 27.1 Non-Political Events shall mean one or more of the following acts or events:
- (i) acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, exceptionally adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption or fire (to the extent originating from a source external to the Site or beyond design specifications for the Construction Works) or landslide;
  - (ii) radioactive contamination or ionizing radiation;
  - (iii) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/ representatives or attributable to any act or omission of any of them) interrupting supplies and services to the Project Infrastructure for a period exceeding a continuous period of 7 (seven) days in an Accounting Year, and not being an Indirect [Insert country name] Political Event set forth in Clause 27.3 hereof;
  - (iv) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
  - (v) Any judgement or order of any court of competent jurisdiction or statutory authority in [Insert country name] made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or enforcement of this Agreement or exercise of any of its rights under this Agreement by [Insert Institution's (abbreviated) name]; or
  - (vi) Any event or circumstance of a nature analogous to any of the foregoing.
- 27.3. Indirect Political Force Majeure Events: For purposes of Clause 27.1, Indirect Political Event shall mean one or more of the following acts or events:
- (i) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage which prevents collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year;
  - (ii) industry wide or state wide or [Insert country name] wide strikes or industrial action which prevent collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year; or
  - (iii) any public agitation which prevents collection of Fees by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year.
- 27.4. Political Force Majeure Events: For purposes of Clause 27.1, Political Event shall mean one or more of the following acts or events by or on account of [Insert Institution's (abbreviated) name], Government of [insert country name] or any other Governmental Agency:
- (i) Change in Law, only when provisions of Clause 34 cannot be applied;
  - (ii) expropriation or compulsory acquisition by any Governmental Agency of any Project Assets or rights of the Concessionaire or of the Contractors; or
  - (iii) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is Condition Precedent) provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any

Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits.

- 27.5. Effect of Force Majeure Event before Financial Close: Upon the occurrence of any Force Majeure Event prior to Financial Close as set forth in Clause 20, the following shall apply:
- (a) There shall be no Termination except as provided in Clause 27.8;
  - (b) The date for achieving Financial Close shall be extended by the period for which such Force Majeure event shall subsist; and
  - (c) The Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs arising out of such Force Majeure Event.
- 27.6. Effect of Force Majeure Event after Financial Close: Upon occurrence of any Force Majeure Event after Financial Close, the following shall apply:
- (a) There shall be no Termination of this Agreement except as provided in Clause 27.8;
  - (b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;
  - (c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to collect Fees, but if it is unable to collect Fees during the subsistence of such Force Majeure Event, the Concession Period shall be extended by the period for which collection of Fees remains suspended on account thereof; and
  - (d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of Clause 27.7.
- 27.7. Allocation of costs during subsistence of Force Majeure: Subject to the provisions of clause 27.6, upon occurrence of a Force Majeure Event after Financial Close, the costs arising out of such event shall be allocated as follows:
- (a) When the Force Majeure Event is a Non Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any costs arising out of any such Force Majeure Event;
  - (b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the "Force Majeure Costs") shall be borne by the Concessionaire to the extent of the Insurance Claims, and to the extent such Force Majeure Costs exceed the Insurance Claims, one half of the same to the extent actually incurred and duly certified by the Auditors of the Concessionaire shall be reimbursed by [Insert Institution's (abbreviated) name] to the Concessionaire in one lump sum or paid in three equal annual installments with interest @ SBI PLR plus two percent; and
  - (c) Where the Force Majeure Event is a Political Event, the Force Majeure Costs to the extent actually incurred and certified by the Auditors of Concessionaire shall be reimbursed by [Insert Institution's (abbreviated) name] to the Concessionaire in one lump sum or paid in three equal annual instalments with interest @ SBI PLR plus two percent, provided that no Force Majeure Costs shall be payable by [Insert Institution's (abbreviated) name] if the Concession Period is increased under Clause 27.6.
- For avoidance of doubt, Force Majeure Costs shall not include loss of Fee revenues or any debt repayment obligations but shall include interest payments on such debt, O&M Expenses and all other costs directly attributable to the Force Majeure Event.
- 27.8. Termination Notice: If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred sixty five) days, either Party may in its sole discretion terminate this Agreement by giving 30 (thirty) days Termination Notice in writing to the other Party without being liable in any manner whatsoever, save as provided in Clause 27.9.
- 27.9. Termination Payment for Force Majeure Events: Upon Termination of this Agreement pursuant to Clause 27.8, Termination Payment to the Concessionaire shall be made in accordance with the following:
- (a) If the Termination is on account of a Non Political Event, the Concessionaire shall be entitled to receive from [Insert Institution's (abbreviated) name] by way of Termination Payment an amount equal to 90% of the Debt Due and the entire Subordinated Debt less due insurance claims, if any. Provided that in the event some insurance claims are not admitted, then 90% of such claims shall qualify for being included in the computation of Debt Due.



- (b) If the Termination is on account of an Indirect Political Event, the Concessionaire shall be entitled to receive from [Insert Institution's (abbreviated) name] by way of Termination Payment an amount equal to:
    - (i) the total Debt Due, less due insurance claims, if any. Provided, however, that if all or any of the insurance claims are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due, plus
    - (ii) the outstanding Subordinated Debt, plus
    - (iii) 110% (one hundred ten per cent) of the Equity (subscribed in cash and actually spent on the Project but excluding the amount of Equity Support referred to in Clause 21) if such Termination occurs at any time during three years commencing from the Appointed Date and for each successive years thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived at shall be reduced every year by 7.5% (seven and half per cent) per annum.
  - (c) If the Termination of this Agreement is on account of a Political Event, the Concessionaire shall be entitled to receive from [Insert Institution's (abbreviated) name] by way of Termination Payment an amount equal to:
    - (i) the total Debt Due, plus
    - (ii) 120% (one hundred and twenty per cent) of the Subordinated Debt plus
    - (iii) 150% (one hundred and fifty per cent) of the Equity (subscribed in cash and actually spent on the project but excluding the amount of Equity Support referred to in Clause 21) the if such Termination occurs at any time during three years commencing from the Appointed Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived at shall be reduced every year by 7.5% (seven and half per cent) per annum.
- 27.10. Dispute Resolution: In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such dispute shall be finally settled in accordance with the Dispute Resolution Procedure, provided however that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.
- 27.11. Liability for other losses, damages etc: Save and except as expressly provided in this Clause 27, neither Party hereto shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant to this Clause 27.
- 27.12. Duty to Report: The Affected Party shall discharge the following obligations in relation to reporting the occurrence of a Force Majeure Event to the other Party:
- (a) The Affected Party shall not claim any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party in writing of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event within 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence and the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.
  - (b) Any notice pursuant to this Clause 27.12 shall include full particulars of:
    - (i) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Clause 27 with evidence in support thereof;
    - (ii) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
    - (iii) the measures which the Affected Party is taking or proposes to take, to alleviate the impact of such Force Majeure Event; and
    - (iv) any other information relevant to the Affected Party's claim.
  - (c) For so long as the Affected Party continues to claim to be affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) written reports containing information as required by this Clause 27.12, and such other information as the other Party may reasonably request the Affected Party to provide.
- 27.13. Excuse from performance of obligations: If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event provided that:

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

## **CHAPTER VII SUSPENSION AND TERMINATION**

### **28. MATERIAL BREACH AND SUSPENSION**

- 28.1. If the Concessionaire shall be in Material Breach of this Agreement [Insert Institution's (abbreviated) name], shall be entitled in its sole discretion and without prejudice to its other rights and remedies under this Agreement including its right of Termination hereunder, to (i) suspend all or any of the rights of the Concessionaire under this Agreement including the Concessionaire's right to collect and appropriate all Fees and other revenues from the Project Infrastructure, and (ii) exercise the rights of the Concessionaire under this Agreement itself or authorise any other person to exercise the same during such suspension. Such suspension by [Insert Institution's (abbreviated) name] shall be by a communication in writing to the Concessionaire and shall be effective forthwith upon the issue thereof to the Concessionaire. Any Fees or revenues collected by or on behalf of [Insert Institution's (abbreviated) name] during such suspension shall be deposited in the Escrow Account to the exclusion of the Concessionaire. Provided, however, that the period of such suspension under this Clause 28 shall not exceed 120 (one hundred and twenty) days.
- 28.2. Subject to clause 28.1, [Insert Institution's (abbreviated) name] shall have the right to utilise the proceeds of Fees and other revenues for meeting the costs incurred by [Insert Institution's (abbreviated) name] to remedy and rectify the cause of such suspension and for defraying the O&M Expenses during such suspension period. Provided, however, that if the Concessionaire is making diligent efforts to remedy and rectify such cause, then [Insert Institution's (abbreviated) name] shall allow the Concessionaire reasonable time and opportunity for such remedy or rectification.
- 28.3. The suspension of the rights of the Concessionaire by [Insert Institution's (abbreviated) name] pursuant to this Clause 28 shall be revoked by [Insert Institution's (abbreviated) name] forthwith upon the Concessionaire having remedied the Material Breach during such suspension period to the satisfaction of [Insert Institution's (abbreviated) name] unless in the meantime this Agreement has been terminated by [Insert Institution's (abbreviated) name] in accordance with Clause 30.
- 28.4. At any time during the period of suspension under this Clause 28, the Concessionaire may in writing notify to [Insert Institution's (abbreviated) name] that it does not intend to cure the breach or default that had caused such suspension. Within 7 (seven) days of receipt of such notice, [Insert Institution's (abbreviated) name] shall terminate this Agreement as if a Material Breach of this Agreement had occurred on account of a Concessionaire Event of Default.

### **29. COMPENSATION FOR BREACH OF AGREEMENT**

- 29.1. In the event of Concessionaire being in material default of this Agreement and such default is cured before Termination, the Concessionaire shall pay to [Insert Institution's (abbreviated) name] as compensation, all direct additional costs suffered or incurred by [Insert Institution's (abbreviated) name] arising out of such material default by the Concessionaire, in one lump sum within 30 (thirty) days of receiving the demand or at the Concessionaire's option in 3 (three) equal semi-annual instalments with interest @ SBI PLR plus 2% (two per cent).
- 29.2. In the event of [Insert Institution's (abbreviated) name] being in material default of this Agreement and such default is cured before Termination, [Insert Institution's (abbreviated) name] shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by [Insert Institution's (abbreviated) name], in one lump sum within 30 (thirty) days of receiving the demand or at

[Insert Institution's (abbreviated) name]'s option in 3 (three) equal semi-annual instalments with interest @ SBI PLR plus 2% (two per cent).

### 30. TERMINATION

#### 30.1. Termination for the Concessionaire Event of Default.

##### 30.1.1. Concessionaire Event of Default

The following events shall constitute an event of default by the Concessionaire (a "Concessionaire Event of Default") unless such Concessionaire Event of Default has occurred as a result of [Insert Institution's (abbreviated) name] Event of Default or a Force Majeure Event;

- (1) The Concessionaire fails to achieve Financial Close in accordance with the provisions of Clause 20;
- (2) The Concessionaire fails to achieve any Project milestone other than Scheduled Project Completion Date within the period set forth in Schedule [insert relevant schedule] and fails to cure such default within a period of 180 (one hundred and eighty) days from the date of its occurrence.
- (3) The Concessionaire is in Material Breach of this Agreement;
- (4) The Concessionaire commits default in complying with any of the terms and conditions of this Agreement, save and except those defaults in respect of which Cure Period has been expressly provided in this Agreement and fails to remedy or rectify the same within the period provided in a notice in this behalf from [Insert Institution's (abbreviated) name] which shall:
  - (i) require the Concessionaire to remedy the breach or breaches referred to in such notice within 1 (one) month (or such longer period as may be agreed by the [Insert Institution's (abbreviated) name] at its absolute discretion); or
  - (ii) permit the Concessionaire to put forward within 15 days of such notice a reasonable programme for the remedying of the breach or breaches, such programme to specify in reasonable detail the manner in which such breach or breaches is or are proposed to be remedied and the latest date by which it is proposed that such breach or all such breaches shall be remedied.
- (5) The Concessionaire creates any Encumbrance, charges or lien in favour of any person save and except as otherwise expressly permitted under Clause 33.2;
- (6) The shareholding of the Consortium Members falls below the minimum prescribed under Clause 10.1 (xiii) and the Concessionaire does not on its own cure such default within 90 (ninety) days of its occurrence;
- (7) The transfer, pursuant to law of either (a) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or (b) all or material part of the assets or undertaking of the Concessionaire except where such transfer in the reasonable opinion of [Insert Institution's (abbreviated) name] does not affect the ability of the Concessionaire to perform, and the Concessionaire has the financial and technical capability to perform, its material obligations under the Project Agreements;
- (8) A resolution is passed by the shareholders of the Concessionaire for the voluntary winding up of the Concessionaire;
- (9) The Concessionaire has compromised with its creditors, passed a resolution for its winding up or dissolution or is adjudged bankrupt or insolvent or if a trustee or receiver is appointed for the Concessionaire or for any of its property that has a material bearing on the Project;
- (10) Any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction provided that, as part of such amalgamation or reconstruction, the property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements, and provided that:
  - (i) the amalgamated or reconstructed entity has the technical capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
  - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit

worthiness at least as good as that of the Concessionaire as at the Financial Close; and

(iii) each of the Project Agreements remains in full force and effect

- (11) The Concessionaire is in Material Breach of any of the Project Agreements;
- (12) An event of default of the Concessionaire under any of the Financing Documents has occurred or any of the Senior Lenders has recalled its loan under any of the Financing Documents;
- (13) The Concessionaire abandons the operations of the Project Infrastructure for more than 15 (fifteen) consecutive days without the prior consent of [Insert Institution's (abbreviated) name], provided that the Concessionaire shall be deemed not to have abandoned such operation if such abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations by [Insert Institution's (abbreviated) name].
- (14) The Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement;
- (15) The Concessionaire suffers an execution being levied on any of its assets/equipment causing a Material Adverse Effect on the Project and allows it to be continued for a period of 15 (fifteen) days;
- (16) The Concessionaire has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days; or
- (17) The Concessionaire is in breach of its obligation to repay the Revenue Shortfall Loans in accordance with this Agreement.

30.1.2. Save and except as otherwise provided in Clause 30.2, and without prejudice to any other right or remedy which [Insert Institution's (abbreviated) name] may have in respect thereof under this Agreement, upon the occurrence of any breach or default by the Concessionaire under this Agreement including any Concessionaire Event of Default, [Insert Institution's (abbreviated) name] shall be entitled to terminate this Agreement by a communication in writing (the "Termination Notice") to the Concessionaire if the Concessionaire has failed to cure such breach or default within the period provided for the same in this Agreement provided that before issuing the Termination Notice, [Insert Institution's (abbreviated) name] shall by a notice in writing inform the Concessionaire of its intention to issue the Termination Notice (the "Preliminary Notice") and grant 15 (fifteen) days' time to the Concessionaire to make its representation, if any, against such intended Termination Notice and shall after the expiry of said 15 (fifteen) day period whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

30.1.3. Subject to Clause 30.2, the following shall apply in respect of cure of any of the defaults and/or breaches of this Agreement.

- (i) The Cure Period shall commence from the date on which a notice in writing is delivered by [Insert Institution's (abbreviated) name] to the Concessionaire asking the latter to cure the breach or default specified in such notice.
- (ii) The Cure Period provided in this Agreement shall not relieve the Concessionaire from liability for Damages caused by its breach or default;
- (iii) The Cure Period shall not in any way be extended by any period of suspension under this Agreement;
- (iv) If the cure of any breach by the Concessionaire requires any reasonable action by Concessionaire that must be approved by [Insert Institution's (abbreviated) name] or the Independent Consultant hereunder the applicable Cure Period (and any liability of the Concessionaire for damages incurred) shall be extended by the period taken by [Insert Institution's (abbreviated) name] or the Independent Consultant to accord their required approval.

30.2. Notwithstanding anything to the contrary contained in this Agreement, in the event of the Concessionaire being in default under any of the provisions hereof expressly providing for Termination under or in accordance with this Clause 30.2, [Insert Institution's (abbreviated) name] shall be entitled to terminate this Agreement forthwith by issuing a Termination Notice to the Concessionaire and upon issue of such Termination Notice by [Insert Institution's (abbreviated) name] this Agreement shall stand terminated forthwith. Provided, however, that prior to such Termination, [Insert Institution's (abbreviated) name] shall by notice grant to the Concessionaire a Cure Period of one month for curing the relevant breach or default of the provisions of this Agreement.

- 30.3. Upon Termination by [Insert Institution's (abbreviated) name] on account of occurrence of Concessionaire Event of Default during the Operations Period, the [Insert Institution's (abbreviated) name] shall pay to the Concessionaire by way of Termination Payment an amount equal to 90% (ninety per cent) of the Debt Due less insurance claims, if any, provided, however, that if all or any of the insurance claims are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due.
- 30.4. Termination for [Insert Institution's (abbreviated) name] Event of Default.
- 30.4.1. The Concessionaire may after giving 90 (ninety) days' notice in writing to [Insert Institution's (abbreviated) name] terminate this Agreement upon the occurrence and continuation of any of the following events (each a "[Insert Institution's (abbreviated) name] Event of Default"), unless any such [Insert Institution's (abbreviated) name] Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event.
- (1) [Insert Institution's (abbreviated) name] is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and [Insert Institution's (abbreviated) name] has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;
  - (2) [Insert Institution's (abbreviated) name] repudiates this Agreement or otherwise evidences an irrevocable intention not to be bound by this Agreement;
  - (3) Government of [enter country name] or any Governmental Agency have by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligations by the Concessionaire and have failed to cure the same within 90 (ninety) days of receipt of notice by [Insert Institution's (abbreviated) name] in this behalf from the Concessionaire;
  - (4) [Insert Institution's (abbreviated) name] has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days.
- 30.4.2. Upon Termination by the Concessionaire on account of an [Insert Institution's (abbreviated) name] Event of Default, the Concessionaire shall be entitled to receive from [Insert Institution's (abbreviated) name] by way of Termination Payment a sum equal to:
- (i) the total Debt Due, plus
  - (ii) 120% (one hundred twenty percent) the total Subordinated Debt, plus
  - (iii) 150% (one hundred fifty per cent) of the Equity (subscribed in cash and actually spent on the Project but excluding the amount of Equity Support referred to in Clause 21) if such Termination occurs at any time during three years commencing from the Appointed Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year and the adjusted amount so arrived at shall be reduced every year by 7.5% (seven and a half per cent) per annum.
- 30.5. Upon Termination of this Agreement for any reason whatsoever, [Insert Institution's (abbreviated) name] shall:
- (i) take possession and control of Project Infrastructure forthwith;
  - (ii) take possession and control forthwith of any materials, construction plant, implements, stores etc. on or about the Site;
  - (iii) restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project infrastructure; and/or
  - (iv) succeed upon election by [Insert Institution's (abbreviated) name] without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreement as [Insert Institution's (abbreviated) name] may in its discretion deem appropriate and shall upon such election be required to compensate such contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date [Insert Institution's (abbreviated) name] elects to succeed to the interests of the Concessionaire as aforesaid. All sums claimed by such Contractors as being due and owing for work and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors and [Insert Institution's (abbreviated) name] shall in no way or manner be liable or responsible for such sums.
- 30.6. Termination Payments: The Termination Payment pursuant to this Agreement shall become due and payable to the Concessionaire by [Insert Institution's (abbreviated) name] within thirty days of a demand being made by the Concessionaire with the necessary particulars duly

certified by the Auditors. If [Insert Institution's (abbreviated) name] fails to disburse the full Termination Payment within 30 (thirty) days, the amount remaining unpaid shall be disbursed along with interest @ SBI PLR plus two per cent for the period of delay on such amount.

- 30.7. Mode of Payment: Payment of compensation of costs by [Insert Institution's (abbreviated) name] pursuant to this Clause 30 shall be made by way of credit to the Escrow Account and such payment shall constitute valid discharge of [Insert Institution's (abbreviated) name]'s obligations for Termination Payment hereunder.
- 30.8. Notwithstanding anything to the contrary contained in this Agreement, any Termination pursuant to the provisions of this Agreement shall be without prejudice to accrued rights of either Party including its right to claim and recover money damages and other rights and remedies which it may have in law or contract. All rights and obligations of either Party under this Agreement, including without limitation Termination Payments and Divestment procedures, shall survive the Termination of this Agreement to the extent such survival is necessary for giving effect to such rights and obligations.

### 31. DIVESTMENT OF RIGHTS AND INTERESTS

- 31.1. Upon Termination of this Agreement, the Concessionaire shall comply with the following:
- (a) notify to [Insert Institution's (abbreviated) name] forthwith the location and particulars of all Project Assets;
  - (b) deliver forthwith actual or constructive possession of the Project Infrastructure free and clear of all Encumbrances and execute such deeds, writings and documents as may be required by the [Insert Institution's (abbreviated) name] for fully and effectively divesting the Concessionaire of all of the rights, title and interest of the Concessionaire in the Project Infrastructure and conveying the Project infrastructure free of any charge or cost to [Insert Institution's (abbreviated) name]; and
  - (c) comply with the Divestment Requirements set out in Clause 31.2.
- 31.2. Upon Termination of this Agreement, the Concessionaire shall comply and conform to the following Divestment Requirements in respect of the Project infrastructure:
- (i) all Project Assets have been renewed and cured of all defects and deficiencies as necessary so that the Project Infrastructure is compliant with the Specifications and Standards set forth in this Agreement;
  - (ii) the Concessionaire delivers relevant records and reports pertaining to the Project Infrastructure and its design, engineering, construction, operation, and maintenance including all operation and maintenance records and programmes and manuals pertaining thereto and complete as built Drawings on the Divestment Date;
  - (iii) the Concessionaire executes such deeds of conveyance, documents and other writings as the [Insert Institution's (abbreviated) name] may reasonably require to convey, divest and assign all the rights, title and interest of the Concessionaire in the Project infrastructure free from all Encumbrances absolutely and free of any charge or tax unto the [Insert Institution's (abbreviated) name] or its Nominee; and
  - (iv) the Concessionaire complies with all other requirements as may be prescribed under Applicable Laws to complete the divestment and assignment of all the rights, title and interest of the Concessionaire in the Project Infrastructure free from all Encumbrances absolutely and free of any charge or tax to [Insert Institution's (abbreviated) name] or its nominee.
  - (v) {insert other more specific requirements with regard to the Project infrastructure if applicable}
- 31.3. Not earlier than 3 (three) months before the expiry of the Concession Period but not later than 30 (thirty) days before such expiry, or in the event of earlier Termination of this Agreement, immediately upon but not later than 15 (fifteen) days from the date of issue of Termination Notice, the Independent Consultant shall verify, in the presence of a representative of the Concessionaire, compliance by the Concessionaire with the Divestment Requirements set forth in Clause 31.2 in relation to the Project Infrastructure and, if required, cause appropriate tests to be carried out at the Concessionaire's cost for determining the compliance therewith. If any shortcomings in the Divestment Requirements are found by either Party, it shall notify the other of the same and the Concessionaire shall rectify the same at its cost. The provisions of Clause 32 shall apply *mutatis mutandis* in relation to repair or curing of defects under this Clause 31.

- 31.4. Upon the Concessionaire conforming to all Divestment Requirements and handing over actual or constructive possession of the Project Infrastructure to [Insert Institution's (abbreviated) name] or a person nominated by [Insert Institution's (abbreviated) name] in this regard, [Insert Institution's (abbreviated) name] shall issue a certificate substantially in the form set forth in Schedule [insert relevant schedule] (the "Vesting Certificate") which will have the effect of constituting evidence of divestment of all rights, title and lien in the Project Infrastructure by the Concessionaire and their vesting in [Insert Institution's (abbreviated) name] pursuant hereto. Issue of the Vesting Certificate shall not be unreasonably withheld by [Insert Institution's (abbreviated) name]. The divestment of all rights, title and lien in the Project infrastructure shall be deemed to be complete on the date when all the Divestment Requirements have been fulfilled or the Vesting Certificate has been issued, whichever is earlier, it being expressly agreed that any defect or deficiency in any Divestment Requirement shall not in any manner be construed or interpreted as restricting the exercise of any rights by [Insert Institution's (abbreviated) name] or its nominee on or in respect of the Project Infrastructure on the footing as if all Divestment Requirements have been complied with by the Concessionaire.
- 31.5. Notwithstanding anything to the contrary contained in this Agreement, any Termination Payments made by [Insert Institution's (abbreviated) name] into the Escrow Account shall not be withdrawn therefrom for any purpose whatsoever until the Vesting Certificate has been issued by [Insert Institution's (abbreviated) name] under this Clause 31. Provided, however, that the aforesaid restriction shall not apply to withdrawals from the Escrow Account in favour of the Senior Lenders to the extent of Debt Due.

## **CHAPTER VIII MISCELLANEOUS**

### **32. DEFECTS LIABILITY**

- 32.1. Not less than 30 months nor more than 36 months prior to the expiry of the Concession Period, the Concessionaire and the Independent Consultant shall conduct a joint inspection (the "Initial Inspection") of the Project Infrastructure and all Project Facilities.
- 32.2. Within 90 days after the completion of the Initial Inspection, the Concessionaire shall provide to the Independent Consultant a report on the condition of the Project Infrastructure and the Project Facilities and a notice setting out the Concessionaire's proposals as to the renewal works required to comply with the Divestment Requirements.
- 32.3. The Independent Consultant may, within 90 days after receipt of the notice from the Concessionaire in accordance with Clause 32.2, by notice to the Concessionaire object to the proposals giving details of the grounds for such objection and shall give the Independent Consultant's proposals in respect of the renewal works.
- 32.4. If no agreement is reached between the Concessionaire and the Independent Consultant within 30 days of receipt of such notice, then either the Concessionaire or the Independent Consultant may refer the matter to the Disputes Resolution Procedure.
- 32.5. Upon agreement or determination in accordance with the Disputes Resolution Procedure, the Concessionaire shall carry out the renewal works at its own cost.
- 32.6. Not less than 9 months nor more than 12 months prior to the expiry of the Concession Period, the Concessionaire and the Independent Consultant shall conduct a joint inspection (the "Second Inspection") of all elements of the Project infrastructure and Project Facilities (whether or not the Renewal Works have been carried out).
- 32.7. Within 30 days after the completion of the Second Inspection, the Concessionaire shall provide to the Independent Consultant a report on the condition of the Project Infrastructure and Project Facilities and a notice setting out any revisions or additions to the renewal works required in order to ensure compliance with the Divestment Requirements.
- 32.8. The Independent Consultant may, within 30 days after receipt of the notice from the Concessionaire in accordance with Clause 32.7, by notice to the Concessionaire object to the proposed revisions giving details of the grounds for such objection and shall give the Independent Consultant proposals in respect of such matters.

- 32.9. If no agreement is reached between the Concessionaire and the Independent Consultant within 30 days of receipt of such notice, then either the Concessionaire or the Independent Consultant may refer the matter to the Dispute Resolution Procedure.
- 32.10. Upon agreement or determination in accordance with the Disputes Resolution Procedure, the Concessionaire shall carry out the renewal works (as so revised) at its own cost.
- 32.11. From the date which is 2 years prior to the expiry of the Concession Period a sum equal to the Fees realisable during the last two years of the Concession Period for a traffic volume calculated at the rate of 10,000 (ten thousand) PCUs per day per year or a higher sum estimated by the Independent Consultant for Renewal Works, shall notwithstanding anything to the contrary contained in this Agreement, be retained in the Escrow Account provided that if a Bank Guarantee of an equivalent sum in the form and content acceptable to [Insert Institution's (abbreviated) name] has been furnished by the Concessionaire to [Insert Institution's (abbreviated) name], no such retention shall be made.
- 32.12. If following the Second Inspection, it is agreed or determined that no renewal works are required, then within 14 days of such agreement, 50% of the sums retained in accordance with Clause 32.11 shall be released from the Escrow Account to the Concessionaire.
- 32.13. Within 14 days after the issue of the Vesting Certificate issued in accordance with Clause 31 the sums retained in accordance with Clause 32.11 shall be released from the Escrow Account to the Concessionaire.

### 33. ASSIGNMENTS AND CHARGES

- 33.1. Subject to Clauses 33.3 and 33.4, this Agreement shall not be assigned by the Concessionaire save and except with prior consent in writing of [Insert Institution's (abbreviated) name], which consent [Insert Institution's (abbreviated) name] shall be entitled to decline without assigning any reason whatsoever.
- 33.2. Subject to Clause 33.3, the Concessionaire shall neither create nor permit to subsist any encumbrance over or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreements to which Concessionaire is a party except with prior consent in writing of [Insert Institution's (abbreviated) name], which consent [Insert Institution's (abbreviated) name] shall be entitled to decline without assigning any reason whatsoever.
- 33.3. Restraint set forth in Clauses 33.1 and 33.2 shall not apply to:
- (i) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project Infrastructure;
  - (ii) mortgages/pledges/hypothecation of goods/assets other than Project Assets, and those covered by the Substitution Agreement and their related documents of title arising or created in the ordinary course of business of the Project Infrastructure and as security only for indebtedness to the Senior Lenders under the Financing Documents and/or for working capital arrangements for the Project Infrastructure;
  - (iii) assignment of rights, title and interest to or in favour of the Lenders pursuant to and in accordance with the Substitution Agreement in respect of financing by the Senior Lenders under the Financing Documents for the Project; and
  - (iv) liens or encumbrances required by any Applicable Law.
- 33.4. Senior Lenders may exercise the rights of step-in or substitution as provided in the Substitution Agreement to be entered into among the Concessionaire, [Insert Institution's (abbreviated) name] and Senior Lenders in the form set forth in Schedule [insert relevant schedule] provided that the person substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations under this Agreement as if it were the Concessionaire. Provided, however, that in the event of such step-in or substitution, an additional Cure Period of 90 (ninety) days shall be provided by [Insert Institution's (abbreviated) name] to enable the Concessionaire to cure any breach or default subsisting on the day of such step-in or substitution. Provided further that if the Senior Lenders step in to operate and manage the Concession for a period not exceeding 90 (ninety) days, their liabilities shall be restricted to the obligations relating to and arising during such 90 (ninety) days period.
- 33.5. Notwithstanding anything to the contrary contained in this Agreement [Insert Institution's (abbreviated) name] may assign any of its rights and benefits and/or obligations under this Agreement pursuant to any direction of Government of [insert country name] or by operation of law or in the course of its own business.



## 34. CHANGE IN LAW

- 34.1. If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after tax return or other financial burden, the aggregate financial effect of which exceeds [insert currency and amount in numerals] (insert currency and amount in words) in any Accounting Year, the Concessionaire may notify [Insert Institution's (abbreviated) name] and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. Upon notification by the Concessionaire as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days and either agree on amendments to this Agreement or on alternative arrangements to implement the foregoing. Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 34.1, the Concessionaire may by notice in writing require [Insert Institution's (abbreviated) name] to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the Auditors of the Concessionaire. [Insert Institution's (abbreviated) name] shall make payment of such compensation within 15 (fifteen) days of receiving such notice or with interest @ SBI PLR if the payment thereof is delayed beyond such 15 (fifteen) days. If [Insert Institution's (abbreviated) name] shall dispute the quantum of such compensation claim of the Concessionaire, the same shall be finally settled in accordance with the Dispute Resolution Procedure.
- 34.2. If as a result of Change in Law, the Concessionaire enjoys a reduction in costs or increase in net after tax return or other financial benefit, the aggregate financial effect of which exceeds [insert currency and amount in numerals] (insert currency and amount in words) in any Accounting Year, [Insert Institution's (abbreviated) name] may so notify the Concessionaire and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been so such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Upon notification by the [Insert Institution's (abbreviated) name] as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days and either agree on such amendments to this Agreement or on alternative arrangements to implement the foregoing. Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 34.2, [Insert Institution's (abbreviated) name] may by notice in writing require the Concessionaire to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the [Insert Institution's (abbreviated) name] Representative. The Concessionaire shall make such payment within 15 (fifteen) days of receiving such notice or with interest @ SBI PLR if the payment is delayed beyond such 15 (fifteen) days. If the Concessionaire shall dispute such claim of [Insert Institution's (abbreviated) name], the same shall be finally settled in accordance with the Dispute Resolution Procedure.
- 34.3. Notwithstanding anything to the contrary contained in this Agreement, [Insert Institution's (abbreviated) name] shall not be liable to reimburse to the Concessionaire any sums on account of any Change in Taxes if the same are recoverable from the users of the Project infrastructure or if the aggregate financial effect of such changes in any Accounting Year is less than or equal to [insert currency and amount in numerals] (insert currency and amount in words).

## 35. LIABILITY AND INDEMNITY

- 35.1. General Indemnity
- (i) The Concessionaire will indemnify, defend and hold [Insert Institution's (abbreviated) name] harmless against any and all proceedings, actions and, third party claims (other than a claim by [Insert Institution's (abbreviated) name] or Government of [insert country name] for loss, damage and expense of whatever kind and nature arising out of the

design, engineering, construction, procurement, Operation and Maintenance of the Project Infrastructure or arising out of a breach by Concessionaire of any of its obligations under this Agreement except to the extent that any such claim has arisen due to [Insert Institution's (abbreviated) name] Event of Default.

- (ii) [Insert Institution's (abbreviated) name] will, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of defect in title and/or the rights of [Insert Institution's (abbreviated) name] in the land comprised in the Site adversely affecting the performance of the Concessionaire's obligations under this Agreement and/or arising out of acts done in discharge of their lawful functions by [Insert Institution's (abbreviated) name], its Officers, servants, agents, subsidiaries and contractors ("[Insert Institution's (abbreviated) name] Indemnified Persons") including [Insert Institution's (abbreviated) name] Events of Default except to the extent that any such claim has arisen due to a negligent act or omission, breach of contract or breach of statutory duty on the part of the Concessionaire, its Subsidiaries, affiliates, contractors, servants or agents including due to Concessionaire Event of Default.
- 35.2. Without limiting the generality of Clause 35.1 the Concessionaire shall fully indemnify, save harmless and defend [Insert Institution's (abbreviated) name] including its officers, servants, agents and subsidiaries from and against any and all loss and damages arising out of or with respect to (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits, (b) payments of taxes relating to the Concessionaire contractors, suppliers and representatives, income or other taxes required to be paid by the Concessionaire without reimbursement hereunder, or (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its Contractors which are payable by the Concessionaire or any of its contractors.
- 35.3. Without limiting the generality of the provisions of this Clause 35, the Concessionaire shall fully indemnify, save harmless and defend the [Insert Institution's (abbreviated) name] indemnified Person from and against any and all damages which the [Insert Institution's (abbreviated) name] Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the suspension of the injunction or restraint order. If, in any such suit claim or proceedings, the Project, or any part, thereof or comprised therein is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for [Insert Institution's (abbreviated) name] a licence, at no cost to [Insert Institution's (abbreviated) name], authorising continued use of the infringing work. If the Concessionaire is unable to secure such licence within a reasonable time, the Concessionaire shall, at its own expense and without impairing the specifications and standards either replace the affected work, or part, or process thereof with non-infringing work or parts or process, or modify the same so that it becomes non-infringing.
- 35.4. In the event that either Party receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this Clause 35 (the 'Indemnified Party') it shall notify the other Party ("Indemnifying Party") within 14 (fourteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim it may conduct the proceedings in the name of the Indemnified Party subject the Indemnified Party being secured against any costs involved to its reasonable satisfaction.
- 35.5. Defence of Claims
- 35.5.1. The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder and their reasonable costs and expenses shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the person indemnified in respect of loss to the full extent provided by

this Clause 35, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding liabilities, payments and obligations at its expense and through counsel of its choice provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnified Party unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure, the loss to be indemnified hereunder to the extent so compromised or settled.

- 35.5.2. If the Indemnifying Party has exercised its rights under Clause 35.4, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).
- 35.5.3. If the Indemnifying Party exercises its rights under Clause 35.4 then the Indemnified Party shall nevertheless have the right to employ its own counsel and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of such Indemnified Party, when and as incurred, unless:
- (i) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or
  - (ii) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
  - (iii) the Indemnifying Party shall not in fact have employed independent counsel reasonably satisfactory to the Indemnified Party to assume the defence of such action and shall have been so notified by the Indemnified Party; or
  - (iv) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
    - (a) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
    - (b) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement; provided that if clauses (ii), (iii) or (iv) shall be applicable, counsel for the Indemnified Party shall have the right to direct the defence of such claim, action, suit or proceeding on behalf of the Indemnified Party and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

## 36. RIGHTS AND TITLE OVER THE SITE

- 36.1. The Concessionaire shall have exclusive rights to the use of the Site in accordance with the provisions of this Agreement and for this purpose it may regulate the entry and use of the Project Infrastructure by third parties.
- 36.2. The Concessionaire shall allow access to, and use of the Site for telegraph lines, electric lines or such other public purposes as [Insert Institution's (abbreviated) name] may specify. Where such access or use causes any damage to the Project Infrastructure and consequent financial loss to the Concessionaire, it may seek compensation or damages from such user of the Site as per Applicable Laws.
- 36.3. The Concessionaire shall not be liable to pay any property taxes for the Site.
- 36.4. For the purposes of claiming tax depreciation, the property representing the capital investment made by the Concessionaire shall be deemed to be acquired and owned by the Concessionaire.
- 36.5. The Concessionaire shall not sublet the whole or any part of the Site save and except as may be expressly set forth in this Agreement provided however that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project Infrastructure including Project Facilities.

## 37. DISPUTE RESOLUTION

- 37.1. Amicable Resolution

- (a) Save where expressly stated to the contrary in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including incompleteness of the Project Infrastructure between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Sub-clause (b) below.
- (b) In the event of any Dispute between the Parties, either Party may call upon the Independent Consultant to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Consultant or without the intervention of the Independent Consultant, either Party may require such Dispute to be referred to the Chairman of [Insert Institution's (abbreviated) name] and the Chairman of the Board or Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the said two Chairmen shall meet not later than 7 (seven) days of the date of such request to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the said period or the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the said two Chairmen, either Party may refer the dispute to arbitration in accordance with the provisions of Clause 37.2.
- (c) If the Dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty) working days of the aforesaid notice in writing or such longer period as may be mutually agreed by the Parties then the provisions of Clause 37.2 shall apply.

#### 37.2. Arbitration

- 37.2.1. Any Dispute, which is not resolved amicably as provided in Clause 37.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 37.2.2 (b) below. Such arbitration shall be held in accordance with the Rules of Arbitration of the [Insert country name] Council of Arbitration and shall be subject to the provisions of the [Insert relevant legislation reference].
- 37.2.2. There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the [Insert country name] Council of Arbitration.
- 37.2.3. The arbitrators shall issue a reasoned Award.
- 37.2.4. The venue of such arbitration shall be [Insert venue], [Insert country name] in the [insert language] language.

#### 37.3. Arbitration Awards to be Binding

- 37.3.1. The Concessionaire and [Insert Institution's (abbreviated) name] undertake to carry out any decision or award of the arbitrators (the "Award") without delay. Awards relating to any Dispute shall, in the absence of manifest error, be final and binding on the Parties as from the date they are made.
- 37.3.2. The Concessionaire and [Insert Institution's (abbreviated) name] agree that an Award may be enforced against the Concessionaire and/or [Insert Institution's (abbreviated) name], as the case may be and their respective assets wherever situated.
- 37.3.3. This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder.

#### 38. DISCLOSURE

- 38.1. The Concessionaire shall make available for inspection by members of public free of charge during normal business hours on all working days copies of this Concession Agreement, the O&M Contract and the State Support Agreement (hereinafter collectively referred to as "Public Documents") at the Concessionaire's Site office during the subsistence of this Agreement. The Concessionaire shall prominently display at [Insert venue] public notices about the availability of the Public Documents for inspection and shall make available upon request and payment in advance of copying charges on no profit no loss basis to members of public copies of the said Public Documents.

#### 39. REDRESSAL OF PUBLIC GRIEVANCES

- 39.1. The Concessionaire shall maintain a public relations office at [Insert venue] and keep it open to public access at all times. At each such office, the Concessionaire shall open and maintain a register (the "Complaints Register") for recording of complaints by any person (the Complainant") at any time of the day. The availability of and access to such office and the Complaints Register shall be prominently displayed by the Concessionaire at [Insert venue] so as to bring it to the attention of all persons who are entering and exiting the Project Infrastructure.
- 39.2. The Complaints Register shall be securely bound and kept in proper custody at the public relations office. Each page of the Register shall be duly numbered and each complaint recorded therein shall also be duly numbered. Soon after a complaint is registered the Complainant shall be given a receipt by such office stating the date and complaint number, which the Complainant may refer to in any subsequent correspondence or claim. The Complaints Register shall have appropriate columns including but not limited to the complaint number and date, name and address of the Complainant, the complaint and the action taken by the Concessionaire thereon.
- 39.3. The Concessionaire shall inspect the Complaints Register at reasonable intervals and take prompt steps for redressal of the grievances stated in each complaint. The action so taken by the Concessionaire shall be briefly noted in the 'Action taken' column of the Complaints Register and a suitable reply shall also be sent to the Complainant by post under a certificate of posting.
- 39.4. Within one week following the close of each calendar month, the Concessionaire shall send to [Insert Institution's (abbreviated) name] a true photocopy of such pages of the Complaints Register on which any entries have been recorded of any Complaint on the Concessionaire during the course of such month. [Insert Institution's (abbreviated) name] may in its discretion direct the concessionaire to take such further reasonable action as [Insert Institution's (abbreviated) name] may deem appropriate for a fair and just redressal of any grievance. Where [Insert Institution's (abbreviated) name] is of the opinion that the Complainant is entitled to any further redressal or compensation beyond what the Concessionaire is willing to provide, [Insert Institution's (abbreviated) name] may refer the matter to the [Insert relevant body name] having jurisdiction for its disposal in accordance with the provisions of the

#### 40. ADVERTISING ON THE SITE

- 40.1. The Concessionaire shall be capable of undertaking Commercial advertising or display at any place on the Site if the profits from such advertising or display shall be shared as between the Concessionaire and [Insert Institution's (abbreviated) name]. For the avoidance of doubt, such advertising or display and the sharing of the profits thereon shall be agreed in writing in advance between the Concessionaire and [Insert Institution's (abbreviated) name] prior to its commissioning and/or implementation.

#### 41. GOVERNING LAW AND JURISDICTION

- 41.1. This Agreement shall be construed and interpreted in accordance with and governed by the laws of [Insert country name] and the Courts at [Insert place name], [Insert country name] shall have jurisdiction over all matters arising out of or relating to this Agreement.

#### 42. MISCELLANEOUS

- 42.1. Waiver
  - (a) Waiver by either Party of any default by other Party in the observance and performance of any provision of or obligations of or under this Agreement
    - (i) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
    - (ii) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
    - (iii) shall not affect the validity or enforceability of this Agreement in any manner.
  - (a) 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.

42.2. Survival

Termination of this Agreement (a) shall not relieve the Concessionaire or [Insert Institution's (abbreviated) name] of any obligations hereunder which expressly or by implication survives Termination hereof, and (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such termination.

All obligations surviving the cancellation, expiration or Termination of this Agreement shall only survive for a period of 5 (five) years following the date of such Termination or expiry of this Agreement.

42.3. Entire Agreement:

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof and no amendment or modification hereto shall be valid and effective unless expressly previously approved in writing by [Insert Institution's (abbreviated) name] and executed by the person expressly authorised by a resolution of [Insert Institution's (abbreviated) name] in this behalf.

42.4. Notices

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

(a) in the case of the Concessionaire, be given by letter delivered by hand to the address given and marked for the attention of the person set out opposite the corresponding signature below or to such other address marked for such other attention as the Concessionaire may from time to time designate by notice to [Insert Institution's (abbreviated) name], provided that notices or other communications to be given to an address outside [Insert city] may (if they are subsequently confirmed by sending a copy thereof by first class registered airmail or by courier) be sent by facsimile to the number as the Concessionaire may from time to time designate by notice to [Insert Institution's (abbreviated) name]; and

(b) in the case of [Insert Institution's (abbreviated) name], be given by letter delivered by hand and be addressed to the Chairman, [Insert Institution's (abbreviated) name]

Copies of all notices shall also be sent by facsimile and by registered acknowledgement due pre-paid post or courier.

Copies of all notices shall also be sent to the [Insert Institution's (abbreviated) name] Representative.

42.5. Severability

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

42.6. No Partnership

Nothing contained in this Agreement shall be construed or interpreted as constituting a partnership between the Parties. Neither Party shall have any authority to bind the other in any manner whatsoever.

42.7. 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.

42.8. 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.

42.9. Counterparts

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

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

SIGNED SEALED AND DELIVERED

For and on behalf of  
[Insert Institution's full name]

By

\_\_\_\_\_ (Signature)  
\_\_\_\_\_ (Name)  
\_\_\_\_\_ (Designation)  
\_\_\_\_\_ (Date)

In the presence of:

- 1.
- 2.

SIGNED, SEALED AND DELIVERED

For and on behalf of  
CONCESSIONAIRE by:

\_\_\_\_\_ (Signature)  
\_\_\_\_\_ (Name)  
\_\_\_\_\_ (Designation)  
\_\_\_\_\_ (Date)

In the presence of:

- 1.
- 2.