

**Schedule-1: Draft Concession Agreement**

***(This Draft Concession Agreement will be finalised in terms of RFP Conditions (including Addenda), once the Preferred Bidder is Selected and Meets the Pre-conditions of the Agreement)***

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**Draft Concession Agreement for Development of 'Family Entertainment Center-1 (West-side on Road-N12)' at Amaravati Central Park in Amaravati Capital City on PPP Mode**

**THIS CONCESSION AGREEMENT** (herein after also referred to as "**Agreement**") is made on this the \_\_\_\_\_ day of \_\_\_\_\_ 2018 at Vijayawada, Andhra Pradesh.

By and Among

**AMARAVATI DEVELOPMENT CORPORATION LIMITED**, having its Regd. Office at D.No.20-4-15, Flat No.-1G, Ananda Heights, Beside Prabhas College, Kedarewarpet, Vijayawada, Andhra Pradesh 520003 and being represented herein by \_\_\_\_\_ (authorized in this behalf) (hereinafter referred to as "**ADCL**" or the "**Authority**" which expression shall, unless it be repugnant to the context or meaning thereof, include its subsidiaries, successors and assigns) of the **FIRST PART**;

and

**M/s** \_\_\_\_\_, a company incorporated by the Preferred Bidder, exclusively for the Project, under the Companies Act, 2013, having its Registered Office at \_\_\_\_\_ (hereinafter referred to as the "**Concessionaire**" which expression shall, unless it be repugnant to the context or meaning thereof, include its successors and permitted assigns) represented herein through Mr. \_\_\_\_\_, the Authorised Signatory, as authorised vide Board Resolution dated \_\_\_\_\_ or by Power of Attorney dated ----- ---- executed in his favor of the **SECOND PART**;

and

**M/s** \_\_\_\_\_ having its Registered Office at \_\_\_\_\_, in its capacity as the Confirming Party to this Agreement (hereinafter referred to as the "**Preferred Bidder**" which expression shall, unless the context otherwise requires, include its successors and permitted assigns) represented herein through Mr. \_\_\_\_\_, the Authorised Signatory, as authorised vide Board Resolution dated \_\_\_\_\_ or by a Power of Attorney dated -----executed in his favor of the **THIRD PART**;

(Each of the parties of the **FIRST**, **SECOND** and **THIRD** parts are hereinafter, as the context may admit or require, individually referred to as a "**Party**" and collectively as the "**Parties**").

**WHEREAS**

A. Amaravati development Corporation Limited (hereinafter referred to as "**ADCL**" or the "**Authority**") which is, inter alia, responsible for the development, implementation, operation and management of Infrastrure in Amravati, the new Capital City of Andhra Pradesh. The Government of Andhra Pradesh has a vision to develop the entire Capital City with infrastructure of international standards. As per the 'Master Plan', a 'Central Park' has

been proposed at the heart of the Capital City. The Amravati Central Park, being one of the first to be implemented on priority basis, is the showcase of this vision of development. The Central Park is the most significant feature of the Capital City, with an area of 300 Acres approximately. This is an environmental and eco-friendly Park, which will include activities for carnival and celebration, children and family outings, nature lovers and health conscious, culturally rooted and intellectually inclined as well as leisure and hospitality project components. 'ADCL ' intends to develop various 'Tourism Infrastructure Projects' at the site through Public Private Partnership. As part of development of 'Central Park' under 'Tourism Infrastructure Projects', ADCL intends to develop **"Family Entertainment Center-1 (West-side on Road-N12)"** in 2 Acres of land parcel through Public Private Partnership (the **"PPP"**) on [Design, Build, Finance, Operate and Transfer (the **"DBFOT"**)] basis (hereinafter referred to as the **"Project"**).

- B. In view of selecting the private sector participant that would implement the said project, ADCL undertook a transparent competitive bidding process (the **'Bidding Process'**) for selecting the entity, which would undertake the development of the Project and, accordingly, invited Request for Proposal (RFP) documents dated \_\_\_\_\_.
- C. After evaluation of the Bids received, ADCL accepted the Bid of the \_\_\_\_\_<sup>1</sup> with \_\_\_\_\_ as its Lead Member<sup>2</sup> and issued the Letter of Award reference no. \_\_\_\_\_, dated \_\_\_\_\_, 2018\_\_\_ annexed hereto as **Appendix 1** (hereinafter the **'LOA'**) declaring it the Preferred Bidder in accordance with the terms of the RFP.
- D. Since then, the Preferred Bidder has incorporated the Concessionaire as its wholly owned subsidiary, exclusively to implement the Project, in accordance with the provisions of the RFP and requested ADCL to accept the Concessionaire as the entity which shall enter into and undertake the Project and perform the obligations including the obligation to enter into this Concession Agreement for implementing the Project.
- E. This Agreement and ADCL, pursuant to the provisions of the RFP, has agreed to grant the Concession for the implementation of the said 'Project' to the 'Special Purpose Company'.
- F. The Concessionaire acknowledges and confirms that it has undertaken a due diligence exercise of all aspects of the Project including its technical and financial viability, legal due diligence, and on the basis of its independent satisfaction hereby accepts the Concession and agrees to implement the Project at its own cost, risk and expense in accordance with the terms and conditions of this Agreement.

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<sup>1</sup> Insert the name of the Preferred Bidder.

<sup>2</sup> Strikeout reference of Lead Member, where Preferred Bidder is not a Consortium.

- G. Following the issuance of LoA, the Preferred Bidder in accordance with the terms and conditions as specified in the RFP Section-I, as being the pre-condition to the execution of this Agreement, has made a non-refundable, irrevocable payment of: (i) Six Months Advance Lease Rental Deposit amounting to Rs..... (Rupees ..... Only) plus applicable taxes in the form of Demand Draft drawn in favour of ADCL (ii) Rs. .... Lakhs (Rupees ..... only) plus applicable taxes, duties and levies to ADCL towards payment of the Project Development Fee. The Preferred Bidder (for and on behalf of the Concessionaire) has also furnished an irrevocable and unconditional Bank Guarantee No. .... & ..... dated \_\_\_\_\_ drawn from ..... Bank, \_\_\_\_\_ Branch, in favor of \_\_\_\_\_, ADCL for an amount of Rs. .... (Rupees ..... Only) valid up to \_\_\_\_\_, 201\_\_ and of Rs. .... (Rupees ..... Only) valid up to \_\_\_\_\_, 201\_\_ as guarantees for the performance by the Concessionaire of its obligations in relation to the Project ("Performance Security"). In light of the compliance by the Concessionaire of the pre-conditions to the execution of the Concession Agreement, ADCL has agreed to enter into this Concession Agreement vesting the rights for the implementation of the Project with the Concessionaire on the terms, conditions and covenants hereinafter set forth in this Agreement.
- H. The Preferred Bidder has undertaken to ensure that the Concessionaire shall duly discharge its obligations under this Agreement and implement the Project and has joined in and is executing this Agreement as a Confirming Party to the arrangement envisaged and detailed herein under and agrees to undertake and comply with the terms and conditions hereof as binding terms.

**NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:**



## ARTICLE 1 DEFINITIONS AND INTERPRETATION

### Section 1.1 Definitions

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

- (a) **“Accounting Year”** means the financial Year commencing on 1<sup>st</sup> April in each Year and ending on 31<sup>st</sup> March in the next Year except in the first and the last calendar Year of the subsistence of this Agreement. In the first Year of subsistence of this Agreement, it means the period from the signing of Concession Agreement to the immediately following, 31<sup>st</sup> March. In the last Year of subsistence of this Agreement, it means the period from 1<sup>st</sup> April to the Transfer Date;.
- (b) **“Affiliate” or “Associate”** means with respect to a specified Person, any Person which is a holding company or subsidiary of such specified Person, or any Person which directly or indirectly, (i) owns or controls such specified Person, (ii) is owned or controlled by such specified Person, or (iii) is owned or controlled by the same Person, who, directly or indirectly, owns or controls such specified Person. For the purposes of this Agreement, the terms "holding company" and "subsidiary" shall have the meaning ascribed to them under Section 4 of the Companies Act, 2013 and the term "control" shall mean:
- i. control over the composition of majority of board of directors of a company; or
  - ii. control of more than 50% (fifty percent) of the issued equity share capital of a company
  - iii. and with respect to a Person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise;
- (c) **“Agreement”** means this Agreement as of date hereof, including recitals, Appendices and attachments hereto as may be amended, supplemented or modified in accordance with the provisions hereof;
- (d) **“Appendix”** means any of the schedules, supplements or documents, appended to this Agreement;
- (e) **“Applicable Laws”** means any statute, law, regulation, ordinance, notification, rule, regulation, judgment, order, decree, bye-law, approval, directive, guideline, policy, requirement or other governmental restriction or any similar form of decision of, or determination by, or any interpretation or administration of GOI, GOAP or by any Government Authority or instrumentality thereof, as may be in effect on the date of this Agreement and during the subsistence thereof;

- (f) **“Applicable Permits”** means any or all permissions, clearances, Concessions, consents, no-objections, approvals of or from any Government Authority required in connection with the Project and for undertaking, performing or discharging the obligations or fulfillment of the purposes contemplated by this Agreement;
- (g) **“Annual Lease Rental”** means the annual lease rental payable by the Concessionaire to ADCL for the Project Site in accordance with the provisions hereof and the Project Site Lease Deed;
- (h) **“Bank”** means any Nationalized/Scheduled (excluding Cooperative) Banks having operations in the City of Vijayawada, Andhra Pradesh;
- (i) **“Built up Area” or “Floor Area,” or “Built up Space”** means the covered area of a building at all floors levels added together, excluding parking;
- (j) **“Business Day”** means a day on which banks are generally open in Vijayawada for transaction of normal banking business;
- (k) **“Commercial Operations”** means the occupancy and use by third parties of the relevant Project Facility, pursuant to Contractual Arrangements with the Concessionaire and against payment of User Charges;
- (l) **“Commercial Operation Date” or “COD”** means the date on which the Authority issues the Provisional Certificate and / or the Completion Certificate, as the case may be, in respect of the entire Project or any particular Project Facility (as per Minimum Development Obligations (MDOs)), upon receipt of which, the Concessionaire commences Commercial Operations of the respective Project Facility in accordance with the provisions hereof;
- (m) **“Completion Certificate”** means the certificate issued by Authority in the manner set out in Section 6.3;
- (n) **“Compliance Date”** shall mean the later of the dates, within a period of one hundred and eighty (180) Days from the Execution Date, by which both the Parties hereto have fulfilled their respective Conditions Precedent in accordance with Article 3 hereof, and upon which this Agreement becomes unconditional and effective;
- (o) **“Concession ”** shall have the meaning set forth in Article 2.1;
- (p) **“Concession Period”** shall have the meaning specified in Section 2.2;
- (q) **“Concessionaire”** means the Preferred Bidder M/s ( ) and shall include its successors and permitted assignees;

- (r) **“Condition Precedent”** means the conditions set out in Article 3 hereof;
- (s) **‘Consortium’** shall mean the group of legally constituted entities, who have come together, have agreed or have formed an understanding (in writing) for implementing the Project, subject to the terms of this RFP;
- (t) **“Construction Contract”** means the one or more contracts that are entered into by the Concessionaire with the relevant Contractors in relation to the construction of the Project Facilities;
- (u) **“Construction Period”** means the period from the date of execution of this Agreement up to the date of Project Completion (i.e. when the Completion Certificate has been issued for all the Project Facilities);
- (v) **“Contractor”** means a reputed Person with whom the Concessionaire has entered into/ may enter into a contract relating to the Works and subcontractors, including contractors for engineering, procurement and construction of all or any part of the Project Facilities and contractors for operations, management, and maintenance (**‘O&M Contractors’**), as the context may require, service providers, suppliers and/or any other contractors and sub-contractors, manufacturers or suppliers of Works or part thereof, as the context may admit or require;
- (w) **“Contractual Arrangements”** shall mean and include all and any, licensing, tenancy, franchising and similar arrangements that may be entered into by the Concessionaire, in accordance with and subject always to the terms and conditions of this Concession Agreement, with such Persons selected by it for enabling such Persons to occupy or use or market the whole or part of the Project Facilities including built-up floor areas/spaces, advertising spaces, car parking areas and infrastructure facilities. *Provided that* the Concessionaire cannot sell title of the Site or the Project Facilities;
- (x) **“Contractual Counter-Parties”** shall have the meaning specified in Section 6.5.2 (a);
- (y) **“Debt Service”** means all payments on account of principal, interest, financing fees and charges due and payable in an Accounting Year to the Lenders under the Financing Documents;
- (z) **“Demand Draft or DD”** means the instrument issued by any Nationalized/Scheduled (Excluding Cooperative) Banks having operations in Vijayawada, Andhra Pradesh;
- (aa) **“Detailed Project Report”** or **“DPR”** means the detailed design and engineering report for the Project, as indicated in the Article-6;

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

(cc) **“Development Controls”** means the Applicable Laws, guidelines and controls for development and implementation of the Project Facilities set forth in Appendix;

(dd) **“Directive”** means any present or future requirement, instruction, direction, order, rule or regulation issued by any Competent Authority which is legally binding or which is notified/directive issued by the ADCL to the Concessionaire and any modification, extension or replacement thereof from time to time in force;

(ee) **“Dispute Resolution Procedure”** means the procedure for resolution of disputes set forth in Article 17;

(ff) **“Easement”** means all easements, reservations, rights-of-way, utilities and other similar rights as to the use of real property, which are necessary or appropriate for the conduct of activities of the Concessionaire related to the Project;

(gg) **“Encumbrances”** means any encumbrance such as a mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other obligation or restriction and shall include physical or legal obstructions or encroachments on the whole or any part of the Project Site or Third Party claims or rights of any kind attaching to the whole or any part of the Project Site;

(hh) **“Event of Default”** means a Concessionaire Event of Default or a Authority Event of Default or both, as the context may require or admit;

(ii) **“Expert”** means any person, body or organization of repute with recognized technical/professional expertise in respect of any field, matter or subject relevant for the purpose of this Agreement, appointed by the Parties by mutual consent, also referred to as third party expert;

(jj) **“Execution Date” or “Date of Execution”** means the date on which the Parties sign this Concession Agreement;

(kk) **“Escrow Account”** means the bank account in the Escrow Bank into which all the revenue inflows and outflows of the Concessionaire that accrue or arise under, in connection with or pursuant to the Project (including amounts received from User Charges) shall be credited and

debited, as the case may be, in accordance with the provisions hereof and of the Escrow Agreement and shall include the sub-accounts of such account;

(ll) **“Escrow Agreement”** means the Agreement to be entered into by and among the Authority, the Concessionaire the Lenders/Lenders’ representative, and the Escrow Bank, in relation to the opening and operation of the Escrow Account;

(mm) **“Escrow Bank”** means the bank, mutually agreed upon by the Authority, the Concessionaire and the Lenders/Lenders’ representative, for the purpose of opening the Escrow Account;

(nn) **“Family Entertainment Center”** means development of “Family Entertainment Center” in ‘Multi-level Parking Complex’ with Shopping Mall, Multiplex, Food Court & Gaming Zone etc., with an Indoor Amusement Park or Indoor Theme Park targeting families of all age groups with customized and branded attractions and retail outlets and are associated with major entertainment companies also known as ‘Urban Entertainment Center’, sometimes called Family Amusement Center, Play Zone, Family Fun Center, or simply Fun Center.

(oo) **“Financial Assistance”** means the aggregate amounts provided by way of loan, advances, guarantees or otherwise by the Lenders to the Concessionaire for the implementation of the Project and shall include all related financial charges, fees and expenses of all kinds under the Financing Documents relating to the Project;

(pp) **“Financial Closure”** means the date on which the Financing Documents providing for Financial Assistance by the Lenders have become effective and the Concessionaire has access to such Financial Assistance;

(qq) **“Financing Documents”** means, collectively, the documents executed in favor of or entered into with the Lenders, by the Concessionaire in respect of the Financial Assistance, including loan Agreements, all the security documents (such as mortgage deed, hypothecation deed etc.) that create security in respect of the Financial Assistance, notes, indentures, or arrangements, guarantees and acceptable letters of credit and other Agreements evidencing any obligation of the Concessionaire and other necessary undertakings required pursuant to the respective terms thereof, relating to or securing the repayment of the Financial Assistance or any part thereof (including refinancing) provided by the Lenders to the Concessionaire for the Project;

(rr) **“Force Majeure Event”** shall have the meaning ascribed to it in Section 14.1 of this Agreement;

(ss) **“Gross Annual Turnover” or “Gross Revenue”** means the pre-taxation gross revenues of the Concessionaire from all sources or amounts of money by whatever name called, that arise, accrue to and/or are received for any period including all amounts received (or which would have been

received) by the Concessionaire from the operation of the Project/ Project Facilities including without limitation the monies towards the User Charges collected demanded, levied, received by from the Users and all other net amounts which fall (or would fall) to be credited to the profit and loss account of the Concessionaire for the Accounting Year in which the relevant period falls excluding (i) insurance proceeds except insurance indemnification for loss of revenue; and (ii) payments and/or monies collected by the Concessionaire for and on behalf of any Government Authorities under Applicable Laws. It is clarified that the amounts payable to the Authority under this Agreement shall not be deducted from Revenue/Gross Annual Turn Over;

(tt) **“GoAP”** means Government of Andhra Pradesh

(uu) **“Gol”** means the Government of India;

(vv) **“Government Authority”** means Gol, GoAP., or any State Government or Governmental department, commission, board, body, bureau, agency, authority, instrumentality, court or other judicial or administrative body, central, state, or local, having jurisdiction over the Concessionaire, the Project, the Project Assets and the Works or any part thereof or the performance of all or any of the services, obligations or covenants of Concessionaire under or pursuant to this Agreement or any portion thereof;

(ww) **“Good Industry Practice”** means the exercise of that degree of skill, diligence and prudence and those practices, methods, specifications and standards of engineering, procurement, construction, equipment, safety, operation and performance, as may change from time to time and which would reasonably and ordinarily be expected to be used by a skilled and experienced construction contractor and/or operator, in a project of the type and size similar to the Project;

(xx) **“Land Lease Agreement”** means the lease deed to be executed between the Authority and the Concessionaire, substantially in the form set out in *Appendix*, pursuant to which the Authority shall lease to the Concessionaire the land comprising the Project Site, vesting the Concessionaire with Vacant Possession and all rights relating thereto for a period co-terminus with the Concession Period;

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

(zz) **“Material Adverse Effect”** means circumstances which may or do (i) render any right vested in a Party by the terms of this Agreement ineffective or (ii) adversely affect or restrict or frustrate the ability of any Party to observe and perform in a timely manner its obligations under this Agreement or the legality, validity, binding nature or enforceability of this Agreement;

(aaa) **“Material Breach”** means a breach of the obligations, terms and conditions of this Agreement or covenants by a Party, which materially and substantially affects the performance of the transactions contemplated by this Agreement or/ has a Material Adverse Effect;

(bbb) **“Minimum Development Obligations”** (MDOs) shall mean all the project facilities covered under Phase I & II including other obligations as detailed in Appendix;

(ccc) **“Nodal Officer”** means the officer from the Engineering Department of ADCL nominated as the “nodal officer” under Section 7.1 of this Agreement;

(ddd) **“Operations Period”** means, in relation to a particular Project Facility, the period commencing from COD of the relevant Project Facility and ending on the expiry or prior termination of the Concession Period and in relation to the Project means the period commencing from issuance of the Completion Certificate in relation to all the Project Facilities and ending on the expiry or prior termination of the Concession Period;

(eee) **“Person”** means any individual, company, corporation, partnership, joint venture, trust, unincorporated organization, Government or Governmental Authority or agency or any other legal entity

(fff) **“Performance Security”** shall mean the irrevocable and unconditional first demand bank guarantees of an amount equivalent to Rs. \_\_\_\_\_ Crores (Rupees \_\_\_\_\_ Crores only) and Rs. \_\_\_\_\_ Crores (Rupees \_\_\_\_\_ Crores only) provided by the Preferred Bidder/ Concessionaire from a Nationalized /Scheduled (Excluding Cooperative) Bank in favor of ADCL , in the form, manner and content, more particularly specified under Clause \_\_\_\_ hereto., as a security for the performance of its obligations by the Concessionaire, in respect of the Project.

(ggg) **“Performance Standards” or “Maintenance and Performance Standards”** means the performance parameters for the operation and maintenance of the Project set out in *Appendix*;

(hhh) **“Preferred Bidder”** shall mean the entity defined as such in the Name Clause of this Agreement.

(iii) **“Prohibited Activities”** means the activities not permitted, as detailed out in the GO.Ms No.168, dated 07.04.2012 issued by Municipal Administration and Urban Development Department, GoAP., and APCRDA Zonal Regulations 2016.

(jii) **“Project” or “Development of Family Entertainment Center-1 (West-side on Road-N12)”** means, development of “Family Entertainment Center” in ‘Multi-level Parking Complex’ with Shopping Mall, Multiplex, Food Court & Gaming Zone etc., subject to the provisions of this Agreement, the (i) designing, financing, construction, implementation, completion, commissioning, marketing, operation, management and transfer of the Project Facilities and all activities incidental thereto, such as engineering, testing, commissioning and insurance etc., by the Concessionaire during the Concession Period; (ii) the demanding, charging, collecting, retaining and appropriating and revision of User Charges by the Concessionaire in relation to the Project Facilities and (iii) the transfer of the Project Facilities by the Concessionaire to Authority or its nominated agency at the end of the Concession Period by efflux of time or prior termination;

(kkk) **“Project Assets”** shall mean and comprise of all tangible and intangible assets relating respectively to the Project, as the case may be excluding land but including and not limited to, (a) rights over the Site in the form of license, right-of-way or otherwise; (b) each of tangible assets comprising the Project Facilities such as foundation, buildings, substructures and superstructures, pavements, over-bridges, works, subways, drainage facilities, sign boards, equipment, electrical works for lighting of and telephone and communication equipment; (c) financial assets, such as receivables, cash and investments; (d) rights under the Project Contracts and other Agreements relating to the Project entered into by the Concessionaire and (e) proceeds from insurance policies taken by the Concessionaire in relation to the Project Facilities;

(lll) **“Project Completion”** shall have the meaning specified in Section 6.3 (a);

(mmm) **“Project Contracts”** means collectively this Agreement, the Land Lease Agreement, the Construction Contract, O&M Contracts (if any) and any other material contract (other than the Financing Documents) entered into or may hereafter be entered into by the Concessionaire in connection with the Project;

(nnn) **“Project Facilities”** means collectively all the amenities and facilities proposed/developed in the Project Site as per the MDOs that the Concessionaire is authorised to undertake and develop, operate and maintain on the Project Site. “Project Facility” can refer to any one of them, as the context may require;

(ooo) **“Project Implementation Schedule”** means implementation schedule for the Project to be finalized as part of the DPR in accordance with Section 6.1(b) of this Agreement;

(ppp) **“Project Site” or “Site”** means all that plot of land containing an area, approximately admeasuring \_\_\_\_\_acres, located in survey number \_\_\_\_\_of \_\_\_\_\_Village, \_\_\_\_\_Mandal, \_\_\_\_\_district of Andhra Pradesh more particularly detailed in Appendix;



(qqq) **“Project Monitoring & Supervision Consultants’/Consultant”** means the ‘Project Monitoring & Supervision Consultants’/Consultant that may be appointed as referred to in Section 7.1. It is hereby clarified that wherever in this Agreement any certification or verification has been stated to be needed or undertaken by the ‘Project Monitoring & Supervision Consultants’, the same shall be done or undertaken by the Nodal Officer in the event no ‘Project Monitoring & Supervision Consultants’ has been appointed under Article 7.1;

(rrr) **“Proposal” or “Bid”** means the entire set of technical, financial, qualifying and other documents that comprise the proposal submitted by the Preferred Bidder in response to the RFP;

(sss) **“Request for Proposal” or “RFP”** means the Request for Proposal dated \_\_\_\_\_ issued by the Authority as part of the competitive bidding process inviting bids, for implementing the Project on PPP basis, and includes any addendum / clarifications issued in respect thereof by the Authority;

(ttt) **“Revenue Share”** shall mean the fee payable by the Concessionaire to the Authority every Year in consideration of the grant of the Project, and commencing from the Fifth Year of Agreement date and till the end of the Concession Period in accordance with the provisions of **Section 8.3.3** of this Agreement;

(uuu) **“Right of First Refusal”** shall have the meaning specified in Section 2.3 of this Agreement

(vvv) **“Scheduled Project Completion Date”** shall have the meaning specified in Section 6.3 (c);

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

(xxx) **“Specifications and Standards”** means collectively or singularly, as the context may admit or require, the Development Controls, the Technical Specifications and the Performance Standards;

(yyy) **“Special Purpose Company” or “SPC”** shall mean the Concessionaire.

(zzz) **“Tax”** means all forms of taxation whether direct or indirect and whether levied by reference to income, profits, gains, net wealth, asset values, turnover, added value, goods, services, works, import, export, production or other reference and statutory, governmental, state, provincial, local governmental or municipal impositions including property tax, duties, contributions, rates and levies (including without limitation social security contributions and any other payroll taxes),

whenever and wherever imposed (whether imposed by way of a withholding or deduction for or on account of tax or otherwise) and/or levies of any nature whatsoever, whether by GoI, the Authority or Government Authorities, and in respect of any Person and all penalties, charges, costs and interest relating to it;

(aaaa) **“User Charges”** shall mean and include the rentals, license fees, deposits, advances, prices, fees, charges, user charges, charges relating to facility management services, maintenance charges, parking fees, advertisement fees, and all other amounts of money by whatever name called, that are (i) determined, charged, demanded, collected, retained and appropriated by the Concessionaire under this Agreement, including pursuant to any Contractual Arrangement in relation to the use of space within the Project Site, as well as maintenance and upkeep of Project Facilities; and/or (ii) payable at any time and from time to time by any Person to the Concessionaire in respect of the Project Facilities;

(bbbb) **“Technical Specifications”** or **“Specifications & Standards”** mean the technical specifications for the construction and implementation of the Project as set forth in *Appendix*;

(cccc) **“Termination”** means prior termination of this Agreement pursuant to Termination Notice but shall not, unless the context otherwise requires, include the expiry of this Agreement due to efflux of time in the normal course;

(dddd) **“Termination Period”** shall have the meaning specified in Section 16.1;

(eeee) **“Tests”** means the tests to be carried out pursuant to this Agreement and include the test to determine the completion of the Construction Works and certification thereof by the Authority/Project Monitoring & Supervision Consultants/Consultant prior to Commercial Operations;

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

(gggg) **“Transfer Date”** means either: (i) the date of expiry of Concession Period by efflux of time, including extension thereto or (b) in the event of an earlier termination thereof, the date on which the Project Facilities are transferred to the Concessionaire in accordance with the provisions of Article 16;

(hhhh) **“Transaction Documents”** means collectively the Project Contracts and the Financing Documents but does not include the Escrow Agreement;

(iii) **“Vacant Possession”** means delivery of possession of the land comprising the Site, free from all Encumbrances, restrictions or impediments and the grant of all Easements and all other rights appurtenant or in relation thereto;

(jjj) **“Vesting Certificate”** shall have the meaning specified in Section 16.5;

(kkk) **“Year”** means a period of 12 consecutive calendar Months;

(lll) **“Works”** mean the works under and in accordance with the provisions of this Agreement relating to design, development of Site, construction, completion, testing and commissioning of the Project Facilities (the **“Construction Works”**), and the operation, management and maintenance, rectifying and remedying of defects therein (the **“O&M Works”**), collectively or singularly as the context may admit or require, including the technology, services and things to be designed, engineered, constructed, installed, equipped, supplied, executed, manufactured, completed, tested, commissioned, rectified, replaced, made good, carried out and undertaken in respect of the Project/Project Facilities and any other permanent, temporary or urgent works required hereunder;

## **Section 1.2 Interpretations**

In this Agreement, unless the context otherwise requires,

- a. reference to any legislation or law or to any provision thereof shall include references to any such law as it may, after the date of this Agreement, from time to time be amended, supplemented or re-enacted;
- b. words importing singular shall include plural and vice versa, and words importing the masculine shall include the feminine gender;
- c. the table of contents and headings are for convenience of reference only, and shall not be used in and shall not affect the construction or interpretation of this Agreement;
- d. 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 Appendices and used therein shall have the meaning ascribed thereto in the Appendices;
- e. words “include” and “including” are to be construed without limitation;
- f. any reference to any point in time shall mean a reference to that point according to Indian Standard Time;

- g. any reference to day shall mean a reference to a calendar day; any reference to Month shall mean a reference to a calendar Month;
- h. Appendices 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;
- i. reference to this Agreement or any other Agreement, deed, instrument, Concession or document of any description shall be construed as reference to such Agreement, deed, instrument, Concession or other document as the same may from time to time be amended, varied, supplemented, modified, notated or suspended;
- j. references to recitals, articles, sections, sub-sections, appendices in this Agreement shall, except where the context otherwise requires, be deemed to be references to recitals, articles, sections, sub-sections, appendices of or to this Agreement;
- k. any reference to any period commencing “from” a specified day or date and “till” or “until” a specified day or date shall include both such Days or dates; provided that if the last day of any period computed under this Agreement is not a Business day, then the period shall run until the end of the next Business day;
- l. references to any date, period or Milestone Dates shall mean and include such date, period or Milestone Date as may be extended pursuant to this Agreement or by mutual consent of the Parties hereto;
- m. references to “construction” include, unless the context otherwise requires, investigation, design, development of Site, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and “construct” shall be construed accordingly;
- n. wherever in this Agreement provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate, Agreement, Concession proposal, communication, information or report or determination by any Party and/or the ‘Project Monitoring & Supervision Consultants’/Consultant/Consultant/ Expert, unless otherwise specified, such notice, endorsement, consent, approval, certificate, Agreement, Concession proposal, communication, information or report or determination shall be in writing under the hand of the duly authorized representative of such Party and/or the ‘Project Monitoring & Supervision Consultants’/Consultant/Consultant/Expert in this behalf;

- o. unless otherwise provided, any interest to be calculated and payable under this Agreement shall accrue on a Monthly basis and from the respective due dates as provided for in this Agreement;
- p. any word or expression used in this Agreement shall, unless defined or construed in this Agreement, bear its ordinary English meaning;
- q. the damages payable by a Party to the other Party as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage/liquidated damages likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty.

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

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

### **Section 1.4      Ambiguities within Agreement**

In case of ambiguities or discrepancies within this Agreement, the following shall apply:

- (a) Between two Articles of this Agreement, the provisions of specific Article relevant to the issue under consideration shall prevail over those in the other Article;
- (b) Between the provisions of this Agreement and the Appendices, the Agreement shall prevail, save and except as expressly provided in the Agreement or the Appendices;
- (c) Between the written description on the drawings and detailed engineering and the Specifications and Standards, the latter shall prevail; and
- (d) Between any value written in numerical and that in words, the latter shall prevail.

### **Section 1.5      Priority of Documents**

The documents forming part of the bidding process leading to this Agreement shall be relied upon and interpreted in the following descending order of priority:

- (a) This Agreement
- (b) The Appendices to the Agreement
- (c) Any Supplementary Agreements to this Agreement
- (d) The LoA issued to the Preferred Bidder

- (e) Written Addenda to the RFP
- (f) Written Clarifications to the RFP
- (g) The RFP
- (h) The Preferred Bidder’s Bid.

## **ARTICLE 2 CONCESSION**

### **Section 2.1 Grant of Concession**

- (a) Subject to and in accordance with the terms and conditions set forth in this Agreement, the Applicable Laws, the terms of Applicable Permits, and Good Industry Practice, the Authority hereby grants to the Concessionaire, and the Concessionaire hereby accepts the exclusive right, authority and Concession to undertake, during the Concession Period, the development, design, engineering, financing, procurement, completion, commissioning, implementation, marketing, management, administration operation and maintenance of the Project Facilities at the Site and exercise and enjoy the rights, powers, privileges, Concessions and entitlements as set forth in this Agreement (collectively the **“Concession”**) and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein.
- (b) Subject to and in accordance with the provisions of this Agreement, the Concession granted herein includes, subject to the provisions hereof, shall oblige or entitle (as the case may be) the Concessionaire to:
- i. make at its cost and expense such development and improvements in the Site as may be necessary to implement the Project and establish the Project Facilities thereat subject to and in accordance with the provisions of this Agreement;
  - ii. Develop, finance, design, construct, market, manage, administer, operate and maintain the Project Facilities in conformity with the Specifications and Standards set forth in Appendix;
  - iii. To apply for, procure & maintain all requisite Applicable Permits for the development of Project Facilities on the Project Site as well as for the O&M thereof, including plans for construction thereon for such uses and purposes as permitted under this Agreement; and
  - iv. Operate and maintain the Project and regulate the use thereof by Third Parties in accordance with the provisions of this Agreement and Applicable Laws;
  - v. Determine, demand, revise, charge, collect, retain and appropriate User Charges;
  - vi. Enter into Contractual Arrangements in relation to the Project Facilities;
  - vii. Appoint Contractors/sub-contractors for discharging any of its obligations under this Agreement, carrying on its business of implementing, constructing, managing, marketing, operating and/or maintaining the Project;
  - viii. exercise all rights and remedies available under the Applicable Laws to recover the User Charges in compliance with the requirements of the Applicable Laws, terms of Applicable Permits or mandatory requirements of Government Authorities, if any, and Good Industry Practice in this behalf ; and
  - ix. make timely payments to the Authority in accordance with the terms of this Agreement towards, *interalia*, the Revenue Share and the Annual Lease Rental;

- x. Perform and fulfill all of the Concessionaire’s obligations under and in accordance with this Agreement, Carry out such other activities incidental to the foregoing or proper or desirable for the safe, efficient and economic implementation and operations of the Project, in accordance with Applicable Laws & Good Industry Practice;
  - xi. Exercise and/or enjoy all the rights, powers, privileges, Concessions and entitlements as set forth in this Agreement.
- (c) The Concessionaire has no right to sell or mortgage the title of the Site or any of the whole or part thereof and it shall, on the Transfer date, transfer and hand over the Site along with the Project Facilities and Project Assets to the Authority or its nominated agency in accordance with the provisions hereof.
- (d) The Concessionaire is not authorised and shall not assign, transfer or sublet or part with or create any Encumbrances on the whole or any part of the Project Site save and except as expressly permitted under this Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint Contractors, to enter into Contractual Arrangements.

## **Section 2.2 Concession Period**

The period of Concession shall commence on the Execution Date of this Agreement and shall if not terminated earlier or extended by ADCL in accordance with the terms and conditions hereof, remain valid for a period of 33 (Thirty three) Years from such date, during which the Concessionaire is authorized to implement the Project in accordance with the provisions of this Agreement (the “**Concession Period**”). For the avoidance of doubt, the Concession Period shall include the Construction Period.

## **Section 2.3 Right of First Refusal for Additional Period**

Subject to and in accordance with provisions of this Agreement, and upon completion of the Concession Period by efflux of time, the Authority shall, in the event it determines to undertake the continued management, operation and maintenance of the Project Facilities through PPP structure, and subject to the Concessionaire observing all the terms and conditions under the Concession Agreement as well as the Land Lease Agreement and not committing any breach thereof, provide the Concessionaire with the right to match and accept the price and terms of the highest bid / prospective preferred bidder (subject to the Concessionaire participating in such bidding process with its bid falling within 10% variation with the successful bid), that is obtained by the Authority through a competitive bidding process for a fresh term of Concession of additional period, (“**Right of First Refusal**”). If the Concessionaire matches and accepts the price and terms of the highest bid / prospective preferred bidder, then it shall be awarded the Concession for an additional period and if it fails to do so, then the said Concession would be awarded to the prospective preferred bidder.



**Provided that** the Authority shall commence the said bidding process at least 6 (Six) Months prior to the expiry of the Concession Period & culminate the same prior to such expiry of the Concession Period.

## **ARTICLE 3            CONDITIONS PRECEDENT**

### **Section 3.1        Conditions Precedent**

Save and except as may otherwise be expressly provided herein, the obligations of a Party under this Agreement shall be subject to the satisfaction in full of the Conditions Precedent relating to the other Party (the “**Conditions Precedent**”).

### **Section 3.2        Conditions Precedent for Authority**

The obligations of the Concessionaire hereunder are subject to the satisfaction in full of the following Conditions Precedent for the Authority: The Authority shall have:

- (a) handed over to the Concessionaire, the Vacant Possession of the Site free from all encumbrances, on “as is where is basis” and executed Land Lease Deed substantially in the form attached hereto in *Appendix* in accordance with the terms of this Agreement; Shall issue necessary notification/government orders, if any, required for change of land use of the site for development of the Project Facilities as mentioned in the RFP.

### **Section 3.3        Conditions Precedent for Concessionaire**

The obligations of the Authority are subject to the satisfaction in full of the following Conditions Precedent for the Concessionaire. The Concessionaire shall have:

- (a) made all the applications at its cost and procured the Applicable Permits as per the indicative list set out in *Appendix* required for commencing construction and execution of the Works unconditionally or if subject to conditions then all such conditions have been satisfied in full and such Applicable Permits are in full force and effect and the Concessionaire is in compliance with the conditions of grant thereof and they are valid and effective;
- (b) provided the Authority notarised true copies of its constitutional documents and board resolutions authorising the execution, delivery and performance of this Agreement by the Concessionaire;
- (c) executed and procured execution of the Escrow Agreement;
- (d) achieved Financial Closure and provided notarised true copies of the Financing Documents to the Authority along with soft copies;
- (e) prepared, finalised and procured approval of the Authority for the Detailed Project Report in accordance with the provisions of **Section 6.1** hereof;

- (f) procured consent for establishment /consent for operation/ environmental clearance etc from the State/Central Agencies/Authorities, as may be required under Applicable Law, after having completed preparation of the Detailed Project Report as required;
- (g) confirmed in writing that all the representations and warranties of the Preferred Bidder/Concessionaire set forth in the Proposal and forming part of this Agreement are true and correct as on the date of execution of this Agreement and the Compliance Date;

Provided that upon request in writing by the Concessionaire, the Authority may, in its sole discretion, waive fully or partially any or all the Conditions Precedent set forth in this **Section 3.3**.

#### **Section 3.4 Obligation to Satisfy Conditions Precedent**

- (a) Each Party shall make all reasonable endeavours at its respective cost and expense to comply in full with the Conditions Precedent relating to it within a period of 180 (one hundred and eighty) Days from the Execution date, or any extension agreed to between the Parties.
- (b) The later of the dates within such 180 (one hundred and eighty) Days when the Authority and the Concessionaire fulfil their respective Conditions Precedent (unless Authority waives the same for the Concessionaire) shall be the date from which the obligations of the Parties hereunder shall commence (the "**Compliance Date**").

#### **Section 3.5 Non-fulfilment of Conditions Precedent**

- (a) In the event the Conditions Precedent for a Party have not been fulfilled within the stipulated time and the Authority has not waived, fully or partially, such conditions relating to the Concessionaire, this Agreement shall cease to have any effect as of that date and shall be deemed to have been terminated by the mutual Agreement of the Parties and no Party shall subsequently have any rights or obligations under this Agreement and ADCL shall not be liable in any manner whatsoever to the Concessionaire or Persons claiming through or under it.
- (b) In the event that possession of the Site has been delivered to the Concessionaire prior to the fulfilment in full of the Conditions Precedent, upon the termination of this Agreement pursuant to clause 3.5 (a) above, the Site shall immediately revert to the Authority, free and clear from any Encumbrances and along with all Easementary Rights, irrespective of any outstanding mutual claims between the Parties and the Concessionaire and the Persons, claiming through or under it, shall immediately remove itself from the Project Site, without any demur or delay.

- (c) In the event this Agreement is terminated due to non-fulfilment of the Concessionaire’s Conditions Precedent and the same is not due to Authority’s default or Force Majeure event, Authority shall retain the Project Development Fee, Six Months Advance Lease Rental Deposit and forfeit Performance Security as damages.
- (d) In the event this Agreement is terminated due to non-fulfilment of the Authority’s Conditions Precedent, the Authority shall upon such termination return/refund in full the Performance Security along with Six Months Advance Lease Rental Deposit received from the Concessionaire, without any interest, provided there are no outstanding claims of the Authority on the Concessionaire, unless such Authority’s failure to fulfil its Conditions Precedent is a result of the Concessionaire’s default.
- (e) Without prejudice to the foregoing, the Parties may, instead of terminating the Agreement, extend the time for fulfilling the Conditions Precedent by mutual Agreement.
- (f) In case of any delays in getting Applicable Permits or approvals for construction and execution of the Project due and attributable to the concerned Government Authority and provided such delay is not due to any default or negligence or omission on the part of the Concessionaire or Persons claiming through or under it, there may be a commensurate extension of the Conditions Precedent, as certified by the ‘Project Monitoring & Supervision Consultants’/Consultant and as approved by the Authority.

## **ARTICLE 4 PROJECT SITE**

### **Section 4.1 Access to and Lease of Site**

- (a) The Authority shall on the date of execution of this Agreement, grant the Concessionaire with the access to the Site for the period from the date hereof to the Compliance Date for the limited purpose of carrying out site investigations, surveys, inspections etc at the Concessionaire’s cost, risk and consequence. The Authority or any Government Authority shall have no liability whatsoever in this behalf. For the avoidance of doubt, the rights granted herein are only in the nature of a bare Concession for the limited purpose of inspection and investigation of the Project Site. The Concessionaire shall ensure at its cost and consequence that during such period no damage is caused to the Project Site by its activities thereat.
- (b) The Parties shall, within 7 (Seven) Days of the Authority’s notice in this behalf to the Concessionaire, prior to the date of signing of Concession Agreement along with Land Lease Agreement, carry out through their duly authorised representative, a joint inspection and verification of all the real estate, structures, land, buildings and record the report thereof in a memorandum duly signed by the Parties/their representatives. The participation of the Concessionaire in such joint inspection shall be mandatory. The Concessionaire shall carry out at its cost a due diligence of all encumbrances at, on or under the Site and notify the same to the Authority, which shall take prompt action for removing the same.
- (c) The Authority shall bear all the costs of making available the Project Site to the Concessionaire and be liable to remove/relocate at its cost all Persons that may have to be displaced from the Project Site, including the payment of compensation, if any, to such Persons or litigation pursuant thereto and the Concessionaire shall not be liable in this behalf.
- (g) The Authority shall lease the Site to the Concessionaire on an “as is where is basis” under a valid and binding **Land Lease Agreement**, in the form attached hereto as *Appendix*, for a period that shall be co-terminus with the Concession Period.
- (d) The Authority shall on or before the Compliance Date and, upon satisfaction of the Conditions Precedents detailed in Section 3.3 hereof, handover the vacant possession of the Project Site unto the Concessionaire on an “as is where is basis” and together with the full and free right and liberty of way and passage and other rights in relation thereto, for the purpose of implementing the Project in accordance with the provisions of this Agreement.
- (e) In consideration for the Lease of the Site, the Concessionaire shall pay the Authority, the Lease Rental as specified in Section 8.2.1 hereof.

- (f) The Project Site Lease Deed shall be duly registered with the relevant Government Authority at the Concessionaire’s cost (stamp duties, registration charges etc.) as soon as practicable, but in any case within four Months of the date of execution thereof.
- (g) Following delivery of possession of the Project Site, the Concessionaire and the Persons claiming through or under it shall keep the Project Site free from any trespass or encroachment and keep the Authority informed thereof and take appropriate and timely legal and remedial action.

#### **Section 4.2 Leases and Sub-Leases/Contracts**

##### **a) No Sub-Lease of Land**

The Concessionaire shall not sub-lease the whole or any part of the land comprising the Project Site, leased to it by Authority under the Land Lease Agreement, to any person in any form or under any arrangement, device or method. This is an essential condition of this Agreement, the breach of which shall constitute a Concessionaire Event of Default that shall entitle the Authority to terminate this Agreement in accordance with the provisions of Article 16 hereof.

##### **b) Lease of Built-up Area/Space on the Project Site**

For the purpose of exercising its rights pursuant to Article-2 of this Agreement, the Concessionaire shall, subject to the provisions hereof, however be allowed to lease any built-up area or space in the Project Site, and it shall have the right, subject to the provisions of this Agreement, to enter into Contractual Arrangements with third parties in relation to any part of the Built-up Area or Space in the Project Site provided the terms and conditions of such Contractual Arrangements shall not be inconsistent or contrary to the provisions of this Agreement and that such Contractual Arrangements shall be coterminous with the Project Site Lease Deed and this Agreement.

#### **Section 4.3 Possession and Use of Project Site**

- (a) Upon the Concessionaire observing and performing its obligations, the several covenants, conditions and Agreements herein contained and on the part of the Concessionaire to be observed and performed, the Concessionaire shall remain in peaceful possession and enjoyment of the Project Site during the Concession Period.
- (b) The Concessionaire shall not without prior written consent or approval of the Authority, use the Site for any purpose other than for the purposes of implementing the Project in accordance with the provisions of this Agreement and purposes incidental thereto or as may

otherwise be approved in writing by the Authority. The Concessionaire acknowledges, accepts, confirms and agrees that this is an essential condition of this Agreement.

- (c) The Concessionaire shall maintain vigil over the Site during the Concession Period to prevent encroachments or occupation of the Site and in case of any encroachment or occupation forthwith remove the same at its cost and expense and inform the Authority thereof.

The Concessionaire shall shift the utilities at, on, over or under the ground at the Project Site to an appropriate location or alignment. Such shifting of the utilities shall be carried out only if and to the extent according to the Authority, the non-shifting thereof materially obstructs the implementation of the Project. The cost of such shifting shall be borne by the Concessionaire with a right to seek set off from the owner of such utilities as may be available under the Applicable Laws or contract. In the case of any delays in shifting of the utilities due and attributable to the owner of the utility or the Authority and provided such delay is not due to any default or negligence on the part of the Concessionaire, the same delay will be considered based on the merits of the shifting of such utility/ies vis-a-vis project completion for considering extension of project construction period without penalty - Provided, the Concessionaire shall submit a comprehensive list of utilities to be shifted along with the DPR.

- (d) The Concessionaire shall promptly use the Site for the implementation of the Project or remove at its cost from the Site in accordance with Good Industry Practice all surplus structures at, on, over or under the ground at the Project Site, construction machinery and materials, waste materials (including, without limitation, hazardous materials, all types of solid and liquid waste), rubbish and other debris and dispose them in conformity with the Applicable Laws and Applicable Permits.
- (e) The Concessionaire shall be solely liable for all hazardous, dangerous and other goods, materials, creatures and substances brought, kept, stored or handled at the Site.
- (f) The Authority confirms that:
  - (i) The Site together with the necessary Easement rights has been acquired through the due process of law belongs to and is vested in the ADCL, and further that the ADCL has full powers to hold, dispose of and deal with the same consistent, *inter alia*, with the provisions of this Agreement; and
  - (ii) The Concessionaire shall have no obligation/liability as to payment of any compensation whatsoever to or the rehabilitation and resettlement of any Person from whom the Site or any part thereof had been acquired and that the same shall be the sole responsibility of the ADCL.

- (g) In the event the Concessionaire is obstructed by any Person claiming any right or interest in or over the Project Site or any part thereof or in the event of any enforcement action including any attachment, appointment of receiver or liquidator being initiated by any Person claiming to have any interest in/ charge on the Project Site or any part thereof, Authority shall, if called upon by the Concessionaire, defend such claims and proceedings at its cost and expense and the Concessionaire shall not be liable for the same in any manner whatsoever.
- (h) The Concessionaire shall not part with or create any Encumbrances on the whole or any part of the Project Site save and except as expressly permitted under this Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint Contractors, or to enter into Contractual Arrangements in relation to the Project Facilities and to assign its rights here under and create a Security Interest in favour of the Lenders in accordance with the provisions of this Agreement.

#### **Section 4.4 Access to Site**

- (a) Following the delivery of Vacant Possession of the Project Site on “as is where is basis” by the Authority to the Concessionaire, the Concessionaire shall, at all reasonable times and on reasonable notice, afford access to the Project Site to,
  - (i) the Authority, or the ‘Project Monitoring & Supervision Consultants’/Consultant, or the Experts and their duly authorised personnel and representatives so as to carry out their respective functions and obligations hereunder;
  - (ii) the representatives of or Persons duly authorised by the relevant Government Authority concerned with safety, security or environmental protection to inspect the Site, and the Project and the Works, carry out their respective duties and functions and to investigate any other matter within their authority.
- (b) The Persons obtaining access to the Site shall conduct their activities and operations at their own risk, cost and expense and in such manner so as to cause minimum disruption to the construction, operation and maintenance of the Project consistent with the purpose of the Person gaining such access.

#### **Section 4.5 Information about Project Site**

- (a) The site map set out in Appendix is provided by the Authority to the Concessionaire in good faith and with due regard to the matters for which such information is required by the Concessionaire. The Authority agrees to provide to the Concessionaire upon a reasonable request, any further information relating to the Project Site, which the Authority may now possess or may hereafter come to possess. Subject to this, the Authority makes no representation and gives no warranty to the Concessionaire in respect of the condition of the



Project Site and the Concessionaire shall accept the Project Site handed over to it by the Authority on an “as is where is basis”.

- (b) The Concessionaire acknowledges that before entering into this Agreement, it has had sufficient opportunity to investigate the Site, and
  - (i) accepts full responsibility for its condition (including but not limited to its geological condition, any toxic contamination, the adequacy of the connectivity links to the Site and the availability or unavailability of adequate supplies of water and electricity); and
  - (ii) agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site (or part thereof) or for any other reason pertaining to the Site.

#### **Section 4.6 Authority’s Property at Project Site**

- (a) All debris and construction and building materials (sand, gravel, stone, rock, loose earth etc.) lying at the Project Site or generated during the implementation of the Project shall be promptly disposed off by the Concessionaire at its cost in accordance with Applicable Laws. The Concessionaire may if it deems appropriate use the same for the execution of the Works.
- (b) All articles of value or antiquity found on the Project Site shall be the property of the Authority. The Concessionaire shall take reasonable precautions to prevent its labour and personnel and that of its Contractors from removing or damaging any such article or thing. The Concessionaire shall immediately upon discovery of such article or thing, inform the Authority, which may issue instructions for dealing therewith.

#### **Section 4.7 Reservation**

- (a) The Authority accepts and reserves unto itself all the mines, minerals, coals, gold, etc. in, over, on or under the Site and full right and power at all times to undertake, with reasonable prior notice to the Concessionaire, all acts and things which may be necessary for searching, removing, appropriating or enjoying the same without providing or leaving any vertical support for the surface of the land at the Site or for any structure or building thereat; provided always the Authority shall be obligated to pay reasonable compensation to the Concessionaire for all damage directly resulting from the exercise of the rights hereby reserved or any of them.

## **ARTICLE 5 OBLIGATION OF PARTIES**

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

In addition to and not in derogation or substitution of any of the obligations, undertakings, terms and conditions or covenants set out elsewhere in this Agreement, the Concessionaire shall, without qualification, at its own cost and expense observe, undertake, perform and comply during the Concession Period with the following obligations:

#### **Section 5.1.1 Project Implementation**

- (a) The Concessionaire shall construct the Project Facilities in accordance with the Specifications and Standards, Applicable Laws, terms of Applicable Permits and Good Industry Practice. The Concessionaire shall, for such purposes, do all such acts, deeds and things, as may be required under this Agreement. The Concessionaire shall make payments towards Annual Lease Rentals in the terms specified in this Agreement.
- (b) Concessionaire shall design, plan, develop, finance, construct, market, administer, manage, operate and maintain the Project Facilities, including without limitation, the necessary infrastructure, services and facilities, during the Concession Period in accordance with the provisions hereof, including the Specifications and Standards, Applicable Laws, terms of Applicable Permits and Good Industry Practice. The Concessionaire shall, for such purposes do all such acts, deeds and things, as may be required under this Agreement.
- (c) In implementing the Project, the Concessionaire shall ensure compliance by itself and Persons claiming through or under it with all Applicable Laws, including environmental laws, and the terms of Applicable Permits and the Concessionaire shall be entirely liable for any violations or breaches thereof and indemnify and keep indemnified the Authority from and against all liabilities and costs in this behalf.
- (d) The Concessionaire may appoint Contractors to perform its obligations under this Agreement in accordance with Section 5.1.4 below; provided that the Concessionaire shall ensure that the Contractors function in accordance with the terms and conditions of this Agreement and do not violate or cause of breach of this Agreement. The Concessionaire shall indemnify and keep indemnified the Authority from and against all liabilities and costs in this behalf in accordance with Section 5.1.4 below.

#### **Section 5.1.2 Applicable Permits**

- (a) The Concessionaire shall obtain and maintain at its cost all Applicable Permits, including all environmental permits, in conformity with the Applicable Laws and be in compliance

therewith. Subject to the Concessionaire complying with the Applicable Laws and Good Industry Practice, the Authority shall facilitate the securing of such consents, clearances and Applicable Permits.

- (b) The Concessionaire shall expeditiously make necessary applications to the relevant Government Authorities for all Applicable Permits to meet the stipulated time frames in this Agreement, for completion of the Works, to achieve various performance milestones, if any, and to perform all of its other obligations under this Agreement. The Concessionaire shall supply the appropriate particulars and details to such Government Authorities as may be necessary to confirm that the Concessionaire fulfils the eligibility criteria to enable such Authority reasonably to consider the request for the grant of the relevant Applicable Permits and, following the grant of any such Applicable Permits, the Concessionaire shall maintain such Applicable Permits in full force and effect so long as it is necessary in order for the Concessionaire to perform its obligations hereunder.

### **Section 5.1.3 Personnel and Labour**

- (a) The Concessionaire shall -
  - (i) be solely and exclusively responsible for the recruitment, transportation, accommodation, catering, payment of the salaries, wages and other payments and costs incidental thereto, health, hygiene, safety etc. and all taxes, charges, levies, duties payable under Applicable Laws arising from the respective terms and conditions of employment of all labour and personnel employed by the Concessionaire, its Contractors, agents and representatives on or in connection with the Works or the Project Site under or through whatever legal relationship;
  - (ii) be solely responsible and liable for compliance with all Applicable Laws, including labour (without limitation, The Employee Provident Fund & Misc. Provisions Act 1952, Employees State Insurance Act 1948, Workmen's Compensation Act 1923) and local laws, pertaining to the employment of labour, staff and personnel by it and its Contractors for implementing the Project.
- (b) The employees of the Concessionaire and its Contractors shall at all times be the responsibility of the Concessionaire and the Authority shall not be liable in any manner whatsoever in respect of such employees and their employment.

### **Section 5.1.4 Subcontracting**

- (a) The Concessionaire may appoint at its cost and risk, Contractors possessing the requisite skill, expertise, capacity and technical and financial qualifications, for the performance of any of its obligations under this Agreement, provided the Concessionaire shall at all times be solely responsible and liable for any defect, deficiency or delay in the construction and erection of the

structures/equipment or any part thereof and for the management, operation and maintenance of the Project in accordance with the provisions of this Agreement and provided further that this does not result in the assignment of any of the rights vested with the Concessionaire under this Agreement to the Contractors. The Concessionaire shall ensure that any of its obligations, which are relevant to the scope of work of a Contractor pursuant to this Agreement, are incorporated in the terms and conditions under which such Contractor is retained.

- (b) The Concessionaire shall supervise, monitor and control the activities of Contractors under their respective Project Contracts as may be necessary.
- (c) For the avoidance of doubt, it is hereby clarified that notwithstanding the appointment of a Contractor by the Concessionaire for any of the aforesaid purposes, the Concessionaire shall be liable for the performance of its duties and for the discharge of all its obligations and responsibilities which it shall have towards the Authority under this Agreement and the appointment of Contractor(s) for any of the aforesaid purposes shall neither release nor exonerate the Concessionaire from its obligations hereunder, including full and timely compliance with the terms of this Agreement. The Concessionaire does hereby also agree and acknowledge that it shall remain responsible for obligations performed or to be performed by the Contractors/ subcontractors to the same extent as if such obligations were to be always performed by the Concessionaire and shall at all times be solely responsible for any defect, deficiency or delay by the Contractor in the implementation of the Project/execution of Works.
- (d) The Concessionaire further undertakes and covenants that it shall be solely responsible for all payments to be made to the Contractors and shall indemnify the Authority and keep it indemnified and harmless from and against any and all losses, claims, damages, liabilities, costs (including reasonable attorneys' fees and disbursements) and expenses that the ADCL may incur, insofar as such losses directly arise out of, in any way relate to, or result from the non-performance by the Concessionaire of its obligations to the Contractors including non-payment of any monies to such Contractors.

#### **Section 5.1.5 Transaction Documents**

- (a) The Concessionaire accepts and undertakes to ensure that the terms of all Transaction Documents (including but not limited to the Agreements between the Concessionaire and Contractors and any other Person(s), including vendors of goods and services, or between any of these entities) shall be in conformity with the provisions of this Agreement and not in derogation of or conflict with the provisions hereof. In the event of any conflict or inconsistency between such documents and this Agreement, the provisions of this Agreement shall prevail.

(b) The Concessionaire shall -

- (i) Provide to the Authority notarised true copies of every Transaction Document duly executed, to which the Concessionaire is a party, including any related instruments, deeds, contracts, supplemental Agreements and other such documents relating thereto and of any amendments, supplements or replacements etc. thereof within 15 (Fifteen) Days of such execution or amendment etc.;
- (ii) Not make any replacement, modification or amendment to any of the Financing Documents at any time without the prior written consent of the Authority if such replacement, modification or amendment has or may have the effect of imposing or increasing any financial liability or obligation on the Authority and in the event any replacement, modification or amendment is made without such consent, the Concessionaire shall not enforce such replacement, modification or amendment nor permit enforcement thereof against the Authority;
- (iii) Comply with its obligations set out in the Transaction Documents.
- (iv) Ensure and procure that each Project Contract contains provisions that would entitle Authority or a nominee of the Authority to step into such Agreement at the Authority’s discretion, in place and substitution of the Concessionaire in the event of termination pursuant to the provisions of this Agreement. (the “**Covenant**”). For the avoidance of doubt, it is expressly agreed that in the event Authority does not exercise such rights of substitution within a period of 90 Days from the Transfer Date, the Project Contracts shall be deemed to cease to be in force and effect from the Transfer Date without any liability whatsoever on Authority and the Covenant shall expressly provide for such eventuality. The Concessionaire expressly agrees to include the Covenant in all its Project Contracts and undertakes that it shall, in respect of each of the Project Contracts, procure and deliver to Authority an acknowledgement and undertaking, in a form acceptable to Authority, from the counter party(ies) of each of the Project Contracts, where under such counter party(ies) shall acknowledge and accept the Covenant and undertake to be bound by the same and not to seek any relief or remedy whatsoever from Authority in the event of termination;
- (v) Not enter into any material Transaction Document, including without limitation, any Construction Contract or Agreement with any affiliated party related to or in connection with the Project unless the principal terms including consideration is reviewed, assessed by the ‘Project Monitoring & Supervision Consultants’/Consultant appointed by the Authority and approved by the Authority, prior to the execution of any such contract.

#### **Section 5.1.6 Reporting Requirements**

The Concessionaire shall provide to the Authority and the ‘Project Monitoring & Supervision Consultants’/Consultant reports on a regular basis during the Concession Period in accordance with

the provisions of **Article 7** and as set forth elsewhere in the Agreement and at all times provide the Authority such information, data and documents as the Authority may reasonably require.

#### **Section 5.1.7 Accidents and Safety**

- (a) The Concessionaire shall -
- (i) Develop, implement and administer a surveillance and safety program for the Project and the users thereof and the Contractors’ labour and personnel engaged in the provision of any services under any of the Project Contracts, including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Applicable Laws and Good Industry Practice;
  - (ii) Take all reasonable precautions for the prevention of accidents on or about the Project Site and provide all reasonable assistance and emergency medical aid to accident victims;
  - (iii) Maintain liaison with emergency service providers and seek necessary police assistance on payment of applicable charges for the provision of such services as are not provided in the normal course or are available only on payment;

#### **Section 5.1.8 Taxes and Charges**

The Concessionaire shall -

- (i) pay in a timely manner all taxes (including property tax), duties, levies, cess and charges including but not limited to income tax, GST etc. that may be levied, claimed or demanded from time to time by any Government Authority including any increase therein effected from time to time from any Government Authority, in respect of the Project;
- (ii) pay all charges, taxes, fines, late fees and other outgoings in relation to the use of utilities and services by the Concessionaire or its Contractors and agents during the implementation and operation of the Project such as water supply, sewage disposal, fuel, garbage collection and disposal, electric power, gas, telephone and other utilities and ensure avoidance of any disruption thereof due to disconnection or withdrawal of the facility;

#### **Section 5.1.9 Foreign Exchange Risk**

The Concessionaire shall bear any risk on account of fluctuation in foreign exchange rates during the Concession Period.

#### **Section 5.1.10 Contractual Arrangements**

The Concessionaire shall undertake development of the Site and Project Facilities thereon and enter into Contractual Arrangements in accordance with the provision of this Agreement.

#### **Section 5.1.11 Environment Management Plan**

The Concessionaire shall comply with its obligations under the Environment Management Plan.

#### **Section 5.1.12 Marketing**

The Concessionaire shall undertake marketing, public relations and brand building of the Project and each of the Project Facilities at its cost and expense.

#### **Section 5.1.13 Others**

The Concessionaire shall -

- (i) maintain requisite insurance in accordance with the provisions hereof;
- (ii) provide all assistance to the Authority and the 'Project Monitoring & Supervision Consultants'/Consultant /Experts as they may reasonably require for the performance of their duties and services under this Agreement;
- (iii) be responsible for safety, soundness and durability of the Project Facilities including all structures forming part thereof and their compliance with the Specifications and Standards;
- (iv) provide representatives of the Authority, including those concerned with safety, security or environmental protection, at reasonable time and upon reasonable notice, access to the Project Site to review progress of construction and the operations of the Project and to ascertain compliance with any of the requirements of the Agreement. Provided that any failure on the part of the Authority to inspect any works shall not, in relation to such works, (i) amount to any consent or approval of the Authority or shall the same be deemed to be a waiver of any of the rights of the Authority under this Agreement; and (ii) release or discharge the Concessionaire from its obligations or liabilities under this Agreement in respect of such work;
- (v) provide or arrange at its cost during the Concession Period all on-site infrastructure including power, electricity, water, sanitation, sewage treatment and disposal, drainage, solid and hazardous waste disposal, effluent treatment and disposal and other utilities and facilities required from time to time in respect of the construction, operation and maintenance of the Project/Project Facilities and be in compliance to the requirements relating thereto under the Applicable Laws, terms of Applicable Permits and Good Industry Practice;
- (vi) if required, at its cost install meters to measure the consumption of power and water. The Concessionaire shall, at its cost, make alternate and back up arrangement for power, including but not limited to installation of generators and for water, subject to the Concessionaire obtaining Applicable Permits if any;

- (vii) hand over the Project /Project Assets free from encumbrances and encroachments to the Authority or its nominated agency upon the expiry/termination of this Agreement.

#### **Section 5.1.14 Additional Obligations during the Construction Period**

The Concessionaire shall -

- (i) promptly commence construction and complete the Project Facilities in accordance with the provisions of this Agreement, including the Project Implementation Schedule and the Specifications and Standards, the terms of Applicable Permits, the Applicable Laws and Good Industry Practice and achieve the Project Completion;
- (ii) entrust responsibility for project management and construction to professionally competent Persons;
- (iii) give priority to safety in its construction and planning activities and implementation of any of the Work including having suitable illumination at night with barriers to prevent third parties from being injured by the Works;
- (iv) promptly carry out at its cost such further Works as may be necessary to remove any defects or deficiencies observed by the Authority/’Project Monitoring & Supervision Consultants’ and ensure completion of the construction of the Project in all respects in accordance with the provisions of this Agreement;
- (v) incorporate suggestions (if any) made by any Government Authority in the designs proposed for constructions;
- (vi) confine its activities to the Project Site and to any additional areas arranged by the Concessionaire at its cost and not encroach upon, damage or degrade adjacent land and be liable for all costs and consequences for its failure to do so;
- (vii) commence Commercial Operations of the Project Facilities only upon issuance of the Completion Certificate in respect of the relevant Project Facilities.
- (viii) Make provision of space for setting up ADCL kiosks and hoardings within the Project Site /premises.
- (ix) shall explore various options and provide exclusive parking provision for the visitors.

#### **Section 5.1.15 Specified Concessional Use of Family Entertainment Center-1 by the Authority**

- (a) As part of the consideration for grant of the Concession herein, the Authority shall be entitled to and the Concessionaire shall be obligated to offer an exclusive special discount of 33% and charge only 64% of the tariff upon the usage of facilities by the Authority or its nominated agency or authorized entity for organizing State Government Functions/Events during the Operations Period effective from COD, subject to availability with a limitation of 50 Days in a Year.
- (b) The Authority or such agency or entity shall be required to make payment towards booking charges, rentals, parking charges, electricity and water charges,



facility charges or other similar payments to the Concessionaire or persons claiming through or under it for such usage during the stipulated period; including consumables such as food, beverages, special decorations, arrangements or effects, event organizers and ushering staff, accommodation etc., shall be provided, if required, during the period of such usage only on a chargeable basis at the rates applicable from time to time and the Authority or such agency or entity shall make the requisite payments in this regard to the Concessionaire or the persons claiming through or under it.

- (c) The Authority shall inform the Concessionaire in writing at least two Months in advance the dates of the stipulated duration for such usage of the Facility by it/such agency/entity. In case of an overlap of dates/bookings due to other pre-existing advance bookings/engagements during the dates intimated by the Authority, the dates for usage of the Authority or its nominated agency or authorized entity shall be changed with the mutual consent of the Parties pursuant to good faith discussions between them and bonafide attempts by the Concessionaire to shift the other pre-existing advance bookings/engagements to some other dates.
- (d) The Concessionaire shall ensure that the Facility and all related infrastructure (sound, lighting, acoustics, fire fighting equipment, conference facilities, seating arrangements, presentation boards, back up power supply, air conditioning or heating arrangements etc.) provided during the stipulated period for use by the Authority/its nominated agency/authorized entity during the stipulated period are fully operational and in good working condition during such period/usage.
- (e) In the event the Authority or such agency or entity does not/is unable to use the Facility for the aforesaid stipulated duration, or part thereof, in any Year due to reasons not attributable to the Concessionaire, including Force Majeure Events (i) there shall be no carry forward of such entitlement to use the Facility by the Authority or such agency or entity to the next or any other Year; and (ii) the Concessionaire shall not be liable to pay any compensation or amount to the Authority for such non-use of the Facility by the Authority or such agency or entity. Provided, however, in the event such usage is not possible due to reasons attributable to the Concessionaire, such entitlement of the Authority for the relevant Year shall be carried forward to the next immediately following three Years, until utilisation thereof.
- (f) In addition to Conference / Event Facilities, the Concessionaire shall be obligated to provide an exclusive special discount of 33% and charge only 64% of the tariff for the usage of any of the Accommodations (Cottages / Rooms, if any) by the

Authority or its nominated agency or authorized entity during the Operations Period effective from COD. The Authority or such agency or entity shall be required to make payment of room rentals or other similar payments to the Concessionaire for usage such as food, beverages, other facilities, during the period of such usage on a chargeable basis with an exclusive special discount of 33% and charge only 64% of the tariff, at the rates applicable from time to time and the Authority or such agency or entity shall make the requisite payments in this regard to the Concessionaire.

- (g) For the requirement of Rooms, the Authority shall inform the Concessionaire in writing at least 15 Days in advance the number of rooms, duration for such usage of the Rooms by it/such agency/entity subject to availability with a limitation of 50% of the available Accommodations per Day. There shall be no carry forward of such entitlement to use the Rooms by the Authority or such agency or entity to the next or any other month or Year.

#### **Section 5.1.16 Obligations related to Operations and Maintenance**

The Concessionaire shall -

- (i) Operate, maintain, manage and repair the Project Facilities at its cost and risk during the Operations Period in accordance with the provisions hereof, including the Specifications and Standards, the Applicable Laws, the terms of Applicable Permits and Good Industry Practice.
- (ii) Upon achieving Project Completion, shall commence Commercial Operations, if not already done so. Provided that the Concessionaire shall have the right to commence Commercial Operations of a Project Facility once it has obtained the Completion Certificate in respect thereof (which may be before achievement of Project Completion)
- (iii) Employ qualified Persons to efficiently implement, operate and manage the Project.
- (iv) Make available all necessary financial, managerial, technical, technological and other resources for the operations and, maintenance of the Project to conform to the requirements of this Agreement.
- (v) Replace, repair, replenish or renew, as the case may be, the materials, goods, machinery, equipment, capital components and spares etc. and undertake preventive maintenance at its cost as necessary to carry out efficient operations and maintenance of the Project and to provide adequate service standards and to ensure that the Project/Project Facilities are transferred to the Authority in a good condition except for the normal wear and tear having regard to their life, construction, use and the period of use, in accordance with the terms of this Agreement.
- (vi) Ensure maintenance of proper and accurate records, data and accounts relating to the operations of the Project and the revenues earned there from.

- (vii) Comply with all Applicable Laws, including those relating to safety, health, sanitation, environment, labour and hazardous and dangerous materials.
- (viii) promptly and diligently repair, replace or restore the Project or part thereof which may be destroyed, lost or damaged.
- (ix) Except as provided or authorized under this Agreement, not, without the prior written consent of the Authority, remove or replace any asset comprised in the Project/Project Facility.
- (x) Ensure timely payments to the Authority in accordance with the provisions of this Agreement.
- (xi) Carry out the commercial operations and provide the services and facilities as per the requirements of this Agreement and make changes therein only with the prior written approval of the Authority.
- (xii) Not undertake, cause or suffer the undertaking of Prohibited Activities by any person at the Site or the Project Facilities or part thereof.
- (xiii) Ensure Solid Waste Collection and Disposal System in place by implementation of environmentally sound solid waste collection mechanisms. Processing and disposal of Solid waste shall not be allowed within the site Premises.
- (xiv) Maintain Project Facilities as Plastic Free Zone.
- (xv) Recycle and reuse the Liquid waste, instead of disposing into the reservoir, for gardening, landscaping, flushing of toilets etc., and thus making the project as “Zero Discharge” project.

## **Section 5.2 Obligations of Preferred Bidder**

### **Section 5.2.1 Shareholding Lock-In**

The Preferred Bidder/Consortium, as a whole, shall hold a minimum of 51% of the paid-up equity share capital of the Concessionaire at all times during a period that shall not be less than 5 Years from date of signing of Agreement or 3 Years from COD whichever is later (“**Lock-in Period**”). In case of Preferred Bidder being a Consortium, the Lead Member (M/s\_XXXX) of the Consortium shall be required to commit to hold a minimum equity stake not less than 26% in the Project SPC and the other constituent member of the Consortium, shall be required to commit to individually hold minimum 10% of equity in the Project SPC at all times during the lock-in period. No change in composition of the Preferred Bidder/Consortium shall be made Lock-in Period. Any transfer of such share capital after the Lock-in period shall require the prior written approval of the Authority, which shall not be unreasonably denied. Provided, nothing contained in this sub-section shall preclude or prevent pledge of the Preferred Bidder’s/Consortium’s shares in the Concessionaire in favour of Lenders as security for the Financial Assistance and enforcement thereof in accordance with this Agreement and/or the Financing Documents. After the expiry of the Lock-In Period, the Lead Member or other constituent member of the Consortium (whose experience and or the financial capacities have been taken in to consideration for the purposes of the evaluation of the Bid of the

Preferred Bidder) may be replaced by another entity, provided that the substitute entity holds at least 26% of the paid-up equity share capital of the Concessionaire. For the avoidance of doubt, the lead member or other constituent member of the Consortium (whose experience and or the financial capacities have been taken in to consideration for the purposes of the evaluation of the Bid of the Preferred Bidder) shall, at all times, during the Concession Period, hold at least 26% of the paid up equity share capital of the Concessionaire.

#### **Section 5.2.2 Funding Obligation**

The Preferred Bidders shall ensure that the Concessionaire has, at all times, sufficient funds to ensure the due discharge of its payment obligations to the Authority under this Agreement. In the event the Concessionaire is not able to discharge its payment obligations to the Authority under this Agreement on account of lack of funds, the Authority shall have the right to claim and recover from the Preferred Bidders (jointly and severally) and the Preferred Bidders shall have the obligation to pay, all such amounts that are due and payable by the Concessionaire to the Authority under this Agreement.

#### **Section 5.2.3 Obligations in Respect of the Concessionaire**

The Preferred Bidder shall in accordance with and subject to the provisions of this Agreement, undertake or manage, inter alia, the following areas of the Concessionaire’s activities such that its experience and expertise become available to the Concessionaire on an on-going basis:

- (a) Preparation of the DPR and the Designs and Drawings;
- (b) Arranging the financing for the Project, including mobilization of debt and equity;
- (c) Procurement of Applicable Permits for commencing and implementing the Project;
- (d) Execution of Project Contracts in respect of engineering, procurement, construction, management, Operation/or and Maintenance of Project/Project Assets;
- (e) Timely implementation of the Project in accordance with the provisions of this Agreement, including the Specifications and Standards, the Applicable Laws, the terms of the Applicable Permits and Good Industry Practice;
- (f) Compliance with and implementation of the Environment Management Plan;
- (g) Marketing of the Project;
- (h) Compliance with the provisions of this Agreement relating to liability and indemnification;
- (i) Implementation of measures for safety, security and protection of the works, property, life and materials at the Site and the environment.

#### **Section 5.3 Obligations of Authority**

In addition to and not in derogation or substitution of any of the obligations, undertakings, terms and conditions or covenants set out elsewhere in this Agreement, the Authority agrees and undertake as under:

#### **Section 5.3.1 Applicable Permits**

- i. The Authority shall, at the request of the Concessionaire, grant Applicable Permits with reasonable promptness that are in its authority and capacity to grant and, as the case may be, assist but without guarantees and/or without assuming any responsibility in that behalf and issue recommendatory letters and make best efforts to assist the Concessionaire in obtaining all the Applicable Permits from Government Authorities, Concessions to import equipment and materials required for the Project and immigration clearances, employment permits and residential premises for any foreign personnel engaged or employed by the Concessionaire in connection with the implementation of the Project, including renewals thereof; provided that nothing contained in this provision shall relieve the Concessionaire of its obligations under this Agreement to obtain the Applicable Permits and of being in compliance with the requirements of the same, provided further that the Concessionaire (a) provides to the Authority all necessary relevant details and other information as may reasonably be required by the Authority and (b) keeps the Applicable Permits in force and effect throughout the Concession Period.
- ii. Upon written request from the Concessionaire, assist the Concessionaire on best effort basis in obtaining access to all necessary infrastructure facilities and utilities, including water, sewerage, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent facilities/utilities.

#### **Section 5.3.2 Tax Benefits**

In cases found appropriate the Authority may, at the request of the Concessionaire, issue recommendatory or supporting letters to any Government Authority recommending tax or duty concessions/ benefits to the Concessionaire / the Project.

#### **Section 5.3.3 Off-site Infrastructure**

The Offsite infrastructure (Road, Power and Water) are being provided by different agencies like AP CRDA / ADCL, Andhra Pradesh Power Distribution Company Limited (APPDCL) etc. The Concessionaire is required to apply to the concerned Authorities and obtain the necessary approvals in this regard, on its own. The Authority will extend all necessary support to the Concessionaire based on written request of the Concessionaire

#### **Section 5.3.4 Change of Land Use**

- (a) As per the existing Master Plan, there is no restriction for development of Tourism Projects / Facilities in the proposed site. In order to fulfill the obligations of Concessionaire as defined in this Concession Agreement, if any change of land use is warranted, then the Authority shall be

responsible to procure the same at its cost, in conformity with the requirements of the Project so as to ensure that the Concessionaire can enjoy vacant possession, hold and use the Site.

#### **Section 5.4 Others**

In the event of any action or suit to prevent, prohibit or otherwise challenge the Project by any Government Authority, trade union, environmental group or any other Person or organization, which might reasonably be expected to materially and adversely affect the Project Assets, the implementation of the Project or the enjoyment by the Concessionaire of its rights and benefits under the Concession granted herein, the Authority shall, if requested by the Concessionaire in writing, on a best effort basis, take such reasonable action as is available to it to challenge and to mitigate such effects.

## **ARTICLE 6 PROJECT IMPLEMENTATION**

### **Section 6.1 DPR and Designs**

- (a) The Concessionaire, immediately after grant of the Concession, shall at its cost prepare and submit to the Authority, DPR and detailed Designs of the Project.
- (b) The DPR shall, *inter alia*, set out the full details of the developmental activities proposed to be carried out by the Concessionaire for implementation of the Project, proposed order, sequence and method of working, the steps, procedures and processes undertaken and to be undertaken by the Concessionaire, the Project Implementation Schedule with the Project Milestones, detailed Schedule Bar Charts / PERT Networks with Milestone Dates, Master Plan and Building Plan of the Project, including the site development, proposed construction activities, names of likely sub-contractors/ vendors etc., plans for mobilization of finances, plans for marketing the Project, proposed arrangements for operating and managing the Project, the organisation chart of the Concessionaire and such other similar details which define and clarify the method and direction of the Concessionaire’s plans for the implementation of the Project.
- (c) The Authority/’Project Monitoring & Supervision Consultants’ shall review the DPR and Designs submitted by the Concessionaire for conformity with the Specifications and Standards and, subject to the provisions of sub-section (d) herein below, communicate Authority’s approval immediately. The Authority may in consultation with the Concessionaire prescribe a schedule for submission, clarifications and approval of such plan.
- (d) In the event that Authority has any objection to the DPR and/or Designs and Drawings or any part thereof, it shall promptly notify the Concessionaire of its objections in writing and seek clarifications or suggest changes or modifications or corrections thereto in writing. Thereupon, the Concessionaire shall provide necessary clarification to the Authority or re-submit revised DPR and/or Designs and Drawings or part thereof, as the case may be, after incorporating the changes, modifications or corrections suggested by the Authority.
- (e) If the Authority does not submit written objections to the DPR and the Design and Drawings submitted to it by the Concessionaire within Thirty (30) Days of submission, the Authority shall be deemed to have approved such DPR and Design and Drawings and the Concessionaire shall be entitled to proceed with the Project accordingly. However, nothing in this Agreement shall derogate from the Concessionaire’s obligation to obtain the Applicable Permits in relation to the construction and commencement of commercial operations/ use of the Project Facilities from the relevant authorities under Applicable Laws and Development Controls.

- (f) Notwithstanding any express or deemed approval or failure to review by or the comments or observation of the Authority in relation to the DPR and Designs and Drawings, the Concessionaire shall be solely responsible for any defect and/or deficiency therein or any part thereof and accordingly the Concessionaire shall at all times remain solely responsible for the technical feasibility, operational capability and reliability of the Project and shall not be relieved or absolved in any manner whatsoever of any of its obligations hereunder.
- (g) The Concessionaire may, with the prior written approval of the Authority, make or permit alterations in or addition to any DPR and Designs and Drawings, specifications and calculations approved or deemed to be approved by the Authority under this Agreement.
- (h) Designs, drawing or specifications, if any, provided by the Authority to the Concessionaire shall only be indicative and the Concessionaire shall accept the same at its sole risk, cost and consequence.
- (i) The Authority shall not be responsible or liable in any manner for the accuracy, completeness or otherwise of the DPR and Designs and Drawings and the construction and implementation of the Project/Works by the Concessionaire on the basis thereof, irrespective of any perusal or review thereof or comment thereon by the Authority, any Government Authority .
- (j) The Concessionaire needs to submit DPR and obtain approval from the Authority within the Compliance Period.

## **Section 6.2 Development of Site and Implementation of Works**

- (a) The Concessionaire shall commence the Works immediately after taking necessary sanction of the Competent Authority under Applicable Laws and Development Controls for the master plan and building plans.
- (b) The Concessionaire shall, by itself or through its Contractors, at its cost and risk undertake the development of the Site, including land filling, levelling, clearing, shifting of utilities, landscaping and demarcation and division of the Site etc. for establishment of the Project Facilities, in accordance with the provisions of this Agreement, including the Specifications and Standards and Good Industry Practice.
- (c) The Concessionaire shall arrange at its cost the infrastructure facilities, including but without limitation, the power and water supply, necessary for carrying out the Construction, Operation and Maintenance of the Project. Each of the Project Facilities shall have adequate facilities with respect to water supply, power, entry & exit arrangement, fire safety provisions, etc.



- (d) The Concessionaire shall, by itself or through Contractors at its cost and risk establish, install, equip, provide, construct, as the context admits or requires, and commission the Project Facilities in accordance with the requirements of the provisions hereof, including the Specifications and Standards and provide the same to the users/others in an equitable, fair and non-discriminatory manner.
- (e) The Concessionaire or the Persons claiming through or under it, as the case may be, shall be responsible for doing all such acts, deeds and things as may be necessary and expedient for establishing the Project including, without limitation, procuring at its/their own risk and cost all goods, materials, things and services necessary for the development and construction thereof and arranging at its/their cost the construction power, water, materials and labour required for establishing the Project, without in any way relieving the Concessionaire of its obligations as set out in this Agreement. Subject to the provisions of clause 6.3 (c) hereof the Concessionaire shall not be entitled to nor shall it seek or raise any demand for any extension of time for completion of construction on account of any shortage of any material or resources or delay in procurement of the same for any reason whatsoever.
- (f) The Concessionaire shall on and from the Compliance Date, in accordance with the Specifications and Standards, develop the Site and requisite infrastructure facilities so as to:
  - (i) efficiently manage, make available, maintain and operate the Project consistent with prudent standards of safety and technical sufficiency;
  - (ii) provide the necessary resources for the operations and maintenance of the Project ;
  - (iii) provide non-discriminatory access of the Project Facilities within the Project to the users and other persons.
- (a) The Concessionaire shall complete the construction of all the Project Facilities of Phase I within a maximum period of 6 Months and Phase II within a maximum period of 12 Months from the date of signing of this Agreement. The extension of time may be considered for a maximum period of 6 Months. Total project duration shall be One Year.

### **Section 6.3 Project Completion**

- (a) The Project shall be complete only when separate Completion Certificates for the Project have been issued by the Nodal Officer or ‘Project Monitoring & Supervision Consultants’, (if ‘Project Monitoring & Supervision Consultants’ has been appointed) with the due approval of the Authority, in relation to all the proposed Project Facilities constituting the Concessionaire’s Minimum Development Obligations (MDOs). Once the Completion Certificates have been issued in relation to all the proposed Project Facilities, the ‘Project

- Monitoring & Supervision Consultants’ with the due approval of the Authority, shall issue a certificate confirming the completion of construction of the Project in accordance with the provisions of Section 6.3 (b) (the **“Project Completion”**). The Completion Certificate in relation to a particular Phase (I or II) shall be issued, only after Constructions Works in respect thereof have been completed and the necessary Applicable Permits in respect thereof inter-alia the Occupancy Certificate and power connection from concerned Government Authorities/ departments, etc., have been duly procured. The Completion Certificate shall specify the date on which, in the opinion of the Authority/’Project Monitoring & Supervision Consultants’, the relevant Project Phase was completed. Similarly the Authority/’Project Monitoring & Supervision Consultants’ shall specify the date on which in its opinion the Project Completion was achieved.
- (b) For the avoidance of doubt, Project Completion herein refers to the completion of 100% of the Project Facilities under Phase I and/or Phase II as detailed under MDOs at Appendix and as per the approved DPR;
- (c) The Concessionaire shall achieve Project Completion in accordance with the provisions of this Agreement within a maximum period of Two (2) Years from the Execution Date (the **“Scheduled Project Completion Date”**), failing which the Concessionaire may apply to the Authority for grant of extension of time for Project Completion in blocks of 3 Months up to a maximum additional period of 6 Months from such date and the Authority may permit the same subject to the payment of liquidated damages by the Concessionaire to the Authority at the rates specified below:
1. First Extension up to a period of 3 Months beyond the Scheduled Project Completion Date – 0.50% of the Total Project Cost as per the DPR
  2. Second Extension between 3 Months and 6 Months, beyond the Scheduled Project Completion Date – 1.0 % of the Total Project Cost, to be paid over and above the damages payable for the first extension, in terms of point 1 above.
- (d) In the event that Project Completion does not occur even within Two Years from the Scheduled Project Completion Date (extended time period granted to the Concessionaire by the Authority subject to payment of damages in terms hereof), for any reason other than Force Majeure or reasons attributable to the Authority, as certified by the mutually accepted third party Expert, and subject to any provisions of this Agreement providing for extension of time for performance or excuse from performance, as the case may be, the Authority shall be entitled to invoke the Performance Security and to further, at its option, terminate this Agreement for a Concessionaire Event of Default in accordance with the provisions of Article 16 hereof. Provided that instead of terminating this Agreement, the Authority may in its sole discretion extend the time for achieving Project Completion on such terms and conditions, as it deems appropriate.

- (e) Notwithstanding the foregoing, in the event of any unforeseen delay in the issuance of any clearance/ permits by any Government Authority/department, the Authority shall, extend the Construction Period by the period of such delay.
- (f) The Concessionaire shall commence Commercial Operations of a Project Facility only after issuance of Completion Certificate by the Authority/ ‘Project Monitoring & Supervision Consultants’ in respect thereof.

### **Section 6.3 A Tests**

- a) At least 30 (Thirty) Days before the likely completion of the construction of the Project/ or a Project Facility, the Concessionaire shall notify the same in writing to the Authority / Nodal Officer/ ‘Project Monitoring & Supervision Consultants’ as the case may be and of its intention to conduct the Tests for completion of the Construction Works. Such notice will set out the place, date and time when such Tests will be performed (which shall not be on a date which is earlier than 10 (ten) Days following the date of such notice and at least 7 (Seven) Days in case of any subsequent Tests or retests). The Authority shall have the right to attend such Tests. The ‘Project Monitoring & Supervision Consultants’/ Nodal Officer shall attend such tests with a view to determine whether completion of construction has occurred.
- b) Within one (1) Month from the date of inspection in accordance with sub-section (a) above, the ‘Project Monitoring & Supervision Consultants’ shall issue a Completion Certificate (the “**Completion Certificate**”) with the due approval of Authority on successful completion of the Tests, if the “Project”, or any Project Facility thereof, to the reasonable satisfaction of ‘Project Monitoring & Supervision Consultants, can legally, safely and reliably be placed for Commercial Operations and is found satisfactorily complete in all respects.
- c) If the ‘Project Monitoring & Supervision Consultants’ certifies to the Parties that it is unable to issue the Completion certificate because of the events or circumstances which excuse the performance of the Concessionaire’s obligations in accordance with this Agreement and as a consequence thereof the Tests could not be held or had to be suspended, the Concessionaire shall re-schedule the Tests and hold the same as soon as reasonably practicable.
- d) The Concessionaire shall bear all the expenses relating to Tests under this Agreement. Provided, however, if the Authority requires the Concessionaire to conduct any Test that is not specified in this Agreement, the Authority shall forthwith reimburse to the Concessionaire, the expenses incurred by the Concessionaire thereon.

### **Section 6.3 B Inspections and Certification by Authority**

- a. After the completion of the Construction Works of the Project or any Project Facility, the Concessionaire shall at its cost procure the issuance of the necessary occupancy

certificate/ Permits for the Project Facility(ies) from the concerned Government Authorities, if any required, within 45 (forty-five) Days of the date of such completion.

b. The Concessionaire shall procure the preparation and submission of the necessary documentation for complying with and obtaining the occupancy certificate.

c. The Concessionaire should submit ‘As-Built drawings’ in its entirety for the entire Project before the issue of Completion Certificate in respect of the entire Project, to the satisfaction of Authority/ Government Authorities, for reference of Authority at a future date.

d. Whenever obligatory inspection by the concerned Government Authorities is required, the same shall be arranged and attended to by the Concessionaire or its Contractors or authorised representatives.

e. All the deficiencies pointed out by the concerned Government Authorities/ Authority during the inspection shall be promptly attended by the Concessionaire at its cost to the entire satisfaction of the inspecting authorities.

f. The Authority shall provide and procure the necessary cooperation, assistance and facilitation to the Concessionaire during inspection, testing and certification of the Project by Government Authorities and in the grant of requisite certificates.

#### **Section 6.4 Marketing of the Project**

(a) The Concessionaire shall be solely responsible for the marketing of the Project. The Concessionaire shall be entitled to commence such marketing at its cost and risk from the COD and to accept advances, premium, booking amounts and other considerations from such users from such date; provided that Authority shall not be liable in any manner whatsoever to any Person in this behalf and the Concessionaire shall disclose the same to such Users.

(b) The Concessionaire shall ensure that the advertising and marketing of the Project is carried out in a manner that is consistent with and not in derogation of or conflict with any terms or provisions of this Agreement and the Applicable Laws.

#### **Section 6.5 Operation and Maintenance of the Project**

##### **Section 6.5.1 O&M Works**

(a) Effective from date of Commercial Operations of a Project Facility and until the end of the Concession Period, the Concessionaire shall undertake, at its cost and risk, the operation and maintenance of the relevant Project Facility (and of the Project from Project Completion) including the buildings, the common areas, the landscape and other spaces, the parking lots/spaces, the infrastructure, works, fire-fighting and other systems and the common services and facilities, in accordance with the provisions of this Agreement, including the

Specifications and Standards, Good Industry Practice, Applicable Laws and conditions of Applicable Permits, by itself or, subject to the provisions of Section 5.1.2 through O&M Contractor(s) or through suitable management/service contractors, without in any way relieving the Concessionaire of its responsibilities, obligations and liabilities as set out in this Agreement; provided that the O&M Contractors shall be appointed not less than 2 (Two) Months before the Scheduled Project Completion or Project Completion, whichever is earlier. Within 2 (two) weeks of the appointment of such contractors the Concessionaire shall inform the Authority of their appointment. The O&M operators appointed shall have minimum 3 Years of experience in such operations.

- (b) The Concessionaire shall exercise appropriate control over the O&M Contractors and shall manage, direct, administer and supervise their working so as to ensure compliance with the provisions of this Agreement.
- (c) The Concessionaire shall make appropriate arrangements for security at the Site and abide by the security regulations/procedures prescribed by the Authority or any Government Authority from time to time. The Concessionaire may secure assistance of the police force for maintaining security upon payment of routine charges for such services.
- (d) The Concessionaire or the Persons claiming through or under it shall be free to determine the User Charges at market driven rates in respect of the use of the Project/Project Facilities or the goods, services, facilities or amenities provided thereat and shall have the right to demand, collect, retain and appropriate and revise the User Charges; provided that the same shall be in compliance with the requirements, if any, under the Applicable Laws, terms of Applicable Permits and Good Industry Practice.

#### **Section 6.5.2 Contractual Arrangements**

- (a) Subject to the provisions of this Agreement, the Concessionaire may enter into such Contractual Arrangements as it may deem fit and, effective from the Commercial Operations Date of a Project Facility, grant in accordance with the terms thereof the possession of the relevant area of the Project Facility/Project Site to such Person (hereinafter the “**Contractual Counter Parties**”); provided that the use of Project shall not comprise the Prohibited Activities as for the applicable laws for the site jurisdiction and also not in competition with the activities of Authority.
- (b) The Concessionaire may determine, demand, collect, revise, retain and appropriate the User Charges for such Contractual Arrangements at rates determined by the Concessionaire;
- (c) All Contractual Arrangements shall be subject to the following terms and conditions:

- i. the terms and conditions of this Agreement are complied with and as applicable form a part of such Contractual Arrangements and the Contractual Counter Parties, if any, shall be bound by such terms and conditions and be liable and accountable in respect thereof;
- ii. the duration of such Contractual Arrangements shall be limited to and be co-terminus with/not exceed the Concession Period herein;
- iii. all such Contractual Arrangements shall be determined and terminated automatically and simultaneously on the expiry, determination or termination of this Agreement/the Concession Period, as the case may be;
- iv. such Contractual Arrangements shall come into effect and operation only upon the Concessionaire achieving the Commercial Operations Date of the relevant Project Facility in accordance with the provisions of this Agreement unless otherwise authorised by the Authority in writing;
- v. the Concessionaire shall at its cost carry out or cause the operation and the execution and existence of Contractual Arrangements which shall, in no manner, relieve the Concessionaire of its liability or obligations as set out in this Agreement;
- vi. the execution of Contractual Arrangements shall not relieve the Concessionaire of its liability or obligations as set out in this Agreement;
- vii. each Contractual Arrangement shall include provisions to the effect that in case of a conflict, direct or indirect, between the provision of this Agreement or the Land Lease Agreement on the one hand and the Contractual Arrangement on the other hand, the provisions of Agreement or the Land Lease Agreement, as the case may be, shall prevail and such Contractual Arrangement shall stand modified to that extent;
- viii. the Concessionaire shall submit to the Authority for its information and record either a notarised true copy of the Agreements/documents or a copy duly certified by Statutory Auditor/ Authorized Representative relating to the Contractual Arrangements within 60 (Sixty) Days of the date of execution, modification or amendment thereof.
- ix. the Concessionaire’s failure to comply with this Section 6.5.2 shall be at its cost, risk and consequence and constitute a Concessionaire Event of Default that shall entitle the Authority to terminate this Agreement in accordance with the provisions of Article 16 hereof.

### **Section 6.5.3 No Liability of Authority for Contractual Arrangements**

The Authority shall not be liable in any manner whatsoever to any Person in respect of or in connection with execution of documents/Agreements, matters, understandings and/or disputes relating to the Contractual Arrangements between the Concessionaire and such Person or otherwise or for the Concessionaire’s contracts of the Concessionaire with any third parties in relation to the Project. The Concessionaire shall indemnify and keep indemnified the Authority, its employees, agents, representatives and consultants from and against all costs, losses, damages, liabilities, proceedings, litigation, penalties etc. in this behalf.

**Section 6.6 No Breach**

- (a) The Concessionaire shall not be considered to be in breach of its obligations relating to the Project nor shall it incur or suffer any liability if and to the extent performance of any such obligations is affected by or on account of any of the following:
- (i) Force Majeure Events, subject to provisions of Section 14;
  - (ii) a material delay, impediment, default or prevention due to or caused by the Authority;
  - (iii) Compliance with the instructions or directions of the Authority/’Project Monitoring & Supervision Consultants’/Consultant/ Expert/ any Government Authority other than instructions issued as a consequence of a breach or default by the Concessionaire of any of its obligations hereunder;
  - (iv) Extensions granted under the provisions of this Agreement, or specific extensions granted by the Authority or extensions made by the mutual Agreement of the Parties (provided that the payments required to be made by the Concessionaire under this Agreement in respect of the grant of such extensions shall be paid);
  - (v) Measures taken to ensure the safe use of the Project Facilities except when the unsafe conditions have been occasioned by the Concessionaire’s failure to perform its obligations under this Agreement.
- (b) Notwithstanding the above, the Concessionaire and the Authority may, mutually agree to extend the time period mentioned hereinabove for reasons that they may deem expedient in the interest of the Project.

## **ARTICLE 7 PROJECT MONITORING & SUPERVISION**

### **Section 7.1 Nodal Officer or ‘Project Monitoring & Supervision Consultants’**

- (a) The Authority shall nominate a Nodal Officer from their Engineering Department for monitoring the Progress of the Project, or alternatively, the Authority may decide to appoint ‘Project Monitoring & Supervision Consultants’/Consultant, for the purpose. The Nodal Officer/‘Project Monitoring & Supervision Consultants’, as the case may be, shall monitor the implementation of the Project, review and certify on behalf of Authority with due approval from Authority, the DPR and the Designs and Drawings, conduct on behalf of the Authority the periodic verification of the progress in the construction. ADCL may appoint ‘Project Monitoring & Supervision Consultants’, if required, who shall discharge the duties and functions substantially in accordance with the terms of set forth in *Appendix* and elsewhere in this Agreement. The Nodal Officer/‘Project Monitoring & Supervision Consultants’ shall pursue the Concessionaire for submission of periodic reports (at least once every quarter) in respect of its functions.

It is hereby clarified that wherever in this Agreement any certification or verification has been stated to be needed or undertaken by the ‘Project Monitoring & Supervision Consultants’, the same shall be done or undertaken by the Nodal Officer in the event no ‘Project Monitoring & Supervision Consultants’ has been appointed.

- (b) In case, ADCL hires the services of ‘Project Monitoring & Supervision Consultants’, the cost and expenses of the same shall be borne entirely by the Concessionaire and an amount equivalent to two Years retainer of the ‘Project Monitoring & Supervision Consultants’ shall be retained in the Escrow Account to ensure the due payment to the ‘Project Monitoring & Supervision Consultants’.
- (c) For appointment of the ‘Project Monitoring & Supervision Consultants’, the following process shall be followed:
- i. The Authority shall provide a list of five firms to the Concessionaire from which the Concessionaire will suggest three firms.
  - ii. The Authority shall select and appoint one firm, from amongst the three firms suggested by the Concessionaire, as the ‘Project Monitoring & Supervision Consultants’.

### **Section 7.2 Reporting and Inspection**

The Concessionaire shall, in addition to the reporting requirements set forth elsewhere in this Agreement, comply with the reporting requirements hereunder:



**(a) Construction Period Reports**

- (i) The Concessionaire shall within 30 (Thirty) Days after the execution of the EPC Contract provide to the Authority / Nodal Officer/'Project Monitoring & Supervision Consultants' a copy of the construction schedule created using network techniques. A detailed explanation of the construction methodology, outlining the quality assurance, safety and surveillance plan shall also be included.
- (ii) The Concessionaire shall provide to the Authority /Nodal Officer/ 'Project Monitoring & Supervision Consultants' a quarterly progress report during the Construction Period, which shall contain the following information

Summary of Progress: Summary of the progress of the Project for that Month which shall detail:

- (1) any areas of significant concern and the action being taken to resolve any significant difficulties;
- (2) the actual progress made during that Month against the construction schedule including a description in reasonable detail of the work carried out;
- (3) any matters which have come to light which are likely materially and adversely to affect the construction of the Project;
- (4) any potential or actual deviations from the construction schedule, the Specifications and Standards and Good Industry Practice or otherwise confirmation that construction is proceeding in accordance therewith;
- (5) a commentary on the progress of construction as against the business plan;
- (6) areas of concern or problem or bottlenecks, impact and corrective action plans, revised resource planning details. The critical path schedules shall be updated and included as part of this report in order of priority.

Completion: Details of any changes to the proposed date of completion of construction and the reasons for such changes; and

Government Approvals: Written confirmation that all Applicable Permits then required are in full force and effect including a list and copies of such permits.

- (iii) The Concessionaire shall promptly carry out at its cost such further works as may be necessary to remove the defects and deficiencies observed by the Authority /Nodal Officer/'Project Monitoring & Supervision Consultants' and ensure construction of the Project/Project Facilities is in all respects in accordance with the provisions of this Agreement.

**(b) Operation Period Reports**

The Concessionaire shall provide to the Authority 'Project Monitoring & Supervision Consultants', if any, a quarterly operation and maintenance progress report during the Operation Period, which shall contain the following information:

- (i) Summary of Progress: Summary of operating and financial results for that quarter and explanations of any major variation between actual and projected results;
- (ii) Revenue: Details of the Revenue for the relevant quarter from each source
- (iii) Maintenance Plan: Maintenance plan for the Project for the next quarter and a report on maintenance carried out during the previous quarter (including a commentary on any material deviation from expected maintenance activities as set out in the maintenance plan).

**(c) Additional Information**

The Concessionaire agrees to provide the Authority/Nodal Officer such further information as any of them may reasonably request in order for them to monitor the progress and performance of the Project.

**(d) Inspection**

The Authority/Nodal Officer / ‘Project Monitoring & Supervision Consultants’/ Expert, the relevant Government Authorities, and their representatives shall at all reasonable times and upon reasonable notice, have access to the Project Site, the Project and the Works and all related designs, documents, reports, records technology and workmanship, to review progress of the construction, operation and maintenance of Project and to ascertain compliance with any of the requirements of this Agreement, including the Specifications and Standards and to check the progress of the works or for performing statutory duties and the Concessionaire shall provide the necessary cooperation and assistance to them in this behalf

Provided that any failure on the part of the Authority, the concerned Government Authorities to inspect any work, material, equipment and workmanship etc. shall not, in relation to such work etc.

(i) amount to any consent or approval of the Authority nor shall the same be deemed to be a waiver of any of the rights of the Authority under this Agreement; and (ii) release or discharge the Concessionaire from its obligations or liabilities under this Agreement in respect of such work etc.

## **ARTICLE 8 FINANCIAL COVENANTS**

### **Section 8.1 Financing for Project**

- (a) The Concessionaire agrees and undertakes to obtain financing for the Project in the form of equity, debt and other sources, from domestic and foreign sources, through public issues, private placements or direct borrowings or investment from the capital markets, banks, lending institutions, mutual funds, insurance companies, pension funds, provident funds and any other source as it may deem necessary for implementing the Project.
- (b) The Concessionaire may assign its rights, or interest or create a Security Interest in respect of its rights under this Agreement or any part thereof, including right, and interest under this Agreement, in and to the Project Assets (excluding the Project Site or any part thereof and the rights relating thereto), and its right to receive User Charges in favour of Lenders for securing the Financial Assistance provided or agreed to be provided by the Lenders under the Financing Documents; provided that any such assignment or Security Interest shall be consistent with the provisions hereof and the lenders are made aware of the same. For the avoidance of doubt the Concessionaire shall not have the right and authority to mortgage, encumber or create, permit or allow the subsistence of any Security Interest whatsoever on the Project Site or any part thereof, in favor of the Lenders or any person in any form, manner, device or method.
  - (i) Provided that the Concessionaire shall procure prior permission of the Authority as to the creation of any Security Interest in favor of the Lenders and the Authority shall be informed by the Concessionaire as to the creation of any Security Interest in favor of the Lenders, together with the Lenders particulars within a period of 14 Days from the date such Security Interest comes into existence and provide to the Authority within such time notarized true copies of documents/Agreements relating thereto. Failure to do so shall amount to an event of default on the part of the Concessionaire and any consequential failure or inability on the part of the Authority to provide any notice or intimation to such Lender, in terms of the relevant provisions of this Agreement, if any required, shall be at the risk and responsibility of the Concessionaire only. Provided that at any given time the Authority shall give such approval only in respect of one Lender; such Lender acting for itself and as agent of the other Lenders (who are providing financing for the Project). The Lenders shall be free to modify the composition of the consortium of the Lenders.
  - (ii) Provided further in the event of termination of this Agreement by efflux of time or otherwise, such assignment/Security Interest shall stand extinguished upon

payment of compensation by the Concessionaire to the Lenders, to the extent they are entitled to receive the same in accordance with the provisions of this Agreement. The Concessionaire shall primarily be responsible to ensure that the prospective lenders are made aware of this provision and a suitable provision to this effect is incorporated in the financing & security documents to execute between the Concessionaire and the Lenders. If the Concessionaire fails to compensate the Lenders within a stipulated period as mentioned in the financing documents, the lenders, in consultation with the Authority, shall step in and appoint a suitable entity as Concessionaire that has agreed to act as such on the terms and conditions of this Agreement and financing and security Agreements.

- (iii) The Concessionaire shall primarily be responsible to ensure that the prospective lenders are made aware of this provision and a suitable provision to this effect is incorporated in the financing & security documents to execute between the Concessionaire and the Lenders.
  - (iv) Provided further, nothing contained in sub-section (b) of this Section 8.1 shall (i) absolve the Concessionaire from its responsibilities to perform/discharge any of its obligations under and in accordance with the provisions of this Agreement; (ii) authorise or be deemed to authorise the Lenders to implement and execute Project themselves and (iii) under any circumstances amount to any guarantee from or recourse to the Authority.
- (c) Except as stated in sub-section (b) above or elsewhere in this Agreement, the Concessionaire shall not assign its rights, interest or obligation or create a Security Interest with respect to its rights under the Agreement or any part thereof in favour of any Person.
  - (d) The Authority shall assist the Concessionaire as necessary and mutually agreeable, to enable the Concessionaire to achieve Financial Closure. Such assistance shall include discussion in good faith and the obligation of the Authority to consider reasonable modifications to this Agreement as may be required by the Lenders and execution of such further appropriate documentation or additional writings, in order to facilitate the process of achieving Financial Closure and which do not materially and adversely affect the rights and interests of the Authority hereunder or impose additional material liabilities on the Authority.
  - (e) The Agreement entered by the Concessionaire with the lenders will be sub-ordinate to the Concession Agreement entered by the Concessionaire with the Authority.

## **Section 8.2 Escrow Account**

- (a) The Concessionaire shall prior to the Compliance Date open and establish an Escrow Account with a Nationalised or Scheduled Bank, acceptable to the Authority (the “**Escrow Bank**”) in accordance with this Agreement read with the Escrow Agreement. The nature and scope of the Escrow Account are fully described in the Agreement (the “**Escrow Agreement**”) to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Lenders, for a period until the end of Concession Period..
- (b) All revenues, inflows and outflows of cash and receivables on account of Project or otherwise that accrue or arise to the Concessionaire under, in connection with or pursuant to the implementation of the Project under this Agreement including but not limited to all receivables under or pursuant to the Transaction Documents (including without limitation Financial Assistance, the equity contributions, all User Charges, compensation payable by the Authority upon termination of this Agreement pursuant to Article 16), shall be credited to or debited from, as the case may be, the Escrow Account. The Escrow Bank shall be instructed to provide Monthly statements relating to such account to the parties.
- (c) The Concessionaire shall deposit all cash and receivables from the Project, including collection of User Charges, into Escrow Account, which shall at all times including at the time of termination of expiry of the Agreement, be first used to ensure the payments due and payable to the Authority in terms of this Agreement and, subject to timely payments thereof and retention of the amounts required to ensure the payment of the fees and expenses to the ‘Project Monitoring & Supervision Consultants’, transfer the remaining balances to any of the accounts of the Concessionaire or to the order of the Concessionaire in accordance with the terms for the Escrow Agreement. Provided always, all the payments by the Concessionaire to the Authority under this Agreement, including the Lease Rental, Additional Development Premium, Annual enhancement in the Six Months Advance Lease Rental Deposit deposits, Charges and expenses, in terms with the Agreement shall have priority over all other payments that are due and payable by the Concessionaire on any account whatsoever, excepting the payment of taxes by the Concessionaire to any Government Authority.
- (d) The Escrow Account shall be opened and operated at Vijayawada Branch of any Nationalised/Scheduled bank (the Escrow Bank), as approved by the Authority.
- (e) The Escrow Bank shall hold the Escrow Account and such monies, from time to time, as may be deposited in the said Escrow Account subject to conditions herein contained and/or in the Escrow Agreement.
- (f) The monies held by the Escrow Bank in pursuance of this Agreement shall not be considered as part of the assets of the Escrow Bank, and, being trust property shall not, in the case of a

bankruptcy or liquidation of the Escrow Bank, be considered as its assets and shall not be available to the liquidator, bankruptcy trustee or other creditor of the Escrow Bank. The Escrow Bank shall not have any lien or be entitled to exercise claim on the monies in the escrow account.

- (g) The Escrow Bank shall maintain the Escrow Account for the tenor of the Concession Period or until receipt of joint written confirmation from the Parties for the termination thereof. Upon termination of the escrow account the Escrow Bank shall transfer any balances in the account to the Concessionaire or to the order of the Concessionaire; provided there are no outstanding claims of the Authority on the Concessionaire.
- (h) The Concessionaire shall duly appoint authorized signatories ("Authorized Signatories") for operating the Escrow Account from among its personnel and inform their names to the Escrow Bank and the Authority. Such Authorized Signatories shall, on or prior to the payment date, issue and sign cheques in favour of the Authority for payments due and payable by the Concessionaire to the Authority hereunder, including the Lease Rental, the Revenue Share, the enhancement of the Security Deposit and the Charges and Expenses.

#### **Payments to Authority**

In consideration for the grant of the Concession, the Preferred Bidder/ Concessionaire shall make the following payments/provide following facilities to the Authority in the manner and at the times mentioned hereunder:

##### **Section 8.2.1 Annual Lease Rental**

In consideration of the lease of the Site and the rights appurtenant thereto in favor of the Concessionaire, the Concessionaire shall, during the Concession Period, in terms of this Agreement and the Land Lease Agreement, make payments to ADCL with respect to the Annual Lease Rentals. The Annual Lease Rental for the first Year of Concession is Rs. \_\_\_\_\_. The amount of Annual Lease Rental shall be escalated at the rate of five percent\_\_(5%) every Year during the Concession Period.

The Annual Lease Rentals shall be paid in advance in equated quarterly installments, by the 10th day of the first Month of every quarter during each Accounting Year of the Concession Period in accordance with Lease Rental payment schedule attached as Schedule 1 to the Land Lease Agreement.

An amount of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ only) equivalent to the first Six Months Annual Lease Rental (computed on the basis of the Annual Lease Rental payable in the first Year of Concession) of the Concession Period, has been deposited by the Preferred Bidder/ Concessionaire, with the Authority within 15 Days of issue of LoA and prior to the Execution Date, as an interest free security deposit.

Further, towards the security for the due payment of the Annual Lease Rentals during the Concession Period, The payment of the subsequent Lease Rentals shall be made on quarterly basis to be paid in advance by the 10th day of the first Month of that quarter for the entire Concession Period.

The Concessionaire shall ensure that it maintains, at all times during the Concession Period, a deposit with the Authority of an amount equal to Six (6) Months Advance Lease Rental Deposit calculated on the basis of applicable Annual Lease Rental for that particular Year (“**Security Deposit**”).

The Security Deposit shall be returned to the Concessionaire, without any interest thereon, within three (3) Months from the Transfer Date, after adjusting dues of the Concessionaire if any to the Authority or towards any payment obligations pertaining to the Project, like power, water, maintenance etc.

In the event of delay up to 15 Days from the due date (10th day of the first Month of the quarter) in the payment of the Lease Rentals, the Concessionaire shall be liable to pay to the Authority, interest on the due amount at the rate of 18% (Eighteen percent) per annum, for the period from the due date until the date of actual payment.

In the event, the payments are delayed beyond a period of 15 Days from the due date; it shall be construed as a Concessionaire default in payment of Lease Rentals. When such a default occurs, the Authority shall issue a default notice to the Concessionaire requesting to remedy the situation within 15 Days. If the situation is not remedied, at the end of 15th day a second notice shall be issued allowing further period of 15 Days. In the event that the Concessionaire fails to remedy the situation, the Authority may, at the end of 45th day (15+15+15 Days), appropriate the amount due from the Security Deposit and may also issue, at its discretion, a termination notice under Article 16. Upon such appropriation, the Concessionaire shall reinstate the Security Deposit so that the amount of Security Deposit is equal to the Six Month Lease Rentals for the relevant Year within a maximum period of 7 Days, failing which the Authority reserves the right to terminate this Agreement in accordance with Article 16 hereof.

#### **Section 8.2.2 Revenue Share**

- a. In consideration of the grant of the Concession, effective from the 3<sup>rd</sup> Year of COD or 5<sup>th</sup> Year of Agreement date and throughout the balance Concession Period, the Concessionaire shall in accordance with the provisions hereof, pay to the Authority Revenue Share which shall be the higher of the following
  - i. 3% of Gross Revenue of the particular Year,
  - ii. Revenue Share quoted by the Preferred Bidder in absolute terms in its financial Bid for that particular Year.

- b. The Revenue Share quoted by the Preferred Bidder in absolute terms (in figures) in its Price Bid for a particular Year shall be paid in equated quarterly installments, by the 10th day of the first Month of every quarter during each Year of the Concession Period.
- c. At the end of each Year, based on finalised audited accounts and the determination of the audited Gross Revenue for that Year as certified by the statutory auditor of the Concessionaire, necessary adjustments shall be made in respect of the Revenue Share on the basis of the Revenue Share quoted by the Preferred Bidder in its Financial Bid for the respective Year (subject to escalation of 5% over previous Year). In the event the Revenue Share paid in the course of the quarters of the relevant Year (on the basis of the Revenue Share quoted by the Preferred Bidder in absolute figures) is less than the 3% Revenue Share for the respective Year, then the Concessionaire shall, within 30 Days of finalisation of its accounts for the particular Year, pay the difference between the revenue share and the amount already paid as per the quoted Revenue Share for that particular Year.
- d. The Concessionaire shall provide Bank Guarantee (BG) against the Revenue Share payable which shall be equivalent to the Revenue Share quoted for 5<sup>th</sup> Year of Agreement. The BG shall be provided within 10 Days before release of construction period Performance Security of Phase II and shall be valid till end of 7<sup>th</sup> Year of Agreement. Thereafter, the Concessionaire shall upgrade the BG once in every three Years with increased amounts equivalent to Revenue Share quoted for 8<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup>, 23<sup>rd</sup>, 26<sup>th</sup>, 29<sup>th</sup> and 32<sup>nd</sup> Year of Agreements. The validity of each BG shall be for three Years.
- e. The Concessionaire shall ensure that it maintains, at all times during the Concession Period, the Bank Guarantee with the Authority to an amount equal to Revenue Share as above.
- f. The final Bank Guarantee towards Revenue Share shall be returned to the Concessionaire within three (3) Months from the Transfer Date, after adjusting dues of the Concessionaire if any to the Authority or towards any Project Payment Obligations like power, water, maintenance etc.
- g. The Concessionaire shall pay the Revenue Share for each Quarter during the Concession Period to the Authority by way of a Demand Draft drawn on a Nationalized/Scheduled Bank, payable at Vijayawada or by electronic transfer from the Escrow Account.
- h. The Authority/Nodal Officer and its authorized representatives and Experts /Auditors shall at all times be entitled to inspect the Concessionaire's books of accounts, contracts, invoices, vouchers, bills, receipts etc., and to make copies thereof



- i. In the event of delay or default in payment of Revenue Share to the Authority beyond the due date (10<sup>th</sup> day of every quarter) provided herein, Concessionaire shall be liable to pay interest to the Authority on the due amount at the rate of 18 % (Eighteen percent) per annum from and including the due date to and excluding the date of payment. A delay or default in such due payment shall constitute a Concessionaire Event of Default.
- j. The Authority shall have right to appoint at the Concessionaire’s cost an Expert, being reputable Independent Auditor, to audit the accounts and record of the Concessionaire on a Quarterly basis to determine the Revenue. The Concessionaire shall make available to such the Authority, its representatives and such auditor all its records, books, documents and other relevant information that may be reasonably be required to check or audit any information, figures, calculation of revenues of the Concessionaire and shall provide the Authority, its representative and such auditor reasonable access to its offices and premises for the purpose of such audit.

The Parties further agree that in the event that the revenue declared by the Concessionaire (on the basis of which the Revenue Share is determined and paid by the Concessionaire to the Authority) is less than the revenue determined by such auditor pursuant to this section 8.3.2, (i) the differential amount shall be payable immediately by the Concessionaire to the Authority upon such determination by such auditor and shall accrue penal interest at the rate of 18 % of such amount per annum for the period from the date of finalisation of its accounts for the particular Year and until the date of actual payment of the differential amount; and (ii) the Concessionaire shall bear all the cost of such Audits .

### **Section 8.3 User Charges for Project Facilities**

- a. Effective from COD and during the balance Concession Period, the Concessionaire shall:
  - (i) be entitled to fix at rates fixed/structured at the discretion of the Concessionaire from time to time, determine, revise, charge, demand, collect, recover, retain and appropriate the User Charges at market driven rates from users of Facilities / Project for the goods, services, facilities and amenities etc. relating to the Project/Project Facilities/at the Site that are provided, arranged or procured by the Concessionaire by itself or under or pursuant to Contractual Arrangements;
  - (ii) provide separate customized service or User Charges packages or differential rates or special or seasonal discounts for specific, bulk, regular users or different category of users or during different parts of the Year or for timely or early payment.
- b. The Authority expressly recognises that if any user fails to pay User Charges, the Concessionaire may exercise all rights and remedies available under the Applicable Laws for recovery thereof, including the suspension, termination or cancellation of provision of the applicable service to the relevant defaulting Contracting Counter Party or user; provided

that the same shall be in compliance with the requirements of the Applicable Laws, terms of Applicable Permits, statutory or mandatory requirements of Government Authorities, if any, and Good Industry Practice in this behalf.

#### **Section 8.4      Audit and Account**

##### **(a)      Appointment of Auditors**

- (i) The Concessionaire shall appoint and have during the subsistence of this Agreement, as its statutory auditors, a reputed firm of chartered accountants duly authorised to practice in India. All fees and expenses of the statutory auditors shall be borne by the Concessionaire.
- (ii) Any claim or document provided by the Concessionaire to the Authority relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto, in connection with the Project shall be valid and effective only if certified by the Concessionaire’s statutory auditors.

##### **(b)      Maintenance of Accounts**

- (i) The Concessionaire shall, during the subsistence of this Agreement, maintain books of accounts in accordance with standard accounting practices and statutory requirements under the Indian laws recording all its receipts from all sources derived or on account of the Project, income, expenditure, payments and assets and liabilities, in accordance with this Agreement, the Applicable Laws and Good Industry Practice. The Concessionaire shall provide the Authority 2 (two) copies of its audited balance sheet and profit and loss account along with a report thereon by its statutory auditors, within 120 (one hundred and twenty) Days of the close of the Accounting Year to which they pertain.

## **ARTICLE 9      PERFORMANCE SECURITY**

### **Section 9.1      Performance Security**

(a) For securing the performance of the obligations of the Concessionaire / Preferred Bidder under the RFP, the LoA, under Section 3.4 of this Agreement and during the Construction Period, the Preferred Bidder for and on behalf of the Concessionaire, has along with the execution of this Agreement, delivered to the Authority an un-conditional and irrevocable bank guarantees (2 Nos.) in favor of the Authority, from a nationalized bank operable in Vijayawada, for a sum of **Rs. ....** **(Rupees ..... Only)**, valid for 2 (Two) Years from the date of signing of Concession Agreement and further extended by additional 1 (One) Year before Fifteen Days from the expiry of initial BG. One Performance Guarantee will be released to the Concessionaire once the Phase- I of the Project Completion is achieved as per the MDOs and the Second Bank Guarantee will be released on achieving Phase – II of the Project Completion. The BG is payable and enforceable in Vijayawada Andhra Pradesh. (The **“Performance Security”**), the receipt & veracity of which, is hereby acknowledged by the Authority.

(b) The Preferred Bidder / Concessionaire shall keep the Performance Security valid and in full force and effect at all times during the Construction period until MDOs are completed and until completion certificates are issued as per the provisions of the Agreement. This is an essential condition of the Contract and the failure to maintain the Performance Security in accordance with the provisions hereof shall constitute a Concessionaire Event of Default and shall entitle the Authority to terminate this Agreement in accordance with the provisions of Clause 16 hereof.

### **Section 9.2      Appropriation of Performance Security**

(a) In the event of the Concessionaire being in default of the due, faithful and punctual performance of its obligations under the RFP, the LoA, under Section 3.4 of this Agreement and during the Construction Period and until the date of issue of the Completion Certificate in respect of all the Project Facilities under MDOs, as the case may be, or owing any sums whatsoever to Authority under this Agreement or in the event of there being any claims or demands whatsoever whether liquidated or which may at any time be made or have been made on behalf of the Authority for or against the Concessionaire under this Agreement or against the Authority in respect of this Agreement, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to call in, encash and appropriate the relevant or delinquent amounts from the Performance Security as damages for such default, dues, demands or claims.

(b) The decision of the Authority as to any breach/delay having been committed, liability accrued or loss or damage caused or suffered shall be conclusive, absolute and binding on the Concessionaire. The Concessionaire specifically confirms and agrees that no proof of any amount of liability accrued or loss or damages caused or suffered by the Authority under this Agreement is

required to be provided in connection with any demand made by the Authority to recover such compensation through encashment of the Performance Security under this Agreement and that no document or any action shall be required other than the Authority’s written demand as aforesaid.

(c) In the event of encashment of the Performance Security by the Authority, in full or part, the Concessionaire shall within 30 (Thirty) Days of receipt of the encashment notice from the Authority provide a fresh Performance Security or replenish the existing Performance Security to its original value, as the case may be. The provisions of this Article 9 shall apply mutatis mutandis to such fresh Performance Security. The Concessionaire’s failure to comply with this provision shall constitute a Concessionaire Event of Default, which shall entitle the Authority to terminate this Agreement in accordance with the provisions of Article 16 hereof.

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

Subject to the provisions hereof, ADCL shall promptly return the Performance Security to the Concessionaire upon request made by the Concessionaire for release of the Performance Security along with the particulars which establish the Project Completion being achieved, and provided that there are no outstanding claims of the ADCL on the Preferred Bidder/Concessionaire and the Concessionaire is not in breach of this Agreement

## **ARTICLE 10 THE OWNERSHIP AND CERTAIN RIGHTS**

### **Section 10.1 Ownership of Assets**

#### **(a) Land Area**

The ownership of the Project Site shall always remain vested with the Authority. The rights of the Concessionaire in the Project Site shall only be that of a Lessee as provided in this Agreement. It is clarified for the avoidance of doubt that title to the land shall vest exclusively with the Authority and the Concessionaire shall only have the right to develop and use the same in accordance with the provisions of this Agreement.

#### **(b) Assets created or provided by the Concessionaire**

The ownership of all infrastructure assets, buildings, structures, equipment and other immovable and movable assets constructed, installed, located, created or provided by the Concessionaire in, on, over or under the Project Site pursuant to this Agreement shall, until transfer to the Authority in accordance with this Agreement, be with the Concessionaire.

## **ARTICLE 11      INSURANCE**

### **Section 11.1      Insurance Cover**

The Concessionaire shall maintain or cause to be maintained, at its own expense, insurance policies as are customarily and ordinarily available in India on commercially reasonable terms and reasonably required to be maintained, consistent with similar facilities of the size and type of the Project and as may be required by the Lenders.

#### **(a)      Construction Period**

The Concessionaire shall, at its cost and expense, purchase and maintain during the Construction Period such insurances as are necessary, including but not limited to the following:

- (i) Construction/builders'/contractors' all risk insurance;
- (ii) Erection all risk policy
- (iii) Comprehensive third party liability insurance including injury or death to personnel of the Authority and others who may enter the Project Site;
- (iv) Workmen's compensation insurance;
- (v) any other insurance that may be necessary to protect the Concessionaire , its employees and its assets (against loss, damage or destruction at replacement value) including all Force Majeure Events that are insurable and not otherwise covered in items (i) to (iv).

#### **(b)      Operations Period**

The Concessionaire shall, at its cost and expense, purchase and maintain during the Operations Period insurance to cover against Project Facilities/ Project Assets for:

- (i) loss, damage or destruction of the Project/ Project Assets at replacement value or full market value (including fire, burglary, standard and special peril);
- (ii) the Concessionaire's general liability arising out of the Concession .
- (iii) liability to third parties; and
- (iv) any other insurance that may be necessary to protect the Concessionaire and its employees, including all Force Majeure Events that are insurable and not otherwise covered in items (i) to (iii).

### **Section 11.2      Evidence of Insurance**

The Concessionaire shall, from time to time, furnish to the Authority copies of all insurance policies in respect of the Insurance Cover (or appropriate endorsements, certification of other satisfactory evidence of insurance) as soon as reasonably practical after they are received by the Concessionaire and furnish evidence to the Authority that all premiums have been paid and that the relevant policies remain in force, valid and existence. In the event the Concessionaire does not maintain any

Insurance Cover pursuant hereto, the Authority may, at its option, effect such insurance and the Concessionaire shall reimburse all the costs and expenses incurred in this behalf by the Authority within 15 (Fifteen) Days of receipt of the Authority’s claim in respect thereof. In case the Concessionaire fails to reimburse such expense, this shall become the Concessionaire’s Event of Default and shall be treated as per the provisions laid down under Article 15.

### **Section 11.3 Application of Insurance Proceeds**

Subject to the provisions of the Financing Documents and unless otherwise provided herein, the proceeds from all insurance claims, except for life and injury, shall be promptly credited the amount to Escrow Account, in accordance with the terms hereof and thereof, the Concessionaire shall apply such proceeds for the repair, renovation, restoration or re-instatement of the Project or any part thereof, which may have been damaged or destroyed and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Documents

### **Section 11.4 Distribution of Insurance Proceeds Upon Termination**

Whenever this Agreement is terminated following a Force Majeure Event and insurance proceeds are available in connection with the insurance policies to which the Concessionaire is entitled or should be entitled pursuant to this Agreement with respect to the Project, such proceeds shall, if not used to effect a restoration or to make repairs to the Project, be distributed first, (a) payment of dues, if any, to the Authority; and (b) for the payment towards indebtedness (actual or contingent) owing to the Lenders; (c) the residual amount, if any, to the Concessionaire.

### **Section 11.5 Validity of the Insurance Cover**

The Concessionaire shall pay the premium payable on such insurance policy(ies) so as to keep the policy(ies) in force and valid throughout the Concession Period and furnish certified true copies of the same to the Authority. Each insurance policy shall provide that the same shall not be cancelled or terminated unless 10 Days’ clear notice of cancellation is provided to Authority in writing. If at any time the Concessionaire fails to purchase and maintain in full force and effect any and all of the insurances required under this Agreement, the Authority may at its option purchase and maintain such insurance and all sums incurred by the Authority therefore shall be reimbursed by the Concessionaire forthwith on demand, failing which the same shall be recovered by the Authority by exercising right of set off or otherwise.

## **ARTICLE 12 REPRESENTATIONS AND WARRANTIES**

### **Section 12.1 Mutual Representations and Warranties**

Each Party represents and warrants to the other Party that:

- (a) it is duly organized, validly existing and in good standing under the laws of India;
- (b) it has full power and authority to execute, deliver and perform its obligations under this Agreement;
- (c) it has taken all necessary actions to authorise the execution, delivery and performance of this Agreement and to carry out the transactions contemplated hereby;
- (d) this Agreement constitutes its legal, valid and binding obligation, fully enforceable against it in accordance with the terms hereof;
- (e) it has the financial standing and capacity to undertake the Project;
- (f) it shall have an obligation to disclose to the other Party as and when any of its representations and warranties ceases to be true and valid.

### **Section 12.2 Further Representations and Warranties of Concessionaire**

In addition, the Concessionaire represents and warrants to the Authority that:

- (a) The execution, delivery and performance of this Agreement and all instruments or Agreements required hereunder do not conflict with, contravene, violate, result in the breach of, constitute a default under or accelerate performance of any Agreement or instrument to which the Concessionaire is a party, including without limitation, its articles and memorandum of association or by which it is or may be bound or any Applicable Laws or any covenant, Agreement, understanding, decree or order, injunction, award to which it is a party or by which it or any of its properties or assets is bound or affected;
- (b) 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 Essential Material Adverse Effect;
- (c) It has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Authority or any other pending or potential matters which may result in any Material Adverse Effect or impairment of the Concessionaire’s ability to perform its obligations and duties under this Agreement;
- (d) 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 individually or in the aggregate have or may have Material Adverse Effect;
- (e) No representation or warranty by the Preferred Bidder /Concessionaire contained herein or in any other document furnished by it to the Authority or to any Government Authority in relation to Applicable Permits or otherwise 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;

(f) Each Consortium Member/the Preferred Bidder 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 consented to the Concessionaire entering into this Agreement and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement; Provided that whenever any pending or potential matter, including the matters listed in the sub-sections above, comes to the knowledge of the Preferred Bidder /Concessionaire , during the Concession Period, 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 or impairment of the Concessionaire’s ability to perform its obligations and duties under this Agreement, the Concessionaire shall immediately intimate the same to the Authority;

(g) In submitting its Proposal the Preferred Bidder/Concessionaire has complied with all the Applicable Laws and it is and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal proceedings or liabilities which individually or in the aggregate have or may have Material Adverse Effect on its financial condition or its ability to implement the Project.

(h) All rights and interests of the Concessionaire in the Project, the Project Facilities and Project Assets shall pass to and vest in the Authority or its nominated agency on the Transfer Date free and clear of all liens, claims, and Encumbrances, without any further act or deed on the part of the Preferred Bidder/Concessionaire or the Authority and that none of Project Assets including materials, supplies or equipment forming part thereof shall be acquired by the Concessionaire subject to any Agreement under which a Security Interest or other lien or encumbrance is retained by any person save and except as expressly provided in this Agreement; and

(i) No sums, in cash or kind, have been paid or will be paid by or on behalf of the Preferred Bidder /Concessionaire to any person by way of commission or otherwise for securing the Concession execution of this Agreement or for influencing or attempting to influence any officer or employee of the Authority.

### **Section 12.3 Waiver of Sovereign Immunity**

Each Party hereto unconditionally and irrevocably:

(a) agrees that the execution, delivery and performance by it of this Agreement and all other Agreements, contracts, documents and writings relating to this Agreement constitute private and commercial acts and not public or governmental acts and that it is subject to the civil and commercial laws of India with respect to this Agreement;

(b) agrees that any proceedings be brought against it or its assets, other than the assets protected by the diplomatic and consular privileges under the Foreign Sovereign Immunities Act or / any analogous legislation (“**Exempted Assets**”) in any jurisdiction, in relation to this Agreement or any transaction contemplated by this Agreement, no immunity, sovereign or otherwise from such proceedings, execution, attachment or other legal process shall be claimed by or on behalf of itself or with respect to any of its assets (other than the Exempted Assets);

(c) consents generally in respect of the enforcement of any judgment against it in any proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings including without limitation the making, enforcement or execution against or in respect of any property irrespective of its use subject to (b) above.

#### **Section 12.4 Disclaimer**

(a) Without prejudice to any express provision contained in this Agreement, the Preferred Bidder/Concessionaire acknowledges that prior to the execution of this Agreement, the Preferred Bidder/Concessionaire has after a complete and careful examination made an independent evaluation of the Project, the legal and contractual framework, the Applicable Laws and Applicable Permits and the technical and financial aspects of the Project, the Specifications and Standards, the Project Site and the suitability of its condition, soil and location for implementation of the Project, the availability of goods, materials and things needed for implementing Project, all the information and documents provided by the Authority, its consultants or any Government Authority, the market and demand conditions, information relating to users and the cost, risks, consequences and liabilities involved in implementing the Project, and has determined to the Preferred Bidder's/Concessionaire's complete 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. It has also carried out a title search, including without limitation the title, ownership, possession, land acquisition etc. in respect of the Project Site.

(b) The Preferred Bidder /Concessionaire further acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in sub-clause (a) above and hereby confirms that the Authority, its consultants or any Government Authority shall not be liable for the same in any manner whatsoever to the Preferred Bidder/ Concessionaire or Persons claiming through or under the Preferred Bidder/Concessionaire.

(c) The Preferred Bidder /Concessionaire accepts that it is solely responsible for the verification of any design, data, design, documents or information provided to the Concessionaire by the Authority, its consultants or any Government Authority and that it shall accept and act thereon at its own cost and risk.

(d) The Preferred Bidder /Concessionaire shall be solely responsible for the contents of its Proposal, adequacy and correctness of the Design and Drawing, data and detailed engineering prepared or procured by the Concessionaire for implementing the Project.

(e) The Preferred Bidder /Concessionaire is entering into this Agreement on the basis of its satisfaction based on the due diligence audit undertaken by it

## **ARTICLE 13      LIABILITY AND INDEMNIFICATION**

### **Section 13.1      Liability of Concessionaire**

Notwithstanding anything to the contrary contained in this Agreement,

- (a) in addition to the Concessionaire’s liability and obligations, indemnities and the Authority’s remedies provided elsewhere in this Agreement, the Concessionaire shall be solely responsible for any loss of or damage to the Project and the Project Assets, damage to environment, death or injury to Person, and any other liabilities, damages, losses and reasonable cost and expenses (including legal costs) suffered by the Authority:
  - (i) during the Concession Period resulting from any negligent act or omission of the Concessionaire , the Contractors, the Contractual Counter Parties or any other Person and their respective employees, agents, contractors and representatives.
  - (ii) in connection with, arising out of, or resulting from any breach of warranty, material misrepresentation by the Concessionaire , Contractor or Contractual Counter Parties, or non-performance of any term, condition, covenant or obligation to be performed by the Concessionaire , Contractor or Contractual Counter Parties under this Agreement and the Transaction Documents.
- (b) The Concessionaire shall also be liable for any loss or damage which occurs as a result of any act, event, omission, negligence or default (including property circumstances, quality of materials used, workmanship, structural, design or other defects, latent or patent, non-compliance with development control regulations of the relevant local authorities from time to time, building bye laws as may be applicable, other Applicable Laws, regulatory requirements of Government Authorities, Specifications and Standards or any other matter) for which the Concessionaire is liable or which is attributable to the Concessionaire and, in turn, the Persons claiming through or under the Concessionaire .

### **Section 13.2      Indemnification**

- (a) Without prejudice to and in addition to the indemnification provisions elsewhere in this Agreement, the Concessionaire agrees to indemnify and hold harmless the Authority and its officers, employees, agents, trustees and consultants (each a **“Authority Indemnified Party”**) promptly upon demand at any time and from time to time, from and against any and all losses, claims, demands, damages, liabilities, costs, penalties, litigation, proceedings (including reasonable attorneys' fees and disbursements) and expenses of any nature whatsoever (collectively, **“Losses”**) to which the Authority Indemnified Party may become subject, insofar as such Losses arise out of, in any way relate to, or result from (i) any mis-statement or any breach of any representation or warranty made by Concessionaire or (ii) the failure by Concessionaire to fulfill any Agreement, covenant or condition contained in this Agreement, including without limitation the breach of any terms and conditions of this Agreement by any employee or agent of the Concessionaire Person claiming through or

under the Concessionaire or (iii) any claim or proceeding by any Third Party against the Authority arising out of any act, deed or thing done or omitted to be done by Concessionaire or (iv) as a result of failure on the part of the Concessionaire to perform any of its obligations under this Agreement or on the Concessionaire committing breach of any of the terms and conditions of this Agreement or (v) on the failure of the Concessionaire to perform any of its statutory duties and/or obligations or as a consequence of any notice, action, suit or proceedings, given, initiated, filed or commenced by any user of the Project or the Concessionaire's Contractors or employees or any Third Party or Government Authority or (vi) as a result of any failure or negligence or default of the Concessionaire or its Contractor(s), sub-contractor(s), or employees, servants, agents of such Contractor(s) and/or sub-contractor(s) and/or invitees as the case may be, in connection with or arising out of this Agreement and/or arising out of or, in connection with the Concessionaire's use and occupation of Project Site and/or construction, operation and maintenance of the Project.

For the avoidance of doubt, indemnification of Losses pursuant to this Article 13 shall be made in an amount or amounts sufficient to restore each Authority Indemnified Party to the financial position it would have been in had the Losses not occurred.

- (b) Without limiting the generality of sub-section (a) of this Section 13.2,
- (i) the Concessionaire shall fully indemnify and defend the Authority Indemnified Party from and against any and all Losses arising out of or with respect to (1) failure of the Concessionaire and the Persons claiming through or under the Concessionaire to comply with Applicable Laws and Applicable Permits, (2) payments of Taxes relating to the Concessionaire and the Persons claiming through or under the Concessionaire, including contractors, suppliers and representatives, including the income or other taxes required to be paid by the Concessionaire such Persons without reimbursement hereunder, or (3) non-payment of amounts due as a result of materials or services rendered/ provided to the Concessionaire or any Person claiming through or under the Concessionaire, which are payable by the Concessionaire or such Person.
  - (ii) the Concessionaire shall fully indemnify, and defend the Authority Indemnified Party harmless from and against any and all Losses which the Authority Indemnified Party 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 Persons claiming through or under the Concessionaire 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 Authority Indemnified Party, a permission, at no cost to Authority Indemnified Party, authorising continued use of the infringing work. If the Concessionaire is unable to secure such permission 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.

- (iii) the Concessionaire shall further indemnify, defend and hold harmless the Authority Indemnified Party from any and all Third Party claims for loss of or physical damage to property or for death or injury and against all Losses for personal injury and for damage to or loss of any property arising out of or in any way connected with the Concessionaire’s performance of this Agreement or arising out of any act or omission of the Concessionaire, and in turn of the Persons claiming through or under the Concessionaire.

- (c) Any payment made under this Agreement pursuant to an indemnity or claim for breach of any provision of this Agreement shall be net of applicable Taxes.

### **Section 13.3 Indirect or Consequential Losses**

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

### **Section 13.4 Business Risks**

Except as expressly provided in this Agreement, the Concessionaire shall carry out and perform its rights and obligations under this Agreement and the other Transaction Documents at its own cost and risk. The Concessionaire shall be fully responsible for and shall bear the financial, commercial and business risks in relation to the Project and all its rights and obligations under or pursuant to this Agreement and the other Transaction Documents.

### **Section 13.5 Survival**

The provisions of Article 13 shall survive the expiry or prior termination of this Agreement/the Concession.

## **ARTICLE 14      FORCE MAJEURE**

### **Section 14.1      Force Majeure Event**

#### **14.1.1      Force Majeure Event**

Force Majeure Event shall mean any event or circumstance or a combination of events and circumstances (occurring in India) set out hereunder or the consequence(s) thereof which affect or prevent the Party (Authority or Concessionaire) claiming Force Majeure ("**Affected Party**") from performing its obligations in whole or in part under this Agreement and which event or circumstance is (a) is beyond the reasonable control of the Affected Party, (b) such party could not have prevented or reasonably overcome with the exercise of due diligence, reasonable efforts, skill and care, (c) does not result from the negligence of such party or the failure of such party to perform its obligations hereunder, (d) is of an incapacitating nature and prevents or causes a delay or impediment in performance that has Material Adverse Effect and (e) is all or any of the following circumstances:

- (a) Acts of God or natural disasters beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, including but not limited to storm, cyclone, typhoon, hurricane, flood, landslide, drought, lightning, earthquakes, volcanic eruption, fire or exceptionally adverse weather conditions affecting the implementation of the Project.
- (b) Radioactive contamination, ionizing radiation.
- (c) Epidemic, famine.
- (d) An act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action, nuclear blast / explosion, sabotage or civil commotion.
- (e) Any judgment or order of any court of competent jurisdiction or statutory authority in India made against the Concessionaire in any proceedings (which are non-collusive and duly prosecuted by the Concessionaire) for reasons other than failure of the Concessionaire or of any Person claiming through or under it to comply with any Applicable Law or terms of 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 Authority.
- (f) Any event or circumstances of a nature analogous to any of the foregoing.

#### **Section 14.1.2      Exceptions to Force Majeure**

##### **For the Authority**

The Authority will not have the right to consider any of the following circumstances to be an event of Force Majeure that would suspend the performance or excuse the non-performance of its obligations under this Agreement

- (i) the expropriation, confiscation or nationalization of the Project/Project Facilities/Project Assets by the Authority;
- (ii) any delay or difficulty in handing over vacant possession of the Site.

## **For the Concessionaire**

The Concessionaire and/or persons claiming through or under it will not have the right to consider any of the following circumstances to be an event of Force Majeure that would suspend the performance or excuse the nonperformance of its obligations under this Agreement:

- (i) late delivery of any equipment or materials where such delivery is not attributable to Force Majeure events mentioned in section 14.1.1;
- (ii) breakdown or ordinary wear and tear of materials, equipment machinery or parts relating to the Project Facilities;
- (iii) delays in performance by the contractors or sub-contractors or employees, agents and representatives of the Concessionaire
- (iv) economic hardship including insufficiency of funds; or
- (v) general economic slowdown.
- (vi) Delay in shifting/restoration of utilities/public infrastructure in the project site as per the DPR.
- (vii) Delay in completion of construction period

## **Section 14.2 Notice of Force Majeure Event**

- (a) The Affected Party shall give notice to the other Party in writing of the occurrence of any of the Force Majeure Event ("the Notice") as soon as the same arises or 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 adverse effect it has or is likely to have on the performance of its obligations under this Agreement.
- (b) The Notice shall inter-alia include full particulars of:
  - (i) the nature, time of occurrence and extent of the Force Majeure Event with evidence in respect thereof;
  - (ii) the duration or estimated duration and the effect or probable effect which such Force Majeure Event has or will have on the Affected Party's ability to perform its obligations or any of them under this Agreement;
  - (iii) the measures which the Affected Party has taken or proposes to take, to alleviate the impact of the Force Majeure Event or to mitigate the damages; and
  - (iv) any other relevant information.
- (c) So long as the Affected Party continues to claim to be affected by a Force Majeure Event, it shall provide the other Party with periodic (fortnightly/Monthly) written reports containing the information called for under Section 14.2 (b) and such other information as the other Party may reasonably request.

### **Section 14.3 Period of Force Majeure**

Period of Force Majeure shall mean the period from the time of occurrence specified in the notice given by the Affected Party in respect of the Force Majeure Event until the earlier of:

- (a) expiry of the period during which the Affected Party is excused from performance of its obligations in accordance with Article 14.4; or
- (b) termination of this Agreement pursuant to Article 14.7 hereof

### **Section 14.4 Performance Excused**

The Affected Party, to the extent rendered unable to perform its obligations or part thereof under this Agreement as a consequence of the Force Majeure Event shall be excused from performance of the obligations provided that the excuse from performance shall be of no greater scope and of no longer duration than is reasonably warranted by the Force Majeure Event. Provided further, nothing contained herein shall absolve the Affected Party from any payment obligations accrued prior to the occurrence of the underlying Force Majeure Event.

### **Section 14.5 Resumption of Performance**

During the Period of Force Majeure, the Affected Party shall in consultation with the other Party, make all reasonable efforts to limit or mitigate the effects of the Force Majeure Event on the performance of its obligations under this Agreement. The Affected Party shall also make efforts to resume performance of its obligations under this Agreement as soon as possible and upon resumption shall notify the other Party of the same in writing. The other Party shall extend all reasonable assistance to the Affected Party in this regard.

### **Section 14.6 Costs, Revised Timetable**

#### **(a) Costs**

Each Party shall bear its costs, if any, incurred as a consequence of the Force Majeure Event.

#### **(b) Extension of Time/ Period**

The Affected Party shall be granted by the other Party, extension of time specified in this Agreement for the performance of any obligation by such period not exceeding the period during which the relative performance was affected by the Force Majeure Event. Such extension may include extension of the Concession Period by the Authority in appropriate cases.

### **Section 14.7 Termination Due to Force Majeure Event**

If the Period of Force Majeure continues or is in the reasonable judgment of the Parties likely to continue beyond a period of 180 Days, the Parties may mutually decide to continue this Agreement



or terminate this Agreement on mutually agreed revised terms. If the Parties are unable to reach an Agreement in this regard, the Affected Party shall after the expiry of the said period of 180 Days, be entitled to terminate the Agreement in which event, the provisions of Article 16 shall, to the extent expressly made applicable, apply.

**Section 14.8 Liability for Other Losses, Damages etc.**

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

## **ARTICLE 15      EVENTS OF DEFAULT**

### **Section 15.1      Events of Default**

Event of Default means the Concessionaire Event of Default or the Authority Event of Default or both as the context may admit or require.

#### **(a)      Concessionaire Event of Default**

The Concessionaire Event of Default means any of the following events unless such an event has occurred as a consequence of the Authority’s Event of Default or a Force Majeure Event:

- (i) the Concessionaire’s and/or Preferred Bidder’s is in/commits a Material Breach of this Agreement .
- (ii) the Concessionaire’s failure to perform or discharge any of its obligations under any other Transaction Documents, which has or is likely to have a Material Adverse Effect.
- (iii) any representation made or warranties given by the Concessionaire/Preferred Bidder under this Agreement are found to be false or misleading.
- (iv) the Concessionaire passing a resolution for voluntary winding up.
- (v) appointment of a provisional liquidator, administrator, trustee or receiver of the whole or substantially whole of the undertaking of the Concessionaire by a court of competent jurisdiction in proceedings for winding up or any other legal proceedings.
- (vi) levy of an execution or distraint on the Concessionaire assets which has or is likely to have Material Adverse Effect and such execution or distraint remaining in force for a period exceeding 30 Days or any authority, regulatory body, court , tribunal or judicial authority passing or issuing any order or direction against the Concessionaire which would have an or likely to have an Material Adverse Effect on the project or the ability of the Concessionaire to comply with or discharge the obligations and responsibilities under this Agreement. .
- (vii) amalgamation of the Concessionaire with any other company or reconstruction or transfer of the whole or part of the Concessionaire’s undertaking (other than transfer of assets in the ordinary course of business) without the Authority’s prior written approval, provided, if the amalgamated entity, reconstructed entity or the transferee as the case may be, has the financial and technical ability demonstrated to the satisfaction of the Authority, to undertake, perform/discharge the obligations of the Concessionaire under this Agreement, necessary approval shall be granted by the Authority.
- (viii) the Concessionaire engaging or knowingly allowing any of its employees, agents, Contractor or representative to engage in any activity prohibited by law or which constitutes a breach of or an offence under any law, in the course of any activity undertaken pursuant to this Agreement.

- (ix) the Concessionaire repudiates this Agreement or otherwise takes any action or evinces or conveys an intention not to be bound by this Agreement.
- (x) the Concessionaire has not rectified the default in payment as per the clause 8.2.2 (i) of this Agreement .
- (xii) the Concessionaire is adjudged bankrupt or insolvent
- (xiii) the whole of Project or any part of Project remains closed for an aggregate period of Sixty (60) Days (except for reasons on account of Force Majeure or Authority Event of Default).
- (xiv) The Concessionaire is in breach or non-compliance of any terms and conditions of the Land Lease Agreement executed between the Authority and Concessionaire in pursuance of the provisions of this Agreement
- (xv) The Concessionaire committing any breach or non-compliance of any of the terms and conditions of the Financing Documents executed between the Concessionaire and if all or any of the Lender(s) have recalled their outstanding dues and in pursuance thereto have initiated the exercise of their right to enforce the Security Interest created in their favor under the financing documents, as permitted by this Agreement, on the Project Assets and / or the rights and interest under this Agreement.
- (xvi) A change in the shareholding pattern of the Concessionaire has occurred in breach of the provisions hereof.
- (xvii) Failure of the Concessionaire to renew/replenish and maintain the Performance Security, in accordance with the provisions of Section 9 hereof.
- (xviii) the Concessionaire creates any Encumbrance in breach of this Agreement.
- (xix) such events as have been specified as Concessionaire Events of Default under the provisions of this Agreement.
- (xx) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (Fifteen) Days

**(b) Authority Event of Default**

The Authority Event of Default means any of the following events unless such an event has occurred as a consequence of a Concessionaire Event of Default or a Force Majeure Event (the “**Authority Event of Default**”).

- (i) The Authority’s repudiation or failure to perform or discharge any of its obligations in accordance with the provisions of this Agreement that has a Material Adverse Effect unless such failure has occurred as a consequence of a Concessionaire Event of Default or a Force Majeure Event;
- (ii) Any representation made or warranties given by the Authority under this Agreement is found to be false or misleading; any defect in the Authority’s title, ownership and possession of the site.

## **Section 15.2 Parties Rights**

(a) Upon the occurrence of the Concessionaire Event of Default, the Authority shall, subject to the provisions of this Article 15, without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement.

(b) Upon the occurrence of the Authority Event of Default, the Concessionaire shall, subject to the provisions of this Article 15, without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Agreement:

Provided that before proceeding to terminate this Agreement, the Party entitled to do so shall (i) in terms of Clause 15.3 issue a Consultation Notice and follow the Remedial Process in Clause 15.4, (ii) give due consideration and shall have due regard to the nature of the underlying Event of Default, its implication on the performance of the respective obligations of Parties under this Agreement and the circumstances in which the same has occurred.

## **Section 15.3 Consultation Notice**

Either Party exercising its right under Section 15.2, shall issue to the other Party a notice in writing specifying in reasonable detail the underlying Event of Default(s) and proposing consultation amongst the Parties and the Lenders to consider possible measures of curing or otherwise dealing with the underlying Event of Default (the “**Consultation Notice**”).

## **Section 15.4 Remedial Process**

Following the issue of Consultation Notice by either Party, within a period not exceeding 90 Days or such extended period as they may agree (the “**Remedial Period**”) the Parties shall, endeavour to arrive at an Agreement as to the manner of rectifying or remedying the underlying Event of Default. Without prejudice to this, if the underlying event is a Concessionaire Event of Default, with the prior approval of the Authority and in consultation with the Lenders, the Concessionaire shall endeavour to arrive at an Agreement as to one or more of the following measures and/or such other measures as may be considered appropriate by them in the attendant circumstances;

- (a) the change of management or control/ownership of the Concessionaire ;
- (b) the replacement of the Concessionaire by a new Concessionaire (“**Substitute Entity**”) on terms no less favourable than those contained in this Agreement, proposed by either of them or the Lenders and the specific terms and conditions of such replacement which shall include:
  - (i) the criteria for selection of the Substitute Entity,
  - (ii) the transfer of rights and obligations of the Concessionaire surviving under this Agreement to the Substitute Entity,

- (iii) handing over/ transfer of the Project Assets and the Project to the Substitute Entity,
- (iv) assumption by the Substitute Entity of the outstanding obligations of the Concessionaire under the Financing Documents and preserving Lenders’ charge on the Concessionaire’s assets ,
- (v) assumption by Substitute Entity of any amounts due to the Authority from the Concessionaire under this Agreement.

#### **Section 15.5 Obligations during Remedial Period**

During the Remedial Period, the Parties shall continue to perform their respective obligations under this Agreement which can be performed, failing which the Party in breach shall compensate the other Party for any loss or damage caused or suffered on account of the underlying failure/breach.

#### **Section 15.6 Revocation of Consultation Notice**

If during the Remedial Period, the underlying Event of Default is cured or waived or the Parties agree upon any of the measures set out in Section 15.4, the Consultation Notice shall be withdrawn by the Party who has issued the same.

#### **Section 15.7 Termination Due to Events of Default**

If before the expiry of the Remedial Period, the underlying Event of Default is neither cured nor waived nor the Parties and the Lenders have agreed upon any of the measures in accordance with Section 15.4, the Party who has issued the Consultation Notice shall have the right to terminate this Agreement, in which event, the provisions of Article 16 shall, to the extent expressly made applicable, apply.

## **ARTICLE 16**

## **TERMINATION AND EXPIRY OF AGREEMENT/CONCESSION**

### **Section 16.1 Termination Procedure**

The Party entitled to terminate this Agreement either on account of a Force Majeure Event or on account of an Event of Default shall do so by issue of a notice in writing (“**Termination Notice**”) to the other Party and simultaneously deliver a copy thereof to the Lenders. The Termination Notice Period shall not be more than 60 (Sixty) Days, (“**Termination Period**”) and at the expiry of the Termination Period, this Agreement shall stand terminated.

### **Section 16.2 Obligations During Termination Period**

During Termination Period, the Parties shall subject to the provisions of Article 15 wherever applicable, continue to perform such of their respective obligations under this Agreement which are capable of being performed with the object, as far as possible, of ensuring continued availability of the Project to the users, failing which the Party in breach shall compensate the other Party for any loss or damage occasioned or suffered on account of the underlying failure/breach.

### **Section 16.3 Condition Survey**

(a) The Concessionaire agrees that Six Months prior to the expiry of the Concession Period by efflux of time or on the service of a Termination Notice, as the case may be, it shall conduct or cause to be conducted by the mutually accepted third party Expert under the Authority’s supervision, a condition survey of the Project and the Project Assets to ascertain the condition thereof, verifying compliance with the Concessionaire’s obligations under this Agreement and to prepare an inventory of the assets comprised in the Project

(b) If, as a result of the condition survey, the Authority shall observe/notice that the Project Assets and/or the Project or any part thereof have/has not been operated and maintained in accordance with the requirements therefore under this Agreement (normal wear and tear excepted) the Concessionaire shall, at its cost and expenses, take all necessary steps to put the same in good working conditions in light of the life of the relevant Project Facility well before the Transfer Date.

(c) In the event the Concessionaire fails to comply with the provisions of sub clause (a) and (b) above, the Authority may itself cause the condition survey and inventory of Project Assets and the Project to be conducted. The Authority shall be compensated by the Concessionaire for any costs incurred in conducting such survey and preparation of inventory as also in putting the Project and the Project Assets in good working condition.

#### **Section 16.4 Consequences of Termination**

Without prejudice to any other consequences or requirements under this Agreement or under any law, the following consequences shall follow upon expiry of the Concession Period by efflux of time or due to a Force Majeure Event or an Event of Default.

##### **(a) Transfer of Assets**

- (i) On the Transfer Date, the Concessionaire shall subject to the provisions of this Agreement:
  - (A) transfer, assign and deliver to the Authority or its nominated agency, free and clear of any Encumbrances, the vacant and peaceful possession of the Project Facilities, Project Assets and the Site along with the buildings, facilities and structures constructed on, over, at or under it and its right, and interest in and to the Project the Project Assets.
  - (B) transfer all its rights and interest in or over the tangible assets comprised in the Project (including movable assets which the Authority agrees to take over) to the Authority or its nominated agency and execute such deeds and documents as may be necessary for the purpose and complete all legal or other formalities required in this regard.
  - (C) hand over to the Authority or its nominated agency all documents including as building drawings, manuals, designs, documents, information and records relating to the Project and the Project Assets.
  - (D) to the extent possible assign to the Authority or its nominated agency at the time of transfer all unexpired guarantees and warranties by Subcontractors and suppliers and all insurance policies.
  - (E) at its cost remove from the Site all such moveable assets which are not taken over by or transferred/assigned to the Authority or its nominated agency. In the event the Concessionaire fails to remove such objects within the stipulated time, the Authority or its nominated agency may remove and transport or cause removal, transportation and storage of such objects, after giving the Concessionaire notice of its intention to do so to a suitable location for safe storage. The Concessionaire shall be liable to bear the reasonable cost and the risk of such removal, transportation and storage.
  - (F) The transfer of immovable property comprising the Project and the Project Assets shall be deemed to be a termination of all leasehold arrangements or licenses in relation to the Site and all such immovable property shall automatically revert to the Authority or its nominated agency. The movable property comprising the Project and the Project Assets shall be deemed to be transferred by delivery and possession.
  - (G) The ADCL and the Concessionaire shall at least 6 (Six) Months prior to the expiry of the Concession Period or upon commencement of Termination Period, as the case may be, promptly agree upon the modalities and take all necessary steps to complete the aforesaid process of transfer of assets on the Transfer Date. During this period, the designated key personnel of the ADCL shall be associated with the operations of the Project in order to facilitate smooth takeover of the same by ADCL on the Transfer Date.

- (iv) It is clarified that only the assets of the Concessionaire shall be taken over and not the liabilities, including without limitation liabilities relating to labour and personnel related obligations of the Concessionaire and the Persons claiming through or under the Concessionaire shall be taken over by the ADCL. All such labour and employees shall be the responsibility of the Concessionaire /such Persons even after the expiry of the Concession Period and they shall have no claim to any type of employment or compensation from ADCL .
- (v) On the Transfer Date the Project and the Project Assets shall be in fair condition, subject to normal wear and tear, having regard for the nature of the asset, the construction and life of the facilities, constructions, structures etc.
- (vi) All contracts, Agreements, arrangement's etc., entered into by the Concessionaire with its suppliers, service providers, O&M contract's including sub-lease of any built-up area or space in the Project Site, shall also be liable to be terminated forthwith along with the termination of this Agreement at the sole option and discretion of the Authority and if so required by the Authority all monies due and receivable under such Agreement shall be recovered and deposited in the relevant Bank Account pending final settlement with the Concessionaire .
- (vii) If on the Transfer Date, any Person is found to be occupying the Site or any part thereof, other than in respect of the Site/Plot/built up area/unit that has been sub-leased under the Sub-Lease Deeds and the sub-leases/licenses pursuant thereto, the duration of which have been extended by the ADCL upon such expiration/prior termination of this Agreement, as provided herein, it shall be lawful for the ADCL to secure summary eviction of such Person in accordance with the Applicable Laws.

**(b) Project Contracts**

Authority shall upon its election, succeed, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Contracts as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Contracts from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, it is hereby agreed, and the Concessionaire hereby acknowledges, that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Contracts, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.



**(c) Applicable Permits**

The Concessionaire shall, at its cost, transfer to the Authority all such Applicable Permits which the Authority may require and which can be legally transferred. Provided if the termination is on account of Authority Event of Default the cost of such transfer shall be borne/ reimbursed by the Authority.

**(d) Guarantees**

The Authority shall be entitled to encash any subsisting bank guarantee(s) provided by the Concessionaire, if the termination is on account of a Concessionaire Event of Default.

**(e) Transfer of Risk**

Until the Transfer Date, all risks shall lie with the Concessionaire for loss of or damage to the whole or any part of the Project and the Project Assets unless the loss or damage is due to an act or omission of the Authority in contravention of its obligations under this Agreement. On and from the Transfer Date all risks in relation to the Project and the Project Assets shall be deemed to lie with the Authority

**Section 16.5 Vesting Certificate**

- (a) On the Transfer Date the Authority/Expert shall verify, in the presence of the Concessionaire or of a representative of the Concessionaire's, compliance by the Concessionaire with the requirements of Section 16.5 above. In the event the Authority/Expert notifies the Concessionaire of shortcomings, if any, in the Concessionaire's compliance with such requirements, the Concessionaire shall forthwith cure the same.
- (b) The divestment of all rights and interest in the Project and Project Assets shall be deemed to be complete on the Transfer Date but no later than 30 (Thirty) Days thereafter, by when all the requirements of Section 16.4 above shall be fulfilled. The Expert shall on such date issue a certificate substantially (the “**Vesting Certificate**”), with a copy thereof endorsed to the Authority, which shall have the effect of constituting evidence of divestment by the Concessionaire of all of its rights and interest in the Project and the vesting thereof in the Authority or its nominee, as the case may be, pursuant hereto.

**Section 16.6 Compensation on Termination**

**Section 16.6.1 Termination Due to Force Majeure Event or an Event of Default**

- (a) In the event of termination of this Agreement/Concession due to Force Majeure Event or an Event of Default, the Authority shall, upon transfer of the Project, Project Assets and the Site

by the Concessionaire to the Authority or its nominated agency in accordance with the provisions hereof, pay to the Concessionaire the following termination payments:

No termination payments shall be payable to the Concessionaire in the event of termination of this Agreement due to a Concessionaire Event of Default or a Force Majeure Event.

Upon termination of this Agreement due to: (1) a Concessionaire Event of Default, Authority shall retain the Project Development Fee, Lease Rentals Security Deposit, and forfeit the Performance Security, as case may be, as damages; (2) a Force Majeure Event, the Authority shall retain the Project Development Fee, but return/refund the Security Deposit and the Bank Guarantee in lieu of Performance Security to the Concessionaire/Preferred Bidder; provided there are no outstanding claims of the Authority on the Preferred Bidder/Concessionaire.

Upon termination by the Concessionaire due to an Authority Event of Default, compensation payable by the Authority to the Concessionaire shall be the amount determined as follows: The aggregate Depreciated Historic Cost (DHC), as determined by a third party Expert (appointed by mutual consent and who shall be in the position of an expert under the Arbitration and Conciliation Act, 1996), of (a) the tangible assets forming part of, fixed or attached to the ground created, installed or provided by the Concessionaire and comprised in the Project , which in the reasonable judgment of the said Expert are capable of being put to use/utilized by the Authority and (b) the moveable assets which the Authority agrees to take over; LESS any amount due to the Authority from the Concessionaire under this Agreement and the insurance claims claimed or received.

Upon termination of this Agreement due to (i) Authority Event of Default, the Authority shall return the Performance Security and refund the Security Deposit to the Preferred Bidder/Concessionaire; provided there are no outstanding claims of the Authority on the Preferred Bidder/Concessionaire.

- (b) Nothing herein shall prejudice the right of the Authority to recover from the Concessionaire any amounts due and payable to it by the Concessionaire hereunder.
- (c) 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 a 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 a Party under this Agreement, including without limitation termination payment, shall survive the termination of this Agreement to the extent such survival is necessary for giving effect to such rights and obligations.

## **ARTICLE 17 DISPUTE RESOLUTION**

### **Section 17.1 Amicable Settlement**

If any dispute or difference or claims of any kind arises between the Authority and the Concessionaire in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement, or the rights, duties or liabilities of any Party under this Agreement, whether before or after the Termination of this Agreement, then the Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them, period to resolve such dispute should be within 30 Days

### **Section 17.2 Assistance of Expert**

The Parties may, in appropriate cases agree to refer the matter to an Expert appointed by them with mutual consent. The Parties agree to abide by the decision/ opinion of the Expert. The cost of obtaining the service of the Expert shall be shared equally.

### **Section 17.3 Arbitration**

#### **a) Arbitrators**

In the event the dispute or difference or claim, as the case may be, is not resolved, as evidenced by the signing of the written terms of settlement by the Parties, within 30 (Thirty) Days of reference for amicable settlement and/ or settlement with the assistance of Expert, as the case may be, the same shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a tribunal of three arbitrators, one each to be appointed by the Authority and the Concessionaire and the third to be appointed by the two arbitrators so appointed. A Party (Authority or Concessionaire, as the case may be) requiring arbitration shall appoint an arbitrator in writing, inform the other Party (Concessionaire or Authority, as the case may be) about such appointment and call upon the other Party to appoint its arbitrator. If the other Party fails to appoint its arbitrator, the Party appointing arbitrator shall take steps in accordance with Arbitration and Conciliation Act, 1996.

#### **b) Place of Arbitration**

The place of arbitration shall be Vijayawada or Amaravati Capital City but by Agreement of the Parties, the arbitration hearings, if required, can be held elsewhere from time to time.

**c) English Language**

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

**d) Procedure**

The procedure to be followed within the arbitration, including appointment of arbitrator/ arbitral tribunal, the rules of evidence, which are to apply shall be in accordance with the Arbitration and Conciliation Act, 1996.

**e) Enforcement of Award**

Any decision or award resulting from arbitration shall be final and binding upon the Parties. The Parties hereto hereby waive, to the extent permitted by law, any rights to appeal or to review of such award by any court or tribunal. The Parties hereto agree that the arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and that a judgment upon the arbitral award may be entered in any court having jurisdiction thereof.

**f) Fees and Expenses**

The fees and expenses of the arbitrators and all other expenses of the arbitration shall be initially borne and paid by respective Parties subject to determination by the arbitrators. The arbitrators may provide in the arbitral award for the reimbursement to the prevailing Party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by such Party.

**g) Performance during Arbitration**

Pending the submission of and/ or decision on a dispute, difference or claim or until the arbitral award is published, the Parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.

## **ARTICLE 18 MISCELLANEOUS PROVISIONS**

### **Section 18.1 Governing Law and Jurisdiction**

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India and, subject to the provisions of Article 17, the courts at Guntur / Vijayawada / Amaravati Capital City for the time being till High Courts are ready in the Amaravati Capital Region in Andhra Pradesh and subsequently Amaravati Capital Region shall have jurisdiction over all matters arising out of or relating to this Agreement.

### **Section 18.2 Waiver & Remedies**

- (a) The waiver by either Party, including conditional or partial waiver, of any default by the other Party in the observance and performance of any provision of or obligations of under this Agreement:
  - (i) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions or obligations under this Agreement;
  - (ii) shall not be effective unless it is in writing and executed by a duly authorized representative of such Party; and
  - (iii) shall not affect the validity or enforceability of this Agreement in any manner.
- (b) No failure on the part of any Party to exercise, and no delay in exercising, any right, power, obligation or privilege hereunder or time or indulgence granted by a Party to the other Party shall operate or be treated or deemed as a waiver thereof or a consent thereto or the acceptance of any variation or relinquishment of any such right hereunder; nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The remedies herein provided are cumulative and not exclusive of any remedies provided by the Applicable Laws.
- (d) 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 there under 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.

### **Section 18.3 Survival**

The Termination/expiry of this Agreement -

- (a) shall not relieve either Party of any obligations hereunder which expressly or by implication survive Termination/Expiry 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/Expiry or arising out of such Termination/Expiry.

#### **Section 18.4 Entire Agreements and Amendments**

- (a) This Agreement constitutes the complete, exclusive and entire statement of the terms of the Agreement between the Parties on the subject hereof and supersedes all previous Agreements or arrangements between the Parties, including any memoranda of understanding entered into in respect of the contents hereof.
- (b) No amendment or modification or waiver of any provision of this Agreement, nor consent to any departure by any of the Parties there from, shall in any event be valid and effective unless the same is in writing and signed by the Parties or their duly authorised representative especially empowered in this behalf and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which it is given.

#### **Section 18.5 Mode of Delivery of Notices**

Unless otherwise stated, notices to be given under this Agreement including but not limited to a notice of waiver of any term, breach of any term of this Agreement and termination of this Agreement, shall be in writing and shall be given by hand delivery, recognized courier, mail, telex or facsimile transmission and delivered or transmitted to the Parties at their respective addresses set forth below:

##### **If to Authority:**

**Amaravati Development Corporation Limited (ADCL)**  
**20-4-15, Plot No.1G, Anand Heights,**  
**Kedareswararaopet, Beside Prabhas College,**  
**Vijayawada-520003. Andhra Pradesh.**

**Attn: The Chairperson & Managing Director**

##### **If to Concessionaire :**

-----  
-----

Fax No. -----

Mail Id.:

**Attn:**

Or such address or facsimile number or email id., as may be duly notified by the respective Parties from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication made by letter, when delivered by hand, by recognized courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communication made by facsimile number or email id., when transmitted properly addressed to such facsimile number or email id.

In case any Party changes its address, communication numbers, or directed attention as set forth above, it shall notify the other Party in writing prior to the adoption thereof.

**Section 18.6 Severability**

(a) 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, such invalidity, illegality or unenforceability shall not prejudice or affect the remaining provisions of this Agreement which shall continue in full force and effect.

(b) The Parties will negotiate in good faith with a view to agreeing upon one or more provisions, which may be substituted, as nearly as is practicable, to such invalid, illegal and unenforceable provision. Provided failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure under this Agreement or otherwise.

**Section 18.7 No Partnership**

Nothing contained in this Agreement shall be construed to create an association, trust, partnership, agency or joint venture among the Parties and Parties shall be liable to perform their respective duties and discharge their respective liabilities or obligations in accordance with the Provisions of this Agreement.

**Section 18.8 Language**

The language of this Agreement is English. All notices, correspondence, Project Contracts, documentation, Designs and Drawings, DPR, design data, test reports, certificates, specifications and standards and information in respect of this Agreement, under or in connection with this Agreement shall be in the English language. All other written and printed matter, communications, documentation, proceedings and notices etc. pursuant or relevant to this Agreement shall be in the English language.

**Section 18.9 Exclusion of Implied Warranties etc.**

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

**Section 18.10 Counterparts**

This Agreement may be executed in any number of originals or counterparts, each in the like form and all of which when taken together shall constitute one and the same document.

**Section 18.11 Further Assurances**

At all times after the date hereof the Parties shall execute all such documents and do such acts, deeds and things as may reasonably be required for the purpose of giving full effect to this Agreement.

**Section 18.12 Regulatory Framework for Infrastructure Projects**

Without prejudice to the rights and obligations of the Parties under this Agreement, if a regulatory framework for the grant, implementation and supervision of Concession related to infrastructure projects is introduced by Gol., or GoAP., the Parties shall consult in good faith and to agree to such amendments to this Agreement, as may be reasonably necessary to take account of such regulatory framework but so that the rights of the Concessionaire hereunder are not adversely affected or additional material liabilities imposed.

**Section 18.13 Rights of Parties during road widening**

The Authority shall be entitled to receive the monetary compensation, if any paid by the authorities during Road Widening programmes. The Concessionaire shall enjoy the benefit accrued if any in the form of additional built up space subject to compliance to this Agreement. The cost of restoration of the structures shall be borne by the Concessionaire.

**Section 18.14 Remedies Cumulative**

The exercise of right by either Party to terminate this Agreement, as provided herein, shall not preclude, such Party from availing any other rights or remedies that may be available to it under law. All remedies available to the Parties shall be cumulative and the exercise or failure thereof of one or more remedies by any Party shall not limit or preclude the exercise of or constitute a waiver of any other remedies by such Party.



## **Section 18.15 Intellectual Property Rights and Confidentiality**

### **(a) Intellectual Property Rights**

(i) The Concessionaire accepts and agrees that the Authority shall be the absolute and exclusive owner and proprietor of all the details, plans, specifications, schedules, programs, budget, reports, calculations and other work relating to the Project hereafter referred to as "**Proprietary Material**", which have been or are hereafter written, originated or made by any of the Concessionaire or the Persons claiming through or under it or any of their respective employees, contractors, consultants or agents in connection with this Agreement or the design, construction, insurance and financing of the Project. All Proprietary Material shall be clearly marked as such in capital letters and in bold face print. The Concessionaire shall not either directly or in-directly use the trademarks of ADCL.

(ii) The Authority shall own all the intellectual property rights in or relating to the Proprietary Material and all rights, privileges, entitlements, interests, property and benefits and associated rights whatsoever therein for the full period in accordance with the Applicable Laws and with all the reservations and extensions thereof and together with the exclusive right of the Authority to use such information and intellectual property/authorize the use thereof by Third Parties in India and abroad in any form, including without limitation the right to reproduce, translate, edit, modify, distribute, sell or assign such rights, with or without consideration.

(iii) The Authority shall have the exclusive right to apply for/procure registration of the intellectual property rights at its cost with relevant competent authorities in India and abroad.

(iv) The Concessionaire and the Authority hereby grant to each other an irrevocable, royalty-free, non-exclusive Concession to use all proprietary material owned by any of them or any of their respective employees, contractors, consultants or agents in connection with this Agreement or the design, construction, insurance and financing of the Project. Such Concession shall carry the right to use such material for all purposes connected with the Project; however, it shall not be transferable to any Person other than to the permitted assignee under this Agreement. Such Concession shall discontinue on the termination or expiry of this Agreement or the discharge by any Party of its duties hereunder.

### **(b) Confidentiality**

No Party shall, without the prior written consent of the other Party, at any time divulge or disclose or suffer or permit its servants or agents to divulge or disclose to any Person or use for any purpose unconnected with the Project any information which is by its nature or is marked as Proprietary Material or "confidential", concerning the other (including any information concerning the contents of this Agreement) except to its officers, directors, employers, agents, representatives and

professional advisors or as may be required by any law, rule, regulation or any judicial process; provided, however, that a Party, with the written consent of the other Party, may issue press releases containing non-sensitive information in relation to the progress of the Project. This provision shall not apply to information:

- (i) already in the public domain, otherwise than by breach of this Agreement;
- (ii) already in the possession of the receiving Party on a lawful basis before it was received from the other Party in connection with this Agreement and which was not obtained under any obligation of confidentiality;
- (iii) obtained from a Third Party who is free to divulge the same and which was not obtained under any obligation of confidentiality;
- (iv) disclosed to the Lenders under terms of confidentiality; or
- (v) which is required to be disclosed by judicial, administrative or stock exchange process, any enquiry, investigation, action, suit, proceeding or claim or otherwise by or under any Applicable Law or by any Government Authority.

#### **Section 18.16 Joint and Several Liability of Consortium/Preferred Bidder**

In case the Preferred Bidder is a Consortium of two or more Persons/entities, all such Persons shall be jointly and severally liable to the Authority for compliance with the terms of this Agreement. The Lead Member shall have the authority to bind all the Members of the Consortium. Except as expressly provided herein, the composition of the Consortium shall not be altered without the prior written approval of the Authority until five (5) Years from the date of signing this Agreement.

#### **Section 18.17 No Liability for Review**

Except to the extent expressly provided in this Agreement,

- (a) no review, comment or approval by the Authority/Government Authorities/ of the DPR, the Designs and Drawing, the Transaction Documents or the documents submitted by the Concessionaire nor any observation or inspection of the construction, operation or maintenance of the Project nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Concessionaire from its obligations, duties and liabilities under this Agreement, the Applicable Laws and Applicable Permits; and
- (b) the Authority or any Government Authority or GoAP shall not be liable to the Concessionaire by reason of any review, comment, approval observation or inspection referred in sub-section (a) above.
- (c) In no event ADCL , or its successor would be vicariously liable during Concession Period.

#### **Section 18.18 Depreciation**

For the purpose of depreciation under the Applicable Laws, the property representing the capital investments made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire.

#### **Section 18.19 Assignability**

Except as otherwise provided in this Agreement, the Concessionaire shall not assign its rights, or interest in this Agreement in favour of any Persons without prior written consent of the Authority..

Notwithstanding anything to the contrary contained in this Agreement, the Authority may, after giving 60 (Sixty) Days’ notice to the Concessionaire, assign any of its rights and benefits and/or obligations hereunder pursuant to any direction of GoI, GoAP, by the operation of law on such terms and conditions as the Authority may deem appropriate or as may be required by law.

#### **Section 18.20 Interest and Right to Set Off**

Any sum which becomes payable under any of the provisions of this Agreement by one Party to the other Party shall, if the same is not paid within the time allowed for payment thereof, shall be deemed to be a debt owed by the Party responsible for payment thereof to the Party entitled to receive the same. Without prejudice to any other right or remedy that may be available under this Agreement or otherwise under Law, the Party entitled to receive such amount shall also have the right of set off.

(h) The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein the Agreement and if no such period is specified, within 10 (ten) Days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to the 18% (Eighteen percent) per annum, and recovery thereof shall be without prejudice to the rights of the Parties under the Law and this Agreement, including termination thereof.

(c ) All Supplemental Agreements executed subsequently to fulfil the objectives of the Project, shall essentially become part of this Agreement and shall be read in conjunction with the provisions of this Agreement.

(d) The Concessionaire shall be at sole responsibility in respect of issues arising out of consumer laws and their compliance.

**IN WITNESS WHEREOF** the Authority, Concessionaire and Preferred Bidder, through their respective authorized officials subscribe their respective signatures and seals hereto on this \_\_\_\_ day of \_\_\_\_ 2018:

<p>Signed, sealed and delivered by:</p> <p><b>The Authorised Signatory</b> <b>For and on behalf of</b></p> <p><b>ADCL, GoAP. (Authority)</b></p> <p><b>Name</b> <b>Designation</b> <b>Company seal</b></p>	<p>Signed, sealed and delivered by:</p> <p><b>The Authorised Signatory</b> <b>For and on behalf of the</b></p> <p>..... Ltd. (SPV) <b>(Concessionaire )</b></p> <p><b>Name</b> <b>Designation</b> <b>Company seal</b></p>	<p>Signed, sealed and delivered by:</p> <p><b>The Authorised Signatory</b> <b>For and on behalf of the</b></p> <p>..... <b>(Preferred Bidder/Confirming Party)</b></p> <p><b>Name</b> <b>Designation</b> <b>Company seal</b></p>
<p><u>Witness:</u></p> <p><b>1.</b></p>	<p><u>Witness:</u></p> <p><b>1.</b></p>	<p><u>Witness:</u></p> <p><b>1.</b></p>

## APPENDICES

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Appendix 9: List of Applicable Permits

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Appendix 11: Format for Bank Guarantee towards Performance Security

Appendix 12: Format for Escrow Agreement

***\* The Formats for all the Appendices shall be provided to the Preferred Bidder after the completion of Selection of the Bidder by the ADCL, Govt. of A.P.***