

Model documents for development of integrated cold chain in the country on PPP mode - comments solicited.

Concept Note- Model Framework for PPP in Cold Chain

Model Request for Qualification

Model Request for Proposal

Draft Concession Agreement

Comments of the Ministry of Food Processing Industries on aforementioned documents, and

Response of Department of Economic Affairs thereon

Concept Note

Model Framework for Public Private Partnership for development of Cold Chain in India

Department of Economic Affairs,
Government of India

I. Background

1. Recognizing the need for development of cold chain in India, Government of India had constituted dedicated Task Force / Committees to identify measures to promote / facilitate creation of cold chain in India. Amongst other measures recommended by them, a key measure was to invite private sector participation in development of cold chains. The Committee on Encouraging Investments in Supply Chains including Provision for Cold Storages for More Efficient Distribution of Farm Produce in its report had recommended the Public Private Partnership (PPP) model with Viability Gap Funding as an appropriate device to catalyze large scale investments in cold chain. However, it stated the need to work out the details of such an arrangement.
2. Department of Economic Affairs has developed a Model framework for Public Private Partnership, which could be made specific to a particular cold chain project being promoted by the concerned implementing Authority. This model framework has considered the creation of cold chain from farm to market with the objective of creating value for stakeholders including investors / operator / developer and enhancing value to farmers. The business model and the project structure considered under the model framework are presented below.

II. Business Model

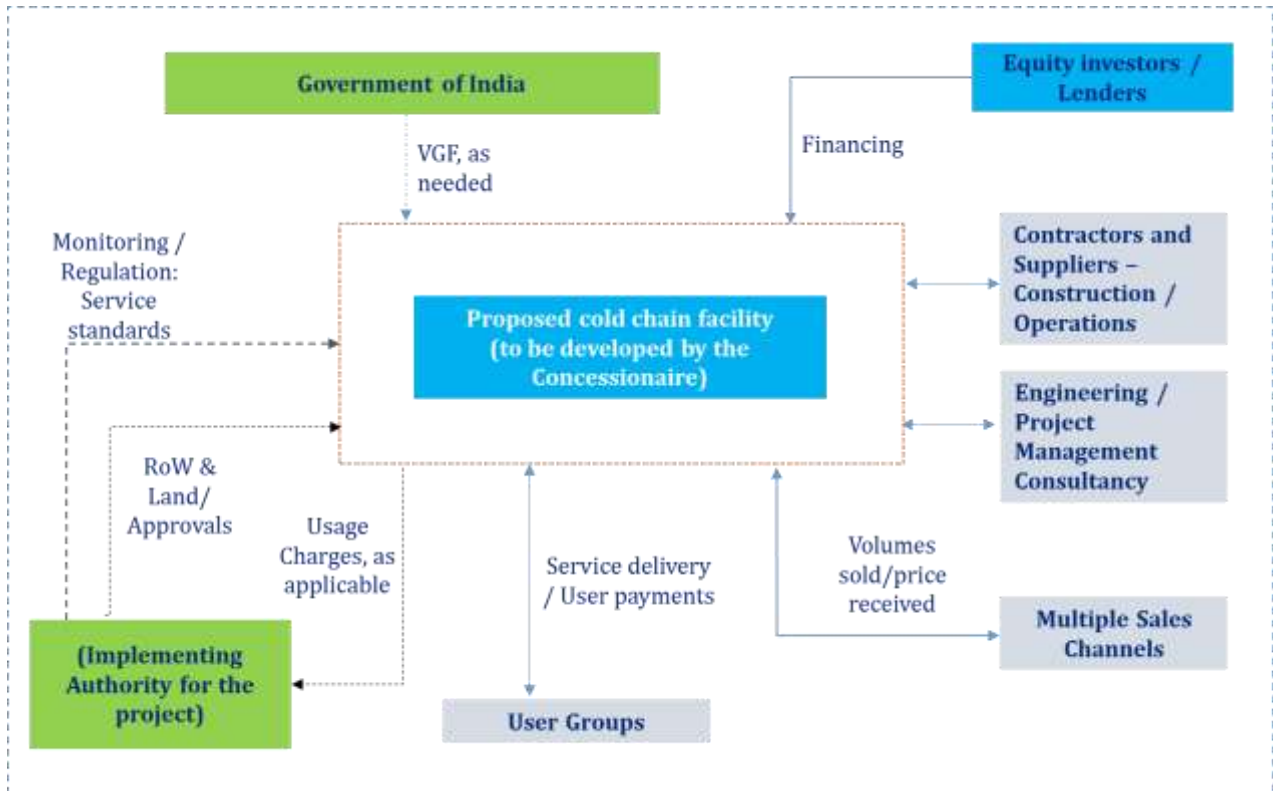
3. Cold chain comprises temperature-controlled or climate-controlled storage and transportation facilities with the ability to provide the desired conditions of temperature and humidity to enhance the shelf life of targeted produce. Facilities like a controlled-atmosphere storage also modulate the gaseous composition in the chamber, where the produce is stored, for a higher shelf life. Depending upon the commodity being handled in the cold chain, it could also include certain processing facilities like a pre-cooling facility. As the exposure to ambient temperature and humidity conditions even for a short duration impacts the life of the produce adversely, it is recommended by experts that a produce should be kept in desired temperature-controlled or climate-controlled conditions seamlessly once it is out of its place of production till the time it is sold for final consumption. Typical facilities in a cold chain would include cold storages, controlled-atmosphere storages, modified-atmosphere storages, refrigerated trucks, pre-cooling facilities and sorting/grading/packaging facilities.
4. Cold chain in India is currently operated under two business models namely, (a) Service Provision and (b) Trading Operations.
 - 4.1. Business model of Service Provision entails the player operating the cold chain infrastructure (including storage space and refrigerated transportation) making its infrastructure available to the users on payment of due rentals. For example, space in a cold storage being made available to farmers/traders for storage of their produce on payment of applicable rent would fall under Service Provision.

- 4.2. Business model of Trading Operations entails the player operating the cold chain infrastructure using this infrastructure for its own produces and realizing revenue from the difference in prices between peak season and off-peak season. For example, a player procuring produces to be stored in its cold storage and then selling at a suitable time to benefit from price arbitrage during seasons would fall under Trading Operations.
5. Most of the cold chain facilities are being operated under both the models as ensuring adequate utilization of the facility under a single model has been found to be challenging. Accordingly, model document has provisions to address both the business models, which have been defined suitably in the document. Revenues likely to be generated by the player are defined in the context of these business models.

III. Project Structure

6. Development of a cold chain not only benefits the player developing and operating the infrastructure, it is also expected to result in benefits for the stakeholders including farmers / traders / consumers in that region enabling them to realize better value out of their produces. However, availability of land parcel at a suitable location is critical for the success of a cold chain as it would determine the accessibility of the facility for the stakeholders. The produce, once out of the farms/place of production, should be placed at the soonest inside the cold chain facility and hence the facility should ideally be located close to the farms. On the other end of the cold chain, being closer to market would reduce the cost of transportation and help ease of access to consumers / buyers. State Governments are best placed to ensure availability of suitable land for cold chain facilities and would also benefit from its development in terms of better opportunities for its people. Consider the above, State Governments are best placed to act as the implementing authority for development of cold chain in respective states. Accordingly Model document has considered agencies of the State Government to be the implementing authority for the PPP project for development of cold chain.
7. State Governments could approach the Central Government for financial support to the project, which would be evaluated by the Central Government and depending upon the expected viability of the project and provisions around Viability Gap Funding would be provided to the implementing authority. While approaching the Central Government, the implementing authority would need to submit the feasibility report for proposed facility with details on sources of revenue, market assessment, projected expenses and expected levels of viability.
8. In line with the above, Model documents have kept the provisions for both grant and premium as the bid parameters. In case the project is found to be viable, potential bidders will need to quote the premium to be shared with the implementing authority and in case of lack of viability, they will need to quote the grant expected from the implementing authority.

Typical project structure is presented in the diagram below:



IV. Brief of the Transaction Process proposed in Model document

9. Transaction Process proposed in the Model documents is a two stage process, as described below:
 - 9.1. 1st Stage: Request for Qualification (Short listing of eligible bidders)
 - 9.2. 2nd Stage: Request for Proposal (Selection of a bidder)
10. Request for Qualification document – eligibility criteria has been prescribed in this document to enable participation from relevant players in the cold chain sector. The criteria considers experience in having developed a cold chain at the highest weight age followed by experience in agri-business and other infrastructure sectors (where there is requirement of developing similar infrastructure i.e. terminals). The model document provides for various formats for submission of technical bid to maintain a consistency among the bidders. Emphasis has been given for the selection of technically qualified bidders who have adequate financial strength to implement the project. A balance has been created to provide equal and fair opportunity to all participants.
11. Players shortlisted at the RFQ stage will be invited for submission of their financial bids in form of Request for Proposal. Bid parameter to be considered would depend upon the viability of a specific project. Accordingly model RFP document has provisions for both Grant as well as Premium to be considered as bid parameter.

V. Key covenants in the Model Concession Agreement

12. Model Concession Agreement has been developed with a view to assist the Authority in implementing the project structure envisaged for the projects in cold chain sector. Key covenants in the Model Concession Agreement are summarized below:

12.1. **Project Scope:** The Project Scope as included in the model documents includes Development/procurement, operation and maintenance of cold chain infrastructure including Sorting/Grading facility, Pre-Cooling facility, Cold Storage and Refrigerated Transport (on ownership/lease/rent basis); It will need to be made specific with respect to the project being promoted by the implementing authority.

12.2. **Concession Period:** The model document provides for a Concession Period of 25 years which includes construction period also. However depending upon specific context of viability, the implementing authority could choose a different concession period.

12.3. **Conditions Precedent:** The Concessionaire has to fulfill various conditions precedent within a prescribed time period before the concerned authority handovers the Project Site to him which includes financial close, permissions, clearances etc. These have been detailed in the Model document. The implementing authority could choose to waive some of these depending upon the circumstances.

12.4. **Obligations of the Concessionaire:** The model document also prescribes obligations of the Concessionaire which includes design, develop, finance, construct, operate and maintain the Project Facilities, in accordance with the design and equipment parameters and the Specification and Standards etc. Performance standards for the proposed cold chain infrastructure would vary depending on the type of facility and the commodity likely to be handled. It has been noted that the equipment and infrastructure for cold chain has evolved significantly over a period of time and it is a focus area for continued research and development. Implementing authority would like to benefit from the latest technologies available in this field. Accordingly it has been left to the implementing authority to define suitable performance standards based on latest research and technological advancements available in this field.

12.5. **Branding:** The Model document further provides for creation of a brand name for the Trading Operations and/or Service Provisions related to the Project and advertising of the same as per Applicable Laws and market practices. Certain restrictions have been imposed on the Concessionaire for transfer, misuse or infringement of such brand name, trade mark, user mark, brand and/or any other Intellectual Property rights, developed/procured as part of this project. However this would be specific to the project and can be modified by the implementing authority as per the requirements.

12.6. **Subsidies under schemes of Government of India:** Government of India has various schemes to subsidize the creation of cold chain infrastructure, however the exact

details in terms of potential benefits and compliance requirements of the scheme could vary year-on-year depending upon the directions from the concerned Ministries. Accordingly it would not be possible for the implementing authority to guarantee availability of such schemes to the developer. Keeping this in mind, Model document does not guarantee support under these schemes but does not prevent the player from availing these either. Model document requires the Concessionaire to notify the implementing authority on subscribing any beneficial scheme/subsidy of Central/State Government and their agencies/departments. Further, the Concessionaire is bound to take prior written consent of the implementing authority before applying for any such beneficial scheme/subsidy.

- 12.7. **Performance Security:** The Model document also provides for submission of performance security during construction and operation phase of the Project to make sure that the Concessionaire fulfills all its obligations during the concession period without committing a default. Provisions for encashment of security in case of default and resubmission of the security are also provided within the clause.
- 12.8. **Right of Way / Sub-lease:** The Model documents provide lease hold rights to the Concessionaire on the Project Sites rather than licence or easement rights as the Project is based on similar platform to real estate and infrastructure facilities and rights to the Concessionaire have to be conferred upon relating to the site of the Project so that the Concessionaire can adequately design, develop, finance and operate the Project. In absence of lease hold rights of the Project Site, the financing of the project becomes difficult.
- 12.9. **Grant / Premium:** The model document provides for both options of obtaining a grant from Authority and in other case payment of premium to Authority. Premium shall be in addition to the usage charge for the use of the Project Site. Under model document, a charge for use of Project Site is being proposed as lease hold rights are being given to the Concessionaire. As the Project envisaged is on the similar platform to the real estate or infrastructure projects, the cost/rent for the land provided by the Authority is being provided under the model documents in form of usage charge.
- 12.10. **Revenue:** The Concessionaire is permitted to levy and collect revenue from the users of the Project facility/services. Further, the Concessionaire is free to fix user fee according to applicable laws and policies of the Government and government agencies.
- 12.11. **Escrow Account:** The model document also provides for an escrow account to safe guard the rights and interest of the Authority. A format of Escrow Agreement is also provided as an annexure containing the waterfall mechanism of funds to be deposited and to be withdrawn from the Escrow Account to be maintained in a Schedule Bank.

- 12.12. **Force Majeure:** Force Majeure events are divided into various categories of political, non-political, direct and indirect political events. Their impacts on performance of the Concessionaire and the Authority, suspension and termination on occurrence of a force majeure event have been detailed out in the model document to cover all probable events affecting the development of the Project. Considering the dependence on weather conditions, famine, floods have been included as events of force majeure in the Model document.
- 12.13. **Substitution of the Concessionaire:** The model document also provides for substitution of the Concessionaire in case of a financial default or if an event of default is committed by the Concessionaire and the same is not cured within the cure period as prescribed under the model document. The senior lenders have been equipped with right to substitute the concessionaire with a similarly qualified party, subject to the Authority's consent.
- 12.14. **Termination Payment:** The model document provides for termination payment on account of a Concessionaire default during the operation period, as an amount equal to 90% (ninety per cent) of the debt due less insurance cover payable by the Authority; provided that if any insurance claims forming part of the insurance cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of debt due. No termination payment shall be due or payable on account of a Concessionaire default occurring prior to commercial operation of the Project. On account of an Authority default, the Authority shall pay to the Concessionaire, by way of termination payment of an amount equal to debt due 150% (one hundred and fifty per cent) of the adjusted equity.

Draft
Model
Request For Qualification
for
PPP Projects

Government of India

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Preface

The justification for promoting Public Private Partnership (PPP) in infrastructure lies in its potential to improve the quality of service at lower costs, besides attracting private capital to fund public projects. This, however, is predicated on a policy and regulatory framework that provides a fair, transparent and competitive environment. Flaws in the framework can lead to unintended outcomes; a cautious and diligent approach is, therefore, necessary while formulating the rules of engagement.

One of the key factors that determine the success of a PPP project is the criteria for selection of the project sponsor, especially as such projects typically involve large capital investments for providing essential infrastructure services to users on a long-term basis. A bidder lacking in sufficient technical and financial capacity can jeopardise the project and compromise the services that the government is committed to provide. On the other hand, selection based on negotiations or inadequate competition can deprive the public exchequer and users of the assurance that they are paying a competitive price.

There was divergence in the principles and practices followed for selection of bidders for PPP projects in different sectors. A variety of technical, financial and other criteria were being used by the project authorities, and in some cases, technical proposals/bids were also invited along with financial offers. Some of the qualification parameters appeared subjective and were, therefore, prone to disputes and controversy. In several cases, the costs of making applications accompanied by detailed technical proposals were significant, and dampened bidder participation. There were instances where inadequacies in the process attracted judicial review coupled with the attendant delays in project implementation. A comprehensive review of the ongoing practices had, therefore, become necessary.

With a view to deliberating on the guidelines to be laid down for pre-qualification and short-listing of applicants who should be invited to make financial offers, the Committee on Infrastructure (CoI), chaired by the Prime Minister constituted an Inter-Ministerial Group under the chairmanship of Secretary, Department of Expenditure. Following extensive consultations with stakeholders and experts, the Group submitted its recommendations that were considered and accepted by CoI.

The Guidelines were issued by the Ministry of Finance in May 2007. Since then, the Model RFQ document has been used by several ministries, state governments and other project authorities for pre-qualification and short-listing of bidders for their respective PPP projects. In the course of experience gained in evaluating the RFQ applications for various projects, it was felt that some provisions of the Model RFQ required modifications and/or clarifications.

Industry associations had also made representation seeking certain modifications. It was decided that all the suggestions would be examined by an Inter-Ministerial Task Force under the chairmanship of Member, Planning Commission with a view to recommending modifications where necessary. The recommendations of the Task Force have since been accepted by the Government and the Model RFQ has been modified accordingly.

These Guidelines include the Model RFQ (Request for Qualification) document that Ministries and autonomous bodies of the Central Government are expected to follow. This Model would also serve as a best practice document that State Governments may wish to adopt. It is hoped that adoption of these Guidelines would enhance the possibilities of a fair, transparent and competitive selection of bidders for delivery of successful PPP projects in infrastructure.

June 29, 2009

(Gajendra Haldea)
Adviser to Deputy Chairman
Planning Commission

Overview of the framework

For ensuring competitive, efficient and economic delivery of services, selection of bidders for undertaking infrastructure projects through Public Private Partnership (PPP) should be undertaken in a manner that is fair, transparent and inexpensive. In line with this objective, guidelines have been framed for pre-qualification of bidders for PPP projects. The guidelines are broad and generic in nature and are aimed at providing predictability to the entire process, allowing decisions to be made objectively and expeditiously. They address the critical minimum requirements that must be observed in conducting the selection process.

Selection must be fair and transparent

It is expected that the administrative ministries/autonomous bodies intending to procure PPP projects would observe these guidelines for short listing of bidders for the Request for Proposal (RFP) stage involving submission of financial bids. The salient features of the guidelines are as follows.

Two-stage Process

The bidding process for PPP projects is typically divided into two stages. In the first stage, eligible and prospective bidders are shortlisted. This stage is generally referred to as Request for Qualification (RFQ) or Expression of Interest (EoI). The objective is to short-list eligible bidders for stage two of the process. In the second and final stage, which is generally referred to as the Request for Proposal (RFP) or invitation of financial bids, the bidders engage in a comprehensive scrutiny of the project before submitting their financial offers.

Selection should be in two stages

Request for Qualification (RFQ)

The RFQ process should aim at short-listing and pre-qualifying applicants who will be asked to submit financial bids in the RFP stage. The objective is to identify credible bidders who have the requisite technical and financial capacity for undertaking the project. In order to encourage greater participation from credible domestic and international investors, the RFQ document should not require respondents to incur significant expense in preparing a response. The information sought for the purposes of pre-qualification should generally be restricted to technical and financial capabilities that are relevant to the project. Such information should be precise and quantified so that the process of short-listing is fair and transparent, and does not expose the government to disputes or controversies.

Only credible bidders should be pre-qualified

Conflict of Interest

With a view to preventing potential collusion or cartelization among bidders, a set of transparent guidelines have been laid down for eliminating any conflicts of interest among bidders. These

Elimination of Conflict of Interest

should be strictly applied for ensuring a fair and competitive bidding process.

Number of bidders to be pre-qualified

The number of bidders to be pre-qualified and short-listed for the final stage of bidding i.e. the RFP stage needs careful consideration. On the one hand, the number of pre-qualified bidders should be adequate for ensuring real competition in bidding. On the other hand, a large number of short-listed bidders is viewed as a factor that dampens participation by serious bidders, thus diluting competition, because credible investors are normally less inclined to spend the time and money necessary for making a competitive PPP bid if the zone of consideration is unduly large.

Bidders should be short-listed for inviting financial bids

Unlike a bid for procurement of goods and services, bids for PPP projects involve greater risks, significantly larger investments and long-term participation. Since PPP projects in infrastructure provide a critical service to the users at large, the quality and reliability of service assumes greater importance. Moreover, restricting the list to the best available bidders improves the chances of a successful PPP operation. It is also an international best practice to short-list about three to four bidders for the final stage of bidding. Considering all these factors, short-listing of about six to seven pre-qualified bidders has been specified in the RFQ with a view to securing high quality and competitive financial bids. Towards this end, a fair and transparent system of evaluation at the RFQ stage would be necessary.

Specifying stringent pre-qualification criteria

While stringent eligibility criteria would ensure pre-qualification of bidders well suited for the RFP stage, yet the same would effectively reduce the number of qualified bidders. A balance, therefore, needs to be drawn for serving the objective of pre-qualifying a reasonable number of bidders for the RFP stage. The principles for determining the eligibility criteria such as technical and financial capacity should be formulated keeping these considerations in view.

Criteria must identify suitable bidders

Project-specific flexibility

The Model RFQ provides sufficient flexibility to adapt its provisions for meeting sector-specific and project-specific needs. Provisions encased in square parenthesis can be modified by the project authorities to suit their respective requirements. Further flexibility has been provided through options specified in the footnotes. In addition, project authorities can add project-specific conditions in their respective RFQ documents.

Project authorities would have sufficient flexibility

Evaluation Criteria

The criteria for short-listing of bidders should be divided into technical and financial parameters as stated below:

Technical Capacity

The applicant should have acquired sufficient experience and capacity in building infrastructure projects. This can be measured either from the construction work undertaken/ commissioned by him, or from revenues of BOT/BOLT/BOO projects, or from both, during the 5 years preceding the application date. Eligibility conditions, as necessary, may also be stipulated in respect of O&M experience. The technical capacity of a bidder can be assessed on the following parameters:

Experience to be indicator of technical capacity

- (a) Project experience on BOT projects in the specified sector.
- (b) Project experience on BOT Projects in the core sector.
- (c) Construction experience in the specified sector.
- (d) Construction experience in the core sector.
- (e) O&M Experience: The Applicant should have sufficient experience in operation and maintenance (O&M) of Cold storage facility(ies) or in operation and maintenance (O&M) of controlled atmosphere storage facility(ies). The Applicant should also have sufficient experience in procurement and distribution of agricultural produces in any three years out of last five years and the Applicant should have made part of these sales to organized retail channels. The Applicant shall, in the case of a Consortium, include a Member who shall subscribe and continue to hold at least 10% (ten percent) of the subscribed and paid up equity of the SPV for a period of 5 (five) years from the date of commercial operation of the Project, and has either by itself or through its Associate, experience. In case the Applicant is not a Consortium, it shall be eligible only if it has equivalent experience of its own or through its Associates.”

For an Applicant to be pre-qualified, it must have undertaken projects having a weighted capital cost/ revenues equal to twice the Estimated Project Cost.

Financial Capacity

Applicants should have a minimum net worth equivalent to 25% of the estimated capital cost of the project for which bids are to be invited. This would ensure that pre-qualified applicants have sufficient financial strength to undertake the project.

Net worth to be indicator of financial capacity

Stake of consortium members

The consortium members on whose strength an Applicant has been short-listed should have a substantial stake in the project. Each Member should, therefore, hold at least 26 per cent of the equity in

Consortium members should have substantial stake

the project SPV and should also hold equity equal to at least 5 per cent of the total project cost for a period of two years after commissioning of the project. This would ensure that members with small equity holdings are not included with the sole purpose of achieving pre-qualification. In other words, only the experience and net worth of consortium members who shall have a substantial stake in implementation of the project is to be counted.

Technical evaluation to be part of Pre-Qualification stage

Requiring a technical evaluation at the RFP stage would normally lead to an elaborate and costly evaluation of complex proposals which are, by their very nature, difficult to compare since technical proposals of different bidders would vary significantly. Apart from the difficulties in evaluating diverse proposals on a common set of parameters, such evaluation also implies that instead of the government determining the assets and services to be provided by the selected bidder, it is the technical bid that would tend to guide the outcome. Logically, the government should set the technical parameters and ask for financial bids only, leaving sufficient flexibility for bidders to design and engineer the project in a manner that conforms to pre-determined standards and specifications, including service outputs.

Technical evaluation to precede bid stage

In the case of exceptionally complex projects where the project authority determines that the bidders must submit their technical proposals/ plans, the requirements thereof should be specified in detail and such proposals/ plans should be invited at the qualification stage, either along with the initial applications or at an intermediate stage preceding the bid stage. Only pre-qualified applicants should be invited to participate in the bid stage, which should only consist of an invitation to submit financial offers.

Restrict bid stage to financial bids

Parity of Experience

In order to provide parity between the projects executed in developed countries and those in India, the experience score for projects executed in OECD countries will be reduced by one-half of their nominal experience score.

Pre-qualification for social sector projects

Enabling provision has been made for suitably adapting the RFQ document to meet the requirements of social sectors and other projects. The overarching principles relating to the bid process would continue to apply.

Use of the document for social sector projects

Conclusion

A Model RFQ document has been developed based on the principles outlined above. It is generic in nature and aims at lending transparency and predictability to the entire process, allowing decisions to be made objectively and expeditiously. It also

Model RFQ document should be followed

provides the requisite sector-specific and project-specific flexibility by placing several provisions within square brackets, thus enabling project authorities to make necessary additions and substitutions. To the extent possible, the concerned ministries should standardise the provisions contained in square brackets so that case by case modifications are minimised. Some flexibility has also been afforded through explanations in the footnotes and project-specific/sector specific modifications may be undertaken to the extent enabled by the footnotes. Additional project-specific conditions may also be added, if necessary.

The Model RFQ document addresses the critical requirements that should be observed for conducting a fair and transparent process of pre-qualification. It is expected that the administrative ministries/ autonomous bodies of the Central Government intending to procure infrastructure projects through PPP would observe these guidelines and adopt to Model RFQ document for short-listing of applicants for the Request for Proposal (RFP)/ financial bid stage. The Model RFQ document is also commended for use by the State Governments.

GUIDELINES OF THE MINISTRY OF FINANCE
File No 24(1)/PF-II/2006
Ministry of Finance
Department of Expenditure
PF-II Section

New Delhi, May 18, 2009

OFFICE MEMORANDUM

Subject: Revised RFQ for Pre-Qualification of Bidders for PPP Projects

- 1.0. The guidelines for Pre-qualification of Bidders for PPP Projects were issued by the Department of Expenditure vide OM of even number dated 5.12.2007. Keeping in view the experience gained in implementation of a large number of PPP projects using the RFQ document and feedback from Ministries as well as representations from various Industry Association, a need was felt for review of certain provisions of the RFQ document. With a view to addressing all relevant issues, it was decided by the Empowered Sub-committee of CoI (ESCoI) that all the suggestions may be examined by an Inter-Ministerial Task Force under the chairmanship of Shri B.K. Chaturvedi, Member Planning Commission.
- 2.0. The task Force examined the suggestions of Industry associations and the relevant Ministries, and after detailed deliberations, submitted a Report on Modification in the Model RFQ Document for PPP projects to ESCoI in its meeting on 13.04.2009.
- 3.0. Based on the recommendations of the ESCoI, the revised Model RFQ document is being issued as Annexure to this OM, for the use of administrative ministries/autonomous bodies intending to procure infrastructure projects through PPP.
- 4.0. The main changes in the RFQ are as follows:
 - a. Provision relating to short-listing of bidders for more than one Project in Clause 1.2.2 has been deleted.
 - b. The present limit of 1% of cross holding in clause 2.2.1(c)(i) relating to Conflict of Interest has been increased to 5%, and the term “indirect shareholding” has been clarified.
 - c. The clause 2.2.1(d) relating to disqualification of consultants has been amended to allow the Consultants of the Authority to allow the Consultants of the Authority to work for private entities in relation to the same project during any period six months prior to the issue of the RFQ or three years after the COD of the same project.
 - d. While prescribing sector specific eligibility conditions in Clause 2.2.1 (e), provision has been made to enable Project Authority to specify suitable restrictions to prevent concentration of projects in the hands of a few entities.
 - e. The Threshold Technical Capacity in Clause 2.2.2(A) have been enhanced to twice the Estimated Project Cost of the proposed project.
 - f. Each of the Consortium Members, in addition to holding 26% equity in the SPV, would now be required to also hold equity equal to at least 5% of the Total Project Cost for a period of two years after commissioning of the Project.
 - g. The commitment of the O&M partner specified in Clause 2.2.3 has now been reduced from 26% to 10%

- h. A new Clause 2.3.5 has been added to allow withdrawal of a Consortium member, who has Conflict of Interest, within 10 days of the date of Application Due Date.
 - i. In order to dis-incentivise submission of incomplete or incorrect information, Clause 2.17.7 and 2.17.8 have been added to enable Project Authorities to exclude erroneous claims for determining the Experience Score and also impose a penalty equal to the score so rejected, and to disqualify applicant where patently false claims are made.
 - j. The Project Authority has been required to extend the Application Due Date by a minimum of 15 days and 7 days for submission of RFQ in case of substantive and minor amendments respectively.
 - k. An enabling provision has been made in Clause 3.2 for making suitable amendments to meet the requirements of social sectors and other projects.
 - l. Definition of PPP and Core sectors has been modified in Clause 3.2.1 to exclude Petroleum and Natural Gas and include logistics park and metro rail. In the case of real estate development, standalone housing would not be included while townships and residential complexes would continue to qualify.
 - m. Project Authorities are now being permitted variation in Factors for Experience by 15% instead of 33%. (Clause 3.2.6)
 - n. A Clause 3.2.7 has been added to the effect that Projects in OECD countries will get a weightage of 50% as compared to projects in developing countries.
 - o. The number of shortlisted bidders has been increased to 6, and further increased to 7 in case of projects costing less than Rs. 500 cr or for repetitive projects (clause 3.5.2). Further, a provision for preparation of reserve list of bidders has been made for substitution of bidders in the event of their withdrawal or rejection (Clause 3.5.3). In so far as road projects are concerned, the existing exemption from short-listing of bidders would continue.
- 5.0 Subject to the above changes, the other provisions of OM dated 5.12.2007 shall continue to apply.
- 6.0 Consequential changes in the guidelines on Request for Proposals would be issued separately.
- 7.0 This issues with approval of the Finance Minister.

Encl: Annexure:Model RFQ

(M.A. SIDDIQUE)
Deputy Secretary
Tel: 23093109

1. Secretary, Department of Economic Affairs, North Block, New Delhi.
2. Chairman, Railway Board, Rail Bhawan, New Delhi.
3. Secretary, Ministry of Civil Aviation, Rajiv Gandhi Bhawan, Safdarjung Airport, New Delhi.
4. Secretary, Department of Road Transport & Highways, Transport Bhawan, New Delhi.
5. Secretary, Department of Shipping, Transport Bhawan, New Delhi.
6. Secretary, Ministry of Power, Shram Shakti Bhawan, Rafi Marg, New Delhi.
7. Secretary, Ministry of Urban Development, Nirman Bhawan, New Delhi.

8. Secretary, Department of Telecommunication, Sanchar Bhawan, New Delhi.
9. Secretary, Ministry of New and Renewable Energy, CGO Complex, New Delhi.
10. Secretary, Ministry of Law and Justice, Department of Legal Affairs, Shastri Bhawan, New Delhi.
11. Adviser to Deputy Chairman, Planning Commission, Yojana Bhawan, New Delhi.

Copy to: PS to JS(PF.II)/PS to AS(E)/PPS to Secretary (E)

Model

Request for Qualification (RFQ)

Glossary

Applicant(s)	As defined in Clause 1.2.1
Application	As defined in the Disclaimer
Application Due Date	As defined in Clause 1.1.5
Associate	As defined in Clause 2.2.9
Authority	As defined in Clause 1.1.1
Bids	As defined in Clause 1.2.3
Bid Due Date	As defined in Clause 1.2.3
Bid Security	As defined in Clause 1.2.4
Bidders	As defined in Clause 1.1.1
Bidding Documents	As defined in Clause 1.2.3
Bidding Process	As defined in Clause 1.2.1
Bid Stage	As defined in Clause 1.2.1
[BOT]	Build, Operate and Transfer
Concessionaire	As defined in Clause 1.1.2
Concession Agreement	As defined in Clause 1.1.2
Conflict of Interest	As defined in Clause 2.2.1(c)
Consortium	As defined in Clause 2.2.1(a)
[DBFOT]	As defined in Clause 1.1.1
Eligible Experience	As defined in Clause 3.2.1
Eligible Projects	As defined in Clause 3.2.1
Estimated Project Cost	As defined in Clause 1.1.4
Experience Score	As defined in Clause 3.2.6
Financial Capacity	As defined in Clause 2.2.2 (B)
Government	Government of *****
Grant	As defined in Clause 1.2.8
Highest Bidder	As defined in Clause 1.2.8
Jt. Bidding Agreement	As defined in Clause 2.2.6 (g)
Lead Member	As defined in Clause 2.2.6 (c)
LOA	Letter of Award
Member	Member of a Consortium
Net Worth	As defined in Clause 2.2.4 (ii)
PPP	Public Private Partnership
Premium	As defined in Clause 1.2.8
Project	As defined in Clause 1.1.1
Qualification	As defined in Clause 1.2.1
Qualification Stage	As defined in Clause 1.2.1
Re. or Rs. or INR	Indian Rupee
RFP or Request for Proposals	As defined in Clause 1.2.1
RFQ	As defined in the Disclaimer
SPV	As defined in Clause 2.2.6
Technical Capacity	As defined in Clause 2.2.2 (A)
Threshold Technical Capability	As defined in Clause 2.2.2 (A)

The words and expressions beginning with capital letters and defined in this document shall, unless repugnant to the context, have the meaning ascribed thereto herein.

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Disclaimer

The information contained in this Request for Qualification document (the “**RFQ**”) or subsequently provided to Applicant(s), whether verbally or in documentary or any other form, by or on behalf of the Authority or any of its employees or advisors, is provided to Applicant(s) on the terms and conditions set out in this RFQ and such other terms and conditions subject to which such information is provided.

This RFQ is not an agreement and is neither an offer nor invitation by the Authority to the prospective Applicants or any other person. The purpose of this RFQ is to provide interested parties with information that may be useful to them in the formulation of their application for qualification pursuant to this RFQ (the “**Application**”). This RFQ includes statements, which reflect various assumptions and assessments arrived at by the Authority in relation to the Project. Such assumptions, assessments and statements do not purport to contain all the information that each Applicant may require. This RFQ may not be appropriate for all persons, and it is not possible for the Authority, its employees or advisors to consider the investment objectives, financial situation and particular needs of each party who reads or uses this RFQ. The assumptions, assessments, statements and information contained in this RFQ may not be complete, accurate, adequate or correct. Each Applicant should therefore, conduct its own investigations and analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained in this RFQ and obtain independent advice from appropriate sources.

Information provided in this RFQ to the Applicant(s) is on a wide range of matters, some of which may depend upon interpretation of law. The information given is not intended to be an exhaustive account of statutory requirements and should not be regarded as a complete or authoritative statement of law. The Authority accepts no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed herein.

The Authority, its employees and advisors make no representation or warranty and shall have no liability to any person, including any Applicant or Bidder, under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this RFQ or otherwise, including the accuracy, adequacy, correctness, completeness or reliability of the RFQ and any assessment, assumption, statement or information contained therein or deemed to form part of this RFQ or arising in any way with pre-qualification of Applicants for participation in the Bidding Process.

The Authority also accepts no liability of any nature whether resulting from negligence or otherwise howsoever caused arising from reliance of any Applicant upon the statements contained in this RFQ.

The Authority may, in its absolute discretion but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions contained in this RFQ.

The issue of this RFQ does not imply that the Authority is bound to select and short-list pre-qualified Applications for Bid Stage or to appoint theselected Bidder or Concessionaire, as the case may be, for the Project and the Authority reserves the right to reject all or any of the Applications or Bids without assigning any reasons whatsoever.

The Applicant shall bear all its costs associated with or relating to the preparation and submission of its Application including but not limited to preparation, copying, postage, delivery fees, expenses associated with any demonstrations or presentations which may be required by the Authority or any other costs incurred in connection with or relating to its Application. All such costs and expenses will remain with the Applicant and the Authority shall not be liable in any manner whatsoever for the same or for any other costs or other expenses incurred by anApplicant in preparation or submission of the Application, regardless of the conduct or outcome of the Bidding Process.

[Name of Authority]

1. INTRODUCTION

1.1 Background¹

- 1.1.1 [Name of the Authority]² (the “**Authority**”) is engaged in the development of [Cold Chain] and as part of this endeavour, the Authority has decided to undertake development and operation/ maintenance of the *****³ Project (the “**Project**”) through Public-Private Partnership (the “**PPP**”) on [Design, Build, Finance, Operate and Transfer (the “**DBFOT**”)] basis, and has decided to carry out the bidding process for selection of [a private entity as]⁴ the bidder to whom the Project may be awarded. [A brief description of the Project may be seen in the Information Memorandum of the Project at the Authority’s website www.*****.] Brief particulars of the Project are as follows:

Name of the [Project]	[Capacity]	Indicative Project Cost ⁵ (In Rs. cr.) ⁶
[_____]	[__]	[__]

The Authority intends to pre-qualify and short-list suitable Applicants (the “**Bidders**”) who will be eligible for participation in the Bid Stage, for awarding the Project through an open competitive bidding process in accordance with the procedure set out herein.

- 1.1.2 The selected Bidder, who is either a company incorporated under the Companies Act, 1956/2013 or undertakes to incorporate as such prior to execution of the concession agreement (the “**Concessionaire**”) shall be responsible for [designing,] engineering, financing, procurement, construction, operation and maintenance of the Project under and in accordance with the provisions of a [long - term] concession agreement (the “**Concession Agreement**”) to be entered into between the Concessionaire and the Authority in the form provided by the Authority as part of the Bidding Documents pursuant hereto.

¹ Serially numbered footnotes in this RFQ are for guidance of the Authority and should be omitted prior to issue of RFQ. Footnotes marked in non-numerical characters shall be retained in the RFQ.

² All project-specific provisions in this document have been enclosed in square parenthesis and may be modified, as necessary, before issuing the RFQ for the Project. The square parenthesis should be removed after carrying out the required modification. The curly parenthesis including the provisions contained therein and all the blank spaces may be retained in the RFQ document to be issued to prospective Applicants. They should be suitably modified/ filled up subsequently by the respective Applicants or the Authority, as the case may be, to reflect the particulars relating to the Project or the Applicants.

³ Wherever the asterisk is used, it should be substituted by project-specific details prior to issue of RFQ.

⁴ If public sector companies are to be allowed to Bid, this Clause may be modified accordingly.

⁵ If the project agreements do not provide for any obligations or liabilities that arise from or are related to capital costs of the project, this column may be omitted.

⁶ This amount should normally include the likely construction cost plus 25% thereof by way of financing costs, physical and price contingencies etc.

- 1.1.3 The scope of work will broadly include [Designing, Construction/ Installation of a sorting / Grading/ Pre-Cooling / Packaging Line.] and the operation and maintenance thereof.
- 1.1.4 Indicative capital cost of the Project (the “**Estimated Project Cost**”) will be revised and specified in the Bidding Documents of the Project. The assessment of actual costs, however, will have to be made by the Bidders.
- 1.1.5 The Authority shall receive Applications pursuant to this RFQ in accordance with the terms set forth herein as modified, altered, amended and clarified from time to time by the Authority, and all Applications shall be prepared and submitted in accordance with such terms on or before the date specified in Clause 1.3 for submission of Applications (the “**Application Due Date**”).

1.2 Brief description of Bidding Process

- 1.2.1 The Authority has adopted a two-stage bidding process (collectively referred to as the “**Bidding Process**”) for selection of the Bidder for award of the Project. The first stage (the “**Qualification Stage**”) of the process involves qualification (the “**Qualification**”) of interested parties/ consortia who make an Application in accordance with the provisions of this RFQ (the “**Applicant**”, which expression shall, unless repugnant to the context, include the Members of the Consortium). Prior to making an Application, the Applicant shall pay to the Authority a sum of Rs 50, 000 (Rupees fifty thousand) as the cost of the RFQ process⁷. At the end of this stage, the Authority expects to announce a short-list of up to [6 (six)] suitable pre-qualified Applicants who shall be eligible for participation in the second stage of the Bidding Process (the “**Bid Stage**”) comprising Request for Proposals (the “**Request for Proposals**” or “**RFP**”).

Government of India has issued guidelines (see Appendix-V) for qualification of bidders seeking to acquire stakes in any public sector enterprise through the process of disinvestment. These guidelines shall apply *mutatis mutandis* to this Bidding Process. The Authority shall be entitled to disqualify an Applicant in accordance with the aforesaid guidelines at any stage of the Bidding Process. Applicants must satisfy themselves that they are qualified to bid, and should give an undertaking to this effect in the form at Appendix-I.

- 1.2.2 In the Qualification Stage, Applicants would be required to furnish all the information specified in this RFQ. Only those Applicants that are pre-qualified and short-listed by the Authority shall be invited to submit their Bids for the Project. The Authority is likely to provide a comparatively short time span for submission of the Bids for the Project. The Applicants are, therefore, advised to visit the site and familiarise themselves with the Project.

⁷ The cost of RFQ may be determined at the rate of Rs. 10,000 for every Rs. 100 crore or part thereof comprising the Estimated Project Cost. Thus, the cost of an RFQ document for a project of Rs. 500 crore shall be Rs. 50, 000.

- 1.2.3 In the Bid Stage, the Bidders will be called upon to submit their financial offers (the “**Bids**”) in accordance with the RFP and other documents to be provided by the Authority (collectively the “**Bidding Documents**”). The Bidding Documents for the Project will be provided to every Bidder on payment of {Rs. 100,000 (Rs. one lakh only)}[§]. The Bid shall be valid for a period of not less than 120 days from the date specified in Clause 1.3 for submission of Bids (the “**Bid Due Date**”).
- 1.2.4 In terms of the RFP, a Bidder will be required to deposit, alongwith its Bid, a bid security [equivalent to about 1% (one per cent)[§] of the Estimated Project Cost] (the “**Bid Security**”), refundable no later than 60(sixty) days from the Bid Due Date, except in the case of the selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the Concession Agreement. The Bidders will have an option to provide Bid Security in the form of a demand draft or a bank guarantee acceptable to the Authority⁹ and in such event, the validity period of the demand draft or bank guarantee, as the case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. The Bid shall be summarily rejected if it is not accompanied by the Bid Security.
- 1.2.5 Generally, the Highest Bidder shall be the selected Bidder. The remaining Bidders shall be kept in reserve and may, in accordance with the process specified in the RFP, be invited to match the Bid submitted by the Highest Bidder in case such Highest Bidder withdraws or is not selected for any reason. In the event that none of the other Bidders match the Bid of the Highest Bidder, the Authority may, in its discretion, invite fresh Bids from the remaining Bidders or annul the Bidding Process, as the case may be.
- 1.2.6 During the Bid Stage, Bidders are invited to examine the Project in greater detail, and to carry out, at their cost, such studies as may be required for submitting their respective Bids for award of the concession including implementation of the Project.
- 1.2.7 As part of the Bidding Documents, the Authority will provide a draft Concession Agreement and [project report/feasibility] report prepared by the [Authority/ its consultants] and other information pertaining/ relevant to the Project available with it.
- 1.2.8 Bids will be invited for the Project on the basis of [the lowest financial grant (the “**Grant**”) required by a Bidder for implementing the Project. [A Bidder may, instead of seeking a Grant, offer to pay a premium in the form of revenue share and/ or upfront payment, as the case may be, (the “**Premium**”) to the Authority for award of the concession.] The concession period shall be pre-determined, and will

[§]The actual amount will be indicated in the RFP.

⁸The Authority may, if deemed necessary, prescribe a higher Bid Security not exceeding 2% of the Estimated Project Cost. In case of a project having an Estimated Project Cost of Rs. 2,000 cr. or above, the Authority may reduce the Bid Security, but not less than 0.5% of the Estimated Project Cost in any case.

⁹The format for the bank guarantee has been published as part of the Model RFP document.

be indicated in the draft Concession Agreement forming part of the Bidding Documents. The [Grant/ Premium amount] shall constitute the sole criteria for evaluation of Bids. The Project shall be awarded to the Bidder quoting the [highest Premium, and in the event that no Bidder offers a Premium, then to the Bidder seeking the lowest Grant.]

In this RFQ, the term “**Highest Bidder**” shall mean the Bidder who is offering the [highest Premium, and where no Bidder is offering a Premium, the Bidder seeking the lowest Grant shall be the Highest Bidder].

1.2.9 The Concessionaire shall be entitled to [levy and charge a pre-determined user fee from users] of the Project.

1.2.10 Further and other details of the process to be followed at the Bid Stage and the terms thereof will be spelt out in the Bidding Documents.

1.2.11 Any queries or request for additional information concerning this RFQ shall be submitted in writing or by fax and e-mail to the officer designated in Clause 2.13.3 below. The envelopes/ communications shall clearly bear the following identification/ title:

“Queries/ Request for Additional Information:RFQ for ***** Project”.

1.3 Schedule of Bidding Process

The Authority shall endeavour to adhere to the following schedule:

Event Description	Date
<u>Qualification Stage</u>	
1. Last date for receiving queries	[25 days from date of RFQ]
2. Pre-Application Conference	[30 days from date of RFQ]
3. Authority response to queries latest by	[35 days from date of RFQ]
4. Application Due Date	[45 days from date of RFQ]
5. Announcement of short-list	Within 15 days of Application Due Date

<u>Bid Stage</u>	Estimated Date
1. Sale of Bid Documents	[To be specified]
2. Last date for receiving queries	[To be specified]
3. Pre-Bid meeting – 1	[To be specified]
4. Authority response to queries latest by	[To be specified]

- | | | |
|-----|---------------------------------|---------------------------------|
| 5. | Pre-Bid meeting – 2 | [To be specified] ¹⁰ |
| 6. | Bid Due Date | [To be specified] |
| 7. | Opening of Bids | On Bid Due Date |
| 8. | Letter of Award (LOA) | Within 30 days of Bid Due Date |
| 9. | Validity of Bids | 120 days of Bid Due Date |
| 10. | Signing of Concession Agreement | Within 30 days of award of LOA |

¹⁰In case of complex projects, the number of pre-bid meeting could be two or more.

2. INSTRUCTIONS TO APPLICANTS

A. GENERAL

2.1 Scope of Application

- 2.1.1 The Authority wishes to receive Applications for Qualification in order to short-list experienced and capable Applicants for the Bid Stage.
- 2.1.2 Short-listed Applicants may be subsequently invited to submit the Bids for the Project.

2.2 Eligibility of Applicants

- 2.2.1 For determining the eligibility of Applicants for their pre-qualification hereunder, the following shall apply:

(a) The Applicant for pre-qualification may be a single entity or a group of entities (the “**Consortium**”), coming together to implement the Project. However, no applicant applying individually or as a member of a Consortium, as the case may be, can be member of another Applicant. The term Applicant used herein would apply to both a single entity and a Consortium.

(b) An Applicant may be a natural person, private entity, [government-owned entity] or any combination of them with a formal intent to enter into an agreement or under an existing agreement to form a Consortium. A Consortium shall be eligible for consideration subject to the conditions set out in Clause 2.2.6 below.

(c) An Applicant shall not have a conflict of interest (the “**Conflict of Interest**”) that affects the Bidding Process. Any Applicant found to have a Conflict of Interest shall be disqualified. An Applicant shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:

- (i) the Applicant, its Member or Associate (or any constituent thereof) and any other Applicant, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of an Applicant, its Member or an Associate thereof (or any shareholder thereof having a shareholding of more than 5 per cent of the paid up and subscribed share capital of such Applicant, Member or Associate, as the case may be) in the other Applicant, its Member or Associate is less than 5 per cent of the subscribed and paid up equity share capital thereof; provided further that this disqualification shall not apply to any ownership by a bank, insurance company, pension fund or a public financial institution referred to in sub-section 4A of the Companies Act, 1956. For the purposes of this Clause 2.2.1(c), indirect shareholding held through one or more intermediate persons shall be computed as follows: (aa) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other

person (the “**Subject Person**”) shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (bb) subject always to sub-clause (aa) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause (bb) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid up equity shareholding of such intermediary; or

- (ii) a constituent of such Applicant is also a constituent of another Applicant; or
- (iii) such Applicant, or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Applicant, or any Associate thereof has provided any such subsidy, grant, concessional loan or subordinated debt to any other Applicant, its Member or any Associate thereof; or
- (iv) such Applicant has the same legal representative for purposes of this Application as any other Applicant; or
- (v) such Applicant, or any Associate thereof has a relationship with another Applicant, or any Associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each other’s information about, or to influence the Application of either or each other; or
- (vi) such Applicant, or any Associate thereof has participated as a consultant to the Authority in the preparation of any documents, design or technical specifications of the Project.

(d) An Applicant shall be liable for disqualification if any legal, financial or technical adviser of the Authority in relation to the Project is engaged by the Applicant, its Member or any Associate thereof, as the case may be, in any manner for matters related to or incidental to the Project. For the avoidance of doubt, this disqualification shall not apply where such adviser was engaged by the Applicant, its Member or Associate in the past but its assignment expired or was terminated 6 (six) months prior to the date of issue of this RFQ. Nor will this disqualification apply where such adviser is engaged after a period of 3 (three) years from the date of commercial operation of the Project.

Explanation: In case an Applicant is a Consortium, then the term Applicant as used in this Clause 2.2.1, shall include each Member of such Consortium.

[(e) Other eligibility conditions shall include:***]¹¹

2.2.2 To be eligible for pre-qualification and short-listing, an Applicant shall fulfil the following conditions of eligibility:

(A) **Technical Capacity:** For demonstrating technical capacity and experience (the “**Technical Capacity**”), the Applicant shall, over the past 5 (five) financial years preceding the Application Due Date, have:

- (i) paid for, or received paymentsfor, construction of Eligible Project(s); and/or
- (ii) paid for development of Eligible Project(s)in Category 1 and/or Category 2 specified in Clause 3.2.1; and/ or
- (iii) collected and appropriated revenues from Eligible Project(s)in Category 1 and/or Category 2 specified in Clause 3.2.1,such that the sum total of the above is more than [Rs.1000 crore (Rs. one thousand crore)] (the “**Threshold Technical Capability**”).¹²

[Provided that at least one fourth of the Threshold Technical Capability shall be from the Eligible Projects in Category 1 and/ or Category 3 specified in Clause 3.2.1.]

(B) **Financial Capacity:** The Applicant shall have a minimum Net Worth¹³ (the “**Financial Capacity**”) of [Rs. 125 crore (Rs. one hundred and twenty five crore)]¹⁴ at the close of the preceding financial year.

In case of a Consortium, the combined technical capabilityand Net Worth of those Members, who have andshall continue to have an equity share of at least 26% (twenty six per cent) each in the SPV, should satisfy the above conditions of eligibility; provided that each such Member shall, for a period of 2 (two) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (twenty six per cent) of the subscribed and paid up equity of the

¹¹Other sector-specific conditions of eligibility or restrictions, if any, may be stated here, such as limit on FDI. In case of sectors such as ports and airports, the Authority may specify restrictions in order to prevent the same entity from acquiring more than a pre-determined number of projects. In sectors where a large number of projects are offered within a comparatively short period, the Authority may specify restrictions in order to prevent the same entity from getting shortlisted in a large number of projects with the potential effect of curtailing effective competition.

¹² This amount should be equivalent to twice the Estimated Project Cost of the Project for which Bids are being invited. Where deemed necessary, the Authority may increase/decrease this amount by one half of the Estimated Project Cost.

¹³ Net Worth has been adopted as the criterion for assessing financial capacity since it is a comprehensive indication of the financial strength of the Applicant. In exceptional cases, however, the Authority may also prescribe a minimum annual turnover and/ or net cash accruals as an indication of the Applicant’s cash flows and financial health.

¹⁴ This amount should be 25% (twenty five percent) of the Estimated Project Cost of the Project for which Bids are being invited.

SPV; and (ii) 5% (five per cent) of the Total Project Cost specified in the Concession Agreement[‡].

2.2.3 **O&M Experience:** [The Applicant shall have experience of five years or more in operation and maintenance (O&M) of Cold storage facility(ies) with a capacity of ***** or more or in operation and maintenance (O&M) of controlled atmosphere storage facility(ies) with a capacity of ***** or more. The Applicant shall also have experience in procurement and distribution of agricultural produces having generated revenue of more than Rs ***** crore from sale of agricultural produces in any three years out of last five years and the Applicant shall have made part of these sales to organized retail channels (Organised retailing refers to trading activities undertaken by licensed retailers, that is, those who are registered for sales tax, income tax, etc). The Applicant shall, [in the case of a Consortium, include a Member who shall subscribe and continue to hold at least 10% (ten percent) of the subscribed and paid up equity of the SPV for a period of 5 (five) years from the date of commercial operation of the Project, and has either by itself or through its Associate, experience of 5 (five) years or more in operation and maintenance (O&M) of Category 1 projects specified in Clause 3.2.1, which have an aggregate capital cost equal to the Estimated Project Cost¹⁵. In case the Applicant is not a Consortium, it shall be eligible only if it has equivalent experience of its own or through its Associates..

2.2.4 The Applicant shall enclose with its Application, to be submitted as per the format at Appendix-I, complete with its Annexes, the following:

- (i) Certificate(s) from its statutory auditors[§] or the concerned client(s) stating the payments made/ received or works commissioned, as the case may be, during the past 5 years in respect of the projects specified in paragraph 2.2.2 (A) above. In case a particular job/ contract has been jointly executed by the Applicant (as part of a consortium), it should further support its claim for the share in work done for that particular job/ contract by producing a certificate from its statutory auditor or the client; and
- (ii) certificate(s) from statutory auditors specifying the Net Worth of the Applicant, as at the close of the preceding financial year, and also specifying that the methodology adopted for calculating such Net Worth conforms to the provisions of this Clause 2.2.4(ii). For the purposes of this RFQ, net worth (the “**Net Worth**”) shall mean the sum of subscribed and paid up equity and reserves from which shall be deducted the sum of

[‡]The Authority may, in its discretion, impose further obligations in the Concession Agreement, but such obligations should provide sufficient mobility for partial divestment of equity without compromising the interests of the Project.

¹⁵Where deemed necessary, the Authority may increase/decrease this amount by one-half of the Estimated Project Cost.

[§]In case duly certified audited annual financial statements containing explicitly the requisite details are provided, a separate certification by statutory auditors would not be necessary in respect of Clause 2.2.4 (i). In jurisdictions that do not have statutory auditors, the firm of auditors which audits the annual accounts of the Applicant may provide the certificates required under this RFQ.

revaluation reserves, miscellaneous expenditure not written off and reserves not available for distribution to equity shareholders.

- 2.2.5 The Applicant should submit a Power of Attorney as per the format at Appendix-II, authorising the signatory of the Application to commit the Applicant. In the case of a Consortium, the Members should submit a Power of Attorney in favour of the Lead Member as per format at Appendix-III.
- 2.2.6 Where the Applicant is a single entity, it may be required to form an appropriate Special Purpose Vehicle, incorporated under the Companies Act, 2013 (the “**SPV**”), to execute the Concession Agreement and implement the Project. In case the Applicant is a Consortium, it shall, in addition to forming an SPV, comply with the following additional requirements:
- (a) Number of members in a consortium shall not exceed 6 (six), but information sought in the Application may be restricted to 4 (four) members in the order of their equity contribution;
 - (b) subject to the provisions of clause (a) above, the Application should contain the information required for each member of the Consortium;
 - (c) members of the Consortium shall nominate one member as the lead member (the “**Lead Member**”), who shall have an equity share holding of at least 26% (twenty six per cent) of the paid up and subscribed equity of the SPV. The nomination(s) shall be supported by a Power of Attorney, as per the format at Appendix-III, signed by all the other members of the Consortium;
 - (d) the Application should include a brief description of the roles and responsibilities of individual members, particularly with reference to financial, technical and O&M obligations;
 - (e) an individual Applicant cannot at the same time be member of a Consortium applying for pre-qualification. Further, a member of a particular Applicant Consortium cannot be member of any other Applicant Consortium applying for pre-qualification;
 - (f) the members of a Consortium shall form an appropriate SPV to execute the Project, if awarded to the Consortium;
 - (g) members of the Consortium shall enter into a binding Joint Bidding Agreement, substantially in the form specified at Appendix-IV (the “**Jt. Bidding Agreement**”), for the purpose of making the Application and submitting a Bid in the event of being short-listed. The Jt. Bidding Agreement, to be submitted along with the Application, shall, *inter alia*:
 - (i) convey the intent to form an SPV with shareholding/ ownership equity commitment(s) in accordance with this RFQ, which would enter into the Concession Agreement and subsequently perform all

the obligations of the Concessionaire in terms of the Concession Agreement, in case the concession to undertake the Project is awarded to the Consortium;

- (ii) clearly outline the proposed roles and responsibilities, if any, of each member;
 - (iii) commit the minimum equity stake to be held by each member;
 - (iv) commit that each of the members, whose experience will be evaluated for the purposes of this RFQ, shall subscribe to 26% (twenty six per cent) or more of the paid up and subscribed equity of the SPV and shall further commit that each such member shall, for a period of 2 (two) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (twenty six per cent) of the subscribed and paid up equity share capital of the SPV; and (ii) 5% (five per cent) of the Total Project Cost specified in the Concession Agreement¹⁶;
 - (v) members of the Consortium undertake that they shall collectively hold at least 51% (fifty one per cent) of the subscribed and paid up equity of the SPV at all times until the second anniversary of the commercial operation date of the Project; and
 - (vi) include a statement to the effect that all members of the Consortium shall be liable jointly and severally for all obligations of the Concessionaire in relation to the Project until the Financial Close of the Project is achieved in accordance with the Concession Agreement; and
- (h) except as provided under this RFQ and the Bidding Documents, there shall not be any amendment to the Jt. Bidding Agreement without the prior written consent of the Authority.

2.2.7 Any entity which has been barred by the [Central/ State Government, or any entity controlled by it,] from participating in any project (BOT or otherwise), and the bar subsists as on the date of Application, would not be eligible to submit an Application, either individually or as member of a Consortium.

2.2.8 An Applicant including any Consortium Member or Associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Applicant, Consortium Member or Associate, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Applicant, Consortium Member or Associate.

¹⁶Add further conditions relating to the O&M Member, if any.

- 2.2.9 In computing the Technical Capacity and Net Worth of the Applicant/ Consortium Members under Clauses 2.2.2, 2.2.4 and 3.2, the Technical Capacity and Net Worth of their respective Associates would also be eligible hereunder.

For purposes of this RFQ, Associate means, in relation to the Applicant/ Consortium Member, a person who controls, is controlled by, or is under the common control with such Applicant/ Consortium Member (the “Associate”). As used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law.

- 2.2.10 The following conditions shall be adhered to while submitting an Application:

- (a) Applicants should attach clearly marked and referenced continuation sheets in the event that the space provided in the prescribed forms in the Annexes is insufficient. Alternatively, Applicants may format the prescribed forms making due provision for incorporation of the requested information;
- (b) information supplied by an Applicant (or other constituent Member if the Applicant is a Consortium) must apply to the Applicant, Member or Associate named in the Application and not, unless specifically requested, to other associated companies or firms. Invitation to submit Bids will be issued only to Applicants whose identity and/ or constitution is identical to that at pre-qualification;
- (c) in responding to the pre-qualification submissions, Applicants should demonstrate their capabilities in accordance with Clause 3.1 below; and
- (d) in case the Applicant is a Consortium, each Member should substantially satisfy the pre-qualification requirements to the extent specified herein.

- 2.2.11 [While Qualification is open to persons from any country, the following provisions shall apply:]

- [(a) Where, on the date of the Application, not less than 15% (fifteen percent) of the aggregate issued, subscribed and paid up equity share capital in an Applicant or its Member is held by persons resident outside India or where an Applicant or its Member is controlled by persons resident outside India; or]
- [(b) if at any subsequent stage after the date of the Application, there is an acquisition of not less than 15% (fifteen percent) of the aggregate issued, subscribed and paid up equity share capital or control, by persons resident outside India, in or of the Applicant or its Member;]

[then the Qualification of such Applicant or in the event described in sub clause (b) above, the continued Qualification of the Applicant shall be subject to

approval of the Authority from national security and public interest perspective. The decision of the Authority in this behalf shall be final and conclusive and binding on the Applicant.]

[The holding or acquisition of equity or control, as above, shall include direct or indirect holding/ acquisition, including by transfer, of the direct or indirect legal or beneficial ownership or control, by persons acting for themselves or in concert and in determining such holding or acquisition, the Authority shall be guided by the principles, precedents and definitions contained in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, or any substitute thereof, as in force on the date of such acquisition.]¹⁷

The Applicant shall promptly inform the Authority of any change in the shareholding, as above, and failure to do so shall render the Applicant liable for disqualification from the Bidding Process.

- 2.2.12 Notwithstanding anything to the contrary contained herein, in the event that the Application Due Date falls within three months of the closing of the latest financial year of an Applicant, it shall ignore such financial year for the purposes of its Application and furnish all its information and certification with reference to the 5 (five) years or 1 (one) year, as the case may be, preceding its latest financial year. For the avoidance of doubt, financial year shall, for the purposes of an Application hereunder, mean the accounting year followed by the Applicant in the course of its normal business.

2.3 Change in composition of the Consortium

- 2.3.1 Change in the composition of a Consortium will not be permitted by the Authority during the Qualification Stage.
- 2.3.2 Where the Bidder is a Consortium, change in the composition of a Consortium may be permitted by the Authority during the Bid Stage, only where:
- (a) the application for such change is made no later than 15 (fifteen) days prior to the Bid Due Date;
 - (b) the Lead Member continues to be the Lead Member of the Consortium;
 - (c) the substitute is at least equal, in terms of Technical Capacity, to the Consortium Member who is sought to be substituted and the modified Consortium shall continue to meet the pre-qualification and short-listing criteria for Applicants;
 - (d) the substitute is at least equal, in terms of Operational Capacity, to the Consortium Member who is sought to be substituted and the modified

¹⁷ The provisions of this Clause 2.2.11 may be modified from time to time in accordance with the extant instructions of the Government.

Consortium shall continue to meet the pre-qualification and short-listing criteria for Applicants; and

- (e) the new Member(s) expressly adopt(s) the Application already made on behalf of the Consortium as if it were a party to it originally, and is not an Applicant/Member/Associate of any other Consortium bidding for this Project.

2.3.3 Approval for change in the composition of a Consortium shall be at the sole discretion of the Authority and must be approved by the Authority in writing.

2.3.4 The modified/ reconstituted Consortium shall submit a revised Jt. Bidding Agreement before the Bid Due Date.

2.3.5 Notwithstanding anything to the contrary contained in sub-clause (c) (i) of Clause 2.2.1, an Applicant may, within 10 (ten) days after the Application Due Date, remove from its Consortium any Member who suffers from a Conflict of Interest, and such removal shall be deemed to cure the Conflict of Interest arising in respect thereof.

2.4 Number of Applications and costs thereof

2.4.1 No Applicant shall submit more than one Application for the Project. An applicant applying individually or as a member of a Consortium shall not be entitled to submit another Application either individually or as a member of any Consortium, as the case may be.

2.4.2 The Applicants shall be responsible for all of the costs associated with the preparation of their Applications and their participation in the Bidding Process. The Authority will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.

2.5 Site visit and verification of information

Applicants are encouraged to submit their respective Applications after visiting the Project site and ascertaining for themselves the site conditions, agriculture produce, location, surroundings, climate, availability of power, water and other utilities for construction, access to site, handling and storage of materials, weather data, applicable laws and regulations, and any other matter considered relevant by them.

2.6 Acknowledgement by Applicant

2.6.1 It shall be deemed that by submitting the Application, the Applicant has:

- (a) made a complete and careful examination of the RFQ;
- (b) received all relevant information requested from the Authority;

- (c) accepted the risk of inadequacy, error or mistake in the information provided in the RFQ or furnished by or on behalf of the Authority relating to any of the matters referred to in Clause 2.5 above; and
- (d) agreed to be bound by the undertakings provided by it under and in terms hereof.

2.6.2 The Authority shall not be liable for any omission, mistake or error in respect of any of the above or on account of any matter or thing arising out of or concerning or relating to the RFQ or the Bidding Process, including any error or mistake therein or in any information or data given by the Authority.

2.7 Right to accept or reject any or all Applications/ Bids

2.7.1 Notwithstanding anything contained in this RFQ, the Authority reserves the right to accept or reject any Application and to annul the Bidding Process and reject all Applications/ Bids, at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

2.7.2 The Authority reserves the right to reject any Application and/ or Bid if:

- (a) at any time, a material misrepresentation is made or uncovered, or
- (b) the Applicant does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Application.

If the Applicant/Bidder is a Consortium, then the entire Consortium may be disqualified/ rejected. If such disqualification/ rejection occurs after the Bids have been opened and the Highest Bidder gets disqualified/ rejected, then the Authority reserves the right to:

- (i) invite the remaining Bidders to match the Highest Bidder/ submit their Bids in accordance with the RFP; or
- (ii) take any such measure as may be deemed fit in the sole discretion of the Authority, including annulment of the Bidding Process.

2.7.3 In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of subsistence thereof, including the concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Applicant, or the Applicant has made material misrepresentation or has given any materially incorrect or false information, the Applicant shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOA or entering into of the Concession Agreement, and if the Applicant/SPV has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFQ,

be liable to be terminated, by a communication in writing by the Authority to the Applicant, without the Authority being liable in any manner whatsoever to the Applicant and without prejudice to any other right or remedy which the Authority may have under this RFQ, the Bidding Documents, the Concession Agreement or under applicable law.

- 2.7.4 The Authority reserves the right to verify all statements, information and documents submitted by the Applicant in response to the RFQ. Any such verification or lack of such verification by the Authority shall not relieve the Applicant of its obligations or liabilities hereunder nor will it affect any rights of the Authority thereunder.

B. DOCUMENTS

2.8 Contents of the RFQ

This RFQ comprises the disclaimer set forth hereinabove, the contents as listed below, and will additionally include any Addenda issued in accordance with Clause 2.10.

Invitation for Qualification

- Section 1. Introduction
- Section 2. Instructions to Applicants
- Section 3. Criteria for Evaluation
- Section 4. Fraud & Corrupt Practices
- Section 5. Pre Application Conference
- Section 6. Miscellaneous

Appendices

- I. Letter comprising the Application
- II. Power of Attorney for signing of Application
- III. Power of Attorney for Lead Member of Consortium
- IV. Joint Bidding Agreement for Consortium
- V. Guidelines of the Department of Disinvestment

2.9 Clarifications

- 2.9.1 Applicants requiring any clarification on the RFQ may notify the Authority in writing or by fax and e-mail in accordance with Clause 1.2.11. They should send in their queries before the date specified in the schedule of Bidding Process contained in Clause 1.3. The Authority shall endeavour to respond to the queries within the period specified therein, but no later than 10(ten) days prior to the Application Due Date. The responses will be sent by fax and/or e-mail. The Authority will forward all the queries and its responses thereto, to all purchasers of the RFQ without identifying the source of queries.
- 2.9.2 The Authority shall endeavour to respond to the questions raised or clarifications sought by the Applicants. However, the Authority reserves the right not to respond

to any question or provide any clarification, in its sole discretion, and nothing in this Clause shall be taken or read as compelling or requiring the Authority to respond to any question or to provide any clarification.

- 2.9.3 The Authority may also on its own motion, if deemed necessary, issue interpretations and clarifications to all Applicants. All clarifications and interpretations issued by the Authority shall be deemed to be part of the RFQ. Verbal clarifications and information given by Authority or its employees or representatives shall not in any way or manner be binding on the Authority.

2.10 Amendment of RFQ

- 2.10.1 At any time prior to the deadline for submission of Application, the Authority may, for any reason, whether at its own initiative or in response to clarifications requested by an Applicant, modify the RFQ by the issuance of Addenda.
- 2.10.2 Any Addendum thus issued will be sent in writing to all those who have purchased the RFQ.
- 2.10.3 In order to afford the Applicants a reasonable time for taking an Addendum into account, or for any other reason, the Authority may, in its sole discretion, extend the Application Due Date.[§]

C. PREPARATION AND SUBMISSION OF APPLICATION

2.11 Language

The Application and all related correspondence and documents in relation to the BiddingProcess shall be in English language. Supporting documents and printed literature furnished by the Applicant with the Application may be in any other language provided that they are accompanied by translations of all the pertinent passages in the English language, duly authenticated and certified by the Applicant. Supporting materials, which are not translated into English, may not be considered. For the purpose of interpretation and evaluation of the Application, the English language translation shall prevail.

2.12 Format and signing of Application

- 2.12.1 The Applicant shall provide all the information sought under this RFQ. The Authority will evaluate only those Applications that are received in the required formats and complete in all respects. Incomplete and /or conditional Applications shall be liable to rejection.
- 2.12.2 The Applicant shall prepare 1 (one) original set of the Application (together with originals/ copies of documents required to be submitted along therewith pursuant

[§] While extending the Application Due Date on account of an addendum, the Authority shall have due regard for the time required by Applicants to address the amendments specified therein. In the case of significant amendments, at least 15 (fifteen) days shall be provided between the date of amendment and the Application Due Date, and in the case of minor amendments, at least 7 (seven) days shall be provided.

to this RFQ) and clearly marked “ORIGINAL”. In addition, the Applicant shall submit 1 (one) copy of the Application, along with documents required to be submitted along therewith pursuant to this RFQ, marked “COPY”. The Applicant shall also provide 2 (two) soft copies on Compact Disc (CD). In the event of any discrepancy between the original and the copy, the original shall prevail.

2.12.3 The Application and its copy shall be typed or written in indelible ink and signed by the authorised signatory of the Applicant who shall also initial each page in blue ink. In case of printed and published documents, only the cover shall be initialled. All the alterations, omissions, additions or any other amendments made to the Application shall be initialled by the person(s) signing the Application. The Application shall contain page numbers and shall be bound together in hard cover.

2.13 Sealing and Marking of Applications

2.13.1 The Applicant shall submit the Application in the format specified at Appendix-I, together with the documents specified in Clause 2.13.2, and seal it in an envelope and mark the envelope as “APPLICATION”. The Applicant shall seal the original and the copy of the Application, together with their respective enclosures, in separate envelopes duly marking the envelopes as “ORIGINAL” and “COPY”. The envelopes shall then be sealed in an outer envelope which shall also be marked in accordance with Clauses 2.13.2 and 2.13.3.

2.13.2 Each envelope shall contain:

- (i) Application in the prescribed format (Appendix-I) along with Annexes and supporting documents;
- (ii) Power of Attorney for signing the Application as per the format at Appendix-II;
- (iii) if applicable, the Power of Attorney for Lead Member of Consortium as per the format at Appendix-III;
- (iv) copy of the Joint Bidding Agreement, in case of a Consortium, substantially in the format at Appendix-IV;
- (v) copy of Memorandum and Articles of Association, if the Applicant is a body corporate, and if a partnership then a copy of its partnership deed;
- (vi) copies of Applicant's duly audited balance sheet and profit and loss account for the preceding five years; and
- (viii) any other sector or project-specific requirement that may be specified by the Authority].

Each of the envelopes shall clearly bear the following identification:

“Application for Qualification: **** Project”

and shall clearly indicate the name and address of the Applicant. In addition, the Application Due Date should be indicated on the right hand corner of each of the envelopes.

2.13.3 Each of the envelopes shall be addressed to:

ATTN. OF:	Mr*****
DESIGNATION:	*****
ADDRESS:	*****
FAX NO:	*****
E-MAIL ADDRESS:	*****

2.13.4 If the envelopes are not sealed and marked as instructed above, the Authority assumes no responsibility for the misplacement or premature opening of the contents of the Application and consequent losses, if any, suffered by the Applicant.

2.13.5 Applications submitted by fax, telex, telegram or e-mail shall not be entertained and shall be rejected.

2.14 Application Due Date

2.14.1 Applications should be submitted before 1100 hours IST on the Application Due Date, at the address provided in Clause 2.13.3 in the manner and form as detailed in this RFQ. A receipt thereof should be obtained from the person specified in Clause 2.13.3.

2.14.2 The Authority may, in its sole discretion, extend the Application Due Date by issuing an Addendum in accordance with Clause 2.10 uniformly for all Applicants.

2.15 Late Applications

Applications received by the Authority after the specified time on the Application Due Date shall not be eligible for consideration and shall be summarily rejected.

2.16 Modifications/ substitution/ withdrawal of Applications

2.16.1 The Applicant may modify, substitute or withdraw its Application after submission, provided that written notice of the modification, substitution or withdrawal is received by the Authority prior to the Application Due Date. No Application shall be modified, substituted or withdrawn by the Applicant on or after the Application Due Date.

2.16.2 The modification, substitution or withdrawal notice shall be prepared, sealed, marked, and delivered in accordance with Clause 2.13, with the envelopes being additionally marked "MODIFICATION", "SUBSTITUTION" or "WITHDRAWAL", as appropriate.

2.16.3 Any alteration/ modification in the Application or additional information supplied subsequent to the Application Due Date, unless the same has been expressly sought for by the Authority, shall be disregarded.

D. EVALUATION PROCESS

2.17 Opening and Evaluation of Applications

- 2.17.1 The Authority shall open the Applications at 1130 hours IST on the Application Due Date, at the place specified in Clause 2.13.3 and in the presence of the Applicants who choose to attend.
- 2.17.2 Applications for which a notice of withdrawal has been submitted in accordance with Clause 2.16 shall not be opened.
- 2.17.3 The Authority will subsequently examine and evaluate Applications in accordance with the provisions set out in Section 3.
- 2.17.4 Applicants are advised that pre-qualification of Applicants will be entirely at the discretion of the Authority. Applicants will be deemed to have understood and agreed that no explanation or justification on any aspect of the Bidding Process or selection will be given.
- 2.17.5 Any information contained in the Application shall not in anyway be construed as binding on the Authority, its agents, successors or assigns, but shall be binding against the Applicant if the Project is subsequently awarded to it on the basis of such information.
- 2.17.6 The Authority reserves the right not to proceed with the Bidding Process at any time without notice or liability and to reject any or all Application(s) without assigning any reasons.
- 2.17.7 If any information furnished by the Applicant is found to be incomplete, or contained in formats other than those specified herein, the Authority may, in its sole discretion, exclude the relevant project from computation of the Eligible Score of the Applicant.
- 2.17.8 In the event that an Applicant claims credit for an Eligible Project, and such claim is determined by the Authority as incorrect or erroneous, the Authority shall reject such claim and exclude the same from computation of the Eligible Score, and may also, while computing the aggregate Experience Score of the Applicant, make a further deduction equivalent to the claim rejected hereunder. Where any information is found to be patently false or amounting to a material misrepresentation, the Authority reserves the right to reject the Application and/or Bid in accordance with the provisions of Clauses 2.7.2 and 2.7.3.

2.18 Confidentiality

Information relating to the examination, clarification, evaluation, and recommendation for the short-listed pre-qualified Applicants shall not be disclosed to any person who is not officially concerned with the process or is not a retained professional advisor advising the Authority in relation to, or matters arising out of, or concerning the Bidding Process. The Authority will treat all

information, submitted as part of Application, in confidence and will require all those who have access to such material to treat the same in confidence. The Authority may not divulge any such information unless it is directed to do so by any statutory entity that has the power under law to require its disclosure or is to enforce or assert any right or privilege of the statutory entity and/ or the Authority or as may be required by law or in connection with any legal process.

2.19 Tests of responsiveness

2.19.1 Prior to evaluation of Applications, the Authority shall determine whether each Application is responsive to the requirements of the RFQ. An Application shall be considered responsive only if:

- (a) it is received as per format at Appendix-I;
- (b) it is received by the Application Due Date including any extension thereof pursuant to Clause 2.14.2;
- (c) it is signed, sealed, bound together in hard cover, and marked as stipulated in Clauses 2.12 and 2.13;
- (d) it is accompanied by the Power of Attorney as specified in Clause 2.2.5, and in the case of a Consortium, the Power of Attorney as specified in Clause 2.2.6 (c);
- (e) it contains all the information and documents (complete in all respects) as requested in this RFQ;
- (f) it contains information in formats same as those specified in this RFQ;
- (g) it contains certificates from its statutory auditors^{\$} in the formats specified at Appendix-I of the RFQ for each Eligible Project;
- (h) it contains an attested copy of the receipt for payment of [Rs. 50,000 (Rupees fifty thousand only)] to Authority towards the cost of the RFQ document;
- (i) it is accompanied by the Jt. Bidding Agreement (for Consortium), specific to the Project, as stipulated in Clause 2.2.6(g);
- (j) it does not contain any condition or qualification; and
- (k) it is not non-responsive in terms hereof.

^{\$}In case duly certified audited annual financial statements containing the requisite details are provided, a separate certification by statutory auditors would not be necessary in respect of Clause 2.19.1 (g). In jurisdictions that do not have statutory auditors, the firm of auditors which audits the annual accounts of the Applicant may provide the certificates required under this RFQ.

2.19.2 The Authority reserves the right to reject any Application which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Application.

2.20 Clarifications

2.20.1 To facilitate evaluation of Applications, the Authority may, at its sole discretion, seek clarifications from any Applicant regarding its Application. Such clarification(s) shall be provided within the time specified by the Authority for this purpose. Any request for clarification(s) and all clarification(s) in response thereto shall be in writing.

2.20.2 If an Applicant does not provide clarifications sought under Clause 2.20.1 above within the prescribed time, its Application shall be liable to be rejected. In case the Application is not rejected, the Authority may proceed to evaluate the Application by construing the particulars requiring clarification to the best of its understanding, and the Applicant shall be barred from subsequently questioning such interpretation of the Authority.

E. QUALIFICATION AND BIDDING

2.21 Short-listing and notification¹⁸

After the evaluation of Applications, the Authority would announce a list of short-listed pre-qualified Applicants (Bidders) who will be eligible for participation in the Bid Stage. At the same time, the Authority would notify the other Applicants that they have not been short-listed. The Authority will not entertain any query or clarification from Applicants who fail to qualify.

2.22 Submission of Bids

The Bidders will be requested to submit a Bid in the form and manner to be set out in the Bidding Documents.

Only pre-qualified Applicants shall be invited by the Authority to submit their Bids for the Project. The Authority is likely to provide a comparatively short time span for submission of the Bids for the Project. The Applicants are therefore advised to visit the site and familiarise themselves with the Project by the time of submission of the Application. No extension of time is likely to be considered for submission of Bids pursuant to invitation that may be issued by the Authority.

¹⁸ In case of exceptionally complex projects where the Authority is of the opinion that the Bidders must submit their technical proposal/ plan, the requirements thereof shall be specified in detail and such proposal/ plan shall be invited at the Qualification Stage, either along with the initial applications or at an intermediate stage. This shall form part of the pre-qualification process and only the Applicants who have been pre-qualified shall be invited to participate in the Bid Stage for submission of Bids. The Bid Stage shall only consist of invitation to submit financial offers.

2.23 Proprietary data

All documents and other information supplied by the Authority or submitted by an Applicant to the Authority shall remain or become the property of the Authority. Applicants are to treat all information as strictly confidential and shall not use it for any purpose other than for preparation and submission of their Application. The Authority will not return any Application or any information provided along therewith.

2.24 Correspondence with the Applicant

Save and except as provided in this RFQ, the Authority shall not entertain any correspondence with any Applicant in relation to the acceptance or rejection of any Application.

3. CRITERIA FOR EVALUATION

3.1 Evaluation parameters

3.1.1 Only those Applicants who meet the eligibility criteria specified in Clause[s] 2.2.2 [and 2.2.3]above shall qualify for evaluation under this Section 3. Applications of firms/ consortia who do not meet these criteria shall be rejected.

3.1.2 The Applicant’s competence and capability is proposed to be established by the following parameters:

- (a) Technical Capacity; and
- (b) Financial Capacity

3.2 Technical Capacity for purposes of evaluation¹⁹

3.2.1 Subject to the provisions of Clause 2.2, the following categories of experience would qualify as Technical Capacity and eligible experience (the “**Eligible Experience**”) in relation to eligible projects as stipulated in Clauses 3.2.3 and 3.2.4 (the “**Eligible Projects**”):

Category 1: Project experience on Eligible Projects in [Agri Business/Cold chain] sector

Category 2: Project experience on Eligible Projects in core sector

Category 3: Construction experience on Eligible Projects in [Agri Business/Cold chain] sector

Category 4: Construction experience on Eligible Projects in core sector

[insert any other relevant category]

For the purpose of this RFQ:

- (i) [agri business sector would be deemed to include production, transportation, storage, processing, trading and distribution of agricultural products; Cold Chain sector would be deemed to include temperature-controlled storage and transportation;]²⁰ and
- (ii) core sector would be deemed to include ports, airports, railways, industrial parks/ estates, logistic parks.^{\$}

3.2.2 Eligible Experience in respect of each category shall be measured only for Eligible Projects.

¹⁹In the case of social sectors such as health, education etc., the provisions of Clauses 3.2.1, 3.2.3, 3.2.4 and 3.2.6 may be suitably modified to meet sector-specific and project-specific requirements.

²⁰In case the RFQ is not for a highway project, substitute the highway sector by the relevant sector in sub-clause (i), and include highways and bridges in sub-clause (ii).

^{\$} Real estate development shall not include residential flats unless they form part of a real estate complex or township which has been built by the Applicant.

3.2.3 For a project to qualify as an Eligible Project under Categories 1:

- (a) It should have been undertaken as a PPP project on BOT, BOLT, BOO, BOOT or other similar basis for providing its output or services to a public sector entity or for providing non-discriminatory access to users in pursuance of its charter, concession or contract, as the case may be. For the avoidance of doubt, a project which constitutes a natural monopoly such as an airport or port should normally be included in this category even if it is not based on a long-term agreement with a public entity;
- (b) the entity claiming experience should have held, in the company owning the Eligible Project, a minimum of 26% (twenty six per cent) equity during the entire year for which Eligible Experience is being claimed;
- (c) the capital cost of the project should be more than [Rs.100 crore (Rs. one hundred crore)]²¹; and
- (d) the entity claiming experience shall, during the last 5 (five) financial years preceding the Application Due Date, have (i) paid for development of the project (excluding the cost of land), and/ or (ii) collected and appropriated the revenues from users availing of non-discriminatory access to use of fixed project assets, but shall not include revenues from sale or provision of goods or services and other incomes of the company owning the Project.

3.2.4 For a project to qualify as an Eligible Project under Categories 2:

- (a) It should have been undertaken as a PPP project on BOT, BOLT, BOO, BOOT or other similar basis for providing its output or services to a public sector entity or for providing non-discriminatory access to users in pursuance of its charter, concession or contract, as the case may be. For the avoidance of doubt, a project which constitutes a natural monopoly such as an airport or port should normally be included in this category even if it is not based on a long-term agreement with a public entity;
- (b) the entity claiming experience should have held, in the company owning the Eligible Project, a minimum of 26% (twenty six per cent) equity during the entire year for which Eligible Experience is being claimed;
- (c) the capital cost of the project should be more than [Rs. 100 crore (Rs. one hundred crore)]²²; and

²¹This amount should not be less than 20% of the Estimated Project Cost. In case of Projects with an Estimated Project Cost of Rs. 1,000 cr. or above, this amount may be suitably reduced but not less than 10% in any case.

²²This amount should not be less than 20% of the Estimated Project Cost. In case of Projects with an Estimated Project Cost of Rs. 1,000 cr. or above, this amount may be suitably reduced but not less than 10% in any case.

- (d) the entity claiming experience shall, during the last 5 (five) financial years preceding the Application Due Date, have (i) paid for development of the project (excluding the cost of land), and/ or (ii) collected and appropriated the revenues from users availing of non-discriminatory access to or use of fixed project assets, such as revenues from [Agri Business/Cold chain] airports, ports and railway infrastructure, but shall not include revenues from sale or provision of goods or services such as fare/freight revenues²³ and other incomes of the company owning the Project.
- 3.2.4 For a project to qualify as an Eligible Project under Categories 3 and 4, the Applicant should have paid for execution of its construction works or received payments from its client(s) for construction works executed, fully or partially, during the 5 (five) financial years immediately preceding the Application Due Date, and only the payments (gross) actually made or received, as the case may be, during such 5 (five) financial years shall qualify for purposes of computing the Experience Score. However, payments/receipts of less than [Rs. 100 crore (Rs. one hundred crore)]²⁴ shall not be reckoned as payments/receipts for Eligible Projects. For the avoidance of doubt, construction works shall not include supply of goods or equipment except when such goods or equipment form part of a turn-key construction contract/ EPC contract for the project. Further, the cost of land shall not be included hereunder.
- 3.2.5 The Applicant shall quote experience in respect of a particular Eligible Project under any one category only, even though the Applicant (either individually or along with a member of the Consortium) may have played multiple roles in the cited project. Double counting for a particular Eligible Project shall not be permitted in any form.
- 3.2.6 Applicant's experience shall be measured and stated in terms of a score (the "**Experience Score**"). The Experience Score for an Eligible Project in a given category would be the eligible payments and/or receipts specified in Clause 2.2.2(A), divided by one crore and then multiplied by the applicable factor in Table 3.2.6 below. In case the Applicant has experience across different categories, the score for each category would be computed as above and then aggregated to arrive at its Experience Score.

Table 3.2.6: Factors for Experience across categories²⁵

Categories	Factor
Category 1	1.25
Category 2	1.00

²³ In case of an RFQ for power generating stations, the Authority may, in its discretion, include all or part of the revenues from sale of electricity. A similar dispensation could also be applied to revenues from telephony projects or to other sector-specific revenues.

²⁴ This amount should be determined as per footnote 22 above.

²⁵ These factors may be modified by the Authority by upto 15% thereof in each category.

Category 3	0.75
Category 4	0.50

3.2.7 The Experience Score determined in accordance with Clause 3.2.6 in respect of an Eligible Project situated in a developed country which is a member of OECD shall be further multiplied by a factor of 0.5 (zero point five) and the product thereof shall be the Experience Score for such Eligible Project.

3.2.8 Experience for any activity relating to an Eligible Project shall not be claimed by two or more Members of the Consortium. In other words, no double counting by a Consortium in respect of the same experience shall be permitted in any manner whatsoever.

3.3 Details of Experience

3.3.1 The Applicant should furnish the details of Eligible Experience for the last 5 (five) financial years immediately preceding the Application Due Date.

3.3.2 The Applicants must provide the necessary information relating to Technical Capacity as per format at Annex-II of Appendix-I.

3.3.3 The Applicant should furnish the required Project-specific information and evidence in support of its claim of Technical Capacity, as per format at Annex-IV of Appendix-I.

3.4 Financial information for purposes of evaluation

3.4.1 The Application must be accompanied by the Audited Annual Reports of the Applicant (of each Member in case of a Consortium) for the last 5 (five) financial years, preceding the year in which the Application is made.

3.4.2 In case the annual accounts for the latest financial year are not audited and therefore the Applicant cannot make it available, the Applicant shall give an undertaking to this effect and the statutory auditor shall certify the same. In such a case, the Applicant shall provide the Audited Annual Reports for 5 (five) years preceding the year for which the Audited Annual Report is not being provided.

3.4.3 The Applicant must establish the minimum Net Worth specified in Clause 2.2.2 (B), and provide details as per format at Annex-III of Appendix-I.

3.5 Short-listing of Applicants

3.5.1 The credentials of eligible Applicants shall be measured in terms of their Experience Score. The sum total of the Experience Scores for all Eligible Projects shall be the 'Aggregate Experience Score' of a particular Applicant. In case of a Consortium, the Aggregate Experience Score of each of its Members, who have an equity share of at least 26% in such Consortium, shall be summed up for arriving at the combined Aggregate Experience Score of the Consortium.

- 3.5.2 The Applicants shall then be ranked on the basis of their respective Aggregate Experience Scores and short-listed for submission of Bids. The Authority expects to short-list upto 6 (six)²⁶ pre-qualified Applicants for participation in the Bid Stage. The Authority, however, reserves the right to increase the number of short-listed pre-qualified Applicants by adding additional Applicant.
- 3.5.3 The Authority may, in its discretion, maintain a reserve list of pre-qualified Applicants who may be invited to substitute the short-listed Applicants in the event of their withdrawal from the Bid Process or upon their failure to conform to the conditions specified herein; provided that a substituted Applicant shall be given at least 30 (thirty) days to submit its Bid.

²⁶The Authority may, in case of repetitive projects that attract a larger number of Bidders, or where the total project cost is less than Rs. 500 crore, increase the number of short-listed Bidders to 7 (seven). In case of power projects to be awarded on the basis of statutory guidelines for tariff-based bidding and having no obligations or liabilities for buy-out of project assets or any similar obligations, the Authority may suitably increase the number of short-listed Bidders.

4. FRAUD AND CORRUPT PRACTICES

- 4.1 The Applicants and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process. Notwithstanding anything to the contrary contained herein, the Authority may reject an Application without being liable in any manner whatsoever to the Applicant if it determines that the Applicant has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process.
- 4.2 Without prejudice to the rights of the Authority under Clause 4.1 hereinabove, if an Applicant is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, such Applicant shall not be eligible to participate in any tender or RFQ issued by the Authority during a period of 2 (two) years from the date such Applicant is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as the case may be.
- 4.3 For the purposes of this Clause4, the following terms shall have the meaning hereinafter respectively assigned to them:
- (a) “**corrupt practice**” means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bidding Process (for avoidance of doubt, offering of employment to, or employing, or engaging in any manner whatsoever, directly or indirectly, any official of the Authority who is or has been associated in any manner, directly or indirectly, with the Bidding Process or the LOA or has dealt with matters concerning the Concession Agreement or arising therefrom, before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the Authority, shall be deemed to constitute influencing the actions of a person connected with the Bidding Process); or (ii) save and except as permitted under sub clause (d) of Clause 2.2.1, engaging in any manner whatsoever, whether during the Bidding Process or after the issue of the LOA or after the execution of the Concession Agreement, as the case may be, any person in respect of any matter relating to the Project or the LOA or the Concession Agreement, who at any time has been or is a legal, financial or technical adviser of the Authority in relation to any matter concerning the Project;
 - (b) “**fraudulent practice**” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;

- (c) “**coercive practice**” means impairing or harming or threatening to impair or harm, directly or indirectly, any person or property to influence any person’s participation or action in the Bidding Process;
- (d) “**undesirable practice**” means (i) establishing contact with any person connected with or employed or engaged by the Authority with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process; or (ii) having a Conflict of Interest; and
- (e) “**restrictive practice**” means forming a cartel or arriving at any understanding or arrangement among Applicants with the objective of restricting or manipulating a full and fair competition in the Bidding Process.

5. PRE-APPLICATION CONFERENCE

- 5.1 A Pre-Application Conference of the interested parties shall be convened at the designated date, time and place. Only those persons who have purchased the RFQ document shall be allowed to participate in the Pre-Application Conference. Applicants who have downloaded the RFQ document from the Authority's website () should submit a Demand Draft of [Rs. 50,000 (Rupees fifty thousand only) towards the cost of document, through their representative attending the conference. A maximum of three representatives of each Applicant shall be allowed to participate on production of authority letter from the Applicant.
- 5.2 During the course of Pre-Application Conference, the Applicants will be free to seek clarifications and make suggestions for consideration of the Authority. The Authority shall endeavor to provide clarifications and such further information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.

6. MISCELLANEOUS

- 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the courts at [Delhi] shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process.
- 6.2 The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;
- (a) suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;
 - (b) consult with any Applicant in order to receive clarification or further information;
 - (c) pre-qualify or not to pre-qualify any Applicant and/ or to consult with any Applicant in order to receive clarification or further information;
 - (d) retain any information and/ or evidence submitted to the Authority by, on behalf of, and/ or in relation to any Applicant; and/ or
 - (e) independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Applicant.
- 6.3 It shall be deemed that by submitting the Application, the Applicant agrees and releases the Authority, its employees, agents and advisers, irrevocably, unconditionally, fully and finally from any and all liability for claims, losses, damages, costs, expenses or liabilities in any way related to or arising from the exercise of any rights and/ or performance of any obligations hereunder and the Bidding Documents, pursuant hereto, and/ or in connection with the Bidding Process, to the fullest extent permitted by applicable law, and waives any and all rights and/ or claims it may have in this respect, whether actual or contingent, whether present or in future.

APPENDIX-I

Letter Comprising the Application for Pre-Qualification

(Refer Clause 2.13.2)

Dated:

To,

[The Secretary,
.....
.....]

Sub: Application for pre-qualification for the Project

Dear Sir,

With reference to your RFQ document dated^s, I/we, having examined the RFQ document and understood its contents, hereby submit my/our Application for Qualification for the aforesaid project. The Application is unconditional and unqualified.

2. I/ We acknowledge that the Authority will be relying on the information provided in the Application and the documents accompanying such Application for pre-qualification of the Applicants for the aforesaid project, and we certify that all information provided in the Application and in Annexes I to V is true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying such Application are true copies of their respective originals.

3. This statement is made for the express purpose of qualifying as a Bidder for the [development, construction, operation and maintenance] of the aforesaid Project.

4. I/ We shall make available to the Authority any additional information it may find necessary or require to supplement or authenticate the Qualification statement.

5. I/ We acknowledge the right of the Authority to reject our Application without assigning any reason or otherwise and hereby waive, to the fullest extent permitted by applicable law, our right to challenge the same on any account whatsoever.

6. I/ We certify that in the last three years, we/ any of the Consortium Members or our/ their Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach on our part.

7. I/ We declare that:

^sAll blank spaces shall be suitably filled up by the Applicant to reflect the particulars relating to such Applicant.

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- (a) I/ We have examined and have no reservations to the RFQ document, including any Addendum issued by the Authority;
 - (b) I/ We do not have any conflict of interest in accordance with Clauses 2.2.1(c) and 2.2.1(d) of the RFQ document; and
 - (c) I/We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as defined in Clause 4.3 of the RFQ document, in respect of any tender or request for proposal issued by or any agreement entered into with the Authority or any other public sector enterprise or any government, Central or State; and
 - (d) I/ We hereby certify that we have taken steps to ensure that in conformity with the provisions of Section 4 of the RFQ document, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice.
8. I/ We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Application that you may receive nor to invite the Applicants to Bid for the Project, without incurring any liability to the Applicants, in accordance with Clause 2.17.6 of the RFQ document.
9. I/ We believe that we/ our Consortium/ proposed Consortium satisfy(s) the Net Worth criteria and meet(s) all the requirements as specified in the RFQ document and am/ are qualified to submit a Bid.
10. I/ We declare that we/ any Member of the Consortium, or our/ its Associates are not a Member of a/ any other Consortium applying for pre-qualification.
11. I/ We certify that in regard to matters other than security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.

12. I/ We further certify that in regard to matters relating to security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been charge-sheeted by any agency of the Government or convicted by a Court of Law.

13. I/ We further certify that no investigation by a regulatory authority is pending either against us/ any Member of the Consortium or against our/ their Associates or against our CEO or any of our directors/ managers/ employees.

14. [I/ We further certify that we are qualified to submit a Bid in accordance with the guidelines for qualification of bidders seeking to acquire stakes in Public Sector Enterprises through the process of disinvestment issued by the GOI vide Department of

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Disinvestment OM No. 6/4/2001-DD-II dated 13th July, 2001 which guidelines apply *mutatis mutandis* to the Bidding Process. A copy of the aforesaid guidelines form part of the RFQ at Appendix-V thereof.]

15. I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of the provisions of this RFQ, we shall intimate the Authority of the same immediately.

16. The Statement of Legal Capacity as per format provided at Annex-V in Appendix-I of the RFQ document, and duly signed, is enclosed. The power of attorney for signing of Application and the power of attorney for Lead Member of consortium, as per format provided at Appendix II and III respectively of the RFQ, are also enclosed.

17. I/ We understand that the selected Bidder shall either be an existing Company incorporated under the Indian Companies Act, 1956, or shall incorporate as such prior to execution of the Concession Agreement.

18. I/ We hereby confirm that we [are in compliance of/shall comply with] the O&M requirements specified in Clause 2.2.3.

19. I/We hereby irrevocably waive any right or remedy which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by the Authority in connection with the selection of Applicants, selection of the Bidder, or in connection with the selection/ Bidding Process itself, in respect of the above mentioned Project and the terms and implementation thereof.

20. I/ We agree and undertake to abide by all the terms and conditions of the RFQ document.

21. I/ We certify that in terms of the RFQ, my/our Net Worth is Rs.(Rupees in words)andExperience Score is (number in words).

{22. We agree and undertake to be jointly and severally liable for all the obligations of the Concessionaire under the Concession Agreement till occurrence of Financial Close in accordance with the Concession Agreement.}^{\$}

In witness thereof,I/we submit this Application under and in accordance with the terms of the RFQ document.

Yours faithfully,

Date: (Signature,name and designation of the Authorised Signatory)

Place: Name and seal of the Applicant/ Lead Member

Note: Paragraphs in square parenthesis may be omitted, if not applicable, or modified as necessary.

^{\$}Omit if the Applicant is not a Consortium.

ANNEX-I

Details of Applicant

1.
 - (a) Name:
 - (b) Country of incorporation:
 - (c) Address of the corporate headquarters and its branch office(s), if any, in India:
 - (d) Date of incorporation and/ or commencement of business:
2. Brief description of the Company including details of its main lines of business and proposed role and responsibilities in this Project:
3. Particulars of individual(s) who will serve as the point of contact/ communication for the Authority:
 - (a) Name:
 - (b) Designation:
 - (c) Company:
 - (d) Address:
 - (e) Telephone Number:
 - (f) E-Mail Address:
 - (g) Fax Number:
4. Particulars of the Authorised Signatory of the Applicant:
 - (a) Name:
 - (b) Designation:
 - (c) Address:
 - (d) Phone Number:
 - (e) Fax Number:
5. In case of a Consortium:
 - (a) The information above (1-4) should be provided for all the Members of the Consortium.
 - (b) A copy of the Jt. Bidding Agreement, as envisaged in Clause 2.2.6(g) should be attached to the Application.
 - (c) Information regarding the role of each Member should be provided as per table below:

Appendix I
Annex-I

Sl. No.	Name of Member	Role* {Refer Clause 2.2.6(d)} [§]	Percentage of equity in the Consortium {Refer Clauses 2.2.6 (a), (c) & (g)}
1.			
2.			
3.			
4.			

*The role of each Member, as may be determined by the Applicant, should be indicated in accordance with instruction 4 at Annex-IV.

(d) The following information shall also be provided for each Member of the Consortium:

Name of Applicant/ member of Consortium:

No.	Criteria	Yes	No
1.	Has the Applicant/ constituent of the Consortium been barred by the [Central/ State] Government, or any entity controlled by it, from participating in any project (BOT or otherwise).		
2.	If the answer to 1 is yes, does the bar subsist as on the date of Application.		
3.	Has the Applicant/ constituent of the Consortium paid liquidated damages of more than 5% of the contract value in a contract due to delay or has been penalised due to any other reason in relation to execution of a contract, in the last three years?		

6. A statement by the Applicant and each of the Members of its Consortium (where applicable) or any of their Associates disclosing material non-performance or contractual non-compliance in past projects, contractual disputes and litigation/ arbitration in the recent past is given below (Attach extra sheets, if necessary):

[§]All provisions contained in curly parenthesis shall be suitably modified by the Applicant to reflect the particulars relating to such Applicant.

ANNEX-II

Technical Capacity of the Applicant[@]*(Refer to Clauses 2.2.2(A), 3.2 and 3.3 of the RFQ)*

Applicant type [#]	Member Code [*]	Project Code ^{**}	Cate- gory ^{\$}	Experience [¥] (Equivalent Rs. crore) ^{\$\$}			Experience Score [£]
				Payments made/ received for construction of Eligible Projects in Categories 3 and 4	Payments made for development of Eligible Projects in Categories 1 and 2	Revenues appropriated from Eligible Projects in Categories 1 and 2	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Single entity Applicant		a					
		b					
		c					
		d					
Consortium Member 1		1a					
		1b					
		1c					
		1d					
Consortium Member 2		2a					
		2b					
		2c					
		2d					
Consortium Member 3		3a					
		3b					
		3c					
		3d					
Consortium Member 4		4a					
		4b					
		4c					
		4d					
Aggregate Experience Score =							

Appendix I
Annex-II

[@] Provide details of only those projects that have been undertaken by the Applicant under its own name and/ or by an Associate specified in Clause 2.2.9 and/ or by a project company eligible under Clause 3.2.3(b). In case of Categories 1 and 2, include only those projects which have an estimated capital cost exceeding the amount specified in Clause 3.2.3(c) and for Categories 3 and 4, include only those projects where the payments made/received exceed the amount specified in Clause 3.2.4. In case the Application Due Date falls within 3(three) months of the close of the latest financial year, refer to Clause 2.2.12.

[#] An Applicant consisting of a single entity should fill in details as per the row titled Single entity Applicant and ignore the rows titled Consortium Member. In case of a Consortium, the row titled Single entity Applicant may be ignored. In case credit is claimed for an Associate, necessary evidence to establish the relationship of the Applicant with such Associate, in terms of Clause 2.2.9, shall be provided.

^{*} Member Code shall indicate NA for Not Applicable in case of a single entity Applicant. For other Members, the following abbreviations are suggested viz. LM means Lead Member, TM means Technical Member, FM means Financial Member, OMM means Operation & Maintenance Member, OM means Other Member.

^{**} Refer Annex-IV of this Appendix-I. Add more rows if necessary.

[§] Refer Clause 3.2.1.

[¥] In the case of Eligible Projects in Categories 1 and 2, the figures in columns 6 and 7 may be added for computing the Experience Score of the respective projects. In the case of Categories 3 and 4, construction shall not include supply of goods or equipment except when such goods or equipment form part of a turn-key construction contract/ EPC contract for the project. In no case shall the cost of land be included while computing the Experience Score of an Eligible Project.

^{\$\$} For conversion of US Dollars to Rupees, the rate of conversion shall be Rupees [50 (fifty)] to a US Dollar. In case of any other currency, the same shall first be converted to US Dollars as on the date 60 (sixty) days prior to the Application Due Date, and the amount so derived in US Dollars shall be converted into Rupees at the aforesaid rate. The conversion rate of such currencies shall be the daily representative exchange rates published by the International Monetary Fund for the relevant date.

[£] Divide the amount in the Experience column by one crore and then multiply the result thereof by the applicable factor set out in Table 3.2.6 to arrive at the Experience Score for each Eligible Project. In the case of an Eligible Project situated in an OECD country, the Experience Score so arrived at shall be further multiplied by 0.5, in accordance with the provisions of Clause 3.2.7, and the product thereof shall be the Experience Score for such Eligible Projects. [Above all, the sum total of columns 5, 6 and 7, as the case may be, in respect of each Eligible Project shall be restricted to a ceiling equivalent to twice the Estimated Project Cost, as specified in Clause 3.2.8.]

ANNEX-III

Financial Capacity of the Applicant*(Refer to Clauses 2.2.2(B), 2.2.4 (ii) and 3.4 of the RFQ)***(In Rs. crore^{\$\$})**

Applicant type ^{\$}	Member Code [£]	Net Cash Accruals					Net Worth [€]
		Year 1 (3)	Year 2 (4)	Year 3 (5)	Year 4 (6)	Year 5 (7)	
(1)	(2)						
Single entity Applicant							
Consortium Member 1							
Consortium Member 2							
Consortium Member 3							
Consortium Member 4							
TOTAL							

Name & address of Applicant's Bankers:

^{\$}An Applicant consisting of a single entity should fill in details as per the row titled Single entity Applicant and ignore the rows titled Consortium Members. In case of a Consortium, row titled Single entity Applicant may be ignored.

[£]For Member Code, see instruction 4 at Annex-IV of this Appendix-I.

[€]The Applicant should provide details of its own Financial Capacity or of an Associate specified in Clause 2.2.9.

^{\$\$}For conversion of other currencies into rupees, see notes below Annex-II of Appendix-I.

Instructions:

1. The Applicant/ its constituent Consortium Members shall attach copies of the balance sheets, financial statements and Annual Reports for 5 (five) years preceding the Application Due Date. The financial statements shall:
 - (a) reflect the financial situation of the Applicant or Consortium Members and its/ their Associates where the Applicant is relying on its Associate's financials;
 - (b) be audited by a statutory auditor;
 - (c) be complete, including all notes to the financial statements; and
 - (d) correspond to accounting periods already completed and audited (no statements for partial periods shall be requested or accepted).
2. Net Cash Accruals shall mean Profit After Tax + Depreciation.
3. Net Worth shall mean (Subscribed and Paid-up Equity + Reserves) less (Revaluation reserves + miscellaneous expenditure not written off + reserves not available for distribution to equity shareholders).
4. Year 1 will be the latest completed financial year, preceding the bidding. Year 2 shall be the year immediately preceding Year 1 and so on. In case the Application Due Date falls within 3 (three) months of the close of the latest financial year, refer to Clause 2.2.12.
5. In the case of a Consortium, a copy of the Jt. Bidding Agreement shall be submitted in accordance with Clause 2.2.6 (g) of the RFQ document.
6. The applicant shall also provide the name and address of the Bankers to the Applicant.
7. The Applicant shall provide an Auditor's Certificate specifying the Net Worth of the Applicant and also specifying the methodology adopted for calculating such Net Worth in accordance with Clause 2.2.4 (ii) of the RFQ document.

ANNEX-IV

Details of Eligible Projects*(Refer to Clauses 2.2.2(A), 3.2 and 3.3 of the RFQ)***Project Code:****Member Code:**

Item	Refer Instruction	Particulars of the Project
(1)	(2)	(3)
Title & nature of the project		
Category	5	
Year-wise (a) payments received/ made for construction,(b) payments made for development of PPP projects and/ or(c) revenues appropriated	6	
Entity for which the project was constructed/ developed	7	
Location		
Project cost	8	
Date of commencement of project/ contract		
Date of completion/ commissioning	9	
Equity shareholding (with period during which equity was held)	10	
Whether credit is being taken for the Eligible Experience of an Associate (Yes/ No)	16	

Instructions:

1. Applicants are expected to provide information in respect of each Eligible Project in this Annex. The projects cited must comply with the eligibility criteria specified in Clause 3.2.3 and 3.2.4 of the RFQ, as the case may be. Information provided in this section is intended to serve as a back-up for information provided in the Application. Applicants should also refer to the Instructions below.

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Annex-IV

2. For a single entity Applicant, the Project Codes would be a, b, c, d etc. In case the Applicant is a Consortium then for Member 1, the Project Codes would be 1a, 1b, 1c, 1d etc., for Member 2 the Project Codes shall be 2a, 2b, 2c, 2d etc., and so on.
3. A separate sheet should be filled for each Eligible Project.
4. Member Code shall indicate NA for Not Applicable in case of a single entity Applicant. For other Members, the following abbreviations are suggested viz. LM means Lead Member, TM means Technical Member, FM means Financial Member, OMM means Operation & Maintenance Member; and OM means Other Member. In case the Eligible Project relates to an Associate of the Applicant or its Member, write “Associate” alongwith Member Code.
5. Refer to Clause 3.2.1 of the RFQ for category number.
6. The total payments received/ made and/or revenues appropriated for each Eligible Project are to be stated in Annex-II of this Appendix-I. The figures to be provided here should indicate the break-up for the past 5 (five) financial years. Year 1 refers to the financial year immediately preceding the Application Due Date; Year 2 refers to the year before Year 1, Year 3 refers to the year before Year 2, and so on (Refer Clause 2.2.12). For Categories 1 and 2, expenditure on development of the project and/or revenues appropriated, as the case may be, should be provided, but only in respect of projects having an estimated capital cost exceeding the amount specified in Clause 3.2.3(c) and 3.2.4(c) respectively. In case of Categories 3 and 4, payments made/received only in respect of construction should be provided, but only if the amount paid/received exceeds the minimum specified in Clause 3.2.5. Payment for construction works should only include capital expenditure, and should not include expenditure on repairs and maintenance.
7. In case of projects in Categories 1 and 2, particulars such as name, address and contact details of owner/ Authority/ Agency (i.e. concession grantor, counter party to PPA, etc.) may be provided. In case of projects in Categories 3 and 4, similar particulars of the client need to be provided.
8. Provide the estimated capital cost of the Eligible Project. Refer to Clauses 3.2.3, 3.2.4 and 3.2.5
9. For Categories 1 and 2, the date of commissioning of the project, upon completion, should be indicated. In case of Categories 3 and 4, date of completion of construction should be indicated. In the case of projects under construction, the likely date of completion or commissioning, as the case may be, shall be indicated.
10. For Categories 1 and 2, the equity shareholding of the Applicant, in the company owning the Eligible Project, held continuously during the period for which Eligible Experience is claimed, needs to be given (Refer Clause 3.2.3 and 3.2.4).
11. Experience for any activity relating to an Eligible Project shall not be claimed by two or more Members of the Consortium. In other words, no double

Appendix I
Annex-IV

counting by a consortium in respect of the same experience shall be permitted in any manner whatsoever.

12. Certificate from the Applicant’s statutory auditor[§] or its respective clients must be furnished as per formats below for each Eligible Project. In jurisdictions that do not have statutory auditors, the auditors who audit the annual accounts of the Applicant/ Member/Associate may provide the requisite certification.
13. If the Applicant is claiming experience under Categories 1 & 2[‡], it should provide a certificate from the statutory auditor in the format below:

Certificate from the Statutory Auditor regarding PPP projects^Φ	
<p>Based on its books of accounts and other published information authenticated by it, this is to certify that <i>(name of the Applicant/Member/Associate)</i> is/ was an equity shareholder in <i>(title of the project company)</i> and holds/held Rs.cr. (Rupees crore) of equity (which constitutes%[€] of the total paid up and subscribed equity capital) of the project company from<i>(date)</i> to<i>(date)</i>[¥]. The project was/is likely to be commissioned on<i>(date of commissioning of the project)</i>.</p>	
<p>We further certify that the total estimated capital cost of the project is Rs.cr. (Rupeescrore), of which Rs.cr. (Rupees crore) of capital expenditure was incurred during the past five financial years as per year-wise details noted below:</p> <p style="text-align: center;">.....</p>	
<p>We also certify that the eligible annual revenues collected and appropriated by the aforesaid project company in terms of Clauses 3.2.1, 3.2.3(d) and 3.2.4 (d) of the RFQ during the past five financial years were Rs.cr. as per year-wise details noted below:</p> <p style="text-align: center;">.....</p>	
Name of the audit firm:	
Seal of the audit firm:	(Signature, name and designation of the authorised signatory)
Date:	

[§] In case duly certified audited annual financial statements containing the requisite details are provided, a separate certification by statutory auditors would not be necessary.

[‡] Refer Clause 3.2.1 of the RFQ.

^Φ Provide Certificate as per this format only. Attach explanatory notes to the Certificate, if necessary. Statutory auditor means the entity that audits and certifies the annual accounts of the company.

[€] Refer instruction no. 10 in this Annex-IV.

[¥] In case the project is owned by the Applicant company, this language may be suitably modified to read: “It is certified that (name of Applicant) constructed and/ or owned the (name of project) from (date) to (date).”

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Annex-IV

14. If the Applicant is claiming experience under Category 3 & 4*, it should provide a certificate from its statutory auditors or the client in the format below:

Certificate from the Statutory Auditor/ Client regarding construction works^Φ

Based on its books of accounts and other published information authenticated by it, {this is to certify that(name of the Applicant/Member/Associate) was engaged by(title of the project company) to execute(name of project) for(nature of project)}^Ψ. The construction of the project commenced on(date) and the project was/ is likely to be commissioned on(date, if any). It is certified that(name of the Applicant/ Member/ Associate) received/paid Rs. cr. (Rupees crore) by way of payment for the aforesaid construction works.

We further certify that the total estimated capital cost of the project is Rs.cr. (Rupeescrore), of which the Applicant/Member/Associate received/paid Rs.cr. (Rupees crore), in terms of Clauses 3.2.1 and 3.2.5 of the RFQ, during the past five financial years as per year-wise details noted below:

.....
.....

{It is further certified that the payments/ receipts indicated above are restricted to the share of the Applicant who undertook these works as a partner or a member of joint venture/ consortium.}[▲]

Name of the audit firm:
Seal of the audit firm: (Signature, name and designation of the authorised signatory).
Date:

* Refer Clauses 3.2.1 and 3.2.4 of the RFQ.

Φ Provide Certificate as per this format only. Attach explanatory notes to the Certificate, if necessary. Statutory auditor means the entity that audits and certifies the annual accounts of the company.

ΨIn case the Applicant owned the Eligible Project and engaged a contractor for undertaking the construction works, this language may be modified to read: “this is to certify that (name of Applicant/ Member/ Associate) held 26% or more of the paid up and subscribed share capital in the..... (name of Project company) when it undertook construction of the (name of Project) through..... (name of the contractor).

▲ This certification should only be provided in case of jobs/ contracts, which are executed as part of a partnership/ joint venture/ consortium. The payments indicated in the certificate should be restricted to the share of Applicant in such partnership/ joint venture/ consortium. This portion may be omitted if the contract did not involve a partnership/ joint venture/ consortium. In case where work is not executed by partnership/ joint venture/ consortium, this paragraph may be deleted.

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Annex-IV

15. To confirm compliance with the requirements under Clause 2.2.3 towards O&M Experience, the Applicant should provide a certificate in the format below (the Applicant can use part of the certificate, as needed):

Certificate from the Chartered Accountant/ Client regarding O&M Experience	
Based on its books of accounts and other published information authenticated by it, {this is to certify that (name of the Applicant/Member/Associate) has operated and maintained / was engaged by (name of client) to operate and maintain (name of cold storage / controlled atmosphere storage facility) located at (address).}	
Based on its books of accounts and other published information authenticated by it, {this is to certify that (name of the Applicant / Member / Associate) has sold (name of agricultural produces) and have generated revenue during the past five financial years as per year-wise details noted below:	
{We further certify that (name of the Applicant / Member / Associate) has made sales to organized retail channels during the past five years (Organised retailing refers to trading activities undertaken by licensed retailers, that is, those who are registered for sales tax, income tax, etc).}	
Name of the audit firm:	
Seal of the audit firm:	(Signature, name and designation of the
Date:	authorised signatory).

16. In the event that credit is being taken for the Eligible Experience of an Associate, as defined in Clause 2.2.9, the Applicant should also provide a certificate in the format below:

[§] In the event that the Applicant/ Consortium Member exercises control over an Associate by operation of law, this certificate may be suitably modified and copies of the relevant law may be enclosed and referred to.

[£] In the case of indirect share-holding, the intervening companies in the chain of ownership should also be Associates i.e., the share-holding in each such company should be more than 50% in order to establish that the chain of “control” is not broken.

16. It may be noted that in the absence of any detail in the above certificates, the information would be considered inadequate and could lead to exclusion of the relevant project in computation of Experience Score[©].

[§]In the event that the Applicant/Consortium Member exercises control over an Associate by operation of law, this certificate may be suitably modified and copies of the relevant law may be enclosed and referred to.

[£]In case of indirect shareholding, the intervening companies in the chain of ownership should also be Associates i.e., the share-holding in each such company should be more than 50% in order to establish that the chain of “control” is not broken.

[©] Refer Clause 3.2.6 of the RFQ.

17. It may be noted that in the absence of any detail in the above certificates, the information would be considered inadequate and could lead to exclusion of the relevant project in computation of Experience Score.

ANNEX-V

Statement of Legal Capacity

(To be forwarded on the letterhead of the Applicant/ Lead Member of Consortium)

Ref. Date:

To,

Dear Sir,

We hereby confirm that we/ our members in the Consortium (constitution of which has been described in the Application) satisfy the terms and conditions laid out in the RFQ document.

We have agreed that(insert member’s name) will act as the Lead Member of our consortium.*

We have agreed that (insert individual’s name) will act as our representative/ will act as the representative of the consortium on its behalf* and has been duly authorized to submit the RFQ. Further, the authorised signatory is vested with requisite powers to furnish such letter and authenticate the same.

Thanking you,

Yours faithfully,

(Signature, name and designation of the authorised signatory)

For and on behalf of.....

*Please strike out whichever is not applicable.

APPENDIX-II

Power of Attorney for signing of Application

(Refer Clause 2.2.5)

Know all men by these presents, We.....
(name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorise Mr/ Ms (name), son/daughter/wife of and presently residing at, who is presently employed with us/ the Lead Member of our Consortium and holding the position of, as our true and lawful attorney (hereinafter referred to as the “Attorney”) to do in our name and on our behalf, all such acts, deeds and things as are necessary or required in connection with or incidental to submission of our application for pre-qualification and submission of our bid for the ***** Project proposed or being developed by the ***** (the “Authority”) including but not limited to signing and submission of all applications, bids and other documents and writings, participate in Pre-Applications and other conferences and providing information/ responses to the Authority, representing us in all matters before the Authority, signing and execution of all contracts including the Concession Agreement and undertakings consequent to acceptance of our bid, and generally dealing with the Authority in all matters in connection with or relating to or arising out of our bid for the said Project and/ or upon award thereof to us and/or till the entering into of the Concession Agreement with the Authority.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

IN WITNESS WHEREOF WE,....., THE ABOVE NAMED PRINCIPAL HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS DAY OF2.....

For

.....

(Signature, name, designation and address)

Witnesses:

1.

(Notarised)

2.

Accepted

.....

(Signature)

(Name, Title and Address of the Attorney)

Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- *Wherever required, the Applicant should submit for verification the extract of the charter documents and documents such as a board or shareholders' resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Applicant.*
- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Applicants from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Apostille certificate.*

APPENDIX-III

Power of Attorney for Lead Member of Consortium

(Refer Clause 2.2.5)

Whereas the ***** (“the Authority”) has invited applications from interested parties for the ***** Project(the “Project”).

Whereas,.....
.....and..... (collectively the “Consortium”) being Members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of the Request for Qualification document (RFQ), Request for Proposal (RFP)and other connected documents in respect of the Project, and

Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium’s bid for the Project and its execution.

NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS

We,.....having our registered office at.....M/s.
.....having our registered office at.....M/s.
.....having our registered office atand
.....having our registered office at.....(hereinafter collectively referred to as the “Principals”) do hereby irrevocably designate, nominate, constitute, appoint and authorise M/S.....having its registered office at.....being one of the Members of the Consortium, as the Lead Memberand true and lawful attorney of the Consortium (hereinafter referred to as the “Attorney”). We hereby irrevocably authorise the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the concession/contract, during the execution of the Project and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the pre-qualification of the Consortium and submission of its bid for the Project, including but not limited to signing and submission of all applications, bids and other documents and writings, participate in bidders’ and other conferences, respond to queries, submit information/ documents, sign and execute contracts and undertakings consequent toacceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Authority, and/ or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium’s bid for the Project and/ or upon award thereof till the Concession Agreement is entered into with the Authority.

AND hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds

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Page 2

and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us/ Consortium.

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS DAY OF2.....

For
(Signature)

.....
(Name & Title)

For
(Signature)

.....
(Name & Title)

For
(Signature)

.....
(Name & Title)

Witnesses:

1.

2.

.....

(Executants)

(To be executed by all the Members of the Consortium)

Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- *Also, wherever required, the Applicant should submit for verification the extract of the charter documents and documents such as a board or shareholders' resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Applicant.*
- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Applicants from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Appostille certificate.*

APPENDIX-IV

Format of Joint Bidding Agreement

(Refer Clause 2.13.2)

(To be executed on Stamp paper of appropriate value)

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

AMONGST

1. {..... Limited, a company incorporated under the Companies Act, 1956} and having its registered office at (hereinafter referred to as the “**First Part**” which expression shall, unless repugnant to the context include its successors and permitted assigns)

AND

2. {..... Limited, a company incorporated under the Companies Act, 1956} and having its registered office at (hereinafter referred to as the “**Second Part**” which expression shall, unless repugnant to the context include its successors and permitted assigns)

AND

3. {..... Limited, a company incorporated under the Companies Act, 1956} and having its registered office at (hereinafter referred to as the “**Third Part**” which expression shall, unless repugnant to the context include its successors and permitted assigns)}

AND

4. {..... Limited, a company incorporated under the Companies Act, 1956} and having its registered office at (hereinafter referred to as the “**Fourth Part**” which expression shall, unless repugnant to the context include its successors and permitted assigns)}[§]

The above mentioned parties of the FIRST, SECOND, {THIRD and FOURTH} PART are collectively referred to as the “**Parties**” and each is individually referred to as a “**Party**”

WHEREAS,

- (A) [AUTHORITY, established under the (Statutory Act), having its principal offices at _____] (hereinafter referred to as the “**Authority**” which expressions shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) has

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Page 2

[§] The number of Parties will be shown here, as applicable, subject however to a maximum of 6 (six).

invited applications (the **Applications**) by its Request for Qualification No. dated(the **RFQ**) for pre-qualification and short-listing of bidders for development, operation and maintenance of the ***** Project (the **Project**) through public private partnership.

- (B) The Parties are interested in jointly bidding for the Project as members of a Consortium and in accordance with the terms and conditions of the RFQ document and other bid documents in respect of the Project, and
- (C) It is a necessary condition under the RFQ document that the members of the Consortium shall enter into a Joint Bidding Agreement and furnish a copy thereof with the Application.

NOW IT IS HEREBY AGREED as follows:

1. Definitions and Interpretations

In this Agreement, the capitalised terms shall, unless the context otherwise requires, have the meaning ascribed thereto under the RFQ.

2. Consortium

- 2.1 The Parties do hereby irrevocably constitute a consortium (the **Consortium**) for the purposes of jointly participating in the Bidding Process for the Project.
- 2.2 The Parties hereby undertake to participate in the Bidding Process only through this Consortium and not individually and/ or through any other consortium constituted for this Project, either directly or indirectly or through any of their Associates.

3. Covenants

The Parties hereby undertake that in the event the Consortium is declared the selected Bidder and awarded the Project, it shall incorporate a special purpose vehicle (the **SPV**) under the Indian Companies Act, 2013 for entering into a Concession Agreement with the Authority and for performing all its obligations as the Concessionaire in terms of the Concession Agreement for the Project.

4. Role of the Parties

The Parties hereby undertake to perform the roles and responsibilities as described below:

- (a) Party of the First Part shall be the Lead member of the Consortium and shall have the power of attorney from all Parties for conducting all business for and on behalf of the Consortium during the Bidding

Process and until the Appointed Date under the Concession Agreement when all the obligations of the SPV shall become effective;

- (b) Party of the Second Part shall be {the Technical Member of the Consortium;}
- {(c) Party of the Third Part shall be the Financial Member of the Consortium; and}
- {(d) Party of the Fourth Part shall be the Operation and Maintenance Member/ Other Member of the Consortium.}

5. Joint and Several Liability

The Parties do hereby undertake to be jointly and severally responsible for all obligations and liabilities relating to the Project and in accordance with the terms of the RFQ, RFP and the Concession Agreement, till such time as the Financial Close for the Project is achieved under and in accordance with the Concession Agreement.

6. Shareholding in the SPV

- 6.1 The Parties agree that the proportion of shareholding among the Parties in the SPV shall be as follows:

First Party:

Second Party:

{Third Party:}

{Fourth Party:}

- 6.2 The Parties undertake that a minimum of 26% (twenty six per cent) of the subscribed and paid up equity share capital of the SPV shall, at all times till the second anniversary of the date of commercial operation of the Project, be held by the Parties of the First, {Second and Third} Part whose experience and network have been reckoned for the purposes of qualification and short-listing of Applicants for the Project in terms of the RFQ. The Parties further undertake that a minimum of 10% (ten per cent) of the subscribed and paid up equity share capital of the SPV shall, at all times till the fifth anniversary of the date of commercial operation of the Project, be held by the Parties of the First {Fourth} Part whose experience in operation and maintenance (O&M) of Cold storage facility(ies) or in operation and maintenance (O&M) of controlled atmosphere storage facility(ies) have been reckoned for the purposes of qualification and short listing of Applicants for the Project in terms of the RFQ.

- 6.3 The Parties undertake that each of the Parties specified in Clause 6.2 above shall, at all times between the commercial operation date of the Project and the second anniversary thereof, hold subscribed and paid up equity share capital of SPV equivalent to at least 5% (five per cent) of the Total Project Cost.
- 6.4 The Parties undertake that they shall collectively hold at least 51% (fifty one per cent) of the subscribed and paid up equity share capital of the SPV at all times until the second anniversary of the commercial operation date of the Project.

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Page 4

- 6.5 The Parties undertake that they shall comply with all equity lock-in requirements set forth in the Concession Agreement.
- 6.6 The Parties undertake that the O&M Member shall subscribe and hold at least 10% (ten per cent) of the subscribed and paid up equity shares in the SPV²⁷ in terms of the Concession Agreement. }

7. Representation of the Parties

Each Party represents to the other Parties as of the date of this Agreement that:

- (a) Such Party is duly organised, validly existing and in good standing under the laws of its incorporation and has all requisite power and authority to enter into this Agreement;
- (b) The execution, delivery and performance by such Party of this Agreement has been authorised by all necessary and appropriate corporate or governmental action and a copy of the extract of the charter documents and board resolution/ power of attorney in favour of the person executing this Agreement for the delegation of power and authority to execute this Agreement on behalf of the Consortium Member is annexed to this Agreement, and will not, to the best of its knowledge:
- (i) require any consent or approval not already obtained;
 - (ii) violate any Applicable Law presently in effect and having applicability to it;
 - (iii) violate the memorandum and articles of association, by-laws or other applicable organisational documents thereof;
 - (iv) violate any clearance, permit, concession, grant, license or other governmental authorisation, approval, judgment, order or decree or any mortgage agreement, indenture or any other instrument to which such Party is a party or by which such

²⁷Add further conditions relating to the O&M Member, if any.

Party or any of its properties or assets are bound or that is otherwise applicable to such Party; or

- (v) create or impose any liens, mortgages, pledges, claims, security interests, charges or encumbrances or obligations to create a lien, charge, pledge, security interest, encumbrances or mortgage in or on the property of such Party, except for encumbrances that would not, individually or in the aggregate, have a material adverse effect on the financial condition or

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prospects or business of such Party so as to prevent such Party from fulfilling its obligations under this Agreement;

- (c) this Agreement is the legal and binding obligation of such Party, enforceable in accordance with its terms against it; and
- (d) there is no litigation pending or, to the best of such Party's knowledge, threatened to which it or any of its Associates is a party that presently affects or which would have a material adverse effect on the financial condition or prospects or business of such Party in the fulfillment of its obligations under this Agreement.

8. Termination

This Agreement shall be effective from the date hereof and shall continue in full force and effect until the Financial Close of the Project is achieved under and in accordance with the Concession Agreement, in case the Project is awarded to the Consortium. However, in case the Consortium is either not pre-qualified for the Project or does not get selected for award of the Project, the Agreement will stand terminated in case the Applicant is not pre-qualified or upon return of the Bid Security by the Authority to the Bidder, as the case may be.

9. Miscellaneous

- 9.1 This Joint Bidding Agreement shall be governed by laws of India.
- 9.2 The Parties acknowledge and accept that this Agreement shall not be amended by the Parties without the prior written consent of the Authority.

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

SIGNED, SEALED AND DELIVERED

SIGNED, SEALED AND DELIVERED

For and on behalf of

LEAD MEMBER by:

SECOND PART

(Signature)
(Name)
(Designation)
(Address)

(Signature)
(Name)
(Designation)
(Address)

SIGNED, SEALED AND DELIVERED

SIGNED, SEALED AND DELIVERED

For and on behalf of

THIRD PART

For and on behalf of

FOURTH PART

(Signature)
(Name)
(Designation)
(Address)

(Signature)
(Name)
(Designation)
(Address)

In the presence of:

1.

2.

Notes:

1. The mode of the execution of the Joint Bidding Agreement should be in accordance with the procedure, if any, laid down by the Applicable Law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.
2. Each Joint Bidding Agreement should attach a copy of the extract of the charter documents and documents such as resolution / power of attorney in favour of the person executing this Agreement for the delegation of power and authority to execute this Agreement on behalf of the Consortium Member.
3. For a Joint Bidding Agreement executed and issued overseas, the document shall be legalised by the Indian Embassy and notarized in the jurisdiction where the Power of Attorney has been executed.

APPENDIX-V²⁸

Guidelines of the Department of Disinvestment

(Refer Clause 1.2.1)

No. 6/4/2001-DD-II
Government of India
Department of Disinvestment

Block 14, CGO Complex
New Delhi.

Dated 13th July, 2001.

OFFICE MEMORANDUM

Sub: Guidelines for qualification of Bidders seeking to acquire stakes in Public Sector Enterprises through the process of disinvestment

Government has examined the issue of framing comprehensive and transparent guidelines defining the criteria for bidders interested in PSE-disinvestment so that the parties selected through competitive bidding could inspire public confidence. Earlier, criteria like Net Worth, experience etc. used to be prescribed. Based on experience and in consultation with concerned departments, Government has decided to prescribe the following additional criteria for the qualification/ disqualification of the parties seeking to acquire stakes in public sector enterprises through disinvestment:

- (a) In regard to matters other than the security and integrity of the country, any conviction by a Court of Law or indictment/ adverse order by a regulatory authority that casts a doubt on the ability of the bidder to manage the public sector unit when it is disinvested, or which relates to a grave offence would constitute disqualification. Grave offence is defined to be of such a nature that it outrages the moral sense of the community. The decision in regard to the nature of the offence would be taken on case to case basis after considering the facts of the case and relevant legal principles, by the Government of India.
- (b) In regard to matters relating to the security and integrity of the country, any charge-sheet by an agency of the Government/ conviction by a Court of Law for an offence committed by the bidding party or by any sister concern of the bidding party would result in disqualification. The decision in regard to the relationship between the sister concerns would be taken, based on the relevant facts and after examining whether the two concerns are substantially controlled by the same person/ persons.
- (c) In both (a) and (b), disqualification shall continue for a period that Government deems appropriate.

²⁸ These guidelines may be modified or substituted by the Government from time to time.

- (d) Any entity, which is disqualified from participating in the disinvestment process, would not be allowed to remain associated with it or get associated merely because it has preferred an appeal against the order based on which it has been disqualified. The mere pendency of appeal will have no effect on the disqualification.
- (e) The disqualification criteria would come into effect immediately and would apply to all bidders for various disinvestment transactions, which have not been completed as yet.
- (f) Before disqualifying a concern, a Show Cause Notice why it should not be disqualified would be issued to it and it would be given an opportunity to explain its position.
- (g) Henceforth, these criteria will be prescribed in the advertisements seeking Expression of Interest (EOI) from the interested parties. The interested parties would be required to provide the information on the above criteria, along with their Expressions of Interest (EOI). The bidders shall be required to provide with their EOI an undertaking to the effect that no investigation by a regulatory authority is pending against them. In case any investigation is pending against the concern or its sister concern or against its CEO or any of its Directors/ Managers/ employees, full details of such investigation including the name of the investigating agency, the charge/ offence for which the investigation has been launched, name and designation of persons against whom the investigation has been launched and other relevant information should be disclosed, to the satisfaction of the Government. For other criteria also, a similar undertaking shall be obtained along with EOI.

sd/-

(A.K. Tewari)

Under Secretary to the Government of India

APPENDIX-VI

List of Application-specific provisions^{\$}

A. Clauses with currency-based footnotes

1. Introduction
2. Clause 1.2.4: Brief description of Bidding Process.
3. Clause 2.2.1 (c): Eligibility of Applicants.
4. Clause 2.2.4: Eligibility of Applicants.
5. Clause 2.3.2: Change in composition of the Consortium.
6. Clause 2.10.3: Amendment of RFQ.
7. Clause 2.19.1 (g): Test of responsiveness.
8. Clause 3.2.1: Technical Capacity for purposes of evaluation.

Note: The above footnotes marked “\$” shall not be deleted. They shall remain in the RFQ to be issued to prospective Applicants.

B. Appendices with non-numeric footnotes

All non-numeric footnotes in the Appendices shall be retained in the respective Appendices for guidance of the Applicants. These shall be omitted by the Applicants while submitting their respective Applications.

C. Appendices where curly brackets are used

1. Appendix I (Annex-IV): Letter Comprising the Application for Pre-Qualification.
2. Appendix IV: Joint Bidding Agreement: Recitals 3 and 4; Clauses 4 and 6.

Note: The curly brackets should be removed after the provisions contained therein are suitably addressed by the Applicants.

D. Appendices with blank spaces

All blank spaces in the Appendices shall be retained in the RFQ. These shall be filled up when the format of the respective Appendix is used.

^{\$}This Appendix-VI contains a list of Clauses and Appendices that would need to be suitably modified for reflecting application-specific provisions. This Appendix-VI may, therefore, be included in the RFQ document to be issued to prospective Applicants.

APPENDIX-VII

List of Project-specific provisions²⁹

A. Clauses with serially numbered Footnotes (Fn)

1. Clause 1.1: Background (Fn. 1).
2. Clause 1.1.1: Background: (Fn. 2, 3 and 4)*.
3. Clause 1.2.1: Brief description of Bidding Process (Fn. 5)*.
4. Clause 1.2.4: Brief description of Bidding Process (Fn. 6)*.
5. Clause 1.3: Schedule of Bidding Process (Fn. 7)*.
6. Clause 2.2.1 (e): Eligibility of Applicants (Fn. 8)*.
7. Clause 2.2.2: Eligibility of Applicants (Fn. 9*, 10 and 11*).
8. Clause 2.2.11: Eligibility of Applicants (Fn. 12)*.
9. Clause 2.21: Short-listing and notification (Fn. 13).
10. Clause 3.2: Technical Capacity for purposes of evaluation (Fn. 14)*.
11. Clause 3.2.1: Technical Capacity for purposes of evaluation (Fn. 15)*.
12. Clause 3.2.3: Technical Capacity for purposes of evaluation (Fn. 16* and 17).
13. Clause 3.2.4: Technical Capacity for purposes of evaluation (Fn. 18)*.
14. Clause 3.2.6: Technical Capacity for purposes of evaluation (Fn. 19).
15. Clause 3.5.2: Short-listing of Applicants (Fn. 20).

***Note:** The Clauses to which these Footnotes relate also include square parenthesis or asterisks which may be addressed simultaneously. Such square parenthesis or asterisks have not been listed in (B) or (C) below.

B. Clauses with square parenthesis

1. Glossary: Definition of BOT and DBFOT.
2. Clauses 1.1.2 and 1.1.3: Background.
3. Clauses 1.2.7, 1.2.8 and 1.2.9: Brief description of Bidding Process.
4. Clauses 2.2.1 (b), 2.2.3 and 2.2.7: Eligibility of Applicants.
5. Clause 2.13.2: Sealing and Marking of Applications.

C. Clauses with asterisks

1. Glossary: Definition of Government.
2. Clause 1.2.11: Brief description of Bidding Process.
3. Clause 1.4: Pre-Application Conference.
4. Clauses 2.13.2 and 2.13.3: Sealing and Marking of Applications.
5. Clause 5.1: Pre-Application Conference.

²⁹ This Appendix-VII contains a list of Clauses and Appendices that would need to be suitably modified, prior to issue of the RFQ document, for reflecting project-specific provisions. This Appendix-VII should be omitted before issuing the RFQ document to prospective Applicants.

D. Appendices with serially numbered Footnotes (Fn)

1. Appendix V: Guidelines of the Department of Disinvestment: (Fn. 21).
2. Appendix VII: List of Project-specific Provisions: (Fn. 22).

E. Appendices with square parenthesis

1. Appendix I: Letter Comprising the Application for Pre-Qualification: Paragraphs 3 and 15; (Annex-I) and (Annex-II).
2. Appendix IV: Joint Bidding Agreement: Recital A.

Draft

Model

Request For Proposal

for

PPP Projects

Government of India

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Overview of the framework

Need for a standardised framework

With a view to enabling a smooth transition from public sector projects to Public Private Partnerships (PPPs) and for adoption of best practices, Government of India has recognised the critical role of standardising documents and processes to be adopted for structuring and award of PPP concessions. Standardised documents enable project authorities to save on the time and costs involved in structuring and awarding complex PPP projects. In addition, they afford protection to individual entities and officials against making errors and answering for them. Such standard documents typically lay down the norms, principles and parameters to be followed for PPP projects and enable project authorities to adopt them with considerable ease for meeting the specific requirements of individual projects.

Standardised documents save on time and costs; avoid costly mistakes

One of the key factors for the success of a PPP contract is the transparency of the selection process. A fair and competitive selection of the private partner is of utmost importance in the entire process since cost and quality of service to users would depend on the performance of the private partner. In line with this objective, guidelines have been framed for the Request for Proposals (RFP) stage involving submission of financial bids subsequent to a process of pre-qualification at the Request for Qualification (RFQ) stage. The guidelines are broad and generic in nature and aim at lending transparency and predictability to the entire process, allowing decisions to be made objectively and expeditiously. They address the critical minimum requirements that must be observed in conducting a credible selection process.

Selection must be fair and transparent

It is expected that the administrative Ministries and other government entities intending to procure PPP projects would adopt this document while conducting the bidding process for PPP projects. It allows sufficient flexibility for incorporating project specific requirements without compromising on the underlying principles. The salient features of the guidelines are as follows:

Two-stage process

The bidding process for PPP projects is divided into two stages. The first stage is generally referred to as Request for Qualification (RFQ) or Expression of Interest (EoI). The objective is to pre-qualify and short-list eligible bidders for stage two of the process. In the second and final stage, which is generally referred to as RFP or invitation of financial bids, the bidders engage in a comprehensive scrutiny of the project before submitting their financial offers.

Selection should be in two stages

Request for Qualification (RFQ)

Detailed guidelines for inviting applications for pre-qualification and short-listing of bidders have already been issued vide O.M. of number F. No. 24(1)/PF.II/07 dated 5th December 2007 and subsequently modified vide O.M. of even number dated May 18, 2009. Bidders short-listed in accordance with these guidelines shall be invited to submit their financial offers in accordance with the guidelines stated below. In the event of a conflict between the Model RFQ and Model RFP, the latter shall prevail.

First stage of selection

Request for Proposals (RFP)

The RFP process is aimed at obtaining financial offers from the bidders pre-qualified at the RFQ stage. The information sought in the RFP would normally be restricted to financial offers only. The bidding parameter should be decided keeping in view the nature of the project and its revenue streams.

Second stage of selection – financial bid from pre-qualified bidders

The RFP document should be simple and transparent and should require the bidder to quote only the value for a single bidding parameter. The detailed terms of the project would have to be specified in the Concession Agreement that should form an integral part of the Bid Documents to be provided to the bidders along with the RFP document. The contents of the Concession Agreement would constitute the bid conditions and would, therefore, be binding. As such, much effort and expertise would be required in drafting the Concession Agreement. A Feasibility Report should also be provided to the bidders but this would only be for their assistance, and its contents would not be binding.

Technical evaluation at RFP stage

As already detailed in O.M. of number F. No. 24(1)/PF.II/07 dated 5th December, 2007 (Para 8.2), in case of exceptionally complex projects where the project authority determines that the bidders must submit their technical proposals/ plans, the requirements thereof should be specified in detail and such proposals/plans should be invited at the qualification stage, either along with the initial applications or at an intermediate stage preceding the RFP stage. Only prequalified applicants should be invited to participate in the bid stage, which shall only consist of an invitation to submit financial offers.

In exceptionally complex projects technical evaluation to be done at RFP stage

Evaluation criteria

The concession period and other terms of the project shall be pre-determined and clearly specified in the Concession Agreement. The financial offer would constitute the sole criteria for selection of a bidder and the project would be awarded to the Bidder quoting the lowest grant/highest premium.

Financial bid to constitute the sole criteria for selection

Conclusion

A Model RFP document has been developed based on the principles outlined above. It is generic in nature and aims at lending transparency, efficiency and predictability to the entire process, allowing decisions to be made objectively and expeditiously. It also provides the requisite sector-specific and project-specific flexibility by placing several provisions within square brackets, thus enabling the project authorities to make necessary substitutions. To the extent possible, the concerned Ministries should standardise the provisions contained in square brackets so that case by case modifications are minimised. Some flexibility has also been afforded through explanations in the footnotes and project-specific/ sector-specific modifications may be undertaken to the extent enabled by the footnotes. Additional project-specific conditions may also be added if necessary.

Model RFP document should be followed

The Model RFP document addresses the critical requirements that should be satisfied for conducting a fair and transparent bidding process. It is expected that the administrative ministries and other organisations intending to procure infrastructure projects through PPP would observe these guidelines and adopt the Model RFP document for selecting the concessionaires.

Model
Request for Proposal (RFP)

[NAME AND ADDRESS OF THE AUTHORITY]

LETTER OF INVITATION

Dated *****

To,

Sub: RFP for ***** **Project**

Dear Sir,

Pursuant to your application in response to our Request for Qualification for the abovesaid project (the “**RFQ**”), you were short listed as a Bidder, and asked vide our letter dated ***** to remit the fee for RFP document (the “**RFP**”) within a week. We acknowledge your remittance of Rs. 100,000/- (Rs one lakh only)]¹ as the cost of procuring the RFP documents, which are enclosed.

You are requested to participate in the Bid Stage and submit your financial proposal (the “**Bid**”) for the aforesaid project in accordance with the RFP.

Please note that the [Authority] reserves the right to accept or reject all or any of the bids without assigning any reason whatsoever.

Thanking you,

Yours faithfully,

(Signature, name and designation of the Signatory)

¹ To be fixed at the rate of Rs 20,000 (twenty thousand) for every Rs. 100crore of the Estimated Project Cost. The Authority may, in its discretion, increase this amount by upto Rs. 50,000 per Rs. 100 crore of the Estimated Project Cost.

Disclaimer

The information contained in this Request for Proposals document (the “**RFP**”) or subsequently provided to Bidder(s), whether verbally or in documentary or any other form by or on behalf of the Authority or any of its employees, advisors, consultants and sub-consultants is provided to Bidder(s) on the terms and conditions set out in this RFP and such other terms and conditions subject to which such information is provided.

This RFP is not an agreement and is neither an offer nor invitation by the Authority to the prospective Bidders or any other person. The purpose of this RFP is to provide interested parties with information that may be useful to them in making their financial offers (Bids) pursuant to this RFP. This RFP includes statements, which reflect various assumptions and assessments arrived at by the Authority in relation to the Project. Such assumptions, assessments and statements do not purport to contain all the information that each Bidder may require. This RFP may not be appropriate for all persons, and it is not possible for the Authority, its employees, advisors consultants and sub-consultants to consider the investment objectives, financial situation and particular needs of each party who reads or uses this RFP. The assumptions, assessments, statements and information contained in the Bidding Documents, especially the [Feasibility Report], may not be complete, accurate, adequate or correct. Each Bidder should, therefore, conduct its own investigations and analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained in this RFP and obtain independent advice from appropriate sources.

Information provided in this RFP to the Bidder(s) is on a wide range of matters, some of which may depend upon interpretation of law. The information given is not intended to be an exhaustive account of statutory requirements and should not be regarded as a complete or authoritative statement of law. The Authority accepts no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed herein.

The Authority, its employees and advisors make no representation or warranty and shall have no liability to any person, including any Applicant or Bidder under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this RFP or otherwise, including the accuracy, adequacy, correctness, completeness or reliability of the RFP and any assessment, assumption, statement or information contained therein or deemed to form part of this RFP or arising in any way for participation in this Bid Stage.

The Authority also accepts no liability of any nature whether resulting from negligence or otherwise howsoever caused arising from reliance of any Bidder upon the statements contained in this RFP.

The Authority may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions contained in this RFP.

The issue of this RFP does not imply that the Authority is bound to select a Bidder or to appoint the Selected Bidder or Concessionaire, as the case may be, for the Project and the Authority reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.

The Bidder shall bear all its costs associated with or relating to the preparation and submission of its Bid including but not limited to preparation, copying, postage, delivery fees, expenses associated with any demonstrations or presentations which may be required by the Authority or any other costs incurred in connection with or relating to its Bid. All such costs and expenses will remain with the Bidder and the Authority shall not be liable in any manner whatsoever for the same or for any other costs or other expenses incurred by a Bidder in preparation or submission of the Bid, regardless of the conduct or outcome of the Bidding Process.

Glossary

Authority	As defined in Clause 1.1.1
Associate	As defined in Clause 2.1.14
Bank Guarantee	As defined in Clause 2.20.1
Bid(s)	As defined in Clause 1.2.2
Bidders	As defined in Clause 1.2.2
Bidding Documents	As defined in Clause 1.1.7
Bid Due Date	As defined in Clause 1.1.7
Bidding Process	As defined in Clause 1.2.1
Bid Security	As defined in Clause 1.2.4
Bid Stage	As defined in Clause 1.2.1
Concession	As defined in Clause 1.1.5
Concession Agreement	As defined in Clause 1.1.2
Concessionaire	As defined in Clause 1.1.2
Conflict of Interest	As defined in Clause 2.1.14
Damages	As defined in Clause 2.1. 14
[DBFOT]	As defined in Clause 1.1.1
Demand Draft	As defined in Clause 2.20.2
Estimated Project Cost	As defined in Clause 1.1.4
Feasibility Report	As defined in Clause 1.2.3
Government	Government of India
Grant	As defined in Clause 1.2.7
Highest Bidder	As defined in Clause 1.2.7
LOA	As defined in Clause 3.3.5
Member	Member of a Consortium
PPP	Public Private Partnership
Premium	As defined in Clause 1.2.7
Project	As defined in Clause 1.1.1
Re. or Rs.or INR	Indian Rupee
RFP or Request for Proposals	As defined in the Disclaimer
RFQ	As defined in Clause 2.1.2
Selected Bidder	As defined in Clause 3.3.1

The words and expressions beginning with capital letters and defined in this document shall, unless repugnant to the context, have the meaning ascribed thereto herein. The words and expressions beginning with capital letters and not defined herein, but defined in the RFQ, shall, unless repugnant to the context, have the meaning ascribed thereto therein.

[Name of Authority]

1. INTRODUCTION

1.1 Background²

1.1.1 The [Name of the Authority]³ (the “**Authority**”) is engaged in the development of [Cold Chain facility] and as part of this endeavour, the Authority has decided to undertake development, operation and maintenance of the *****⁴ Project (the “**Project**”) through Public Private Partnership (the “**PPP**”) on [Design, Build, Finance, Operate and Transfer (the “**DBFOT**”) basis, and has, therefore, decided to carry out the bidding process for selection of [a private entity as]⁵ the Bidder to whom the Project may be awarded. Brief particulars of the Project are as follows:

Name of the Project	Estimated Project Cost⁶ (In Rs. cr.) ⁷
----------------------------	--

[]

1.1.2 The Selected Bidder, who is either a company incorporated under the Companies Act, 1956/ 2013 or undertakes to incorporate as such prior to execution of the concession agreement (the “**Concessionaire**”), shall be responsible for [designing], engineering, financing, procurement, construction, operation and maintenance of the Project under and in accordance with the provisions of a [long-term] concession agreement (the “**Concession Agreement**”) to be entered into between the Selected Bidder and the Authority in the form provided by the Authority as part of the Bidding Documents pursuant hereto.

1.1.3 The scope of work will broadly include [Designing, Construction /Installation of sorting/grading/Pre-cooling/Packaging line etc.] and the operation and maintenance thereof.

² Serially numbered footnotes in this RFP are for guidance of the Authority and should be omitted prior to issue of RFP. Footnotes marked in non-numerical characters shall be retained in the RFP.

³ All project-specific provisions in this RFP have been enclosed in square parenthesis and may be modified, as necessary. The square parenthesis should be removed after carrying out the required modifications. The curly parenthesis including the provisions contained therein, and all blank spaces shall be retained in the RFP document to be issued to the Bidders. They should be suitably modified/ filled up by the respective Bidders to reflect the particulars relating to such Bidders.

⁴ Wherever asterisk is used, it should be substituted by project-specific details prior to issue of RFP

⁵ If public sector companies are to be allowed to Bid, this Clause may be modified in accordance with the provisions of the RFQ for the Project.

⁶ If the project agreements do not provide for any obligations or liabilities that arise from or related to capital costs of the Project, this column may be omitted with the approval of PPPAC.

⁷ This amount should normally include the likely construction costs plus about 25% thereof by way of financing costs, physical and price contingencies etc.

- 1.1.4 The estimated cost of the Project (the “**Estimated Project Cost**”) has been specified in Clause 1.1.1 above. The assessment of actual costs, however, will have to be made by the Bidders.
- 1.1.5 The Concession Agreement sets forth the detailed terms and conditions for grant of the concession to the Concessionaire, including the scope of the Concessionaire’s services and obligations (the “**Concession**”).
- 1.1.6 The statements and explanations contained in this RFP are intended to provide a better understanding to the Bidders about the subject matter of this RFP and should not be construed or interpreted as limiting in any way or manner the scope of services and obligations of the Concessionaire set forth in the Concession Agreement or the Authority’s rights to amend, alter, change, supplement or clarify the scope of work, the Concession to be awarded pursuant to this RFP or the terms thereof or herein contained. Consequently, any omissions, conflicts or contradictions in the Bidding Documents including this RFP are to be noted, interpreted and applied appropriately to give effect to this intent, and no claims on that account shall be entertained by the Authority.
- 1.1.7 The Authority shall receive Bids pursuant to this RFP in accordance with the terms set forth in this RFP and other documents to be provided by the Authority pursuant to this RFP, as modified, altered, amended and clarified from time to time by the Authority (collectively the “**Bidding Documents**”), and all Bids shall be prepared and submitted in accordance with such terms on or before the date specified in Clause 1.3 for submission of Bids (the “**Bid Due Date**”).

1.2 Brief description of Bidding Process

- 1.2.1 The Authority has adopted a two-stage bidding process (collectively referred to as the “**Bidding Process**”) for selection of the Bidder for award of the Project. The first stage (the “**Qualification Stage**”) of the process involved pre-qualification of interested parties/ Consortia in accordance with the provisions of the RFQ. At the end of the Qualification Stage, the Authority short-listed Applicants who are eligible for participation in this second stage of the Bidding Process (the “**Bid Stage**”) comprising Request for Proposals.

[The GOI has issued guidelines (see Appendix-V of RFP) for qualification of bidders seeking to acquire stakes in any public sector enterprise through the process of disinvestment. These guidelines shall apply *mutatis mutandis* to this Bidding Process. The Authority shall be entitled to disqualify an Applicant in accordance with the aforesaid guidelines at any stage of the Bidding Process. Applicants must satisfy themselves that they are qualified to bid, and should give an undertaking to this effect in the form at Appendix-I.]

- 1.2.2 In the Bid Stage, the aforesaid short-listed Applicants, including their successors, (the “**Bidders**”, which expression shall, unless repugnant to the context, include the Members of the Consortium) are being called upon to submit their financial offers (the “**Bids**”) in accordance with the terms specified in the Bidding

Documents. The Bid shall be valid for a period of not less than 120 days from the date specified in Clause 1.3 for submission of the bids (the “**Bid Due Date**”).

- 1.2.3 The Bidding Documents include the draft Concession Agreement for the Project [which is enclosed/ which will be provided to the Bidders on or near about ***]⁸. The Feasibility Report prepared by the [Authority/ consultants of the Authority] (the “**Feasibility Report**”) [is also enclosed/ will also be provided to the Bidders on or near about ***]⁹. Subject to the provisions of Clause 2.1.3, the aforesaid documents and any addenda issued subsequent to this RFP Document, will be deemed to form part of the Bidding Documents.
- 1.2.4 A Bidder is required to deposit, along with its Bid, a bid security of Rs. *****¹⁰ (the “**Bid Security**”), refundable not later than 60 (sixty) days from the Bid Due Date, except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the Concession Agreement. The Bidders will have an option to provide Bid Security in the form of a demand draft or a bank guarantee acceptable to the Authority, and in such event, the validity period of the demand draft or bank guarantee, as case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. Where a demand draft is provided, its validity shall not be less than 80 (eighty) days from the Bid Due Date, for the purposes of encashment by the Authority. The Bid shall be summarily rejected if it is not accompanied by the Bid Security.
- 1.2.5 During the Bid Stage, Bidders are invited to examine the Project in greater detail, and to carry out, at their cost, such studies as may be required for submitting their respective Bids for award of the Concession including implementation of the Project.
- 1.2.6 Bids are invited for the project on the basis of [the lowest financial grant (the “**Grant**”) required] by a Bidder for implementing the Project. [A Bidder may, instead of seeking a Grant, offer to pay a premium in the form of revenue share and/or upfront payment, as the case may be, (the “**Premium**”) to the Authority for award of the Concession]. The concession period is pre-determined, as indicated in the Concession Agreement. The [Grant/ Premium amount] shall constitute the sole criteria for evaluation of Bids. Subject to Clause 2.16, the Project will be awarded to the Bidder quoting the [highest Premium, and in the event that no Bidder offers a Premium, then to a Bidder seeking the lowest Grant]. [In case a Bidder seeks a Grant, it shall specify the amount thereof in its Bid. For the

⁸ The Concession Agreement should either be provided along with the RFP or at least 45 days before the Bid Due Date and 21 days before the Pre-Bid Conference.

⁹ The Feasibility Report should either be provided along with the RFP or at least 45 days prior to the Bid Due Date.

¹⁰ The Bid Security shall be an amount equivalent to 1% of the Estimated Project Cost. However, the Authority may, in its discretion, prescribe a higher Bid Security not exceeding 2% of the Estimated Project Cost. In case of a Project having an Estimated Project Cost of Rs. 2,000 cr. or above, the Authority may, in its discretion, reduce the Bid Security, but not less than 0.5% of the Estimated Project Cost in any case.

avoidance of doubt, it is clarified that a Bidder who seeks a Grant cannot offer any Premium. A Bidder who seeks a Grant or offer to pay a Premium shall nevertheless be required to commence payment of a Usage Fee of Rs. ***** (Rupees ***** only) from commercial operation date (COD) or from date as specified in draft Concession Agreement and, which shall be increased for each subsequent year by an additional *****% (*****per cent) of the Usage Fee, in accordance with the provisions of Clause *** of the draft Concession Agreement.]

In this RFP, the term “**Highest Bidder**” shall mean the Bidder who is offering the [highest Premium, and where no Bidder is offering a Premium, the Bidder seeking the lowest Grant].

- 1.2.7 Generally, the Highest Bidder shall be the Selected Bidder. The remaining Bidders shall be kept in reserve and may, in accordance with the process specified in Clause 3 of this RFP, be invited to match the Bid submitted by the Highest Bidder in case such Highest Bidder withdraws or is not selected for any reason. In the event that none of the other Bidders match the Bid of the Highest Bidder, the Authority may, in its discretion, either invite fresh Bids from the remaining Bidders or annul the Bidding Process.
- 1.2.8 The Concessionaire shall be entitled to [levy and collect a pre-determined user fee from users] of the Project.
- 1.2.9 Further and other details of the process to be followed at the Bid Stage and the terms thereof are spelt out in this RFP.
- 1.2.10 Any queries or request for additional information concerning this RFP shall be submitted in writing or by fax and email to the officer designated in Clause 2.11.5. The envelopes/ communication shall clearly bear the following identification/ title:

“Queries/Request for Additional Information: RFP for ***** Project”.

1.3 Schedule of Bidding Process

The Authority shall endeavour to adhere to the following schedule:

Event Description	Date
1. Last date for receiving queries	[25 days from the date of RFP]
2. Pre-Bid meeting-1	[To be specified]
3. Authority response to queries latest by	[35 days from the date of RFP]
4. [Pre-Bid meeting-2] ¹¹	[To be specified]

¹¹ In case of complex projects, the number of Pre-Bid Conferences could be more than two. For repetitive projects, one Pre-Bid Conference would suffice.

- | | |
|------------------------------------|---|
| 5. Bid Due Date | [To be specified] |
| 6. Opening of Bids | On Bid Due Date [at least 45 days from the date of RFP] |
| 7. Letter of Award (LOA) | Within 30 days of Bid Due Date |
| 8. Validity of Bids | 120 days of Bid Due Date |
| 9. Signing of Concession Agreement | Within 30 days of award of LOA |

2. INSTRUCTIONS TO BIDDERS

A. GENERAL

2.1. General terms of Bidding

- 2.1.1 No Bidder shall submit more than one Bid for the Project. A Bidder bidding individually or as a member of a Consortium shall not be entitled to submit another bid either individually or as a member of any Consortium, as the case may be.
- 2.1.2 Unless the context otherwise requires, the terms not defined in this RFP, but defined in the Request for Qualification document for the Project (the “**RFQ**”) shall have the meaning assigned thereto in the RFQ.
- 2.1.3 The Feasibility Report of the Project is being provided only as a preliminary reference document by way of assistance to the Bidders who are expected to carry out their own surveys, investigations and other detailed examination of the Project before submitting their Bids. Nothing contained in the Feasibility Report shall be binding on the Authority nor confer any right on the Bidders, and the Authority shall have no liability whatsoever in relation to or arising out of any or all contents of the Feasibility Report.
- 2.1.4 Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft Concession Agreement shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Concession Agreement.
- 2.1.5 The Bid should be furnished in the format at Appendix–I, clearly indicating the bid amount in both figures and words, in Indian Rupees, and signed by the Bidder’s authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be taken into account.
- 2.1.6 The Bid shall consist of [a Grant or a Premium, as the case may be,] to be quoted by the Bidder. [Grant shall be payable by the Authority to the Concessionaire and the Premium shall be payable by the Concessionaire to the Authority, as the case may be,] as per the terms and conditions of this RFP and the provisions of the Concession Agreement.
- 2.1.7 The Bidder shall deposit a Bid Security of Rs. ***** (Rupees *****) in accordance with the provisions of this RFP. The Bidder has the option to provide the Bid Security either as a Demand Draft or in the form of a Bank Guarantee acceptable to the Authority, as per format at Appendix–II.
- 2.1.8 The validity period of the Bank Guarantee shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and

the Bidder. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. The Bid Security shall be refundable no later than 60 (sixty) days from the Bid Due Date except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Construction Performance Security under the Concession Agreement.

- 2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix–III, authorising the signatory of the Bid to commit the Bidder.
- 2.1.10 In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix–IV.
- 2.1.11 Any condition or qualification or any other stipulation contained in the Bid shall render the Bid liable to rejection as a non-responsive Bid.
- 2.1.12 The Bid and all communications in relation to or concerning the Bidding Documents and the Bid shall be in English language.
- 2.1.13 The documents including this RFP and all attached documents, provided by the Authority are and shall remain or become the property of the Authority and are transmitted to the Bidders solely for the purpose of preparation and the submission of a Bid in accordance herewith. Bidders are to treat all information as strictly confidential and shall not use it for any purpose other than for preparation and submission of their Bid. The provisions of this Clause 2.1.13 shall also apply *mutatis mutandis* to Bids and all other documents submitted by the Bidders, and the Authority will not return to the Bidders any Bid, document or any information provided along therewith.
- 2.1.14 A Bidder shall not have a conflict of interest (the “**Conflict of Interest**”) that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. In the event of disqualification, the Authority shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Authority and not by way of penalty for, *inter alia*, the time, cost and effort of the Authority, including consideration of such Bidder’s proposal (the “**Damages**”), without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/ or the Concession Agreement or otherwise. Without limiting the generality of the above, a Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:
 - (i) the Bidder, its Member or Associate (or any constituent thereof) and any other Bidder, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder, its Member or an Associate thereof (or any shareholder thereof having a shareholding of more than 5% (five per cent) of the paid up and subscribed share capital of such Bidder,

Member or Associate, as the case may be) in the other Bidder, its Member or Associate, is less than 5% (five per cent) of the subscribed and paid up equity share capital thereof; provided further that this disqualification shall not apply to any ownership by a bank, insurance company, pension fund or a public financial institution referred to in sub-section (72) of section 2 of the Companies Act, 2013. For the purposes of this Clause 2.1.14, indirect shareholding held through one or more intermediate persons shall be computed as follows: (aa) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the “**Subject Person**”) shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (bb) subject always to sub-clause (aa) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause (bb) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid up equity shareholding of such intermediary; or

- (ii) a constituent of such Bidder is also a constituent of another Bidder; or
- (iii) such Bidder, its Member or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder, its Member or Associate, or has provided any such subsidy, grant, concessional loan or subordinated debt to any other Bidder, its Member or any Associate thereof; or
- (iv) such Bidder has the same legal representative for purposes of this Bid as any other Bidder; or
- (v) such Bidder, or any Associate thereof, has a relationship with another Bidder, or any Associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each other’s information about, or to influence the Bid of either or each other; or
- (vi) such Bidder or any Associate thereof has participated as a consultant to the Authority in the preparation of any documents, design or technical specifications of the Project.

Explanation:

In case a Bidder is a Consortium, then the term Bidder as used in this Clause 2.1.14, shall include each Member of such Consortium.

For purposes of this RFP, Associate means, in relation to the Bidder/ Consortium Member, a person who controls, is controlled by, or is under the common control

with such Bidder/ Consortium Member (the “**Associate**”). As used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law.

2.1.15 A Bidder shall be liable for disqualification and forfeiture of Bid Security if any legal, financial or technical adviser of the Authority in relation to the Project is engaged by the Bidder, its Members or any Associate thereof, as the case may be, in any manner for matters related to or incidental to such Project during the Bidding Process or subsequent to the (i) issue of the LOA or (ii) execution of the Concession Agreement. In the event any such adviser is engaged by the Selected Bidder or Concessionaire, as the case may be, after issue of the LOA or execution of the Concession Agreement for matters related or incidental to the Project, then notwithstanding anything to the contrary contained herein or in the LOA or the Concession Agreement and without prejudice to any other right or remedy of the Authority, including the forfeiture and appropriation of the Bid Security or Performance Security, as the case may be, which the Authority may have thereunder or otherwise, the LOA or the Concession Agreement, as the case may be, shall be liable to be terminated without the Authority being liable in any manner whatsoever to the Selected Bidder or Concessionaire for the same. For the avoidance of doubt, this disqualification shall not apply where such adviser was engaged by the Bidder, its Member or Associate in the past but its assignment expired or was terminated 6 (six) months prior to the date of issue of RFQ for the project. Nor will this disqualification apply where such adviser is engaged after a period of 3 (three) years from the date of commercial operation of the Project.

2.1.16 This RFP is not transferable.

2.1.17 Any award of Concession pursuant to this RFP shall be subject to the terms of Bidding Documents.

2.1.18 [Other Bid conditions shall include: ***]¹²

[The Applicant shall have experience of five years or more in operation and maintenance (O&M) of Cold storage facility(ies) with a capacity of ***** or more or in operation and maintenance (O&M) of controlled atmosphere storage facility(ies) with a capacity of ***** or more. The Applicant shall also have experience in procurement and distribution of agricultural produces having generated revenue of more than Rs ***** Crore from sale of agricultural produces in any three years out of last five years and the Applicant shall have made part of these sales to organized retail channels (Organized retailing refers to trading activities undertaken by licensed retailers, that is, those who are registered for sales tax, income tax, etc). The Applicant

¹² Other sector-specific conditions of bidding or restrictions, if any, may be stated here, such as O&M experience as specified in Clause 2.2.3 of RFQ or limit on FDI.

shall, in the case of a Consortium, include a Member who shall subscribe and continue to hold at least 10% (ten percent) of the subscribed and paid up equity of the SPV for a period of 5 (five) years from the date of commercial operation of the Project, and has either by itself or through its Associate, experience specified in Clause 2.2.3 of the RFQ. In case the Applicant is not a Consortium, it shall be eligible only if it has equivalent experience of its own or through its Associates.”]

2.2 Change in composition of the Consortium

2.2.1 Where the Bidder is a Consortium, change in composition of the Consortium may be permitted by the Authority during the Bid Stage, only where:

- (a) the Lead Member continues to be the Lead Member of the Consortium;
- (b) the substitute is at least equal, in terms of Technical Capacity or Financial Capacity or operational capacity, to the Consortium Member who is sought to be substituted and the modified Consortium shall continue to meet the pre-qualification and short-listing criteria for Applicants; and
- (c) the new Member(s) expressly adopt(s) the Application already made on behalf of the Consortium as if it were a party to it originally, and is not an Applicant/Member/ Associate of any other Consortium bidding for this Project.

2.2.2 Approval for change in the composition of a Consortium shall be at the sole discretion of the Authority and must be approved by the Authority in writing. The Bidder must submit its application for change in composition of the Consortium no later than 15 (fifteen) days prior to the Bid Due Date.

2.2.3 The modified/ reconstituted Consortium shall submit a revised Jt. Bidding Agreement and a Power of Attorney, substantially in the form at Appendix-IV, prior to the Bid Due Date.

2.3 Change in Ownership

2.3.1 By submitting the Bid, the Bidder acknowledges, that it was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Consortium Members who shall, until the 2nd (second) anniversary of the date of commercial operation of the Project, hold equity share capital representing not less than: (i) 26% (twenty six per cent) of the subscribed and paid-up equity of the Concessionaire; and (ii) 5% (five per cent) of the Total Project Cost specified in the Concession Agreement. The Bidder further acknowledges and agrees that the aforesaid obligation shall be the minimum, and shall be in addition to such other obligations as may be contained in this RFP and Concession Agreement, and a breach hereof shall, notwithstanding anything to the contrary contained in the Concession Agreement, be deemed to be a breach of the Concession Agreement and dealt with as such thereunder. For the avoidance of doubt, the provisions of this Clause 2.3.1 shall apply only when the Bidder is a Consortium.

2.3.2 By submitting the Bid, the Bidder shall also be deemed to have acknowledged and agreed that in the event of a change in control of a Consortium Member or an Associate whose Technical Capacity and/ or Financial Capacity and/or operational capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, the Bidder shall be deemed to have knowledge of the same and shall be required to inform the Authority forthwith along with all relevant particulars about the same and the Authority may, in its sole discretion, disqualify the Bidder or withdraw the LOA from the Selected Bidder, as the case may be. In the event such change in control occurs after signing of the Concession Agreement but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the Concession Agreement, be deemed to be a breach of the Concession Agreement, and the same shall be liable to be terminated without the Authority being liable in any manner whatsoever to the Concessionaire. In such an event, notwithstanding anything to the contrary contained in the Concession Agreement, the Authority shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/ or the Concession Agreement or otherwise.

2.4 Cost of Bidding

The Bidders shall be responsible for all of the costs associated with the preparation of their Bids and their participation in the Bidding Process. The Authority will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.

2.5 Site visit and verification of information

2.5.1 Bidders are encouraged to submit their respective Bids after visiting the Project site and ascertaining for themselves the site conditions, agricultural produce location, surroundings, climate, availability of power, water and other utilities for construction, access to site, handling and storage of materials, weather data, applicable laws and regulations, and any other matter considered relevant by them.

2.5.2 It shall be deemed that by submitting a Bid, the Bidder has:

- (a) made a complete and careful examination of the Bidding Documents;
- (b) received all relevant information requested from the Authority;
- (c) accepted the risk of inadequacy, error or mistake in the information provided in the Bidding Documents or furnished by or on behalf of the Authority relating to any of the matters referred to in Clause 2.5.1 above;
- (d) satisfied itself about all matters, things and information including matters referred to in Clause 2.5.1 hereinabove necessary and required for

submitting an informed Bid, execution of the Project in accordance with the Bidding Documents and performance of all of its obligations thereunder;

- (e) acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in the Bidding Documents or ignorance of any of the matters referred to in Clause 2.5.1 hereinabove shall not be a basis for any claim for compensation, damages, extension of time for performance of its obligations, loss of profits etc. from the Authority, or a ground for termination of the Concession Agreement by the Concessionaire;
- (f) acknowledged that it does not have a Conflict of Interest; and
- (g) agreed to be bound by the undertakings provided by it under and in terms hereof.

2.5.3 The Authority shall not be liable for any omission, mistake or error in respect of any of the above or on account of any matter or thing arising out of or concerning or relating to RFP, RFQ, the Bidding Documents or the Bidding Process, including any error or mistake therein or in any information or data given by the Authority.

2.6 Verification and Disqualification

2.6.1 The Authority reserves the right to verify all statements, information and documents submitted by the Bidder in response to the RFQ, the RFP or the Bidding Documents and the Bidder shall, when so required by the Authority, make available all such information, evidence and documents as may be necessary for such verification. Any such verification, or lack of such verification, by the Authority shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Authority thereunder.

2.6.2 The Authority reserves the right to reject any Bid and appropriate the Bid Security if:

- (a) at any time, a material misrepresentation is made or uncovered, or
- (b) the Bidder does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Bid.

Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium and each Member may be disqualified / rejected. If such disqualification / rejection occurs after the Bids have been opened and the Highest Bidder gets disqualified / rejected, then the Authority reserves the right to:

- (i) invite the remaining Bidders to submit their Bids in accordance with Clauses 3.3.3 and 3.3.4; or
 - (ii) take any such measure as may be deemed fit in the sole discretion of the Authority, including annulment of the Bidding Process.
- 2.6.3 In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of subsistence thereof, including the Concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOA or entering into of the Concession Agreement, and if the Selected Bidder has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Authority to the Selected Bidder or the Concessionaire, as the case may be, without the Authority being liable in any manner whatsoever to the Selected Bidder or Concessionaire. In such an event, the Authority shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/ or the Concession Agreement, or otherwise.

B. DOCUMENTS

2.7 Contents of the RFP

- 2.7.1 This RFP comprises the Disclaimer set forth hereinabove, the contents as listed below, and will additionally include any Addenda issued in accordance with Clause 2.9.

Invitation for Bids

- Section 1. Introduction
- Section 2. Instructions to Bidders
- Section 3. Evaluation of Bids
- Section 4. Fraud and Corrupt Practices
- Section 5. Pre-Bid Conference
- Section 6. Miscellaneous

Appendices

- I. Letter comprising the Bid
- II. Bank Guarantee for Bid Security

- III. Power of Attorney for signing of Bid
- IV. Power of Attorney for Lead Member of Consortium
- V. Guidelines of the Department of Disinvestment

2.7.2 The draft Concession Agreement [and the Feasibility Report] provided by the Authority as part of the Bidding Documents shall be deemed to be part of this RFP.

2.8 Clarifications

2.8.1 Bidders requiring any clarification on the RFP may notify the Authority in writing or by fax and email in accordance with Clause 1.2.10. They should send in their queries on or before the date mentioned in the Schedule of Bidding Process specified in Clause 1.3. The Authority shall endeavour to respond to the queries within the period specified therein, but no later than 15 (fifteen) days prior to the Bid Due Date. The responses will be sent by e-mail. The Authority will forward all the queries and its responses thereto, to all Bidders without identifying the source of queries.

2.8.2 The Authority shall endeavour to respond to the questions raised or clarifications sought by the Bidders. However, the Authority reserves the right not to respond to any question or provide any clarification, in its sole discretion, and nothing in this Clause shall be taken or read as compelling or requiring the Authority to respond to any question or to provide any clarification.

2.8.3 The Authority may also on its own motion, if deemed necessary, issue interpretations and clarifications to all Bidders. All clarifications and interpretations issued by the Authority shall be deemed to be part of the Bidding Documents. Verbal clarifications and information given by Authority or its employees or representatives shall not in any way or manner be binding on the Authority.

2.9 Amendment of RFP

2.9.1 At any time prior to the Bid Due Date, the Authority may, for any reason, whether at its own initiative or in response to clarifications requested by a Bidder, modify the RFP by the issuance of Addenda.

2.9.2 Any Addendum issued hereunder will be in writing and shall be sent to all the Bidders.

2.9.3 In order to afford the Bidders a reasonable time for taking an Addendum into account, or for any other reason, the Authority may, in its sole discretion, extend the Bid Due Date⁵.

⁵While extending the Bid Due Date on account of an addendum, the Authority shall have due regard for the time required by Bidders to address the amendments specified therein. In the case of significant

C. PREPARATION AND SUBMISSION OF BIDS

2.10 Format and Signing of Bid

2.10.1 The Bidder shall provide all the information sought under this RFP. The Authority will evaluate only those Bids that are received in the required formats and complete in all respects.

2.10.2 The Bid and its copy shall be typed or written in indelible ink and signed by the authorised signatory of the Bidder who shall also initial each page, in blue ink. In case of printed and published documents, only the cover shall be initialled. All the alterations, omissions, additions or any other amendments made to the Bid shall be initialled by the person(s) signing the Bid.

2.11 Sealing and Marking of Bids

2.11.1 The Bidder shall submit the Bid in the format specified at Appendix-I, and seal it in an envelope and mark the envelope as “BID”.

2.11.2 The documents accompanying the Bid shall be placed in a separate envelope and marked as “Enclosures of the Bid”. The documents shall include:

- (a) Bid Security in the format at Appendix–II;
- (b) Power of Attorney for signing of Bid in the format at Appendix–III;
- (c) If applicable, the Power of Attorney for Lead Member of Consortium in the format at Appendix–IV; and
- (d) A copy of the Concession Agreement with each page initialled by the person signing the Bid in pursuance of the Power of Attorney referred to in Clause (b) hereinabove.

2.11.3 A true copy of the documents accompanying the Bid, as specified in Clause 2.11.2 above, shall be bound together in hard cover and the pages shall be numbered serially. Each page thereof shall be initialled in blue ink by the authorised signatory of the Bidder. This copy of the documents shall be placed in a separate envelope and marked “Copy of Documents”.

2.11.4 The three envelopes specified in Clauses 2.11.1, 2.11.2 and 2.11.3 shall be placed in an outer envelope, which shall be sealed. Each of the four envelopes shall clearly bear the following identification:

“Bid for the ***** Project”

amendments, at least 15 (fifteen) days shall be provided between the date of amendment and the Bid Due Date, and in the case of minor amendments, at least 7 (seven) days shall be provided.

and shall clearly indicate the name and address of the Bidder. In addition, the Bid Due Date should be indicated on the right hand top corner of each of the envelopes.

2.11.5 Each of the envelopes shall be addressed to:

ATTN. OF:	Mr. ****
DESIGNATION	*****
ADDRESS:	*****
FAX NO.	*****
E-MAIL ADDRESS	*****

2.11.6 If the envelopes are not sealed and marked as instructed above, the Authority assumes no responsibility for the misplacement or premature opening of the contents of the Bid submitted and consequent losses, if any, suffered by the Bidder.

2.11.7 Bids submitted by fax, telex, telegram or e-mail shall not be entertained and shall be rejected.

2.12 Bid Due Date

2.12.1 Bids should be submitted before 1100 hours IST on the Bid Due Date at the address provided in Clause 2.11.5 in the manner and form as detailed in this RFP. A receipt thereof should be obtained from the person specified at Clause 2.11.5.

2.12.2 The Authority may, in its sole discretion, extend the Bid Due Date by issuing an Addendum in accordance with Clause 2.9 uniformly for all Bidders.

2.13 Late Bids

Bids received by the Authority after the specified time on the Bid Due Date shall not be eligible for consideration and shall be summarily rejected.

2.14 Contents of the Bid

2.14.1 The Bid shall be furnished in the format at Appendix–I and shall consist of a [Grant or Premium, as the case may be,] to be quoted by the Bidder. The Bidder shall specify (in Indian Rupees) the [Grant or Premium, as the case may be, required by him or offered by him, as the case may be,] to undertake the Project in accordance with this RFP and the provisions of the Concession Agreement.

2.14.2 Generally, the Project will be awarded to the Highest Bidder.

2.14.3 The opening of Bids and acceptance thereof shall be substantially in accordance with this RFP.

2.14.4 The proposed Concession Agreement shall be deemed to be part of the Bid.

2.15 Modifications/ Substitution/ Withdrawal of Bids

2.15.1 The Bidder may modify, substitute or withdraw its Bid after submission, provided that written notice of the modification, substitution or withdrawal is received by the Authority prior to the Bid Due Date. No Bid shall be modified, substituted or withdrawn by the Bidder on or after the Bid Due Date.

2.15.2 The modification, substitution or withdrawal notice shall be prepared, sealed, marked, and delivered in accordance with Clause 2.11, with the envelopes being additionally marked “MODIFICATION”, “SUBSTITUTION” or “WITHDRAWAL”, as appropriate.

2.15.3 Any alteration/ modification in the Bid or additional information supplied subsequent to the Bid Due Date, unless the same has been expressly sought for by the Authority, shall be disregarded.

2.16 Rejection of Bids

2.16.1 Notwithstanding anything contained in this RFP, the Authority reserves the right to reject any Bid and to annul the Bidding Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

2.16.2 The Authority reserves the right not to proceed with the Bidding Process at any time, without notice or liability, and to reject any Bid without assigning any reasons.

2.17 Validity of Bids

The Bids shall be valid for a period of not less than 120 (one hundred and twenty) days from the Bid Due Date. The validity of Bids may be extended by mutual consent of the respective Bidders and the Authority.

2.18 Confidentiality

Information relating to the examination, clarification, evaluation and recommendation for the Bidders shall not be disclosed to any person who is not officially concerned with the process or is not a retained professional advisor advising the Authority in relation to, or matters arising out of, or concerning the Bidding Process. The Authority will treat all information, submitted as part of the Bid, in confidence and will require all those who have access to such material to treat the same in confidence. The Authority may not divulge any such information

unless it is directed to do so by any statutory entity that has the power under law to require its disclosure or is to enforce or assert any right or privilege of the statutory entity and/ or the Authority or as may be required by law or in connection with any legal process.

2.19 Correspondence with the Bidder

Save and except as provided in this RFP, the Authority shall not entertain any correspondence with any Bidder in relation to acceptance or rejection of any Bid.

D. BID SECURITY

2.20 Bid Security

- 2.20.1 The Bidder shall furnish as part of its Bid, a Bid Security referred to in Clauses 2.1.7 and 2.1.8 hereinabove in the form of a bank guarantee issued by a nationalised bank, or a Scheduled Bank in India having a net worth of at least Rs. 1,000 crore (Rs. one thousand crore), in favour of the Authority in the format at Appendix-II (the “**Bank Guarantee**”) and having a validity period of not less than 180 (one hundred eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalised bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.
- 2.20.2 Bid Security can also be in the form of a demand draft issued by a Scheduled Bank in India, drawn in favour of the Authority and payable at [Delhi] (the “**Demand Draft**”). The Authority shall not be liable to pay any interest on the Bid Security deposit so made and the same shall be interest free.
- 2.20.3 Any Bid not accompanied by the Bid Security shall be summarily rejected by the Authority as non-responsive.
- 2.20.4 Save and except as provided in Clauses 1.2.4 and 1.2.5 above, the Bid Security of unsuccessful Bidders will be returned by the Authority, without any interest, as promptly as possible on acceptance of the Bid of the Selected Bidder or when the Bidding process is cancelled by the Authority, and in any case within 60 (sixty) days from the Bid Due Date. Where Bid Security has been paid by demand draft, the refund thereof shall be in the form of an account payee demand draft in favour of the unsuccessful Bidder(s). Bidders may by specific instructions in writing to the Authority give the name and address of the person in whose favour the said demand draft shall be drawn by the Authority for refund, failing which it shall be drawn in the name of the Bidder and shall be mailed to the address given on the Bid.

- 2.20.5 The Selected Bidder's Bid Security will be returned, without any interest, upon the Concessionaire signing the Concession Agreement and furnishing the Construction Performance Security, in accordance with the provisions thereof. The Authority may, at the Selected Bidder's option, adjust the amount of Bid Security in the amount of Construction Performance Security to be provided by him in accordance with the provisions of the Concession Agreement.
- 2.20.6 The Authority shall be entitled to forfeit and appropriate the Bid Security as Damages *inter alia* in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No relaxation of any kind on Bid Security shall be given to any Bidder.
- 2.20.7 The Bid Security shall be forfeited as Damages without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/ or under the Concession Agreement, or otherwise, under the following conditions:
- (a) If a Bidder submits a non-responsive Bid;
 - (b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this RFP;
 - (c) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority;
 - (d) In the case of Selected Bidder, if it fails within the specified time limit -
 - (i) to sign and return the duplicate copy of LOA;
 - (ii) to sign the Concession Agreement; or
 - (iii) to furnish the Construction Performance Security within the period prescribed therefor in the Concession Agreement; or
 - (e) In case the Selected Bidder, having signed the Concession Agreement, commits any breach thereof prior to furnishing the Performance Security.

3. EVALUATION OF BIDS

3.1 Opening and Evaluation of Bids

- 3.1.1 The Authority shall open the Bids at 1130 hours on the Bid Due Date, at the place specified in Clause 2.11.5 and in the presence of the Bidders who choose to attend.
- 3.1.2 The Authority will subsequently examine and evaluate the Bids in accordance with the provisions set out in this Section 3.
- 3.1.3 To facilitate evaluation of Bids, the Authority may, at its sole discretion, seek clarifications in writing from any Bidder regarding its Bid.

3.2 Tests of responsiveness

- 3.2.1 Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive only if:
 - (a) it is received as per the format at Appendix-I;
 - (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;
 - (c) it is signed, sealed, bound together in hard cover and marked as stipulated in Clauses 2.10 and 2.11;
 - (d) it is accompanied by the Bid Security as specified in Clause 2.1.7;
 - (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;
 - (f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified);
 - (g) it does not contain any condition or qualification; and
 - (h) it is not non-responsive in terms hereof.
- 3.2.2 The Authority reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Bid.

3.3 Selection of Bidder

- 3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and who quotes the [highest Premium offered to the Authority, and in the event that no Bidder offers a Premium, then the

- Bidder quoting the lowest Grant to be paid by the Authority]¹³ shall be declared as the selected Bidder (the “**Selected Bidder**”). In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.
- 3.3.2 In the event that two or more Bidders quote the same amount of [Premium or Grant, as the case may be] (the “**Tie Bidders**”), the Authority shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.
- 3.3.3 In the event that the Highest Bidder withdraws or is not selected for any reason in the first instance (the “**first round of bidding**”), the Authority may invite all the remaining Bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Highest Bidder (the “**second round of bidding**”). If in the second round of bidding, only one Bidder matches the Highest Bidder, it shall be the Selected Bidder. If two or more Bidders match the said Highest Bidder in the second round of bidding, then the Bidder whose Bid was higher as compared to other Bidder(s) in the first round of bidding shall be the Selected Bidder. For example, if the third and fifth highest Bidders in the first round of bidding offer to match the said Highest Bidder in the second round of bidding, the said third highest Bidder shall be the Selected Bidder.
- 3.3.4 In the event that no Bidder offers to match the Highest Bidder in the second round of bidding as specified in Clause 3.3.3, the Authority may, in its discretion, invite fresh Bids (the “**third round of bidding**”) from all Bidders except the Highest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are higher than the Bid of the second highest Bidder in the first round of bidding.
- 3.3.5 After selection, a Letter of Award (the “**LOA**”) shall be issued, in duplicate, by the Authority to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA, and the next eligible Bidder may be considered.
- 3.3.6 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Concessionaire to execute the Concession Agreement within the period

¹³ The bidding parameter may be described in this Clause 3.3.1 or in a new Clause 3.5. The bidding parameter should normally be specified in a manner that requires the Bidders to quote a single number in paragraph 30 of Appendix-I.

prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the Concession Agreement.

3.4 Contacts during Bid Evaluation

Bids shall be deemed to be under consideration immediately after they are opened and until such time the Authority makes official intimation of award/ rejection to the Bidders. While the Bids are under consideration, Bidders and/ or their representatives or other interested parties are advised to refrain, save and except as required under the Bidding Documents, from contacting by any means, the Authority and/ or their employees/ representatives on matters related to the Bids under consideration.

3.5 Bid Parameter

3.5.1 The Bid shall comprise a Grant or a Premium, as the case may be, to be quoted by the Bidder in accordance with the provisions of the Concession Agreement. The Bidder who offers the highest Premium, and in case no Bidder offers a Premium, then the Bidder requiring the lowest Grant shall ordinarily be the Selected Bidder. The Grant/Premium comprising the Bid shall be offered in accordance with the provisions of Clause 3.5.2.

3.5.2 [(a) The Bid may comprise the Grant required by the Bidder. A Bidder seeking Grant shall, nevertheless be required to pay a Usage Fee of Rs. ***** (Rupees ***** only)) from commercial operation date (COD) or from date as specified in draft Concession Agreement and, which shall be increased for each subsequent year by an additional *****% (***** per cent) of the Usage Fee, in accordance with the provisions of Clause *** of the draft Concession Agreement.

OR

(b) The Bid for the project shall comprise a Premium of Rs. ***** (Rupees***** commencing from commercial operation date (COD) or from date as specified in draft Concession Agreement. A Bidder offering to pay Premium shall, nevertheless be required to pay a Usage Fee of Rs. ***** (Rupees ***** only) from commercial operation date (COD) or from date as specified in draft Concession Agreement and, which shall be increased for each subsequent year by an additional *****% (***** per cent) of the Usage Fee, in accordance with the provisions of Clause *** of the draft Concession Agreement.

4. FRAUD AND CORRUPT PRACTICES

- 4.1 The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LOA and during the subsistence of the Concession Agreement. Notwithstanding anything to the contrary contained herein, or in the LOA or the Concession Agreement, the Authority may reject a Bid, withdraw the LOA, or terminate the Concession Agreement, as the case may be, without being liable in any manner whatsoever to the Bidder or Concessionaire, as the case may be, if it determines that the Bidder or Concessionaire, as the case may be, has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process. In such an event, the Authority shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/ or the Concession Agreement, or otherwise.
- 4.2 Without prejudice to the rights of the Authority under Clause 4.1 hereinabove and the rights and remedies which the Authority may have under the LOA or the Concession Agreement, or otherwise if a Bidder or Concessionaire, as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the Concession Agreement, such Bidder or Concessionaire shall not be eligible to participate in any tender or RFP issued by the Authority during a period of 2 (two) years from the date such Bidder or Concessionaire, as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be.
- 4.3 For the purposes of this Clause 4, the following terms shall have the meaning hereinafter respectively assigned to them:
- (a) “**corrupt practice**” means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bidding Process (for avoidance of doubt, offering of employment to or employing or engaging in any manner whatsoever, directly or indirectly, any official of the Authority who is or has been associated in any manner, directly or indirectly, with the Bidding Process or the LOA or has dealt with matters concerning the Concession Agreement or arising therefrom, before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the Authority, shall be deemed to constitute influencing the actions of a person connected

with the Bidding Process); or (ii) save and except as permitted under the Clause 2.1.15 of this RFP, engaging in any manner whatsoever, whether during the Bidding Process or after the issue of the LOA or after the execution of the Concession Agreement, as the case may be, any person in respect of any matter relating to the Project or the LOA or the Concession Agreement, who at any time has been or is a legal, financial or technical adviser of the Authority in relation to any matter concerning the Project;

- (b) “**fraudulent practice**” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;
- (c) “**coercive practice**” means impairing or harming, or threatening to impair or harm, directly or indirectly, any person or property to influence any person’s participation or action in the Bidding Process;
- (d) “**undesirable practice**” means (i) establishing contact with any person connected with or employed or engaged by the Authority with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process; or (ii) having a Conflict of Interest; and
- (e) “**restrictive practice**” means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of restricting or manipulating a full and fair competition in the Bidding Process.

5. PRE-BID CONFERENCE

- 5.1 Pre-Bid Conferences of the Bidders shall be convened at the designated date, time and place. Only those persons who have purchased the RFP document shall be allowed to participate in the Pre-Bid Conferences. A maximum of five representatives of each Bidder shall be allowed to participate on production of authority letter from the Bidder.
- 5.2 During the course of Pre-Bid Conference(s), the Bidders will be free to seek clarifications and make suggestions for consideration of the Authority. The Authority shall endeavour to provide clarifications and such further information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.

6. MISCELLANEOUS

- 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at [New Delhi] shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process.
- 6.2 The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;
- (a) suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;
 - (b) consult with any Bidder in order to receive clarification or further information;
 - (c) retain any information and/ or evidence submitted to the Authority by, on behalf of, and/ or in relation to any Bidder; and/ or
 - (d) independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Bidder.
- 6.3 It shall be deemed that by submitting the Bid, the Bidder agrees and releases the Authority, its employees, agents and advisers, irrevocably, unconditionally, fully and finally from any and all liability for claims, losses, damages, costs, expenses or liabilities in any way related to or arising from the exercise of any rights and/ or performance of any obligations hereunder, pursuant hereto and/ or in connection with the Bidding Process and waives, to the fullest extent permitted by applicable laws, any and all rights and/ or claims it may have in this respect, whether actual or contingent, whether present or in future.
- 6.4 The Bidding Documents and RFQ are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this RFP, in the event of any conflict between them the priority shall be in the following order:
- (a) the Bidding Documents;
 - (b) the RFQ.
- i.e. the Bidding Documents at (a) above shall prevail over the RFQ at (b) above.

APPENDIX-I

Letter comprising the Bid
(Refer Clauses 2.1.5 and 2.14)

Dated:

[The Secretary,

*****]

Sub: Bid for ***** Project

Dear Sir,

With reference to your RFP document dated *****^{\$} I/we, having examined the Bidding Documents and understood their contents, hereby submit my/our Bid for the aforesaid Project. The Bid is unconditional and unqualified.

2. I/ We acknowledge that the Authority will be relying on the information provided in the Bid and the documents accompanying the Bid for selection of the Concessionaire for the aforesaid Project, and we certify that all information provided therein is true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying the Bid are true copies of their respective originals.
3. This statement is made for the express purpose of our selection as Concessionaire for the [development, construction, operation and maintenance of the aforesaid Project.
4. I/ We shall make available to the Authority any additional information it may find necessary or require to supplement or authenticate the Bid.
5. I/ We acknowledge the right of the Authority to reject our Bid without assigning any reason or otherwise and hereby waive, to the fullest extent permitted by applicable law, our right to challenge the same on any account whatsoever.
6. I/ We certify that in the last three years, we/ any of the Consortium Members[£] or our/ their Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any

^{\$} All blank spaces shall be suitably filled up by the Applicant to reflect the particulars relating to such Applicant.

[£] If the Bidder is not a Consortium, the provisions applicable to Consortium may be omitted.

project of contract by any public authority nor have any contract terminated by any public authority for breach on our part.

. I/ We declare that:

- (a) I/ We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Authority; and
 - (b) I/ We do not have any conflict of interest in accordance with Clauses 2.1.14 and 2.1.15 of the RFP document; and
 - (c) I/ We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as defined in Clause 4.3 of the RFP document, in respect of any tender or request for proposal issued by or any agreement entered into with the Authority or any other public sector enterprise or any government, Central or State; and
 - (d) I/ We hereby certify that we have taken steps to ensure that in conformity with the provisions of Section 4 of the RFP, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice; and
 - (e) the undertakings given by us along with the Application in response to the RFQ for the Project were true and correct as on the date of making the Application and are also true and correct as on the Bid Due Date and I/we shall continue to abide by them.
8. I/ We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.16 of the RFP document.
9. I/ We believe that we/ our Consortium satisfy(s) the Net Worth criteria and meet(s) the requirements as specified in the RFQ document.
10. I/ We declare that we/ any Member of the Consortium, or our/ its Associates are not a Member of a/ any other Consortium submitting a Bid for the Project.

11. I/ We certify that in regard to matters other than security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the

Project or which relates to a grave offence that outrages the moral sense of the community.

12. I/ We further certify that in regard to matters relating to security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been charge-sheeted by any agency of the Government or convicted by a Court of Law.
13. I/ We further certify that no investigation by a regulatory authority is pending either against us or against our Associates or against our CEO or any of our directors/ managers/ employees.
14. [I/ We further certify that we are not disqualified in terms of the additional criteria specified by the Department of Disinvestment in their OM No. 6/4/2001-DD-II dated July 13, 2001, a copy of which forms part of the RFP at Appendix-V thereof.]
15. I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of the guidelines referred to above, we shall intimate the Authority of the same immediately.
16. I/ We acknowledge and undertake that our Consortium was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Members who shall, for a period of 2 (two) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (twenty six per cent) of the subscribed and paid-up equity of the Concessionaire; and (ii) 5% (five per cent) of the Total Project Cost specified in the Concession Agreement. We further agree and acknowledge that the aforesaid obligation shall be in addition to the obligations contained in the Concession Agreement in respect of Change in Ownership.
17. I/ We acknowledge and agree that in the event of a change in control of an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, I/We shall inform the Authority forthwith along with all relevant particulars and the Authority may, in its sole discretion, disqualify our Consortium or withdraw the Letter of Award, as the case may be. I/We further

acknowledge and agree that in the event such change in control occurs after signing of the Concession Agreement but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed a breach thereof, and the Concession Agreement shall be liable to be terminated without the Authority being liable to us in any manner whatsoever.

18. I/ We understand that the Selected Bidder shall either be an existing Company incorporated under the Indian Companies Act, 1956/ 2013, or shall incorporate as such prior to execution of the Concession Agreement.
19. I/ We hereby irrevocably waive any right or remedy which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by the Authority in connection with the selection of the Bidder, or in connection with the Bidding Process itself, in respect of the above mentioned Project and the terms and implementation thereof.
20. In the event of my/ our being declared as the Selected Bidder, I/we agree to enter into a Concession Agreement in accordance with the draft that has been provided to me/us prior to the Bid Due Date. We agree not to seek any changes in the aforesaid draft and agree to abide by the same.
21. I/ We have studied all the Bidding Documents carefully and also surveyed the [Project Land]. We understand that except to the extent as expressly set forth in the Concession Agreement, we shall have no claim, right or title arising out of any documents or information provided to us by the Authority or in respect of any matter arising out of or relating to the Bidding Process including the award of Concession.
22. I/ We offer a Bid Security of Rs *****.(Rupees ***** only) to the Authority in accordance with the RFP Document.
23. The Bid Security in the form of a Demand Draft/ Bank Guarantee (strike out whichever is not applicable) is attached.
24. The documents accompanying the Bid, as specified in Clause 2.11.2 of the RFP, have been submitted in a separate envelope and marked as “Enclosures of the Bid”.
25. I/ We agree and understand that the Bid is subject to the provisions of the Bidding Documents. In no case, I/we shall have any claim or right of whatsoever nature if the Project / Concession is not awarded to me/us or our Bid is not opened or rejected.

26. The [Premium / Grant] has been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft Concession Agreement, our own estimates of costs [and] agricultural produce and after a careful assessment of the site and all the conditions that may affect the project cost and implementation of the Project.
27. I/ We agree and undertake to abide by all the terms and conditions of the RFP document.
28. {We, the Consortium Members agree and undertake to be jointly and severally liable for all the obligations of the Concessionaire under the Concession Agreement till occurrence of Financial Close in accordance with the Concession Agreement. }
29. I/ We shall keep this offer valid for 120 (one hundred and twenty) days from the Bid Due Date specified in the RFP.
30. I/ We hereby submit our Bid and offer [a Premium in the form of Rs.or(in words)/ require a Grants of Rs. (Rupees only)] (Strike out whichever is not applicable) for undertaking the aforesaid Project in accordance with the Bidding Documents and the Concession Agreement:

In witness thereof, I/we submit this Bid under and in accordance with the terms of the RFP document.

Yours faithfully,

Date: (Signature, name and designation of the Authorised signatory)

Place: Name and seal of Bidder/Lead Member

Note: Paragraphs in curly parenthesis may be omitted by the Bidder, if not applicable to it, or modified as necessary to reflect Bidder-specific particulars.

APPENDIX-II

Bank Guarantee for Bid Security
(Refer Clauses 2.1.7 and 2.20.1)

B.G. No. Dated:

1. In consideration of you, *****, having its office at *****, (hereinafter referred to as the “Authority”, which expression shall unless it be repugnant to the subject or context thereof include its, successors and assigns) having agreed to receive the Bid of (a company registered under the Companies Act, 1956/2013) and having its registered office at (and acting on behalf of its Consortium) (hereinafter referred to as the “Bidder” which expression shall unless it be repugnant to the subject or context thereof include its/their executors, administrators, successors and assigns), for the ***** Project on [DBFOT] basis (hereinafter referred to as “the Project”) pursuant to the RFP Document dated issued in respect of the Project and other related documents including without limitation the draft concession agreement (hereinafter collectively referred to as “Bidding Documents”), we (Name of the Bank) having our registered office at and one of its branches at (hereinafter referred to as the “Bank”), at the request of the Bidder, do hereby in terms of Clause 2.1.7 read with Clause 2.1.8 of the RFP Document, irrevocably, unconditionally and without reservation guarantee the due and faithful fulfilment and compliance of the terms and conditions of the Bidding Documents (including the RFP Document) by the said Bidder and unconditionally and irrevocably undertake to pay forthwith to the Authority an amount of Rs. ***** (Rupees ***** only) (hereinafter referred to as the “Guarantee”) as our primary obligation without any demur, reservation, recourse, contest or protest and without reference to the Bidder if the Bidder shall fail to fulfil or comply with all or any of the terms and conditions contained in the said Bidding Documents.
2. Any such written demand made by the Authority stating that the Bidder is in default of the due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents shall be final, conclusive and binding on the Bank.
3. We, the Bank, do hereby unconditionally undertake to pay the amounts due and payable under this Guarantee without any demur, reservation, recourse, contest or protest and without any reference to the Bidder or any other person and irrespective of whether the claim of the Authority is disputed by the Bidder or not, merely on the first demand from the Authority stating that the amount claimed is due to the Authority by reason of failure of the Bidder to fulfil and comply with the terms and conditions contained in the Bidding Documents including

failure of the said Bidder to keep its Bid open during the Bid validity period as set forth in the said Bidding Documents for any reason whatsoever. Any such demand made on the Bank shall be conclusive as regards amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs. ***** (Rupees ***** only).

4. This Guarantee shall be irrevocable and remain in full force for a period of 180 (one hundred and eighty) days from the Bid Due Date inclusive of a claim period of 60 (sixty) days or for such extended period as may be mutually agreed between the Authority and the Bidder, and agreed to by the Bank, and shall continue to be enforceable till all amounts under this Guarantee have been paid.
5. We, the Bank, further agree that the Authority shall be the sole judge to decide as to whether the Bidder is in default of due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents including, *inter alia*, the failure of the Bidder to keep its Bid open during the Bid validity period set forth in the said Bidding Documents, and the decision of the Authority that the Bidder is in default as aforesaid shall be final and binding on us, notwithstanding any differences between the Authority and the Bidder or any dispute pending before any Court, Tribunal, Arbitrator or any other authority.
6. The Guarantee shall not be affected by any change in the constitution or winding up of the Bidder or the Bank or any absorption, merger or amalgamation of the Bidder or the Bank with any other person.
7. In order to give full effect to this Guarantee, the Authority shall be entitled to treat the Bank as the principal debtor. The Authority shall have the fullest liberty without affecting in any way the liability of the Bank under this Guarantee from time to time to vary any of the terms and conditions contained in the said Bidding Documents or to extend time for submission of the Bids or the Bid validity period or the period for conveying acceptance of Letter of Award by the Bidder or the period for fulfilment and compliance with all or any of the terms and conditions contained in the said Bidding Documents by the said Bidder or to postpone for any time and from time to time any of the powers exercisable by it against the said Bidder and either to enforce or forbear from enforcing any of the terms and conditions contained in the said Bidding Documents or the securities available to the Authority, and the Bank shall not be released from its liability under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the said Bidder or any other forbearance, act or omission on the part of the Authority or any indulgence by the Authority to

the said Bidder or by any change in the constitution of the Authority or its absorption, merger or amalgamation with any other person or any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of releasing the Bank from its such liability.

8. Any notice by way of request, demand or otherwise hereunder shall be sufficiently given or made if addressed to the Bank and sent by courier or by registered mail to the Bank at the address set forth herein.
9. We undertake to make the payment on receipt of your notice of claim on us addressed to [name of Bank along with branch address] and delivered at our above branch which shall be deemed to have been duly authorised to receive the said notice of claim.
10. It shall not be necessary for the Authority to proceed against the said Bidder before proceeding against the Bank and the guarantee herein contained shall be enforceable against the Bank, notwithstanding any other security which the Authority may have obtained from the said Bidder or any other person and which shall, at the time when proceedings are taken against the Bank hereunder, be outstanding or unrealised.
11. We, the Bank, further undertake not to revoke this Guarantee during its currency except with the previous express consent of the Authority in writing.
12. The Bank declares that it has power to issue this Guarantee and discharge the obligations contemplated herein, the undersigned is duly authorised and has full power to execute this Guarantee for and on behalf of the Bank.
13. For the avoidance of doubt, the Bank's liability under this Guarantee shall be restricted to Rs. **** crore (Rupees **** crore only). The Bank shall be liable to pay the said amount or any part thereof only if the Authority serves a written claim on the Bank in accordance with paragraph 9 hereof, on or before (** indicate date falling 180 days after the Bid Due Date)].

Signed and Delivered by Bank

By the hand of Mr./Ms, its and authorised official.

(Signature of the Authorised Signatory)

(Official Seal)

APPENDIX-III

Power of Attorney for signing of Bid
(Refer Clause 2.1.9)

Know all men by these presents, We, (name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorise Mr. / Ms (Name), son/daughter/wife of and presently residing at, who is presently employed with us/ the Lead Member of our Consortium and holding the position of, as our true and lawful attorney (hereinafter referred to as the "Attorney") to do in our name and on our behalf, all such acts, deeds and things as are necessary or required in connection with or incidental to submission of our bid for the ***** Project proposed or being developed by the ***** (the "Authority") including but not limited to signing and submission of all applications, bids and other documents and writings, participate in bidders' and other conferences and providing information / responses to the Authority, representing us in all matters before the Authority, signing and execution of all contracts including the Concession Agreement and undertakings consequent to acceptance of our bid, and generally dealing with the Authority in all matters in connection with or relating to or arising out of our bid for the said Project and/or upon award thereof to us and/or till the entering into of the Concession Agreement with the Authority.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

IN WITNESS WHEREOF WE,, THE ABOVE NAMED PRINCIPAL HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS DAY OF, 20.....

For.....

(Signature, name,
designation and address)

Witnesses:

1.

2.

Accepted

Notarised

(Signature, name, designation and address
of the Attorney)

Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- *Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*
- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Appostille certificate.*

APPENDIX-IV

Power of Attorney for Lead Member of Consortium
(Refer Clause 2.1.10)

Whereas the ***** (the “Authority”) has invited bids from pre-qualified and short-listed parties for the ***** Project(the “Project”).

Whereas,,, and
(collectively the “Consortium”) being Members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of the Request for Proposal and other connected documents in respect of the Project, and

Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium’s bid for the Project and its execution.

NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS

We, having our registered office at, M/s., having our registered office at, and M/s., having our registered office at, (hereinafter collectively referred to as the “Principals”) do hereby irrevocably designate, nominate, constitute, appoint and authorise M/s, having its registered office at, being one of the Members of the Consortium, as the Lead Member and true and lawful attorney of the Consortium (hereinafter referred to as the “Attorney”) and hereby irrevocably authorise the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the Concession/ Contract, during the execution of the Project, and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the submission of its bid for the Project, including but not limited to signing and submission of all applications, bids and other documents and writings, accept the Letter of Award, participate in bidders’ and other conferences, respond to queries, submit information/ documents, sign and execute contracts and undertakings consequent to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Authority, and/ or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium’s bid for the Project and/ or upon award thereof till the Concession Agreement is entered into with the Authority.

AND hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done

by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us/ Consortium.

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS DAY OF, 20....

For
(Signature, Name & Title)

For
(Signature, Name & Title)

For
(Signature, Name & Title)

(Executants)

(To be executed by all the Members of the Consortium)

Witnesses:

- 1.
- 2.

Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*

Appendix - IV

- *Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*

- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Appostille certificate.*

APPENDIX-V¹⁴

Guidelines of the Department of Disinvestment
(Refer Clause 1.2.1)

No. 6/4/2001-DD-II
Government of India
Department of Disinvestment

Block 14, CGO Complex
New Delhi.
Dated 13th July 2001.

OFFICE MEMORANDUM

Sub: Guidelines for qualification of Bidders seeking to acquire stakes in Public Sector Enterprises through the process of disinvestment

Government has examined the issue of framing comprehensive and transparent guidelines defining the criteria for bidders interested in PSE-disinvestment so that the parties selected through competitive bidding could inspire public confidence. Earlier, criteria like net worth, experience etc. used to be prescribed. Based on experience and in consultation with concerned departments, Government has decided to prescribe the following additional criteria for the qualification/ disqualification of the parties seeking to acquire stakes in public sector enterprises through disinvestment:

- (a) In regard to matters other than the security and integrity of the country, any conviction by a Court of Law or indictment/ adverse order by a regulatory authority that casts a doubt on the ability of the bidder to manage the public sector unit when it is disinvested, or which relates to a grave offence would constitute disqualification. Grave offence is defined to be of such a nature that it outrages the moral sense of the community. The decision in regard to the nature of the offence would be taken on case to case basis after considering the facts of the case and relevant legal principles, by the Government of India.
- (b) In regard to matters relating to the security and integrity of the country, any charge-sheet by an agency of the Government/ conviction by a Court of Law for an offence committed by the bidding party or by any sister concern of the bidding party would result in disqualification. The decision in regard to the relationship between the sister concerns would be taken, based on the relevant facts and after examining whether the two concerns are substantially controlled by the same person/ persons.
- (c) In both (a) and (b), disqualification shall continue for a period that Government deems appropriate.

¹⁴ These guidelines may be modified or substituted by the Government from time to time.

DRAFT

MODEL CONCESSION AGREEMENT

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Part I
Preliminary

CONCESSION AGREEMENT

THIS AGREEMENT ¹is entered into on this theday of, 2015.

BETWEEN

1. ***** {Name of the Authority}, having its principal office at....., represented by Mr. ===== (Designation) (hereinafter referred to as the “**Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of One Part;

AND

2. {.....LIMITED}[§], a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at, (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Other Part.

WHEREAS:

- (A) The Authority had resolved to procure the development of Cold Chain infrastructure at [name of the place]² for [details of the product to be stored/preserved in facility] originating from [name of the place] under the Public Private Partnership (PPP) arrangement.

(B)

The Authority resolved to establish a Controlled Atmosphere (CA) storage facility at [name of the place] with [capacity of the facility] (the “**Project Facility**” more particularly described at Annex-I of Schedule A). The Authority now intends to appoint a private developer/operator to develop/operate the cold chain infrastructure in [name of the place] with backward and forward linkage to [Project Scope] the Project Facility on [design, build, finance, operate and transfer (“**DBFOT**”)] basis in accordance with the terms and conditions to be set forth in a concession agreement to be entered into.

- (C) The Authority has since, for the development of cold chain infrastructure, acquired land [Details of Land] (more particularly described in Annex-II of Schedule A).

¹Serially numbered footnotes in this Model Concession Agreement are for guidance of the Authority and should be omitted from the draft Concession Agreement forming part of Bid Documents. Footnotes marked “\$” or in other non-numerical characters shall be retained in the draft Concession Agreement.

[§]The provisions in curly parenthesis and the blank spaces shall be retained in the draft Concession Agreement and shall be suitably modified/ filled after completion of the bid process to reflect the particulars relating to the selected bidder.

²All project-specific provisions in this Model Concession Agreement have been enclosed in square parenthesis and may be modified, as necessary, before issuing the draft Concession Agreement forming part of Bid Documents.

- (D) The Authority had accordingly invited proposals by its [Notice/ Request for Qualification No. ***³ dated ***] (the “**Request for Qualification**” or “**RFQ**”) for short listing of bidders for construction, operation and maintenance of the Project Facilities on DRBFOT basis and had shortlisted certain bidders including, *inter alia*, the {the selected bidder/ consortium comprisingand(collectively the “**Consortium**”) withas its lead member (the “**Lead Member**”)}.
- (E) The Authority had prescribed the technical and commercial terms and conditions, and invited bids (the “**Request for Proposals**” or “**RFP**”) from the bidders shortlisted pursuant to the RFQ for undertaking the Project.
- (F) After evaluation of the bids received, the Authority had accepted the bid of the {selected bidder/ Consortium} and issued its Letter of Award No.dated.....(hereinafter called the “**LOA**”) to the {selected bidder/ Consortium} requiring, *inter alia*, the execution of this Concession Agreement within 45 (forty-five) days of the date of issue thereof.
- (G) {The selected bidder/ Consortium has since promoted and incorporated the Concessionaire as a limited liability company under the Companies Act 2013, and has requested the Authority to accept the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the selected bidder/ Consortium under the LOA} including the obligation to enter into this Concession Agreement pursuant to the LOA for executing the Project.
- (H) {By its letter dated, the Concessionaire has also joined in the said request of theselected bidder/ Consortium to the Authority to accept it as the entity which shall undertakeand perform the obligations and exercise the rights of the selected bidder/ Consortium includingthe obligation to enter into this Concession Agreement pursuant to the LOA. TheConcessionaire has further represented to the effect that it has been promoted bytheselected bidder/ Consortium for the purposes hereof.}
- (I) The Authority has agreed to the said request of the {selected bidder/Consortium and the} Concessionaire, and has accordingly agreed to enter into this Concession Agreement with the Concessionaire for execution of the Project on [DRBFOT] basis, subject to and on the terms and conditions set forth hereinafter.

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

³All asterisks in this Model Concession Agreement should be substituted by project-specific particulars in the draft Concession Agreement forming part of Bid Documents.

ARTICLE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 40) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules.

1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

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

- (g) references to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, upgradation and other activities incidental thereto, and “**develop**” shall be construed accordingly;
- (h) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (i) any reference to day shall mean a reference to a calendar day;
- (j) references to a “**business day**” shall be construed as a reference to a day (other than a Sunday) on which banks in Delhi are generally open for business;
- (k) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- (l) references to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- (m) any reference to any period commencing “**from**” a specified day or date and “**till**” or “**until**” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- (n) the words importing singular shall include plural and vice versa;
- (o) references to any gender shall include the other and the neutral gender;
- (p) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- (q) “**indebtedness**” shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- (r) referencetothe“**winding-up**”, “**dissolution**”, “**insolvency**”, or“**reorganisation**” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- (s) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended,

varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause shall not operate so as to increase liabilities or obligations of the Authority hereunder or pursuant hereto in any manner whatsoever;

- (t) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;
- (u) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (v) references to Recitals, Articles, Clauses, Sub-clauses or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses and Schedules of or to this Agreement, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a Paragraph of this Agreement or of the Schedule in which such reference appears;
- (w) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “**Damages**”);and
- (x) time shall be of the essence in the performance of the Parties’ respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence.

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

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

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

1.3 Measurements and arithmetic conventions

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

1.4 Priority of agreements, clauses and schedules

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

- (a) this Agreement; and
- (b) all other agreements and documents forming part hereof or referred to herein;

i.e. the Agreement at (a) above shall prevail over the agreements and documents at (b) above.

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

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

Part II
The Concession

ARTICLE 2

SCOPE OF THE PROJECT

2.1 Scope of the Project

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

- (a) Development/procurement, operation and maintenance of cold chain infrastructure including the following:
 - i. [Sorting/Grading – facility]
 - ii. [Pre-Cooling facility]
 - iii. [Cold Store]
 - iv. [Refrigerated Trucks (on ownership/lease/rent basis)]

on the Project Sites set forth in **Annex –I of Schedule-A;**

- (b) operation and maintenance of the Project Facility as specified in **Annex –I of Schedule A;** and

[Along with facilities given in **Schedule-B** together with provision of Project Facilities as specified in **Schedule-C**, and in conformity with the Specifications and Standards set forth in **Schedule-D**];

- (c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

ARTICLE 3

GRANT OF CONCESSION

3.1 The Concession

- 3.1.1 Subject to and in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and authority to construct, operate and maintain the Project (the “**Concession**”) for a period of [25 (Twenty Five)] years commencing from the Appointed Date, and the Concessionaire hereby accepts the Concession and agrees to implement the Project;
- 3.1.2 Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle (as the case may be) the Concessionaire to:
- (a) Right of Way, access and lease rights to the Project Sites for the purpose of and to the extent conferred by the provisions of this Agreement;
 - (b) design, finance and construct the Project;
 - (c) manage, rehabilitate, operate and maintain the Project Facilities and regulate the use thereof by Third Parties;
 - (d) demand, collect and appropriate revenue generated from the use of Project Facilities and the services provided by the Concessionaire;
 - (e) perform and fulfil all of the Concessionaire’s obligations under and in accordance with this Agreement;
 - (f) bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Concessionaire under this Agreement; and
 - (g) neither assign, mortgage, transfer or sublet or create any lien or Encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Project nor transfer, lease, sub-lease or part possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement

ARTICLE 4

CONDITIONS PRECEDENT

4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles 4, 9, 10, 21, 27, 37 and 39, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “**Conditions Precedent**”).

4.1.2 The Concessionaire may, upon providing the Construction Performance Security to the Authority in accordance with Article 9, at any time after [90 (ninety)] days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have:

- (a) in accordance with this Concession Agreement, procured land and provide peaceful possession of Project Sites to the Concessionaire on “as is where is basis” in accordance with the provisions of Clause 10.3.1;
- (b) made at its cost, requisite changes in the land use of the Project Sites;
- (c) provided electricity and water connection on “as is where is basis”, however, the Authority will assist the Concessionaire in procuring any Right of Way required for such utilities connections / networks upto the Project Sites; and
- (d) taken all the necessary permission including clearances / sanction to exempt the Concessionaire from the applicability of the relevant land reforms/ceiling laws or any other Applicable Law related to land ceiling, if any, in relation to the Project Sites;

4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire prior to the Appointed Date shall be deemed to have been fulfilled when the Concessionaire shall have:

- (a) provided Construction Performance Security to the Authority;
- (b) executed and procured execution of the Escrow Agreement as specified in **Schedule O**;

- (c) executed and procured execution of the Substitution Agreement as specified in **Schedule R**;
- (d) procured all the Applicable Permits, specified in **Schedule-E** unconditionally or if subject to conditions, then all such conditions required to be fulfilled by the date specified therein shall have been satisfied in full and such Applicable Permits are in full force and effect;
- (e) executed the Financing Agreements and delivered to the Authority 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;
- (f) delivered to the Authority 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders;
- (g) delivered to the Authority from {the Consortium Members, their respective} confirmation, in original, of the correctness of their representations and warranties set forth in Sub clauses (k), (l) and (m) of clause 7.1 of this Agreement;
- (h) delivered to the Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof;
- (i) prepared, finalised and procured approval of the Independent Engineer for the revised detailed project report in accordance with Standards and Specifications as stated under **Schedule D**;
- (j) 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;
- (k) submitted and obtained approvals from the Authority on project master plan within 180 (one hundred and eighty) days of the Appointed Date;
- (l) delivered to the Authority executed copies of Project Agreements; and
- (m) delivered to the Authority a certificate on shareholding pattern for each member of the Consortium, from an Authorized Representative.

Provided that upon request in writing by the Concessionaire, the Authority may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3. For the avoidance of doubt, the Authority may, in its sole

discretion, grant any Waiver hereunder with such conditions as it may deem fit.

- 4.1.4 Each Party shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible.
- 4.1.5 The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

4.2 Damages for delay by the Authority

In the event that (i) the Authority does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the Authority shall pay to the Concessionaire Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Construction Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty percent) of the Construction Performance Security.

4.3 Damages for delay by the Concessionaire

In the event that (i) the Concessionaire does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.1.3 within a period of 180 (one hundred and eighty) days from the date of this Agreement, and (ii) the delay has not occurred as a result of failure to fulfil the obligations under Clause 4.1.2 or other breach of this Agreement by the Authority, or due to Force Majeure, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Construction Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty percent) of the Construction Performance Security.

ARTICLE 5

OBLIGATIONS OF THE CONCESSIONAIRE

5.1 Obligations of the Concessionaire

- 5.1.1 Subject to and on the terms and conditions of this Agreement, the Concessionaire shall, at its own cost and expense, procure finance for and undertake the [designing, rehabilitation, engineering, procurement, construction, operation and maintenance] of the Project Facilities and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 5.1.2 The Concessionaire shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- 5.1.3 Subject to the provisions of Clauses 5.1.1 and 5.1.2, the Concessionaire shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.
- 5.1.4 The Concessionaire shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
- (a) [design,develop, finance, construct, operate and maintain] the Project Facilities, in accordance with the design and equipment parameters and technical limits set out in the Specification and Standards as specified in **Schedule D** and provide an implementation schedule to be verified by the Independent Engineer (“**ImplementationSchedule**”);
 - (b) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars and details as may be required for obtaining Applicable Permits (other than those set forth in Clause 4.1.2), and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
 - (c) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project;
 - (d) perform and fulfil its obligations under the Financing Agreements;
 - (e) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;
 - (f) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Concessionaire’s obligations under this Agreement;

- (g) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
- (h) support, cooperate with and facilitate the Authority in the implementation and operation of the Project in accordance with the provisions of this Agreement;
- (i) transfer the Project to the Authority upon Termination of this Agreement, in accordance with the provisions thereof;
- (j) shall create a brand name for the Trading Operations and/or Service Provisions related to the Project and advertise the same as per Applicable Laws and market practices;
- (k) make sure that any trade mark, user mark, brand and/or any other Intellectual Property rights, developed/procured as part of this project, shall not be used by any of the associate/ subsidiary/company/joint venture partner/third party whether related or unrelated to the Concessionaire and shall not bear any name/mark of the promoters/promoter company including that of the Concessionaire. For removal of any doubt, the Concessionaire shall create a brand name for its Trading Operations and/or Service Provisions and shall advertise the same as a product/service of Concessionaire, however, the “brand name” shall not bear the name of the Concessionaire or its promoters/related parties; and
- (l) [shall notify the Authority on subscribing any beneficial scheme/subsidy of Central/State Government and their agencies/departments. The Concessionaire shall take prior written consent of the Authority before applying for any such beneficial scheme/subsidy and the consent under this Clause shall be subject to such conditions as the Authority may deem fit.]

5.2 Obligations relating to Project Agreements

- 5.2.1 It is expressly agreed that the Concessionaire shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the Project Agreements or any other agreement, and no default under any Project Agreement or agreement shall excuse the Concessionaire from its obligations or liability hereunder.
- 5.2.2 The Concessionaire shall submit to the Authority the drafts of all Project Agreements, or any amendments or replacements thereto, for its review and comments, and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, to the Concessionaire within 15 (fifteen) days of the receipt of such drafts. Within 7 (seven) days of execution of any Project Agreement or amendment thereto, the Concessionaire shall submit to the Authority a true copy thereof, duly attested by a Director of the Concessionaire, for its record. For the avoidance of doubt, it is agreed that the review and comments hereunder shall be limited to ensuring compliance with the terms of this Agreement. It is further

agreed that no review and/or observation of the Authority and/or its failure to review and/or convey its observations on any document shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Authority be liable for the same in any manner whatsoever.

- 5.2.3 The Concessionaire shall not make any addition, replacement or amendments to any of the Financing Agreements without the prior written consent of the Authority if such addition, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the Authority, and in the event that any replacement or amendment is made without such consent, the Concessionaire shall not enforce such replacement or amendment nor permit enforcement thereof against the Authority. For the avoidance of doubt, the Authority acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the Debt Due.
- 5.2.4 The Concessionaire shall procure that each of the Project Agreements contains provisions that entitle the Authority to step into such agreement, in its sole discretion, in substitution of the Concessionaire in the event of Termination or Suspension (the “**Covenant**”). For the avoidance of doubt, it is expressly agreed that in the event the Authority does not exercise such rights of substitution within a period not exceeding 90 (ninety) days from the Transfer Date, the Project Agreements shall be deemed to cease to be in force and effect on the Transfer Date without any liability whatsoever on the Authority and the Covenant shall expressly provide for such eventuality. The Concessionaire expressly agrees to include the Covenant in all its Project Agreements and undertakes that it shall, in respect of each of the Project Agreements, procure and deliver to the Authority an acknowledgment and undertaking, in a form acceptable to the Authority, from the counter party(ies) of each of the Project Agreements, whereunder 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 the Authority in the event of Termination or Suspension.
- 5.2.5 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that thereplacement of an O&M member and/or other members of the consortium forming the Concessionaire shall be subject to the conditions stipulated under Article 7.1(k) and only after obtaining prior approval of the Authority from national security and public interest perspective. The decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and the Concessionaire undertakes that it shall not give effect to any such selection or contract without prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavour to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of its decision and that such approval or denial thereof shall not in any manner absolve the

Concessionaire or its consortium members from any liability or obligation under this Agreement.

5.3 Obligations relating to Change in Ownership

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

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

- (i) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of not less than 15% (fifteen per cent) of the total Equity of the Concessionaire; or
- (ii) acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him

shall constitute a Change in Ownership requiring prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Concessionaire without such prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavour to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire from any liability or obligation under this Agreement.

For the purposes of this Clause 5.3.2:

- (a) the expression “acquirer”, “control” and “person acting in concert” shall have the meaning ascribed thereto in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997 or any statutory re-enactment thereof as in force as on the date of acquisition of Equity, or the control of the Board of Directors, as the case may be, of the Concessionaire;
- (b) the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control of any company or companies whether in India or abroad which results in the acquirer acquiring control over the shares or voting rights of shares of the Concessionaire; and

- (c) power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situate in India or abroad) the Equity of the Concessionaire, not less than half of the directors on the Board of Directors of the Concessionaire or of any company, directly or indirectly whether situate in India or abroad, having ultimate control of not less than 15% (fifteen per cent) of the Equity of the Concessionaire shall constitute acquisition of control, directly or indirectly, of the Board of Directors of the Concessionaire.

5.4 Employment of foreign nationals

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

5.5 Employment of trained personnel

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

5.6 Sole purpose of the Concessionaire

Having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the Concessionaire or any of its subsidiaries shall not, except with the previous written consent of the Authority, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein.

5.7 Branding of Project

The Project Facilities and Project Assets including the Trading Operations and/or Service Provisions shall be branded in the manner provided under Clauses 5.1.4 sub-clause (j) and (k) and shall not be branded in any manner to advertise, display or reflect the name or identity of the Concessionaire or its shareholders. The Concessionaire undertakes that it shall not, in any manner, use the name or entity of the Project to advertise or display its own identity, brand equity or business interests, including those of its shareholders, save and except as may be necessary in the normal course of business. For the avoidance of doubt, it is agreed that the Concessionaire may display its own name at a spot where other public notices are displayed

for the public and the Concessionaire is free to create and use a brand name/trademark etc. for the purpose of Trading Operations and/or Service Provisionsto be undertaken by the Concessionaire, however this brand name / trademark shall be used solely by the Concessionaire and not by any other entity includingits Associates / sister concerns. It is also agreed that the brand name/trademark used for the purpose of Trading Operations and/or Service Provisionsshall vest into the Authority on the expiry/Termination of this Concession Agreement.

5.8. Liability for Personnel

- 5.8.1. The Concessionaire shall be solely responsible for complying with all statutory responsibilities and liabilities in respect of the personnel engaged by him and liable for obtaining all mandatory registrations and deposit of contributions under various enactments. If, on account of default of the Concessionaire, the Authority is compelled to make any payments/contributions or discharge any responsibility/liability of the Concessionaire, the Authority shall be entitled to recover and/or set off such amounts/expenses incurred from the amounts due to the Concessionaire without prejudice to the right of the Authority to initiate appropriate legal proceedings for recovery of such amounts. The Concessionaire shall indemnify the Authority against all claims whatsoever arising out of his default in respect of the personnel engaged by him under any Statute/Law in force.
- 5.8.2. The Concessionaire shall maintain and submit all records & returns prescribed under all the Applicable Laws to the designated Authorities within the prescribed time limit and also to the Authority's Representative or any officer acting on its behalf whenever demanded.
- 5.8.3. The Agreement as entered into between the Authority and the Concessionaire shall in no way nullify, reduce, mitigate or absolve the Parties of any responsibility, obligation or liability that may devolve upon them under any statutory/mandatory provisions prevailing in India. Liabilities of the Concessionaire in respect of obligatory laws remain unaffected and Concessionaire shall remain responsible for settlement of claims, if any, of Third Parties who may suffer Damages either due to the fault of the Concessionaire or its employees and Associates.
- 5.8.4. All persons employed by the Concessionaire shall be engaged by him as his own employees/workers in all respects and all rights and liabilities under the Indian Factories Act, the Employees Compensation Act, Employees Provident Fund & Miscellaneous Provisions Act (EPF & MP Act), Industrial Disputes Act, Employees State Insurance Act, Contract Labor (R&A) Act and under all other applicable enactments in India in respect of all such personnel shall exclusively be that of the Concessionaire. The Concessionaire shall be bound to indemnify the Authority against all the claims whatsoever in respect of his personnel under the Employees Compensation Act, 1923 or any statutory modification thereof or otherwise or in respect of any damage or compensation payable in consequence of any

accident or injury sustained by any workmen or other person whether in employment of the Concessionaire or not.

- 5.8.5. The provisions indicated above are not comprehensive; the Concessionaire shall ensure compliance of all statutory/mandatory provisions under all the Applicable Laws, rules & regulations made by the State Government/Central Government from time to time pertaining to the contract, including all labor laws and all the laws as applicable.

ARTICLE 6

OBLIGATIONS OF THE AUTHORITY

6.1 Obligations of the Authority

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

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

- (a) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide reasonable support and assistance to the Concessionaire in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project;
- (b) upon written request from the Concessionaire, provide reasonable assistance to the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity;
- (c) assist the Concessionaire in procuring police assistance for removal of trespassers and security on or at the Project Facilities;
- (d) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
- (e) support, cooperate with and facilitate the Concessionaire in the implementation and operation of the Project in accordance with the provisions of this Agreement; and
- (f) provide reasonable assistance to the Concessionaire in developing/strengthening the association with farmers for the purpose of procurement of [details of the product to be stored/preserved in facility].

6.2 Maintenance obligations prior to Appointed Date

During the Development Period, the Authority shall maintain the Project, at its own cost and expense in the event of any material deterioration or damage other than normal wear and tear, undertake repair thereof, or pay to the Concessionaire the cost and expense, as determined by the Independent Engineer, for undertaking such repair after the Appointed Date. For the avoidance of doubt, the Authority shall undertake only routine maintenance during the Development Period, and it shall undertake special repairs only for ensuring safe operation of the Project, or in the event of excessive

deterioration or damage caused due to unforeseen events such as floods or torrential rain.

ARTICLE 7

REPRESENTATIONS AND WARRANTIES

7.1 Representations and Warranties of the Concessionaire

The Concessionaire represents and warrants to the Authority that:

- (a) it is duly organised and validly existing under the laws of India, and has full power and authority to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and other actions under Applicable Laws to authorise the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (c) it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (d) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (e) it is subject to the laws of India, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (f) the information furnished in the Bid and as updated on or before the date of this Agreement is true and accurate in all respects as on the date of this Agreement;
- (g) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Articles of Association {or those of any member of the Consortium} or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (h) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of this Agreement or which individually or in the aggregate may result in any material

impairment of its ability to perform any of its obligations under this Agreement;

- (i) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Instrumentality which may result in any Material Adverse Effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (j) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a Material Adverse Effect on its ability to perform its obligations under this Agreement;
- (k) it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.3 and that the {selected bidder/ Consortium Members}, together with {its/ their} Associates, hold not less than 51% (fifty-one percent) of its subscribed and paid up Equity as on the date of this Agreement and until the 2nd (second) anniversary of the date of commercial operation of the project; and that members of the Consortium, whose technical and financial capacity was evaluated for the purposes of pre-qualification and short-listing in response to the Request for Qualification, shall hold equity share capital representing not less than: (i) 26% (twenty six percent) of the subscribed and paid-up equity of the Concessionaire; and (ii) 5% (five percent) of the Total Project Cost specified in the Concession Agreement for a period of 2 (two) years starting from Commercial Operation Date; and that the member of the Consortium, possessing the experience required in Clause 2.2.3 (a) of the RFQ document (O&M Experience), shall subscribe and continue to hold at least 10% (ten percent) of the subscribed and paid up equity of the SPV for a period of 5 (five) years starting from Commercial Operation Date,

Provided further that any such request made under Article 7.1(k) and / or Article 39, at the option of the Authority, may be required to be accompanied by a suitable no objection letter from lenders”.

- (l) {the selected bidder/ Consortium Members and its/their} Associates have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with this Agreement;
- (m) {the selected bidder/ each Consortium Member} is duly organised and validly existing under the laws of the jurisdiction of its incorporation, and has requested the Authority to enter into this Agreement with the Concessionaire pursuant to the Letter of Award,

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

- (n) all its rights and interests in the Project, Project Assets, Project Facilities and Trading Operations and/or Service Provisions inclusive of all Intellectual Property Rights shall pass to and vest in the Authority on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Authority, and that none of the Project Facilities shall be acquired by it, 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;
- (o) no representation or warranty by it contained herein or in any other document furnished by it to the Authority or to any Government Instrumentality in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (p) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Authority in connection therewith; and
- (q) all information provided by the {selected bidder/ Consortium Members} in response to the Request for Qualification and Request for Proposals or otherwise, is to the best of its knowledge and belief, true and accurate in all material respects.

7.2 Representations and Warranties of the Authority

The Authority represents and warrants to the Concessionaire that:

- (a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) it has taken all necessary actions under the Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under this Agreement;
- (d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;

- (e) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any Material Adverse Effect on the Authority's ability to perform its obligations under this Agreement;
- (f) it has complied with Applicable Laws in all material respects;
- (g) it has the right, power and authority to manage and operate the Project Facilities up to the Appointed Date;and
- (h) it has good and valid right to the Project Sites, and has power and authority to grant a lease/licence in respect thereto to the Concessionaire.

7.3 Disclosure

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

ARTICLE 8

DISCLAIMER

8.1 Disclaimer

- 8.1.1 The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the Request for Qualification, Request for Proposals, Scope of the Project, Specifications and Standards, Project Sites, existing structures, local conditions, physical qualities of ground, subsoil and geology and all information provided by the Authority and/or its consultants or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. The Authority makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Concessionaire confirms that it shall have no claim whatsoever against the Authority in this regard.
- 8.1.2 The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the Authority shall not be liable for the same in any manner whatsoever to the Concessionaire, {the Consortium Members and their} Associates or any person claiming through or under any of them.
- 8.1.3 The Parties agree that any mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above shall not vitiate this Agreement, or render it voidable.
- 8.1.4 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 8.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error; provided, however, that a failure on part of the Authority to give any notice pursuant to this Clause 8.1.4 shall not prejudice the disclaimer of the Authority contained in Clause 8.1.1 and shall not in any manner shift to the Authority any risks assumed by the Concessionaire pursuant to this Agreement.
- 8.1.5 Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Concessionaire and the Authority shall not be liable in any manner for such risks or the consequences thereof.

Part III
Development and Operations

ARTICLE 9

PERFORMANCE SECURITY

9.1 Construction Performance Security

9.1.1 The Concessionaire shall, for the performance of its obligations hereunder during the Construction Period, provide to the Authority no later than 180 (one hundred and eighty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Bank for a sum equivalent to [Rs. ***** (Rupees

***** only)] in the form set forth in **Schedule-F**, Part-A (the “**Construction Performance Security**”). Until such time the Construction Performance Security is provided by the Concessionaire pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Construction Performance Security pursuant hereto, the Authority shall release the Bid Security to the Concessionaire.

9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Construction Performance Security is not provided by the Concessionaire within a period of 180 (one hundred and eighty) days from the date of this Agreement, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

9.2 Appropriation of Construction Performance Security

Upon occurrence of a Concessionaire Default or failure to meet any Condition Precedent, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Construction Performance Security as Damages for such Concessionaire Default. Upon such encashment and appropriation from the Construction Performance Security, the Concessionaire shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Construction Performance Security, and in case of appropriation of the entire Construction Performance Security provide a fresh Construction Performance Security, as the case may be, and the Concessionaire shall, within the time so granted, replenish or furnish fresh Construction Performance Security as aforesaid failing which the Authority shall be entitled to terminate this Agreement in accordance with Article 30. Upon replenishment or furnishing of a fresh Construction Performance Security, as the case may be, as aforesaid, the Concessionaire shall be entitled to an additional Cure Period of 90 (ninety) days for remedying the Concessionaire Default, and in the event of the Concessionaire not curing its default within such Cure Period, the Authority shall be entitled to encash and

appropriate such Construction Performance Security as Damages, and to terminate this Agreement in accordance with Article 30.

9.3 Release of Construction Performance Security

The Construction Performance Security shall remain in force and effect for a period of two year from the Appointed Date or till Commercial Operation Date of the Project whichever is later. Upon request made by the Concessionaire for release of the Construction Performance Security along with the particulars which establish satisfaction of the requirements specified under this Clause 9.3, the Authority shall release the Construction Performance Security forthwith.

9.4 Operational Performance Security

9.4.1 The Concessionaire shall, for the performance of its obligations hereunder during the Operation Period, provide to the Authority no later than 365 (Three hundred and Sixty Five) days from the completion of construction of the Project Facilities, an irrevocable and unconditional guarantee from a Bank for a sum equivalent to [Rs. ***** (Rupees *****)] or equivalent to amount aggregating Concession Fee and Usage Fee, whichever is higher in the form set forth in **Schedule-F, Part-B** (the “**Operation Performance Security**”). Until such time the Operation Performance Security is provided by the Concessionaire pursuant hereto and the same comes into effect, the Construction Performance Security shall remain in force and effect, and upon such provision of the Operation Performance Security pursuant hereto, the Authority shall release the Construction Performance Security to the Concessionaire.

9.4.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Operation Performance Security is not provided by the Concessionaire within a period of 365 (Three hundred and Sixty Five) days, the Authority may encash the Construction Performance Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

9.5 Appropriation of Operation Performance Security

Upon occurrence of a Concessionaire Default or failure to meet any obligation, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Operation Performance Security as Damages for such Concessionaire Default during Operation Period. Upon such encashment and appropriation from the Operation Performance Security, the Concessionaire shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Operation Performance Security, and in case of appropriation of the entire Operation Performance Security provide a fresh Operation Performance Security, as the case may

be, and the Concessionaire shall, within the time so granted, replenish or furnish fresh Operation Performance Security as aforesaid failing which the Authority shall be entitled to terminate this Agreement in accordance with Article 30. Upon replenishment or furnishing of a fresh Operation Performance Security, as the case may be, as aforesaid, the Concessionaire shall be entitled to an additional Cure Period of 90 (ninety) days for remedying the Concessionaire Default, and in the event of the Concessionaire not curing its default within such Cure Period, the Authority shall be entitled to encash and appropriate such Operation Performance Security as Damages, and to terminate this Agreement in accordance with Article 30.

9.6 Release of Operation Performance Security

The Operation Performance Security shall remain in force and effective for a period of one year from the Transfer Date in case the Project is transferred to Authority in pursuance to Article 31 or for a period of one year from Termination Date in case this Concession Agreement is terminated in pursuance to Article 30. Upon request made by the Concessionaire for release of the Operation Performance Security along with the particulars which establish satisfaction of the requirements specified under this Clause 9.6, the Authority shall release the Operation Performance Security forthwith.

ARTICLE 10

PROJECT SITES & LEASE RIGHTS

10.1 The Project Sites

The Project Sites shall comprise the real estate described in **Schedule-A** and in respect of which the lease hold rights including the Right of Way of Project Facilities, shall be provided and granted by the Authority, to the Concessionaire as a lessee by execution of Lease Agreements/Deeds under and in accordance with this Agreement (the “**Project Sites**”). The Lease Agreements/deeds shall be executed on fulfilment of Conditions Precedent by the Concessionaire. For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Project Sites shall be construed as references to the real estate required for the Project as set forth in **Schedule-A**.

10.2 Access and Right of Way

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

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

10.2.3 The -lease, access and right of way granted by this Agreement to the Concessionaire shall always be subject to existing rights of way and the Concessionaire shall perform its obligations in a manner that no inconvenience is caused to public at all times during the Concession Period.

10.2.4 It is expressly agreed that the -lease rights granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Authority to terminate the Lease Agreement/deed, upon the Termination

of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Project Sites by the Concessionaire, the lease in respect of the Project Sites shall automatically terminate, without any further act of the Parties, upon Termination of this Agreement.

- 10.2.5 The Concessionaire hereby irrevocably appoints the Authority (or its nominee) to be its true and lawful attorney, to execute and sign in the name of the Concessionaire a transfer or surrender of the lease granted hereunder at any time after the Concession Period has expired or has been terminated earlier in terms hereof, a sufficient proof of which will be the declaration of any duly authorised officer of the Authority, and the Concessionaire consents to it being registered for this purpose.
- 10.2.6 It is expressly agreed that trees on the Project Sites are property of the Authority except that the Concessionaire shall be entitled to exercise usufructuary rights thereon during the Concession Period.

10.3 Procurement of the Project Sites

- 10.3.1 Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Project Sites and prepare a memorandum containing an inventory of the Project Sites including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Project Sites. Such memorandum shall have appended thereto an appendix (the “**Appendix**”) specifying in reasonable detail those parts of the Project Sites to which vacant access, lease and Right of Way has not been granted to the Concessionaire. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall, subject to the provisions of Clause 10.2.2, be deemed to constitute a valid lease, and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Project Sites during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid leases, and Right of Way with respect to the parts of the Project Sites as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire.
- 10.3.2 On and after signing the memorandum referred to in Clause 10.3.1, and until the Transfer Date, the Concessionaire shall maintain a round-the-clock vigil over the Project Sites and shall ensure and procure that no encroachment thereon takes place, and in the event of any encroachment or occupation on any part thereof, the Concessionaire shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its cost and expenses.
- 10.3.3 The Authority shall make best efforts to procure and grant, no later than 90 (ninety) days from the Appointed Date, subject to the fulfilment of Conditions Precedent by the Concessionaire, the lease rights and Right of

Way to the Concessionaire in respect of all land included in the Appendix, and in the event of delay for any reason other than Force Majeure or breach of this Agreement by the Concessionaire, it shall pay to the Concessionaire Damages in a sum calculated at the rate of Rs. 50 (Rupees Fifty) per day for every 1,000 (one thousand) square metres or part thereof, commencing from the 91st (ninety first) day of the Appointed Date and until such Right of Way and lease rights are procured in favour of the Concessionaire.

10.3.4 Upon receiving the Right of Way and the lease rights in respect of any land included in the Appendix, the Concessionaire shall complete the Construction Works thereon within a reasonable period to be determined by the Independent Engineer in accordance terms of this Agreement and with Good Industry Practice; provided that the issue of Provisional Certificate shall not be affected or delayed on account of vacant access to any part of the Project Sites not being granted to the Concessionaire or any construction on such part of the Project Sites remaining incomplete on the date of Tests on account of the delay or denial of such access thereto. For the avoidance of doubt, it is expressly agreed that Construction Works on all lands for which Right of Way is granted within 90 (ninety) days of the Appointed Date shall be completed before the Project Completion Date. It is further agreed that the obligation of the Concessionaire to complete the affected Construction Works shall subsist so long as the Authority continues to pay the Damages specified herein, and upon the Authority ceasing to pay such Damages after giving 60 (sixty) days' notice thereof to the Concessionaire, the obligation of the Concessionaire to complete such works on such part of the Project Sites shall cease forthwith. It is also expressly agreed that completion of the respective Construction Works within the time determined by the Independent Engineer hereunder shall be deemed to be Project Milestones for the purposes of levy and recovery of Damages under and in accordance with the provisions of Clause 12.4.2.

10.3.5 The Concessionaire may at its own cost and expense construct/develop/install Additional Facility and the Authority shall have no obligation or liability in respect thereof. Additional facilities herein refer to the facilities other than the mandatory and support facilities specified in Annexure II – Clauses 2.1 and 2.2. Such facilities may include fruit processing unit, ripening chambers, bank branch / ATM, etc (the “Additional Facility”).

Provided, the Concessionaire shall utilise not more than 100 sq. m. out of the Project Sites for construction/development/installation of Additional Facility. For the avoidance of doubt, the Concessionaire shall seek prior consent of the Authority to construct/develop/install Additional Facility to the Project and such consent shall not be unreasonably withheld.

10.4 Project Sites to be free from Encumbrances

Subject to the provisions of Clause 10.3, the Project Sites shall be made available by the Authority to the Concessionaire pursuant hereto free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to the Authority on account of any costs,

compensation, expenses and charges for the acquisition and use of such Project Sites for the duration of the Concession Period, except insofar as otherwise expressly provided in this Agreement. For the avoidance of doubt, it is agreed that existing rights of way, easements, privileges, liberties and appurtenances to the Project Sites premises shall not be deemed to be Encumbrances. It is further agreed that the Concessionaire accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Project Sites.

10.5 Protection of Project Sites from encroachments

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

10.6 Special/temporary right of way

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

10.7 Access to the Authority and Independent Engineer

The Right of Way and lease rights to the Project Sites granted to the Concessionaire hereunder shall always be subject to the right of access of the Authority, Independent Engineer and their employees and agents for inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.

10.8 Geological and archaeological finds

It is expressly agreed that mining, geological or archaeological rights do not form part of the lease granted to the Concessionaire under this Agreement and the Concessionaire hereby acknowledges that it shall not have any mining rights or interest in the underlying minerals, fossils, antiquities, structures or other remnants or things either of particular geological or archaeological interest and that such rights, interest and property on or under the Project Sites shall vest in and belong to the Authority or the concerned Government Instrumentality. The Concessionaire shall take all reasonable precautions to prevent its workmen or any other person from removing or damaging such interest or property and shall inform the Authority forthwith of the discovery thereof and comply with such instructions as the concerned Government Instrumentality may reasonably give for the removal of such property. For the avoidance of doubt, it is agreed that any reasonable

expenses incurred by the Concessionaire hereunder shall be reimbursed by the Authority. It is also agreed that the Government shall procure that the instructions hereunder are issued by the concerned Government Instrumentality within a reasonable period.

ARTICLE 11

UTILITIES ON THE PROJECT SITES AND TREES

11.1 Existing utilities

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

11.2 Shifting of obstructing utilities

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

11.3 New utilities

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

11.4 Felling of trees

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

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

ARTICLE 12

CONSTRUCTION OF THE PROJECT FACILITIES

12.1 Obligations prior to commencement of construction

Prior to commencement of Construction Works, the Concessionaire shall:

- (a) submit to the Authority and the Independent Engineer its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule as set forth in **Schedule-G**;
- (b) appoint its representative duly authorised to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, the Applicable Laws and Applicable Permits;
- (d) make its own arrangements for quarrying of materials needed for the Project under and in accordance with the Applicable Laws and Applicable Permits; and
- (e) Obtain all requisite approvals of the Drawings from the competent authorities.

12.2 Maintenance during Construction Period

During the Construction Period, the Concessionaire shall maintain, at its cost, the Project Sites and shall undertake the necessary maintenance works for this purpose;

12.3 Drawings

In respect of the Concessionaire's obligations relating to the Drawings of the Project as set forth in **Schedule-H**, the following shall apply:

- (a) The Concessionaire shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of all Drawings to the Independent Engineer for review;
- (b) By submitting the Drawings for review to the Independent Engineer, the Concessionaire shall be deemed to have represented that it has determined and verified that the design and engineering, including field construction criteria related thereto, are in conformity with the Scope of the Project and the Specifications and Standards;

- (c) Within 15 (fifteen) days of the receipt of the Drawings, the Independent Engineer shall review the same and convey its observations to the Concessionaire with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Concessionaire shall not be obliged to await the observations of the Independent Engineer on the Drawings submitted pursuant hereto beyond the said 15 (fifteen) days period and may begin or continue Construction Works at its own discretion and risk;
- (d) If the aforesaid observations of the Independent Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Concessionaire and resubmitted to the Independent Engineer for review. The Independent Engineer shall give its observations, if any, within 7 (seven) days of receipt of the revised Drawings;
- (e) No review and/or observation of the Independent Engineer and/or its failure to review and/or convey its observations on any Drawings shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the Authority be liable for the same in any manner;
- (f) Without prejudice to the foregoing provisions of this Clause 12.3, the Concessionaire shall submit to the Authority for review and comments, its Drawings relating to alignment of the Project Facilities and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, within 30 (thirty) days of the receipt of such Drawings. The provisions of this Clause 12.3 shall apply *mutatis mutandis* to the review and comments hereunder; and
- (g) Within 90 (ninety) days of the Project Completion Date, the Concessionaire shall furnish to the Authority and the Independent Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in micro film form or in such other medium as may be acceptable to the Authority, reflecting the Project Facilities as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Project Facilities and setback lines, if any, of the buildings and structures forming part of Project Facilities.

12.4 Scheduled Completion Date

- 12.4.1 On or after the Appointed Date, the Concessionaire shall undertake construction of Project as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D. The [650th (six hundred and fiftieth) day] from the Appointed Date shall be the scheduled date for completion of the Project (the “**Scheduled**

Completion Date”) and the Concessionaire agrees and undertakes that the Project shall be completed on or before the Scheduled Completion Date.

- 12.4.2 The Concessionaire shall construct the Project Facilities in accordance with the Project Completion Schedule set forth in **Schedule-G**. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Milestone in **Schedule-G**, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Construction Performance Security for delay of each day until such Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Completion Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-G shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-G has been amended as above; provided further that in the event Project Completion Date is achieved on or before the Scheduled Completion Date, the Damages paid under this Clause 12.4.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.4.2 shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.
- 12.4.3 In the event that Project Facilities is not completed within 270 (two hundred and seventy) days from the Scheduled Completion Date, unless the delay is on account of reasons solely attributable to the Authority or due to Force Majeure, the Authority shall be entitled to terminate this Agreement.

ARTICLE 13

MONITORING OF CONSTRUCTION

13.1 Monthly Progress Reports

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

13.2 Inspection

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

13.3 Tests

13.3.1 For determining that the Construction Works conform to the Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at such time and frequency and in such manner as may be specified by the Independent Engineer from time to time, in accordance with Good Industry Practice for quality assurance. The size of sample for such tests shall, to the extent possible, not exceed 10% (ten per cent) of the quantity and/or number of tests prescribed by the Authority through their contractors. The Concessionaire shall, with due diligence, carry out or cause to be carried out all the tests in accordance with the instructions of the Independent Engineer and furnish the results thereof to the Independent Engineer. One half of the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the Authority to the Concessionaire. For the avoidance of doubt, the costs to be incurred on any Test which is undertaken for determining the rectification of any defect or deficiency in construction shall be borne solely by the Concessionaire.

13.3.2 In the event that results of any tests conducted under this Clause 13.3 establish any defects or deficiencies in the Construction Works, the Concessionaire shall carry out remedial measures and furnish a report to the Independent Engineer in this behalf. The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests to determine that such remedial measures have brought the Construction Works into

compliance with the Specifications and Standards, and the procedure set forth in this Clause 13.3 shall be repeated until such Construction Works conform to the Specifications and Standards. For the avoidance of doubt, it is agreed that tests pursuant to this Clause 13.3 shall be undertaken in addition to and independent of the tests that shall be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice. It is also agreed that a copy of the results of such tests shall be sent by the Concessionaire to the Independent Engineer forthwith.

13.4 Delays during construction

Without prejudice to the provisions of Clause 12.4.2, if the Concessionaire does not achieve any of the Project Milestones or the Independent Engineer shall have reasonably determined that the rate of progress of Construction Works is such that Project Facilities are not likely to be completed by the Scheduled Completion Date, it shall notify the Concessionaire to this effect, and the Concessionaire shall, within 15 (fifteen) days of such notice, by a communication inform the Independent Engineer in reasonable detail about the steps it proposes to take to expedite progress and the period within which it shall achieve the Scheduled Completion Date.

13.5 Suspension of unsafe Construction Works

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

13.5.2 The Concessionaire shall, pursuant to the notice under Clause 13.5.1, suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Authority and thereupon carry out remedial measures to secure the safety of suspended works and the Users. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Authority recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Engineer, the Authority shall either revoke such Suspension or instruct the Concessionaire to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 13.5 shall be repeated until the Suspension hereunder is revoked.

13.5.3 Subject to the provisions of Clause 27.7, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the period of Suspension (the “**Preservation Costs**”), shall be borne by the Concessionaire; provided that if the Suspension has occurred as a result of any breach of this Agreement by the Authority, the Preservation Costs shall be borne by the Authority.

13.5.4 If Suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates set forth in the Project Completion Schedule to which the

Concessionaire is reasonably entitled, and shall notify the Authority accordingly whereupon the Authority shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Engineer. In the event that the Scheduled Completion Date is extended pursuant hereto, the Concession Period shall be deemed to be extended by a period equal in length to the period of extension of the Scheduled Completion Date.

ARTICLE 14

COMPLETION CERTIFICATE

14.1 Tests

14.1.1 At least 30 (thirty) days prior to the likely completion of the Project Facilities, the Concessionaire shall notify the Independent Engineer of its intent to subject the Project Facilities to Tests. The date and time of each of the Tests shall be determined by the Independent Engineer in consultation with the Concessionaire, and notified to the Authority who may designate its representative to witness the Tests. The Concessionaire shall provide such assistance as the Independent Engineer may reasonably require for conducting the Tests. In the event of the Concessionaire and the Independent Engineer failing to mutually agree on the dates for conducting the Tests, the Concessionaire shall fix the dates by not less than 10 (ten) days' notice to the Independent Engineer.

14.1.2 All Tests shall be conducted in accordance with **Schedule-I**. The Independent Engineer shall observe, monitor and review the results of the Tests to determine compliance of the Project Facilities with Specifications and Standards and if it is reasonably anticipated or determined by the Independent Engineer during the course of any Test that the performance of the Project Facilities or any part thereof does not meet the Specifications and Standards, it shall have the right to suspend or delay such Test and require the Concessionaire to remedy and rectify the defects or deficiencies. Upon completion of each Test, the Independent Engineer shall provide to the Concessionaire and the Authority copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Independent Engineer may require the Concessionaire to carry out or cause to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Project Facilities with Specifications and Standards.

14.2 Completion Certificate

Upon completion of Construction Works and the Independent Engineer determining the Tests to be successful, it shall forthwith issue to the Concessionaire and the Authority a certificate substantially in the form set forth in **Schedule-J** (the "**Completion Certificate**").

14.3 Provisional Certificate

14.3.1 The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in **Schedule-J** (the "**Provisional Certificate**") if the Tests are successful and the Project Facilities can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the "**Punch List**"); provided

that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the Authority.

14.4 Completion of Punch List items

14.4.1 All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) days of the date of issue of the Provisional Certificate and for any delay thereafter, other than for reasons solely attributable to the Authority or due to Force Majeure, the Authority shall be entitled to recover Damages from the Concessionaire to be calculated and paid for each day of delay until all items are completed, at the lower of (a) 0.1% (zero point one per cent) of the Construction Performance Security, and (b) 0.2% (zero point two per cent) of the cost of completing such items as estimated by the Independent Engineer. Subject to payment of such Damages, the Concessionaire shall be entitled to a further period not exceeding 120 (one hundred and twenty) days for completion of the Punch List items. For the avoidance of doubt, it is agreed that if completion of any item is delayed for reasons solely attributable to the Authority or due to Force Majeure, the completion date thereof shall be determined by the Independent Engineer in accordance with Good Industry Practice, and such completion date shall be deemed to be the date of issue of the Provisional Certificate for the purposes of Damages, if any, payable for such item under this Clause 14.4.1.

14.4.2 Upon completion of all Punch List items, the Independent Engineer shall issue the Completion Certificate. Failure of the Concessionaire to complete all the Punch List items within the time set forth in Clause 14.4.1 for any reason, other than conditions constituting Force Majeure or for reasons solely attributable to the Authority, shall entitle the Authority to terminate this Agreement.

14.5 Withholding of Provisional Certificate

14.5.1 If the Independent Engineer determines that the Project Facilities or any part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in commercial operation, it shall forthwith make a report in this behalf and send copies thereof to the Authority and the Concessionaire. Upon receipt of such a report from the Independent Engineer and after conducting its own inspection, if the Authority is of the opinion that the Project Facilities is not fit and safe for commercial service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Concessionaire of the defects and deficiencies in the Project Facilities and direct the Independent Engineer to withhold issuance of the Provisional Certificate. Upon receipt of such notice, the Concessionaire shall remedy and rectify such defects or deficiencies and thereupon Tests shall be undertaken in accordance with this Article 14. Such procedure shall be repeated as necessary until the defects or deficiencies are rectified.

14.5.2 Notwithstanding anything to the contrary contained in Clause 14.5.1, the Authority may, at any time after receiving a report from the Independent Engineer under that Clause, direct the Independent Engineer to issue a

Provisional Certificate under Clause 14.3, and such direction shall be complied forthwith.

14.6 Rescheduling of Tests

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

ARTICLE 15

ENTRY INTO COMMERCIAL SERVICE

15.1 Commercial Operation Date (COD)

The Project Facilities shall be deemed to be complete when the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14, and accordingly the commercial operation date of the Project shall be the date on which such Completion Certificate or the Provisional Certificate is issued]⁴ (the “**COD**” or “**Commercial Operation Date**”). The Project Facilities to be developed by the Concessionaire at the Project Site (more particularly described at Annex-II of Schedule A) shall enter into commercial service on COD and the Concessionaire shall be entitled to collect Project Revenue in accordance with the provisions of Article 23.

15.2 Damages for delay

Subject to the provisions of Clause 12.4, if COD does not occur prior to the 91st (ninety first) day after the Scheduled Completion Date, unless the delay is on account of reasons solely attributable to the Authority or due to Force Majeure, the Concessionaire shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Construction Performance Security for delay of each day until COD is achieved.

⁴ This provision may be suitably modified in case of a project where Fee is being levied and collected prior to the Appointed Date. In such a case, clause 15.2 shall be omitted.

ARTICLE 16

CHANGE OF SCOPE

16.1 Change of Scope

- 16.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the Scope of the Project as contemplated by this Agreement (the “**Change of Scope**”). Any such Change of Scope shall be made in accordance with the provisions of this Article 16 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the Authority in accordance with Clause 16.3.
- 16.1.2 If the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved services to the Users, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings therefor in accordance with this Article 16 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope.
- 16.1.3 Any works or services which are provided under and in accordance with this Article 16 shall form part of the Project and the provisions of this Agreement shall apply *mutatis mutandis* to such works or services.

16.2 Procedure for Change of Scope

- 16.2.1 In the event of the Authority determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the “**Change of Scope Notice**”).
- 16.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Authority such information as is necessary, together with preliminary Documentation in support of:
- (a) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period; and
 - (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the Authority to its contractors, along with the proposed premium/discount on such rates; provided that the cost incurred by the Concessionaire in providing such information shall be reimbursed

by the Authority to the extent such cost is certified by the Independent Engineer as reasonable.

- 16.2.3 Upon receipt of information set forth in Clause 16.2.2, if the Authority decides to proceed with the Change of Scope, it shall convey its preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time and costs for implementation thereof. Upon reaching an agreement, the Authority shall issue an order (the “**Change of Scope Order**”) requiring the Concessionaire to proceed with the performance thereof. In the event that the Parties are unable to agree, the Authority may, by issuing a Change of Scope Order, require the Concessionaire to proceed with the performance thereof pending resolution of the Dispute, or carry out the works in accordance with Clause 16.5.
- 16.2.4 The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works undertaken by the Concessionaire under this Article 16.

16.3 Payment for Change of Scope

- 16.3.1 Within 7 (seven) days of issuing a Change of Scope Order, the Authority shall make an advance payment to the Concessionaire in a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the Authority bills for payment in respect of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the Authority to determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the Authority shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable and after making a proportionate deduction for the advance payment made hereunder, and in the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.
- 16.3.2 Notwithstanding anything to the contrary contained in Clause 16.3.1, all costs arising out of any Change of Scope Order issued during the Construction Period shall be borne by the Concessionaire, subject to an aggregate ceiling of 0.25% (zero point two five per cent) of the Total Project Cost. Any costs in excess of the ceiling shall be reimbursed by the Authority in accordance with Clause 16.3.1. In the event that the total cost arising out of Change of Scope Orders (if any) issued prior to the Project Completion Date is less than 0.25% (zero point two five per cent) of the Total Project Cost, the difference thereof shall be credited by the Concessionaire to the Safety Fund within a period of 180 (one hundred and eighty) days of the Project Completion Date. For the avoidance of doubt, it is agreed that the aforesaid 0.25% (zero point two five per cent) of the Total Project Cost shall, to the extent borne by the Concessionaire, be deemed to form part of the actual capital cost of the Project.

16.4 Restrictions on certain works

16.4.1 Notwithstanding anything to the contrary contained in this Article 16, but subject to the provisions of Clause 16.4.2, the Authority shall not require the Concessionaire to undertake any works or services if such works or services are likely to delay completion of Project; provided that in the event that the Authority considers such works or services to be essential, it may issue a Change of Scope Order, subject to the condition that the works forming part of or affected by such Order shall not be reckoned for purposes of determining completion of Project and issuing the Provisional Certificate.

16.4.2 Notwithstanding anything to the contrary contained in this Article 16, the Concessionaire shall be entitled to nullify any Change of Scope Order if it causes the cumulative costs relating to all the Change of Scope Orders to exceed 5% (five per cent) of the Total Project Cost in any continuous period of 3 (three) years immediately preceding the date of such Change of Scope Order or if such cumulative costs exceed 20% (twenty per cent) of the Total Project Cost at any time during the Concession Period.

16.5 Power of the Authority to undertake works

16.5.1 Notwithstanding anything to the contrary contained in Clauses 16.1.1, 16.2 and 16.3, the Authority may, after giving notice to the Concessionaire and considering its reply thereto, award any works or services, contemplated under Clause 16.1.1, to any person on the basis of open competitive bidding; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority[§], and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Concessionaire shall be entitled to exercise such option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% (ten per cent) thereof. It is also agreed that the Concessionaire shall provide access, assistance and cooperation to the person who undertakes the works or services hereunder.

16.5.2 The works undertaken in accordance with this Clause 16.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimises the disruption in operation of the Project. The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works carried out under this Clause 16.5.

16.6 Reduction in Scope of the Project

16.6.1 If the Concessionaire shall have failed to complete any Construction Works on account of Force Majeure or for reasons solely attributable to the Authority, the Authority may, in its discretion, require the Concessionaire to pay 80% (eighty per cent) of the sum saved therefrom, and upon such payment to the Authority, the obligations of the Concessionaire in respect of

[§]The Authority shall transfer 75% (seventy five per cent) of the amount so received to the first ranked bidder whose bid shall have been matched by the Concessionaire.

such works shall be deemed to have been fulfilled. For the avoidance of doubt, it is agreed that in the event such reduction in Scope of the Project causes or will cause a reduction in net after-tax return of the Concessionaire, the Parties shall meet, as soon as reasonably practical, and agree on a full or partial waiver of the aforesaid payment of 80% (eighty per cent) so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no reduction in Scope of the Project. It is further agreed that the liability of the Authority under this Clause 16.6 shall not extend beyond waiver of the aforesaid 80% (eighty per cent). It is also agreed that in the event of a dispute, the Dispute Resolution Procedure shall apply.

- 16.6.2 For determining the obligations of the Concessionaire under this Clause 16.6, the provisions of Clauses 16.1, 16.2 and 16.4 shall apply *mutatis mutandis*, and upon issue of Change of Scope Order by the Authority hereunder, the Concessionaire shall pay forthwith the sum specified therein.

ARTICLE 17

OPERATION AND MAINTENANCE

17.1 O&M obligations of the Concessionaire

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

- (a) ensuring optimal operation and maintenance of the Project Facilities, in accordance with the Specifications and Standards prescribed herein, throughout the Concession Period, either by performing the operation and maintenance itself or by making durable, effective and permanent arrangements for due performance of the operation and maintenance obligations by third party(s);
- (b) collecting and appropriating Project Revenues in accordance with the provisions contained herein;
- (c) carrying out periodic renovation as required from time to time so that the Project Facilities are always in conformity with the Scope of the Project;
- (d) carrying out periodic preventive maintenance of the Project Facilities;
- (e) undertaking routine maintenance including prompt repairs of the Project Facilities;
- (f) undertaking major maintenance as applicable for the Project Facilities;
- (g) preventing, with the assistance of concerned law enforcement agencies, any unauthorised use of the Project Facilities and assist the concerned law enforcement agencies to maintain law & order in the Project Facilities.;
- (h) preventing, with the assistance of the concerned law enforcement agencies, any encroachments on the Project Facilities;
- (i) protection of the environment and provision of equipment and materials therefor;
- (j) maintaining a public relations unit to interface with and attend to suggestions from the farmers, government agencies, media and other agencies; and

(k) complying with Safety Requirements in accordance with Article 18.

17.1.2 The Concessionaire shall keep the Project Facilities in a clean, tidy and orderly condition, and in conformity with the Applicable Laws, Applicable Permits and Good Industry Practice.

17.2 Maintenance Requirements

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

17.3 Maintenance Manual

17.3.1 No later than 180 (one hundred and eighty) days prior to the Scheduled Completion Date, the Concessionaire shall, in consultation with the Independent Engineer, evolve a repair and maintenance manual (the “**Maintenance Manual**”) for the regular and preventive maintenance of the Project Facilities in conformity with the Specifications and Standards, Maintenance Requirements, Safety Requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the Authority and 2 (two) copies to the Independent Engineer. The Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 17.3 shall apply, *mutatis mutandis*, to such revision.

17.3.2 Without prejudice to the provision of Clause 17.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Facilities and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Facilities, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

17.4 Maintenance Programme

17.4.1 On or before COD and nolater than 45 (forty five) days prior to the beginning of each Accounting Yearduring the Operation Period, as the case may be, the Concessionaire shall provide to the Authority and the Independent Engineer, its proposed annual programme of preventive, urgent and other scheduled maintenance (the “**Maintenance Programme**”) to comply with the Maintenance Requirements, Maintenance Manual and Safety Requirements. Such Maintenance Programme shall include:

- (a) preventive maintenance schedule;
- (b) arrangements and procedures for carrying out urgent repairs;
- (c) criteria to be adopted for deciding maintenance needs;
- (d) intervals and procedures for carrying out inspection of all elements of the Project;

- (e) intervals at which the Concessionaire shall carry out periodic maintenance;
- (f) arrangements and procedures for carrying out safety related measures; and
- (g) intervals for major maintenance works and the scope thereof.

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

17.4.3 The Concessionaire may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 17.4.1 and 17.4.2 shall apply *mutatis mutandis* to such modifications.

17.5 De-commissioning due to Emergency

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

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

17.5.3 Any decommissioning or closure of any part of the Project Facilities and the re-commissioning thereof shall, as soon as practicable, be brought to the notice of affected persons by means of public announcements/notice.

17.6 Damages for breach of maintenance obligations

17.6.1 In the event that the Concessionaire fails to repair or rectify any defect or deficiency set forth in the Maintenance Requirements within the period specified therein, it shall be deemed to be in breach of this Agreement and the Authority shall be entitled to recover Damages, to be calculated and paid for each day of delay until the breach is cured, at the higher of (a) 0.5% (zero point five per cent) of Concession Fee and (b) 0.1% (zero point one per cent) of the cost of such repair or rectification as estimated by the Independent Engineer.

Recovery of such Damages shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.

- 17.6.2 The Damages set forth in Clause 17.6.1 may be assessed and specified forthwith by the Independent Engineer; provided that the Authority may, in its discretion, demand a smaller sum as Damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder. The Concessionaire shall pay such Damages forthwith and in the event that it contests such Damages, the Dispute Resolution Procedure shall apply.

17.7 Authority's right to take remedial measures

- 17.7.1 In the event the Concessionaire does not maintain and/or repair the Project Facilities or any part thereof in conformity with the Maintenance Requirements, the Maintenance Manual or the Maintenance Programme, as the case may be, and fails to commence remedial works within 15 (fifteen) days of receipt of the O&M Inspection Report or a notice in this behalf from the Authority or the Independent Engineer, as the case may be, the Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Concessionaire, and to recover its cost from the Concessionaire. In addition to recovery of the aforesaid cost, a sum equal to 20% (twenty per cent) of such cost shall be paid by the Concessionaire to the Authority as Damages. For the avoidance of doubt, the right of the Authority under this Clause 17.7.1 shall be without prejudice to its rights and remedies provided under Clause 17.6.

- 17.7.2 The Authority shall have the right, and the Concessionaire hereby expressly grants to the Authority the right, to recover the costs and Damages specified in Clause 17.7.1 directly from the Escrow Account as if such costs and Damages were O&M Expenses, and for that purpose, the Concessionaire hereby agrees to give irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of the Authority under this Clause 17.7.2 and debit the same to O&M Expenses.

17.8 Overriding powers of the Authority

- 17.8.1 If in the reasonable opinion of the Authority, the Concessionaire is in material breach of its obligations under this Agreement and, in particular, the Maintenance Requirements, and such breach is causing or likely to cause material hardship or danger to the Users, the Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Concessionaire to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.
- 17.8.2 In the event that the Concessionaire, upon notice under Clause 17.8.1, fails to rectify or remove any hardship or danger within a reasonable period, the Authority may exercise overriding powers under this Clause 17.8.2 and take over the performance of any or all the obligations of the Concessionaire to

the extent deemed necessary by it for rectifying or removing such hardship or danger; provided that the exercise of such overriding powers by the Authority shall be of no greater scope and of no longer duration than is reasonably required hereunder; provided further that any costs and expenses incurred by the Authority in discharge of its obligations hereunder shall be deemed to be O&M Expenses, and the Authority shall be entitled to recover them from the Concessionaire in accordance with the provisions of Clause 17.7 along with the Damages specified therein.

17.9 Restoration of loss or damage to Project Facilities

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

17.10 Modifications to the Project Facilities

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

17.11 Excuse from performance of obligations

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

- (a) an event of Force Majeure;
- (b) measures taken to ensure the safe use of the Project Facilities except when unsafe conditions occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
- (c) compliance with a request from the Authority or the directions of any Government Instrumentality, the effect of which is to close all or any part of the Project Facilities.

Notwithstanding the above, the Concessionaire shall keep available all unaffected parts of the Project Facilities provided they can be operated safely.

ARTICLE 18

SAFETY REQUIREMENTS

18.1 Safety Requirements

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

18.1.2 The Authority shall appoint an experienced and qualified firm or organisation (the “**Safety Consultant**”) for carrying out safety audit of the Project Facilities in accordance with the Safety Requirements, and shall take all other actions necessary for securing compliance with the Safety Requirements.

18.2 Expenditure on Safety Requirements

All costs and expenses arising out of or relating to Safety Requirements shall be borne by the Concessionaire to the extent such costs and expenses form part of the works and services included in the Scope of the Project, and works and services, if any, not forming part of the Scope of the Project shall be undertaken in accordance with the provisions of Article 16. Costs and expenses on works and services not covered hitherto before and arising out of Safety Requirements shall, subject to the provisions of Clause 16.3.2, be borne from out of a dedicated safety fund (the “**Safety Fund**”) to be funded, owned and operated by the Authority or a substitute thereof.

ARTICLE 19

MONITORING OF OPERATION AND MAINTENANCE

19.1 Quarterly status reports

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

19.2 Inspection

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

19.3 Tests

For determining that the Project Facilities conforms to the Maintenance Requirements, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests specified by it in accordance with Good Industry Practice. The Concessionaire shall, with due diligence, carry out or cause to be carried out all such tests in accordance with the instructions of the Independent Engineer and furnish the results of such tests forthwith to the Independent Engineer. One half of the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the Authority to the Concessionaire.

19.4 Remedial measures

19.4.1 The Concessionaire shall repair or rectify the defects or deficiencies, if any, set forth in the O&M Inspection Report or in the test results referred to in Clause 19.3 and furnish a report in respect thereof to the Independent Engineer and the Authority within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Concessionaire shall submit progress reports of the repair works once every week until such works are completed in conformity with this Agreement.

19.4.2 The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Project Facilities into compliance with the Maintenance Requirements and the procedure set forth in this Clause 19.4 shall be repeated until the Project Facilities conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the Authority shall be entitled to recover Damages from the Concessionaire under and in accordance with the provisions of Clause 17.6.

19.5 Reports of unusual occurrence

19.5.1. The Concessionaire shall, prior to the close on each day on which any unusual occurrence as defined in this Clause 19.5 materialises, send to the Authority and the Independent Engineer, by facsimile or e-mail, a report stating accidents and unusual occurrences on the Project Facility relating to the safety and security of the Project Facility. A monthly summary of such reports shall also be sent within 3 (three) days of the closing of each month. For the purposes of this Clause 19.5, accidents and unusual occurrences on the Storage Facility shall include:

- (a) death or injury to any person;
- (b) damaged or dislodged fixed equipment; and
- (c) any obstruction on the Project Facility, which adversely impacts the Trading Operations or Service Provision by the Concessionaire;

ARTICLE 20

INDEPENDENT ENGINEER

20.1 Appointment of Independent Engineer

The Authority shall appoint a consulting engineering firm from a panel of 10 (ten) firms or bodies corporate, constituted by the Authority substantially in accordance with the selection criteria set forth in **Schedule-M**, to be the independent consultant under this Agreement (the “**Independent Engineer**”). The appointment shall be made no later than 90 (ninety) days from the date of this Agreement and shall be for a period of 3 (three) years. On expiry or termination of the aforesaid period, the Authority may in its discretion renew the appointment, or appoint another firm from a fresh panel constituted pursuant to **Schedule-M** to be the Independent Engineer for a term of 3 (three) years, and such procedure shall be repeated after expiry of each appointment.

20.2 Duties and functions

20.2.1 The Independent Engineer shall discharge its duties and functions substantially in accordance with the terms of reference set forth in **Schedule-N**.

20.2.2 The Independent Engineer shall submit regular periodic reports (at least once every quarter) to the Authority in respect of its duties and functions set forth in **Schedule-N**.

20.3 Remuneration

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

20.4 Termination of appointment

20.4.1 The Authority may, in its discretion, terminate the appointment of the Independent Engineer at any time, but only after appointment of another Independent Engineer in accordance with Clause 20.1.

20.4.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Authority and seek Termination of the appointment of the Independent Engineer. Upon receipt of such representation, the Authority shall hold a tripartite meeting with the Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the Authority and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the

appointment of the Independent Engineer is terminated hereunder, the Authority shall appoint forthwith another Independent Engineer in accordance with Clause 20.1.

20.5 Authorised signatories

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

20.6 Dispute resolution

If either Party disputes any advice, instruction, decision, direction or award of the Independent Engineer, or, as the case may be, the assertion or failure to assert jurisdiction, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.

Part IV

Financial Covenants

ARTICLE 21

FINANCIAL CLOSE

21.1 Financial Close

21.1.1 The Concessionaire hereby agrees and undertakes that it shall achieve Financial Close within 180 (one hundred and eighty) days from the date of this Agreement and in the event of delay, it shall be entitled to a further period not exceeding [120 (one hundred and twenty)] days, subject to payment of Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the Construction Performance Security for each day of delay, or for a further period not exceeding 200 (two hundred) days, subject to payment of Damages specified in Clause 4.3; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred solely as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. For the avoidance of doubt, the Damages payable hereunder by the Concessionaire shall be in addition to the Damages, if any, due and payable under the provisions of Clause 4.3.

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

21.2 Termination due to failure to achieve Financial Close

21.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to Clause 27.6.1, in the event that Financial Close does not occur, for any reason whatsoever, within the period set forth in Clause 21.1.1 or the extended period provided thereunder, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties. For the avoidance of doubt, it is agreed that in the event the Parties hereto have, by mutual consent, determined the Appointed Date to precede the Financial Close, the provisions of this Clause 21.2.1 shall not apply.

21.2.2 Upon Termination under Clause 21.2.1, the Authority shall be entitled to encash the Bid Security and appropriate the proceeds thereof as Damages; provided, however, that if Financial Close has not occurred solely as a result of the Authority being in default of any of its obligations under Clause 4.2, it

shall, upon Termination, return the Bid Security forthwith along with the Damages due and payable under Clause 4.2. For the avoidance of doubt, it is expressly agreed that if the Bid Security shall have been substituted by Construction Performance Security, the Authority shall be entitled to encash therefrom an amount equal to Bid Security.

ARTICLE 22

GRANT

22.1 Grant

22.1.1 The Authority agrees to provide to the Concessionaire cash support by way of an outright grant equal to the sum set forth in the Bid, namely, [Rs. (Rupeesin words)], in accordance with the provisions of this Article 22 (the “**Grant**”).

22.1.2 The Grant shall be disbursed to the Concessionaire by way of Equity Support in accordance with the provisions of Clause 22.2, and the balance remaining, if any, shall be disbursed as O&M Support in accordance with the provisions of Clause 22.3.

22.2 Equity Support

22.2.1 Subject to the conditions specified in this Clause 22.2, the Grant shall be credited to the Escrow Account and shall be applied by the Concessionaire for meeting the Total Project Cost (the “**Equity Support**”).

22.2.2 The Equity Support shall not exceed the sum specified in the Bid and as accepted by the Authority, but shall in no case be greater than the Equity, and shall be further restricted to a sum not exceeding 20% (twenty per cent) of the Total Project Cost. For the avoidance of doubt, the Total Project Cost to be reckoned for the purposes of this Clause 22.2.2 shall include Equity Support.

22.2.3 Equity Support shall be due and payable to the Concessionaire after it has expended the Equity, and shall be disbursed proportionately along with the loan funds thereafter remaining to be disbursed by the Senior Lenders under the Financing Agreements. The Authority shall disburse each tranche of the Equity Support as and when due, but no later than 15 (fifteen) days of receiving a request from the Concessionaire along with necessary particulars.

22.2.4 In the event of occurrence of a Concessionaire Default, disbursement of Equity Support shall be suspended till such Concessionaire Default has been cured by the Concessionaire.

22.3 O&M Support

22.3.1 The balance of the Grant, if any, remaining after disbursement of the Equity Support shall be disbursed to the Concessionaire in accordance with Clause 22.3.2 for meeting O&M Expenses and Debt Service of the Project (the “**O&M Support**”).

22.3.2 The O&M Support shall be disbursed by the Authority in quarterly instalments and the first such instalment shall be released within 90 (ninety)

days of COD. Each instalment shall be a sum equal to 5 (five) per cent⁵ of the Equity Support and such instalments shall be disbursed by the Authority until the Grant is exhausted.

{PREMIUM}[§]

{22.4 UsageFee

The Concessionaire acknowledges and agrees that as set forth in the Bid, it shall pay to the Authority for each year of the Concession Period, but commencing from the day falling after (.....) days from the COD, a premium (the “**UsageFee**”) in the form of an additional Concession Fee, as set forth in Clause 23.2.1, and in the manner set forth in Clause 23.4.}

⁵ This may be increased upto 7.5 % (seven point five per cent) if the O&M support payments are to be made at an accelerated rate.

[§] In the event that the Concessionaire does not seek any Grant from the Government and offers to pay a Premium instead, the provisions of Clauses 22.1, 22.2 and 22.3 relating to Grant shall be substituted by the provisions of Clause 22.4 relating to Premium, which Clause shall be renumbered.

ARTICLE 23

CONCESSION FEE

23.1 Concession Fee

In consideration of the grant of Concession, the Concessionaire shall pay to the Authority by way of concession fee (the “**Concession Fee**”) a sum of _____ per annum. For avoidance of any doubt, the Concession Fee shall be the Premium, as defined in the RFP document, offered by the Bidder in its Bid to be paid to the Authority⁶ {and the Usage Fee specified in Clause 23.2}.

23.2 Usage Charges

23.2.1 Without prejudice to the provisions of Clause 23.1, the Concessionaire agrees to pay to the Authority a fee for use of Project Sites in the form of an Usage Charge in addition to the Concession Fee equal to Rs. ***** (Rupees *****) per year (“**Usage Charges**”) from entire Operation Period starting from Commercial Operation Date. For avoidance of any doubt, the Usage Charges shall be payable in the financial year in which the Appointed Date is achieved for Project Facilities described in **Annex I of Schedule A**.

23.2.2 The Usage Charges payable under Clause 23.2.1 shall be deemed to be part of the Concession Fee for the purposes of this Agreement.

22.3 Payment of Concession Fee

The Concession Fee payable under the provisions of this Article 23 shall be due and payable annually and shall be paid in advance for a particular year.

⁶ Concession Fee shall be payable by the Concessionaire if no Grant under Article 22 is availed by the Concessionaire. In case Concessionaire avails a Grant under Article 22 of this Concession Agreement, the Concession Fee shall be Re. 1 (Rupee One Only) in addition to with Usage Fee under Section 23.2.

ARTICLE 24

PROJECT REVENUES

24.1 Collection and appropriation of Project Revenues

On and from the COD till the Transfer Date, the Concessionaire shall have the sole and exclusive right to fix, demand, collect, appropriate and revise prices for the purpose of Trading Operations and charge user fee/rental fee or any other fee for use of Project Facilities and Service Provision provided by the Concessionaire ("Project Revenues") to Users, public or any other entity/institution/agency subject to and in accordance with this Agreement and subject to applicable State and Central Laws.

ARTICLE 25

ESCROW ACCOUNT

25.1 Escrow Account

25.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the “**Escrow Bank**”) in accordance with this Agreement read with the Escrow Agreement.

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

25.2 Deposits into Escrow Account

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

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

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

25.3 Withdrawals during Concession Period

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

- (a) all Taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) all payments relating to construction of the Project, subject to and in accordance with the conditions, if any, set forth in the

Financing Agreements;

- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- (e) Concession Fee including Usage Charges, if due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement;
- (h) monthly proportionate provision of Debt Service payments due in an Accounting Year in respect of Subordinated Debt;
- (i) any reserve requirements set forth in the Financing Agreements; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire.

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

25.4 Withdrawals upon Termination

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

- (a) all Taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) outstanding Concession Fee including Usage Charges;
- (d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement and any claims in connection with or arising out of Termination;
- (e) retention and payments arising out of, or in relation to, liability for

defects and deficiencies set forth in Article 33 of the Concession Agreement;

- (f) outstanding Debt Service including the balance of Debt Due;
- (g) outstanding Subordinated Debt;
- (h) incurred or accrued O&M Expenses;
- (i) any other payments required to be made under this Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire:

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

25.4.2 The provisions of this Article 27 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 25.4.1 have been discharged.

ARTICLE 26

INSURANCE

26.1 Insurance during Concession Period

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

26.2 Notice to the Authority

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

26.3 Evidence of Insurance Cover

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

26.4 Remedy for failure to insure

If the Concessionaire shall fail to effect and keep in force all insurances for

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

26.5 Waiver of subrogation

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

26.6 Concessionaire's waiver

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

26.7 Application of insurance proceeds

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

ARTICLE 27

ACCOUNTS AND AUDIT

27.1 Audited accounts

27.1.1 The Concessionaire shall maintain books of accounts recording all its receipts (including all Project Revenue, fees and other revenues derived/collected by it from or on account of the Project and/or its use), income, expenditure, payments (including payments from the Escrow Account), assets and liabilities, in accordance with this Agreement, Good Industry Practice, Applicable Laws and Applicable Permits. The Concessionaire shall provide 2 (two) copies of its Balance Sheet, Cash Flow Statement and Profit and Loss Account, along with a report thereon by its Statutory Auditors, within 90 (ninety) days of the close of the Accounting Year to which they pertain and such audited accounts, save and except where expressly provided to the contrary, shall form the basis of payments by either Party under this Agreement. The Authority shall have the right to inspect the records of the Concessionaire during office hours and require copies of relevant extracts of books of accounts, duly certified by the Statutory Auditors, to be provided to the Authority for verification of basis of payments, and in the event of any discrepancy or error being found, the same shall be rectified and such rectified account shall form the basis of payments by either Party under this Agreement.

27.1.2 The Concessionaire shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to the Authority its unaudited financial results in respect of the preceding quarter, in the manner and form prescribed by the Securities and Exchange Board of India for publication of quarterly results by the companies listed on a stock exchange.

27.1.3 On or before the thirty-first day of May each Year, the Concessionaire shall provide to the Authority, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarised information on (a) Revenues generated or received from the Project, and (b) such other information as the Authority may reasonably require.

27.2 Appointment of auditors

27.2.1 The Concessionaire shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it from the mutually agreed list of 10 (ten) reputable firms of chartered accountants (the “**Panel of Chartered Accountants**”), such list to be prepared substantially in accordance with the criteria set forth in **Schedule-P**. All fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.

27.2.2 The Concessionaire may terminate the appointment of its Statutory Auditors after a notice of 45 (forty five) days to the Authority, subject to the replacement Statutory Auditors being appointed from the Panel of Chartered

Accountants.

27.2.3 Notwithstanding anything to the contrary contained in this Agreement, the Authority shall have the right, but not the obligation, to appoint at its cost from time to time and at anytime, another firm (the “**Additional Auditors**”) from the Panel of Chartered Accountants to audit and verify all those matters, expenses, costs, realisations and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.

27.3 Certification of claims by Statutory Auditors

Any claim or document provided by the Concessionaire to the Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors. For the avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business including the submission of annual Project Revenue statements.

27.4 Set-off

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

27.5 Dispute resolution

In the event of there being any difference between the findings of the Additional Auditors or the Concurrent Auditors, as the case may be, and the certification provided by the Statutory Auditors, such Auditors shall meet to resolve the differences and if they are unable to resolve the same, such Dispute shall be resolved by the Authority by recourse to the Dispute Resolution Procedure.

PART V
FORCE MAJEURE AND TERMINATION

ARTICLE 28

FORCE MAJEURE

28.1 Force Majeure

As used in this Agreement, the expression “Force Majeure” or “Force Majeure Event” shall mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 28.2, 28.3 and 28.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the “**Affected Party**”) of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party.

28.2 Non-Political Event

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

- (a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, famine, drought, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Project Sites);
- (b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting supplies and services to the Project for a continuous period of 24 (twenty four) hours and an aggregate period exceeding 7 (seven) days in an Accounting Year, and not being an Indirect Political Event set forth in Clause 28.3;
- (c) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Concessionaire in any proceedings for reasons other than (i) failure of the Concessionaire to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Authority;

- (e) the discovery of geological conditions, toxic contamination or archaeological remains on the Project Site that could not reasonably have been expected to be discovered through a site inspection; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

28.3 Indirect Political Event

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

- (a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- (b) industry-wide or State-wide strikes or industrial action for a continuous period of 24 (twenty four) hours and exceeding an aggregate period of 7 (seven) days in an Accounting Year;
- (c) any civil commotion, boycott or political agitation which prevents collection of Fee by the Concessionaire for an aggregate period exceeding 7 (seven) days in an Accounting Year;
- (d) any failure or delay of a Contractor to the extent caused by any Indirect Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (e) any Indirect Political Event that causes a Non-Political Event; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

28.4 Political Event

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

- (a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Article 34 and its effect, in financial terms, exceeds the sum specified in Clause 34.1;
- (b) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;
- (c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence,

permit, authorisation, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;

- (d) any failure or delay of a Contractor but only to the extent caused by another Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; or
- (e) any event or circumstance of a nature analogous to any of the foregoing.

28.5 Duty to report Force Majeure Event

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

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

28.5.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

28.5.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 28.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

28.6 Effect of Force Majeure Event on the Concession

28.6.1 Upon the occurrence of any Force Majeure Event prior to the Appointed Date, the period set forth in Clause 21.1.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event.

28.6.2 At any time after the Appointed Date, if any Force Majeure Event occurs:

- (a) before COD, the Concession Period and the dates set forth in the Project Completion Schedule shall be extended by a period equal in length to the duration for which such Force Majeure Event subsists; or
- (b) after COD, whereupon the Concessionaire is unable to collect Project Revenue despite making best efforts or it is directed by the Authority to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from collection of Project Revenue on account thereof.

28.7 Allocation of costs arising out of Force Majeure

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

28.7.2 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Project (the “**Force Majeure Costs**”) shall be allocated and paid as follows:

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

For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Project Revenues or debt

repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent that such information is relevant.

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

28.8 Termination Notice for Force Majeure Event

If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 28, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days' time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

28.9 Termination Payment for Force Majeure Event

- 28.9.1 If Termination is on account of a Non-Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover.
- 28.9.2 If Termination is on account of an Indirect Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to:
- (a) Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due; and
 - (b) 110% (one hundred and ten per cent) of the Adjusted Equity.
- 28.9.3 If Termination is on account of a Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount that would be payable under Clause 31.3.2 as if it were an Authority Default.

28.10 Dispute resolution

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be

finally settled in accordance with the Dispute Resolution Procedure; provided that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.

28.11 Excuse from performance of obligations

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

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

ARTICLE 29

COMPENSATION FOR BREACH OF AGREEMENT

29.1 Compensation for default by the Concessionaire

Subject to the provisions of Clause 29.6, in the event of the Concessionaire being in material default or breach of this Agreement, it shall pay to the Authority by way of compensation, all direct costs suffered or incurred by the Authority as a consequence of such material default, within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 29.1 for any breach or default in respect of which Damages are expressly specified and payable under this Agreement or for any consequential losses incurred by the Authority.

29.2 Compensation for default by the Authority

Subject to the provisions of Clause 29.6, in the event of the Authority being in material default or breach of this Agreement at any time after the Appointed Date, it shall pay to the Concessionaire by way of compensation, all direct costs suffered or incurred by the Concessionaire as a consequence of such material default within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material default but shall not include loss of Project Revenues, debt repayment obligations or other consequential losses, and for determining such compensation, information contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant.

29.3 Extension of Concession Period

Subject to the provisions of Clause 29.6, in the event that a material default or breach of this Agreement set forth in Clause 29.2 causes delay in achieving COD or leads to suspension of or reduction in collection of Project Revenues, as the case may be, the Authority shall, in addition to payment of compensation under Clause 29.2, extend the Concession Period, such extension being equal in duration to the period by which COD was delayed or the collection of Project Revenues remained suspended on account thereof.

29.4 Compensation to be in addition to be in addition of Termination Payment

Compensation payable under this Article 29 shall be in addition to, and not

in substitution for, or derogation of, Termination Payment, if any.

29.5 Mitigation of costs and damage

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

ARTICLE 30

SUSPENSION OF CONCESSIONAIRE'S RIGHTS

30.1 Suspension upon Concessionaire Default

Upon occurrence of a Concessionaire Default, the Authority shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (i) suspend all rights of the Concessionaire under this Agreement including the Concessionaire's right to collect and appropriate Project Revenues and (ii) exercise such rights itself and perform the obligations hereunder or authorise any other person to exercise or perform the same on its behalf during such suspension (**the "Suspension"**). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 180 (one hundred and eighty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders' Representative, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days.

30.2 Authority to act on behalf of Concessionaire

30.2.1 During the period of Suspension, the Authority shall, on behalf of the Concessionaire, collect all Project Revenues under and in accordance with this Agreement and deposit the same in the Escrow Account. The Authority shall be entitled to make withdrawals from the Escrow Account for meeting the costs incurred by it for remedying and rectifying the cause of Suspension, and thereafter for defraying the expenses specified in Clause 30.3.

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

30.3 Revocation of Suspension

30.3.1 In the event that the Authority shall have rectified or removed the cause of Suspension within a period not exceeding 90 (ninety) days from the date of

Suspension, it shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement. For the avoidance of doubt, the Parties expressly agree that the Authority may, in its discretion, revoke the Suspension at any time, whether or not the cause of Suspension has been rectified or removed hereunder.

30.3.2 Upon the Concessionaire having cured the Concessionaire Default within a period not exceeding 90 (ninety) days from the date of Suspension, the Authority shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement.

30.4 Substitution of Concessionaire

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

30.5 Termination

30.5.1 At any time during the period of Suspension under this Article 30, the Concessionaire may by notice require the Authority to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 30.4, the Authority shall, within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 31.

30.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 30.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, mutatis mutandis, to such Termination as if a Termination Notice had been issued by the Authority upon occurrence of a Concessionaire Default.

ARTICLE 31

TERMINATION

31.1 Termination for Concessionaire Default

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

- (a) the Construction Performance Security or the Operation Performance Security has been encashed and appropriated in accordance with Clause 9.2 or Clause 9.4, as the case may be and the Concessionaire fails to replenish or provide fresh Construction Performance Security or the Operation Performance Security within a Cure Period of 30 (thirty) days;
- (b) subsequent to the replenishment or furnishing of fresh Construction Performance Security or the Operation Performance Security in accordance with Clause 9.2 or Clause 9.4, as the case may be, the Concessionaire fails to cure, within a Cure Period of 90 (ninety) days, the Concessionaire Default for which whole or part of the Construction Performance Security or the Operation Performance Security was appropriated;
- (c) the Concessionaire does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-G and continues to be in default for 120 (one hundred and twenty) days;
- (d) the Concessionaire abandons or manifests intention to abandon the construction or operation of the Project without the prior written consent of the Authority;
- (e) Project Completion Date does not occur within the period specified in Clause 12.4;
- (f) the Punch List items have not been completed within the period set forth in Clause 14.4.1;
- (g) the Concessionaire is in breach of the Maintenance Requirements or the Safety Requirements, as the case may be;
- (h) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;

- (i) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;
- (j) upon occurrence of a Financial Default, the Lenders' Representative has by notice required the Authority to undertake Suspension or Termination, as the case may be, in accordance with the Substitution Agreement and the Concessionaire fails to cure the default within the Cure Period specified hereinabove;
- (k) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;
- (l) the Concessionaire creates any Encumbrance in breach of this Agreement;
- (m) the Concessionaire repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- (n) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- (o) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all or part of the assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
- (p) an execution levied on any of the assets of the Concessionaire has caused a Material Adverse Effect;
- (q) the Concessionaire is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its assets that has a material bearing on the Project;
- (r) the Concessionaire has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;
- (s) a resolution for winding up of the Concessionaire is passed, or any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under

this Agreement and the Project Agreements; and provided that:

- (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
- (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
- (iii) each of the Project Agreements remains in full force and effect;
- (t) any representation or warranty of the Concessionaire herein contained which is, as of the date hereof, found to be materially false or the Concessionaire is at any time hereafter found to be in breach thereof;
- (u) the Concessionaire submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;
- (v) the Concessionaire has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
- (w) the Concessionaire commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Authority.

31.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause 30.1.3.

31.1.3 The Authority shall, if there be Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 31.1.2 to inform the Lenders' Representative and grant 15 (fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either

withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement:

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

Provided further that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the Authority may deem appropriate.

31.2 Termination for Authority Default

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

- (a) The Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Concessionaire;
- (b) the Authority has failed to make any payment to the Concessionaire within the period specified in this Agreement; or
- (c) the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement.

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

31.3 Termination Payment

- 31.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due. For the avoidance of doubt, the Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD.
- 31.3.2 Upon Termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:
- (a) Debt Due; and
 - (b) 150% (one hundred and fifty per cent) of the Adjusted Equity.
- 31.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.
- 31.3.4 The Concessionaire expressly agrees that Termination Payment under this Article 30 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

31.4 Other rights and obligations of the Authority

Upon Termination for any reason whatsoever, the Authority shall:

- (a) be deemed to have taken possession and control of the Project forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Project Sites;
- (c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Project Sites or any part of the Project;

- (d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 30.1; and
- (e) succeed upon election by the Authority, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees that all sums claimed by such Contractors as being due and owing for work and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.

31.5 Survival of rights

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 31.3.4, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments and Divestment Requirements, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.

ARTICLE 32

DIVESTMENT OF RIGHTS AND INTEREST

32.1 Divestment Requirements

32.1.1 Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements:

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

32.1.2 Subject to the exercise by the Authority of its rights under this Agreement or under any of the Project Agreements to perform or procure the performance by a third party of any of the obligations of the Concessionaire, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any Termination Notice, until the Termination of this Agreement becomes effective in accordance with its terms.

32.2 Inspection and cure

Not earlier than 90 (ninety) days prior to Termination but not later than 15 (fifteen) days prior to the effective date of such Termination, the Independent Engineer shall verify, after giving due notice to the Concessionaire of the time, date and venue of such verification, compliance by the Concessionaire with the Maintenance Requirements, and if required, cause appropriate tests to be carried out at the Concessionaire's cost for this purpose. Defaults, if any, in the Maintenance Requirements shall be cured by the Concessionaire at its cost and the provisions of Article 33 shall apply, *mutatis mutandis*, in relation to curing of defects or deficiencies under this Article 32.

32.3 Cooperation and assistance on transfer of Project

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

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

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

32.4 Vesting Certificate

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

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

32.5 Divestment costs etc.

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

ARTICLE 33

DEFECTS LIABILITY AFTER TERMINATION

33.1 Liability for defects after Termination

The Concessionaire shall be responsible for all defects and deficiencies in the Project Facilities for a period of 120 (One hundred and twenty) days after Termination, and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Independent Engineer in the Project Facilities during the aforesaid period. In the event that the Concessionaire fails to repair or rectify such defect or deficiency within a period of 15 (fifteen) days from the date of notice issued by the Authority in this behalf, the Authority shall be entitled to get the same repaired or rectified at the Concessionaire's risk and cost so as to make the Project Facilities conform to the Maintenance Requirements. All costs incurred by the Authority hereunder shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receipt of demand thereof, and in the event of default in reimbursing such costs, the Authority shall be entitled to recover the same from the Escrow Account.

33.2 Retention in Escrow Account

- 33.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 33.2.3, a sum equal to 5% (five per cent) of the Concession Fee and Usage Charges for the year immediately preceding the Transfer Date shall be retained in the Escrow Account for a period of 120 (one hundred and twenty) days after Termination for meeting the liabilities, if any, arising out of or in connection with the provisions of Clause 33.1.
- 33.2.2 Without prejudice to the provisions of Clause 33.2.1, the Independent Engineer shall carry out an inspection of the Project Facilities at any time between 210 (two hundred and ten) and 180 (one hundred and eighty) days prior to the Termination and if it recommends that the status of the Project Facilities is such that a sum larger than the amount stipulated in Clause 33.2.1 should be retained in the Escrow Account and for a period longer than the aforesaid 120 (one hundred and twenty) days, the amount recommended by the Independent Engineer shall be retained in the Escrow Account for the period specified by it.
- 33.2.3 The Concessionaire may, for the performance of its obligations under this Article 33, provide to the Authority a guarantee from a Bank for a sum equivalent to the amount determined under Clause 33.2.1 or 33.2.2, as the case may be, and for the period specified therein, substantially in the form set forth in **Schedule-F** (the "**Performance Guarantee**"), to be modified, mutatis mutandis, for this purpose, and the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the required amounts from the Performance Guarantee for

undertaking the repairs or rectification at the Concessionaire's risk and cost in accordance with the provisions of this Article 33. Upon furnishing of a Performance Guarantee under this Clause 33.2.3, the retention of funds in the Escrow Account in terms of Clause 33.2.1 or 33.2.2, as the case may be, shall be dispensed with.

Part VI

Other Provisions

ARTICLE 34

ASSIGNMENT AND CHARGES

34.1 Restrictions on assignment and charges

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

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

34.2 Permitted assignment and charges

The restraints set forth in Clause 34.1 shall not apply to:

- (a) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project;
- (b) mortgages/pledges/hypothecation of goods/assets other than Project Assets and their related documents of title, a charge on the Escrow account arising or created in the ordinary course of business of the Project, and as security only for indebtedness to the Senior Lenders under the Financing Agreements and/or for working capital arrangements for the Project;
- (c) assignment of rights, interest and obligations of the Concessionaire to or in favour of the Lenders' Representative as nominee and for the benefit of the Senior Lenders, to the extent covered by and in accordance with the Substitution Agreement as security for financing provided by Senior Lenders under the Financing Agreements; and
- (d) liens or encumbrances required by any Applicable Law.

34.3 Substitution Agreement

34.3.1 The Lenders' Representative, on behalf of Senior Lenders, may exercise the right to substitute the Concessionaire pursuant to the agreement for substitution of the Concessionaire (the "**Substitution Agreement**") to be entered into amongst the Concessionaire, the Authority and the Lenders' Representative, on behalf of Senior Lenders, substantially in the form set forth in **Schedule-R**.

34.3.2 Upon substitution of the Concessionaire under and in accordance with the Substitution Agreement, the Nominated Company substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations of the Concessionaire under this Agreement as if it were the Concessionaire; provided that where the Concessionaire is in breach of this Agreement on the date of such substitution, the Authority shall by notice grant a Cure Period of 120 (one hundred and twenty) days to the Concessionaire for curing such breach.

34.4 Assignment by the Authority

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

ARTICLE 35

CHANGE IN LAW

35.1 Increase in costs

If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 Crore (Rupees One Crore)⁷ and 0.5% (zero point five percent) of the Concession Fee in any Accounting Year, the Concessionaire may so notify the Authority and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the cost increase, reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:

Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the Authority to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Authority shall pay the amount specified therein; provided that if the Authority shall dispute such claim of the Concessionaire, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 35.1 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

35.2 Reduction in costs

If as a result of Change in Law, the Concessionaire benefits from a reduction in costs or increase in net after-tax return or other financial gains, the aggregate financial effect of which exceeds the higher of Rs. 1 Crore (Rupees One Crore) and 0.5% (zero point five percent) of the Concession Fee in any Accounting Year, the Authority may so notify the Concessionaire and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the decreased costs, increase in return or other financial gains as aforesaid. Upon notice by the Authority, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on such amendments to this Agreement or on any other mutually agreed arrangement:

Provided that if no agreement is reached within 90 (ninety) days of the

⁷ This amount may, in the discretion of the Authority, be suitably increased, but in no case exceeding a ratio of Rs. 1 cr. for every Rs. 500 cr. of Total Project Cost.

aforesaid notice, the Authority may by notice require the Concessionaire to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Concessionaire shall pay the amount specified therein to the Authority; provided that if the Concessionaire shall dispute such claim of the Authority, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 34.2 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

35.3 Protection of NPV

Pursuant to the provisions of Clauses 35.1 and 35.2 and for the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Parties shall rely on the Financial Model to establish a net present value (the "NPV") of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred.

35.4 Restriction on cash compensation

The Parties acknowledge and agree that the demand for cash compensation under this Article 35 shall be restricted to the effect of Change in Law during the respective Accounting Year and shall be made at any time after commencement of such year, but no later than one year from the close of such Accounting Year. Any demand for cash compensation payable for and in respect of any subsequent Accounting Year shall be made after the commencement of the Accounting Year to which the demand pertains, but no later than two years from the close of such Accounting Year.

35.5 No claim in the event of recovery from Users

Notwithstanding anything to the contrary contained in this Agreement, the Authority shall not in any manner be liable to reimburse to the Concessionaire any sums on account of a Change in Law if the same are recoverable from the Users.

ARTICLE 36

LIABILITY AND INDEMNITY

36.1 General indemnity

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

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

36.2 Indemnity by the Concessionaire

36.2.1 Without limiting the generality of Clause 36.1, the Concessionaire shall fully indemnify, hold harmless and defend the Authority and the Authority Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits;
- (b) payment of Taxes required to be made by the Concessionaire in respect of the income or other taxes of the Concessionaire’s contractors, suppliers and representatives;

- (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its contractors which are payable by the Concessionaire or any of its contractors;
- (d) for any loss of or damage to property or death or injury to persons resulting from any negligent act or omission of the Concessionaire or the Concessionaire's shareholders, directors, officers, employees and representatives and its Affiliates, agents, contractors or licensees and their respective directors, officers and employees (**Concessionaire Parties**) that arises out of or is in any manner connected with the performance of the Concession Agreement; or
- (e) under any Law arising out of Concessionaire's design, construction, testing or commissioning of the Project.

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

36.3 Notice and contest of claims

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 40 (the "**Indemnified Party**") it shall notify the other Party (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the

Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

36.4 Defence of claims

- 36.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 36, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.
- 36.4.2 If the Indemnifying Party has exercised its rights under Clause 36.3, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).
- 36.4.3 If the Indemnifying Party exercises its rights under Clause 36.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:
- (a) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or
 - (b) the Indemnified Party shall have reasonably concluded that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defence of such action; or
 - (c) the Indemnifying Party shall not, in fact, have employed independent counsel reasonably satisfactory to the Indemnified Party, to assume the defence of such action and shall have been so notified by the Indemnified Party; or

- (d) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either:
 - (i) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
 - (ii) that such claim, action, suit or proceeding involves or could have a MaterialAdverseEffectupon it beyond the scope of this Agreement:

Provided that if Sub-clauses (b), (c) or (d) of this Clause 36.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

36.5 No consequential claims

Notwithstanding anything to the contrary contained in this Article 36, the indemnities herein provided shall not include any claim or recovery in respect of any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement.

36.6 Survival on Termination

The provisions of this Article 36 shall survive Termination.

ARTICLE 37

RIGHTS AND TITLE OVER THE PROJECT SITES

37.1 Lease rights

For the purpose of this Agreement, the Concessionaire shall have rights to the use of the Project Sites as sole lessee subject to and in accordance with this Agreement and the lease Agreement/deed to be entered into between the Authority and the Concessionaire, and to this end, it may regulate the entry and use of the Project Facilities by Third Parties in accordance with and subject to the provisions of this Agreement and the lease deed/agreement to be entered into between the Authority and the Concessionaire.

37.2 Access rights of the Authority and others

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

37.2.2 The Concessionaire shall, for the purpose of operation and maintenance of any utility specified in Article 11, allow free access to the Project Sites at all times for the authorised persons and vehicles of the controlling body of such utility.

37.3 Taxes

The Concessionaire shall be responsible for all taxes, duties, levies, value added tax (VAT) and charges (including income tax, sales tax, excise duty, customs duty, service tax and withholding tax) that may be levied, claimed or demanded from time to time by any Government Instrumentality including any increase therein effected from time to time from any Government Instrumentality, in respect of the Project and the Project Facility.

37.4 Restriction on sub-letting

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

37.5 Property taxes

All property taxes on the Site shall be payable by the Authority as owner of the Project Site; provided, however, that any such taxes payable by the Concessionaire under Applicable Laws for use of the Project Site shall not be reimbursed or payable by the Authority.

ARTICLE 38

DISPUTE RESOLUTION

38.1 Dispute resolution

- 38.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “Dispute”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 38.2.
- 38.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

38.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 38.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 38.3.

38.3 Arbitration

- 38.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 38.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 38.3.2. Such arbitration shall be held in accordance with the Arbitration and Conciliation Act, 1996. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.
- 38.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the

appointment shall be made in accordance with the Arbitration and Conciliation Act, 1996 and rules made therein.

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

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

38.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

38.4 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory regulatory authority or commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 38.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.

ARTICLE 39

DISCLOSURE

39.1 Disclosure of Specified Documents

The Concessionaire shall make available for inspection by any person, copies of this Concession Agreement, the Maintenance Manual, the Maintenance Programme and the Maintenance Requirements (hereinafter collectively referred to as the “**Specified Documents**”), free of charge, during normal business hours on all working days at the Concessionaire’s Registered Office. The Concessionaire shall prominently display at Concessionaire’s Registered Office public notices stating the availability of the Specified Documents for such inspection, and shall provide copies of the same to any person upon payment of copying charges on a ‘no profit no loss’ basis.

39.2 Disclosure of Documents relating to safety

The Concessionaire shall make available for inspection by any person copies of all Documents and data relating to safety of the Project, free of charge, during normal business hours on all working days, at the Concessionaire’s Registered Office. The Concessionaire shall make copies of the same available to any person upon payment of copying charges on a ‘no profit no loss’ basis.

39.3 Notwithstanding the provisions of Clauses 39.1 and 39.2, the Authority shall be entitled to direct the Concessionaire, from time to time, to withhold the disclosure of Protected Documents (as defined hereinbelow) to any person in pursuance of the aforesaid Clauses.

Explanation:

The expression Protected Documents shall mean such of the Specified Documents or documents referred to in Clauses 39.1 and 39.2, or portions thereof, the disclosure of which the Authority is entitled to withhold under the provisions of the Right to Information Act, 2005.

ARTICLE 40

MISCELLANEOUS

40.1 Governing law and jurisdiction

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

40.2 Waiver of immunity

Each Party unconditionally and irrevocably:

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

40.3 Depreciation and Interest

40.3.1 For the purposes of depreciation under the Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the Authority shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under the Applicable Laws.

40.3.2 Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.

40.4 Delayed payments

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

40.5 Waiver

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

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

40.5.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to 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.

40.6 Liability for review of Documents and Drawings

Except to the extent expressly provided in this Agreement:

- (a) no review, comment or approval by the Authority or the Independent Engineer of any Project Agreement, Document or Drawing submitted by the Concessionaire nor any observation or inspection of the construction, operation or maintenance of the Project Facilities 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 shall not be liable to the Concessionaire by reason of any review, comment, approval, observation or inspection referred to in Sub-clause (a) above.

40.7 Exclusion of implied warranties etc.

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

40.8 Survival

40.8.1 Termination shall:

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

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

40.9 Entire Agreement

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

40.10 Severability

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

Procedure set forth under this Agreement or otherwise.

40.11 No partnership

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

40.12 Third Parties

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

40.13 Successors and Assigns

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

40.14 Notices

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

- (a) in the case of the Concessionaire, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Concessionaire may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside Delhi may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number as the Concessionaire may from time to time designate by notice to the Authority;
- (b) in the case of the Authority, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the Chairman of the Authority with a copy delivered to the Authority Representative or such other person as the Authority may from time to time designate by notice to the Concessionaire; provided that if the Concessionaire does not have an office in Delhi it may send such notice by facsimile or e-mail and by registered acknowledgement due, air mail or by courier; and
- (c) any notice or communication by a Party to the other Party, given in

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

40.15 Language

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

40.16 Counterparts

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

ARTICLE 41

DEFINITIONS

41.1 Definitions

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

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

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

- (a) on or before COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Project, revised to the extent of one half of the variation in WPI occurring between the first day of the month of Appointed Date and the Reference Date;
- (b) from COD and until the 4th (fourth) anniversary thereof, an amount equal to the Adjusted Equity as on COD shall be deemed to be the base (the “Base Adjusted Equity”) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following COD to the extent of variation in WPI occurring between COD and the Reference Date;
- (c) after the 4th (fourth) anniversary of COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by 0.33% (zero point four two per cent) thereof at the commencement of each month following the 4th (fourth) anniversary of COD and the amount so arrived at shall be revised to the extent of variation in WPI occurring between COD and the Reference Date;

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

“**Additional Auditors**” shall have the meaning set forth in Clause 27.2.3;

“Additional Facility” shall have the same meaning as set forth in Clause 10.3.5;

“**AffectedParty**” shall have the meaning set forth in Clause 28.1;

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

“**Appendix**” shall have the meaning set forth in Clause 10.3.1;

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

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

“**AppointedDate**” shall mean the date on which the Concessionaire satisfies the Condition Precedent for Concessionaire as described under Article 4, and shall be deemed to be the date of commencement of the Concession Period. For the avoidance of doubt, every Condition Precedent shall have been satisfied or waived prior to the Appointed Date and in the event all Conditions Precedent are not satisfied or waived, as the case may be, the Appointed Date shall be deemed to occur only when each and every Condition Precedent is either satisfied or waived, as the case may be.

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

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

“**Authority**” shall mean [Name of the Authority];

“**Authority Indemnified Persons**” shall have the meaning set forth in Clause 36.1.1

“**AuthorityDefault**” shall have the meaning set forth in Clause 31.2.1;

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

“**Award**” shall have the meaning set forth in Clause 38.3.3;

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

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

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

“**BidSecurity**” means the security provided by the Concessionaire to the Authority along with the Bid in a sum of Rs. *****⁸(Rupees ***** Only), in accordance with the Request for Proposals, and which is to remain in force until substituted by the Construction Performance Security;

“**COD**” or “Commercial Operation Date” shall have the meaning set forth in Clause 15.1;

“**Change in Law**” means the occurrence of any of the following after the date of Bid discriminately affecting the Concessionaire:

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

⁸Calculated @1% (one per cent) of the amount specified in the definition of Total Project Cost. The Authority may, if deemed necessary, prescribe a higher Bid Security not exceeding 2% of the Total Project Cost. In the case of a project having a Total Project Cost of Rs. 2,000 cr. or above, the Authority may reduce the Bid Security, but not less than 0.5% of the Total Project Cost in any case

- (d) a change in the interpretation or application of any Indian law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the date of Bid; or
- (e) any change in the rates of any of the Taxes that have a direct effect on the Project;

“Change in Ownership” means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the {selected bidder/Consortium Members}, together with {its/their} Associates, in the total Equity to decline below 51% (fifty one per cent) thereof during Construction Period and two years thereafter; provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process for the purposes of meeting the minimum conditions of eligibility or for evaluation of its application or Bid, as the case may be,) in the proportion of the equity holding of {the selected bidder/any Consortium Member} to the total Equity, if it occurs prior to COD, shall constitute Change in Ownership;

“Change of Scope” shall have the meaning set forth in Clause 16.1;

“Change of Scope Notice” shall have the meaning set forth in Clause 16.2.1;

“Change of Scope Order” shall have the meaning set forth in Clause 16.2.3;

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

“Completion Certificate” shall have the meaning set forth in Clause 14.2;

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

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

“Concession Fee” shall have the meaning set forth in Clause 23.1;

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

“Concessionaire Default” shall have the meaning set forth in Clause 31.1.1;

“Concurrent Auditors” shall have the meaning set forth in Clause 27.2.4;

“Concessionaire Parties” shall have the meaning set forth in Clause 36.2.1

“Concessionaire’s Registered Office” shall mean the registered office of the Concessionaire declared/notified under Companies Act, 2013 and shall be at -----;

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

{“**Consortium**” shall have the meaning set forth in Recital (C);}

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

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

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

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

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

“**Covenant**” shall have the meaning set forth in Clause 5.2.4;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“**Encumbrances**” means, in relation to the Project, any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, where applicable herein but excluding utilities referred to in Clause 11.1;

“**Equity**” means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost, and shall for the purposes of this Agreement include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Company, and any interest-free funds advanced by any shareholder of the Company for meeting such equity component;

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

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

“**Equity Support**” shall have the meaning set forth in Clause 26.2.1;

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

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

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

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

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

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

“Financing Agreements” means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.2;

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

“Force Majeure Cost” shall have the meaning set forth in Clause 28.7.2;

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

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

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

“Implementation Schedule” shall have the meaning set forth in Clause 5.1.4;

“Indemnified Party” means the Party entitled to the benefit of an indemnity

pursuant to Article 36;

“**Indemnifying Party**” means the Party obligated to indemnify the other Party pursuant to Article 36;

“**Independent Engineer**” shall have the meaning set forth in Clause 20.1;

“**Indirect Political Event**” shall have the meaning set forth in Clause 28.3;

“**Inspection Report**” shall have the meaning set forth in Clause 13.2;

“**Insurance Cover**” means the aggregate of the maximum sums insured under the insurances taken out by the Concessionaire pursuant to Article 26, and includes all insurances required to be taken out by the Concessionaire under Clause 26.1 but not actually taken, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable or deemed to be insured and payable in relation to such act or event;

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

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

“**Lead Member**” shall have the meaning set forth in Recital (C);

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

“**Maintenance Manual**” shall have the meaning ascribed to it in Clause 17.3;

“**Maintenance Programme**” shall have the meaning ascribed to it in Clause 17.4.1;

“**Maintenance Requirements**” shall have the meaning set forth in Clause 17.2;

“**Material Adverse Effect**” means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under

and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;

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

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

“**NPV**” shall have the meaning set forth in Clause 35.3;

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

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

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

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

“**O&M Inspection Report**” shall have the meaning set forth in Clause 19.2;

“**Operation Performance Security**” shall have the meaning set forth in Clause 9.4;

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

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

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

“**Performance Guarantee**” shall have the meaning set forth in Clause 33.2.3;

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

“**Preservation Cost**” shall have the meaning set forth in Clause 13.5.3;

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

“**Project Agreements**” means this Agreement, the Financing Agreements, EPC Contract, O&M Contract, and any other agreements or material contracts that may be entered into by the Concessionaire with any person in connection with matters relating to, arising out of or incidental to the Project, but does not include the Escrow Agreement, Substitution Agreement, or any agreement for procurement of goods and services involving a consideration of upto Rs.5 (five) crore;

“**Project Assets**” ” means all physical and other assets relating to and forming part of the Project Sites including (a) rights over the Project Sites in the form of lease, licence, Right of Way or otherwise; (b) Project Facilities situated on the Project Sites including movables on Project Sites or elsewhere; (c) all rights of the Concessionaire under the Project Agreements; (d) financial assets, such as receivables, security deposits etc.; (e) insurance proceeds; and (f) Applicable Permits and authorisations relating to or in respect of the Project, and (g) Intellectual Property Rights in Project, Project Facilities and/or Trading Operations and/or Service Provisions of the Concessionaire;

“**Project Completion Date**” means the date on which the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14;

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

“**Project Facility**” or “**Project Facilities**” means all the amenities and facilities situated on the Project Sites, including the existing facilities, tangible assets, the facilities procured by the Concessionaire, the facilities constructed by the Concessionaire as described in **Schedule-C**;

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

“**Project Revenue**” shall have the meaning set forth in Article 26;

“**Project Site**” or “**Project Sites**” shall have the meaning set forth in Clause

10.1;

“**Protected Documents**” shall have the meaning set forth in explanation to Clause 39.3;

“**Provisional Certificate**” shall have the meaning set forth in Clause 14.3;

“**Punch List**” shall have the meaning ascribed to it in Clause 14.3;

“**RBI**” means the Reserve Bank of India, as constituted and existing under the Reserve Bank of India Act, 1934, including any statutory modification or replacement thereof, and its successors;

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

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

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

“**Request for Qualification**” or “**RFQ**” shall have the meaning set forth in Recital (C);

“**Right of Way**” means the constructive possession of the Project Sites under and in terms with the Lease Agreement (“**Schedule S**”), together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project in accordance with this Agreement;

“**Safety Consultant**” shall have the meaning set forth in Clause 18.1.2;

“**Safety Requirements**” shall have the meaning set forth in Clause 18.1.1;

“**Safety Fund**” shall have the meaning set forth in Clause 18.2;

“**Scheduled Completion Date**” shall have the meaning set forth in Clause 12.4.1;

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

“**Senior Lenders**” means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders,

including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold pari-passu charge on the assets, rights, title and interests of the Concessionaire;

“**Service Provisions**” means various services provided by the Concessionaire inclusive but not limited to storing/processing produces for farmers, traders, Third Parties, agencies, authorities etc. for a charge fixed by Concessionaire;

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

“**Specified Documents**” shall have the meaning set forth in Clause 39.1;

“**State**” means the State of Haryana and/or State Himachal Pradesh as the case may be and “**State Government**” means the government of that State;

“**Statutory Auditors**” means a reputable firm of chartered accountants acting as the statutory auditors of the Concessionaire under the provisions of the Companies Act, 1956 or Companies Act, 2013 including any statutory modification or re-enactment thereof, for the time being in force, and appointed in accordance with Clause 27.2.1;

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

- (a) the principal amount of debt provided by lenders or the Concessionaire’s shareholders for meeting the Total Project Cost and subordinated to the financial assistance provided by the Senior Lenders; and
- (b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Rate in case of loans expressed in Indian Rupees and lesser of the actual interest rate and six-month LIBOR (London Inter-Bank Offer Rate) plus 2% (two per cent) in case of loans expressed in foreign currency, but does not include any interest that had fallen due one year prior to the Transfer Date;

provided that if all or any part of the Subordinated Debt is convertible into Equity at the option of the lenders and/or the Concessionaire’s shareholders, it shall for the purposes of this Agreement be deemed to be Subordinated Debt even after such conversion and the principal thereof shall be dealt with

as if such conversion had not been undertaken;

“Lease Agreement” or “Lease Deed” shall mean the lease agreement/deed to be executed between the Authority and the Concessionaire for Project Sites as set forth in **Schedule S**;

“Substitution Agreement” shall have the meaning set forth in Clause 34.3;

“Suspension” shall have the meaning set forth in Clause 30.1;

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

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

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

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

“Tests” means the tests set forth in Schedule-I to determine the completion of Project in accordance with the provisions of this Agreement

“Total Project Cost” means the lowest of:

- (a) the capital cost of the Project, {less Equity Support} as set forth in the Financial Package;
- (b) the actual capital cost of the Project upon completion of the Project

{less Equity Support}; and

- (c) a sum of Rs. ***** crore (Rupees ***** Only), less Equity Support⁹;

provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement; provided further that in the event WPI increases, on an average, by more than 6% (six per cent) per annum for the period between the date hereof and COD, the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount hereinbefore specified such that the effect of increase in WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost;

“**Trading Operations**” means procurement of farm produce etc. from farmers, storing in the Project Facilities and for sale by the Concessionaire;

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

“**Usage Charge**” means amount in Rupees as mentioned in Clause 23.2.1;

“**User**” means a person or entity using Project Facility/Facilities for a fee or a charge;

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

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

⁹ This amount may be indicated on the basis of project-specific cost estimates, including financing charges; and this amount shall, after bidding, be reduced by a sum equivalent to the Equity Support. In determining this amount, the estimated cost of construction shall be increased by 25% thereof to account for contingencies, risk premia and financing costs. These costs should be reviewed and firmed up during pre-bid consultations.

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

SIGNED, SEALED AND
DELIVERED
For and on behalf of
THE AUTHORITYby:

(Signature)
(Name)
(Designation)

THE COMMON SEAL OF
CONCESSIONAIRE has been affixed
pursuant to the resolution passed by the
Board of Directors of the Concessionaire
at its meeting held on the day of
20..... hereunto affixed in the presence of
....., Director, who has
signed these presents in token thereof and
....., company Secretary /
Authorized Officer who has countersigned
the same in token thereof [§]:

In the presence of:

- 1.
- 2.

[§] To be affixed in accordance with the articles of association of the Concessionaire.

Schedules

SCHEDULE – A

(See Clause 10.1)

PROJECTSITES

1 The Project Sites

- 1.1 Project Sites shall include the land, buildings, structures and other works as described in Annex-I and Annex-II of this Schedule-A.
- 1.2 An inventory of the Project Sites including the land, buildings, structures, road works, trees and any other immovable property on, or attached to, the Project Sites shall be prepared jointly by the Authority Representative and the Concessionaire, and such inventory shall form part of the memorandum referred to in Clause 10.3.1 of the Agreement.

Annex - I
(Schedule-A)
Site for Facility

- 1. Site**
- 2. Land Details**

Annex - II
(Schedule-A)

- 1. Site**
- 2. Land Details**

Project Location	
Name of the village/Town/city where the land (site) is located	
Survey numbers of the land parcel (site)	
Area of Land	
Description of topography of the land, boundaries and facilities surrounding the land	
Nearest national / State Highway and distance of the site from the same	

SCHEDULE - B

(See Clause 2.1)

DEVELOPMENT OF THE PROJECT

1 Development of the Project Facilities

Development of the Project shall include construction of the Project Facilities as described in this Schedule-B and in Schedule-C.

Annex - I

(Schedule-B)

Description of Facilities

1 Existing Facilities

.

1.1 Details of the facility are as follows:

-

1.2 Details of Plant and machinery installed are as follows:

2 Facilities to be constructed by Concessionaire

2.1 The Concessionaire shall undertake [].

2.2

3 Specifications and Standards

The Project shall be constructed in conformity with the Specifications and Standards specified in Schedule-D.

Annex - II

(Schedule-B)

Description of Facilities

1 Existing Facilities

.

2 Facilities to be constructed by Concessionaire

The Concessionaire is required to develop

2.1 Operating Facilities (Core): Following Mandatory Facilities along with the minimum number / capacity to be developed by the Concessionaire:

[Cold Store – 500 MT

Pre-Cooling Chambers – 7 MT X 10 no.s

Sorting & Grading Lines - 10 MT X 2 no.s

Packaging Space

Utilities Room including diesel generators, etc.

Loading/Unloading area for trucks/commercial vehicles of apple/produce

Parking Space

Docking Space

Machine Room including refrigeration

Material handling equipment]

The Concessionaire shall procure and install new equipment for the Project.

2.2 Operating Facilities (Support): Following Support Facilities are to be developed by the Concessionaire:

[Repair and maintenance area for handling and transport equipment

Washroom

Change Room

Canteen / Pantry

Laboratory for quality testing of fruits

Drivers' Resting Dormitory / Waiting / Guest Room

Store Room

Medical Room with First-aid equipment

Fire Fighting / Security

Drinking Water]

3 Specifications and Standards

The Project shall be constructed in conformity with the Specifications and Standards specified in Schedule-D.

SCHEDULE – C

(See Clause 2.1)

PROJECT FACILITIES

1 Project Facilities

The Project Facilities shall include the following facilities

1.1 Facilities to be constructed by Concessionaire

1.1.1 The facilities described as Facilities to be constructed by Concessionaire in “Annex-I and Annex-II of Schedule B”

1.2 Existing Facilities

1.2.1 The facilities described as “Existing Facilities” in Annex-I and Annex-II of Schedule B.

SCHEDULE – D

(See Clause 2.1)

SPECIFICATIONS AND STANDARDS

1 Minimum Performance Specification and Standards

The Concessionaire shall be required to comply with Minimum Performance Specification and Standards as specified below:

1.1 Capacity Utilization

- a. [Definition: The Concessionaire shall ensure that the Capacity Utilization for the CA facility at Rai, Sonapat from the Commercial Operation Date shall not be less than 70% on an annual basis for any two Accounting Years in a block of three Accounting Years. For the avoidance of doubt, the first block of three Accounting Years shall be the first, second and third Accounting Years from the Commercial Operation Date. The second block of three Accounting Years shall be the fourth, fifth and sixth Accounting Years from the Commercial Operation Date and so on.
- b. Measurement: Capacity utilization of the CA facility at Rai, Sonapat is defined as ratio of “Volume Stored” to that of “Available Capacity”.

Where,

“Available Capacity” for the CA facility is defined as 10,530 Metric Tonnes per day.

“Volume Stored” is defined as the volume (in Metric Tonnes) of apples or other goods stored in the CA facility on a per day basis.

$$\begin{aligned} \text{Capacity Utilization on daily basis} \\ = \text{Volume Stored} / \text{Available Capacity} \end{aligned}$$

$$\begin{aligned} \text{Capacity Utilization for a period of } n \text{ days} \\ = (\sum_{i=1}^n \text{Volume Stored}_i) / n \times \text{Available Capacity} \end{aligned}$$

- c. Monitoring: The Concessionaire shall submit the calculation of Capacity Utilization:
- for every quarter in the quarterly status report to be submitted by the Concessionaire to the Authority.
 - for an Accounting Year in the quarterly status report of the first quarter of the subsequent Accounting Year to be submitted by the Concessionaire to the Authority.

- d. Penalty: In the event that the Concessionaire does not fulfil the performance standard specified in 1.1 (a) above, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 5% (five per cent) of the Operation Performance Security for each Accounting Year for that block of three Accounting Years. For the avoidance of doubt, in case the Concessionaire does not fulfil the performance standard specified in 1.1 (a) above for the first block of three Accounting Years, the Concessionaire shall pay to the Authority Damages calculated at 15% of the Operation Performance Security].

1.2 Sale through Organized Retail channel

- a. [Definition: The Concessionaire shall, from the 6th (sixth) year of the Commercial Operation Date, ensure sale through “Organized retail” channel of at least 20% of apples procured by it in an Accounting Year and stored in the CA facility at Rai, Sonapat. “Organized retail” herein refers to the procurement and sale of apples undertaken by licensed retailers, that is, those who are registered for sales tax, income tax, etc. For avoidance of doubt, if the Concessionaire has procured 15,000 Metric Tonnes of apples in an Accounting Year and has stored 10,530 Metric Tonnes out of such procured apples in the CA facility at Rai, Sonapat, calculation of share of sales through “Organized retail” will be based on 10,530 Metric Tonnes.
- b. Measurement: Volumes of apples sold by the Concessionaire through “Organized retail” channel will need to be certified by the statutory auditor. For avoidance of doubt, it is noted that the apples procured in an Accounting Year may continue to be sold in the next Accounting Year. Hence for the purpose of calculation of share of sales through Organized retail, the Concessionaire will produce to the statutory auditor the records for apples procured in an Accounting Year and records for sale of these apples through various channels including Organized retail.

$$\begin{aligned} \text{Share of Sale through Organized Retail (\%)} \\ &= (\text{Volumes sold via organized retail channel}) \\ & / (\text{Total volumes stored}) * 100 \end{aligned}$$

Where,

Total volumes stored = Volume of apples stored by the Concessionaire in the CA facility at Rai, Sonapat out of the volume of apples procured by it in an Accounting Year.

Volume sold via organized retail channel = Volume of apples (in Metric Tonnes) certified by the Statutory Auditor to have been sold by the Concessionaire through Organized retail channel

- c. Monitoring: The Concessionaire shall submit the calculation of Share of Sales through Organized Retail for an Accounting Year in the quarterly status report of the second quarter of the subsequent Accounting Year to be submitted by the Concessionaire to the Authority.

- d. Penalty: In the event that the Concessionaire does not fulfil the performance standard specified in 1.2 (a) above for an Accounting Year, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 5% (five per cent) of the Operation Performance Security for that Accounting Year.]

1.3 Sale as Branded apples

- a. [Definition: The Concessionaire shall, from the 6th (sixth) year of the Commercial Operation Date, ensure sale, as “Branded apples”, of at least 10% of apples procured by it in an Accounting Year and stored in the CA facility at Rai, Sonapat. Further the Concessionaire shall, from the 11th (eleventh) year of the Commercial Operation Date, ensure sale as “Branded apples” of at least 25% of apples procured by it in an Accounting Year and stored in the CA facility at Rai, Sonapat. “Branded apples” refer to the apples with a distinctive name and packaging, which shall be the result of the marketing, advertisements, and promotion activities undertaken by the Concessionaire as part of its obligation under clause 5.1.4 (k) of this Concession Agreement.
- b. Measurement: Volumes of apples sold by the Concessionaire as “Branded apples” will need to be certified by the statutory auditor. For avoidance of doubt, it is noted that the apples procured in an Accounting Year may continue to be sold in the next Accounting Year. Hence for the purpose of calculation of share of sales as “Branded apples”, the Concessionaire will produce to the statutory auditor the records for apples procured in an Accounting Year and records for sale of these apples as “Branded apples”.

$$\begin{aligned} \text{Share of sales as Branded apples (\%)} \\ &= (\text{Volume of apples sold as Branded apples}) \\ &/ (\text{Total volume stored}) * 100 \end{aligned}$$

Total volumes stored = Volume of apples stored by the Concessionaire in the CA facility at Rai, Sonapat out of the volume of apples procured by it in an Accounting Year. For avoidance of doubt, if the Concessionaire has procured 15,000 Metric Tonnes of apples in an Accounting Year and has stored 10,530 Metric Tonnes out of such procured apples in the CA facility at Rai, Sonapat, calculation of share of sales through “Organized retail” will be based on 10,530 Metric Tonnes.

Volume sold as “Branded apples” = Volume of apples (in Metric Tonnes) certified by the Statutory Auditor to have been sold by the Concessionaire as “Branded apples”

- c. Monitoring: The Concessionaire shall submit the calculation of Share of Sales as “Branded apples” for an Accounting Year in the quarterly status report of the second quarter of the subsequent Accounting Year to be submitted by the Concessionaire to the Authority.

d. Penalty: In the event that the Concessionaire does not fulfil the performance standard specified in 1.3 (a) above for an Accounting year, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 5% (five per cent) of the Operation Performance Security for that Accounting Year.]

2 The Concessionaire shall also be required to comply with the following guidelines on Standards:

a. [All apples, which are to be stored in the Controlled Atmosphere facility at Rai, are to be pre-cooled and kept in temperature-controlled conditions during transportation and till the time the apples are placed in the CA storage facility.

b. Apples being sold by the Concessionaire shall contain no chemical residues that exceed the prescribed maximum residue levels. The Concessionaire shall adhere to standards specified by FSSAI, or any other agency appointed by the Government of India, on sale of fresh apples in India.

c. Plastic bins/crates or wooden bins/crates or cartons or any other packing units used by the Concessionaire for storage or transportation of apples shall be clean and suitable for packing of fresh apples.

d. Apples being sold by the Concessionaire shall have sufficient firmness and quality to allow the retailers adequate time to sell it to the consumers.

e. As and when the Government of India, or any agency appointed by it, comes out with quality certifications for cold chain facilities, the Concessionaire shall comply with requirements specified for such certifications and will endeavor obtaining such certifications.]

3 Guiding Framework for development of Project Facility

3.1 [The design of Project Facility shall be in accordance with Good Industry Practice; Applicable Laws; and in Conformity with all applicable safety and environmental standards.

3.2 Facility design should be modular and scalable to cater to increase in volumes.

3.3 Facility layout should ensure smooth handling of volumes.

3.4 Facility layout should ensure easy access to the differently abled people.]

4 Broad specifications for the facilities to be constructed/procured

4.1 [Sorting-Grading line Specifications: The sorting-grading will be done through advanced and automatic line with following major specifications:

(a) Weight sorting: from 20 to 500 grams

- (b) Color sorting- by means of special CDD color camera(s). System delivered with an extensive software programme, enabling sorting by average color or background color and blush
 - (c) Optical diameter sorting- size of the fruit is determined by means of a high resolution CCD infrared black & white camera(s)
 - (d) Long-short sorting- software programme determines the diameter as well as the length of the fruit
 - (e) Diameter (min/max):40/120 mm]
- 4.2 [Pre-cooling Facility:Following major specifications are to be considered for pre-cooling facility:
- (a) This should be based on forced air cooling concept with minimal batch processing time.
 - (b) Capacity of this facility should be in synchronization with the capacity of Controlled Atmosphere facility at Rai and the capacity of Cleaning, sorting, grading facility.
 - (c) Pre-cooling within 4-6 hours (per batch)]
- 4.3 General Specification for Civil Works
- (a) The civil construction shall adopt a low energy building approach through passive ventilation and natural lighting. All buildings shall have access to natural lighting and ventilation. Lighting masts shall be provided to light all the external spaces, driveways and walkways.
- 4.4 Parking
- (a) [The Concessionaire shall develop adequate number of parking slots along with a provision for a traffic buffer area or queuing lane off the main road / main entrance to avoid traffic congestion for all types and sizes of trucks. Slots for parking of a minimum of 50 trucks with capacity to carry 500 boxes of apples (each box carrying 20 kgs of apples) shall be ensured.
 - (b) Truck parking shall be provided separately from passenger vehicles. Dedicated parking for the physically challenged person shall be provided.
 - (c) The parking area should provide all utilities, including a canteen, a toilet block and a repair and maintenance area.]
- 4.5 [Fencing
- (a) The site shall be secured through a perimeter fence of sufficient height and care should be taken to ensure that the perimeter is secure against the unauthorized entry of person.]

4.6 [Gate Complex

- (a) The facilities shall be accessed via one controlled gate complex. Gate should be adequate for their purpose and wide enough to allow easy vehicular access.
- (b) There should be separate gates for entry and exit to the facility.]

4.7 Toilets

- (a) The Concessionaire should provide for adequate toilets at the Project Sites.

4.8 Fire Protection

For the sake of protecting the Facilities against fire, the Concessionaire shall:

- (a) Provide well maintained portable cylinders (fire extinguisher) with chemical substance shall be available as per applicable standards;;
- (b) Keep fire extinguishers in appropriate and accessible places; and
- (c) Ensure the fire protection system shall comply with applicable regulations.

4.9 [Handling Area: Handling area should fulfil the following requirements:

- (a) The handling area should be free from obstruction, preferably covered for handling of apples;
- (b) The handling area should allow an adequate turning circle for vehicles; and
- (c) Any area of the site used for maneuvering, vehicle parking should be adequately surfaced for the purpose for which it is used with adequate arrangements and signage for the protection of pedestrians from vehicles.]

4.10 [Refrigerated Trucks:

After pre-cooling at [Kingal facility in Himachal Pradesh], [details of the product to be stored/preserved in facility] are to be transported to the Controlled Atmosphere facility at [Rai, Sonapat] in temperature controlled conditions. The Concessionaire shall have to undertake procurement of refrigerated trucks for this purpose either through acquisition or through lease or rent provided a minimum of [15 trucks] of new condition and of [10 MT] capacity are purchased by the Concessionaire.]

4.11 Packing units:

The Concessionaire shall ensure that the packing units (plastic or wooden bins/crates or any other type of packing units), used by it for storage and

transportation of apples, shall comply with regulations issued by Government of India or Himachal Pradesh as applicable.

SCHEDULE –E

(See Clause 4.1.3)

APPLICABLE PERMITS

1 Applicable Permits

1.1 The Concessionaire shall obtain, as required under the Applicable Laws, the following Applicable Permits on or before the Appointed Date, save and except to the extent of a Waiver granted by the Authority in accordance with Clause 4.1.3 of the Agreement:

- (a) [Approval by the State Level Single Window Clearance & Monitoring Authority (SLSWC&MA) including construction licenses from Industries Department;]
- (b) [Permission for the Development of land including approvals required under the relevant Building Bye-laws from Town and Country Planning Department]
- (c) [Adherence to requirements specified by the Department of Forest, Government of H.P in respect of Forest clearances including permission for cutting trees while granting the leasehold rights to FHEL;]
- (d) [Consent to Establish/operate industrial unit (Water: Prevention & Control of Pollution) Act,1981 from H.P. State Pollution Control Board]
- (e) [Power Availability Certificate (including right of way for establishing power connection to the site) from Himachal Pradesh State Electricity Board Limited;]
- (f) [NOC/permission for sinking of bore well, use of ground water and for drawing water from river/reservoir including right of way for establishing water connection to the site from Himachal Pradesh Irrigation and Public Health Department / Municipal Corporation.;
- (g) [Fire safety clearances from H.P. Fire Services Department]
- (h) [Approval for sewerage connection from Municipal Corporation]
- (i) [Approval from Municipal Corporation for water and sewerage connection;]

1.2 Applicable Permits, as required, relating to environmental protection and conservation shall have been procured by the Authority as a Condition Precedent.

SCHEDULE –F

Part A

(See Clause 9.1)

CONSTRUCTION PERFORMANCE SECURITY

The Director,
Fresh &Healthy Enterprises Limited

WHEREAS:

- (A) (the “**Concessionaire**”) and [Name of the Authority] having its principal office at _____ (the “**Authority**”) have entered into a Concession Agreement dated (the “**Agreement**”) whereby the Authority has agreed to the Concessionaire undertaking development of the cold chain infrastructure in [Name of the State] with backward and forward linkagesand on design,build, finance, operate and transfer (“**DBFOT**”) basis, subject to and in accordance with the provisions of the Agreement.
- (B) The Agreement requires the Concessionaire to furnish a Construction Performance Security to the Authority in a sum of Rs. ***** cr.(Rupees ***** crore) (the “**GuaranteeAmount**”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the Construction Period (as defined in the Agreement).
- (C) We, through our Branch at(the “**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance Security.

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably guarantees the due and faithfulperformance of the Concessionaire’s obligations during the Construction Period, under and in accordance with the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Concessionaire, such sum or sums upto an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of an Officer not below the rank of _____ in the Authority that the Concessionaire has committed default in the due and faithful performance of all or any of its

obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Construction Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Concessionaire for any reason whatsoever.

3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfilment and/ or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.
6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force until _____ (Schedule Commercial Operation Date of the Project) or compliance of the conditions specified in paragraph 8 below and unless a demand or claim in writing is made by the Authority on the Bank under this Guarantee, no later than 6

(six) months from the date of expiry of this Guarantee, all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.

8. The Performance Security shall cease to be in force and effect when the Concessionaire shall have expended on Project construction an aggregate sum not less than 20% (twenty per cent) of the Total Project Cost which is deemed to be Rs.*** cr. (Rupees ***** Crore) for the purposes of this Guarantee, and provided the Concessionaire is not in breach of this Agreement. Upon request made by the Concessionaire for release of the Performance Security alongwith the particulars required hereunder, duly certified by a statutory auditor of the Concessionaire, the Authority shall release the Performance Security forthwith.
9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorized to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.
11. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of [one year and six months] or until it is released earlier by the Authority pursuant to the provisions of the Agreement.

Signed and sealed thisday of, 20.....at

SIGNED, SEALED AND DELIVERED
For and on behalf of
the BANK by:

(Signature)
(Name)
(Designation)
(Code Number)
(Address)

NOTES:

- (i) The bank guarantee should contain the name, designation and code number of the officer(s) signing the guarantee.
- (ii) The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.

SCHEDULE –F

Part B

(See Clause 9.4)

OPERATION PERFORMANCE SECURITY

The Director,
Fresh &Healthy Enterprises Limited

WHEREAS:

- (A) (the “**Concessionaire**”) and [Name of the Authority],
having its principal office at
..... (the
“**Authority**”) have entered into a Concession Agreement dated
(the “**Agreement**”) whereby the Authority has agreed to the Concessionaire
undertaking development of the cold chain infrastructure at [Name of the
State] with backward and forward linkages on design, build, finance, operate
and transfer (“**DBFOT**”) basis, subject to and in accordance with the
provisions of the Agreement.
- (B) The Agreement requires the Concessionaire to furnish an Operation
Performance Security to the Authority in a sum of Rs. ***** cr. (Rupees
***** crore) (the “**Guarantee Amount**”) as security for due and faithful
performance of its obligations, under and in accordance with the Agreement,
during the Operation Period (as defined in the Agreement).
- (C) We, through our Branch at (the
“**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance
Security.

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably,
guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably guarantees the due and
faithful performance of the Concessionaire’s obligations during the
Operation Period, under and in accordance with the Agreement, and agrees
and undertakes to pay to the Authority, upon its mere first written demand,
and without any demur, reservation, recourse, contest or protest, and without
any reference to the Concessionaire, such sum or sums up to an aggregate
sum of the Guarantee Amount as the Authority shall claim, without the
Authority being required to prove or to show grounds or reasons for its
demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of an Officer not below the rank
of ----- in the Authority, that the Concessionaire

has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Operation Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Concessionaire for any reason whatsoever.

3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfilment and/ or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.
6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force until [26th anniversary] of the Appointed Date or compliance of the conditions specified in paragraph 8 below and unless a demand or claim in writing is made by the Authority on the Bank under this

Guarantee, no later than 6 (six) months from the date of expiry of this Guarantee, all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.

8. The Performance Security shall cease to be in force and effect when the Concessionaire shall have ===== for the purposes of this Guarantee, and provided the Concessionaire is not in breach of this Agreement. Upon request made by the Concessionaire for release of the Operation Performance Security along with the particulars required hereunder, duly certified by a statutory auditor of the Concessionaire, the Authority shall release the Operation Performance Security forthwith.
9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorized to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.
11. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of [26 years and 0 months] or until it is released earlier by the Authority pursuant to the provisions of the Agreement.

Signed and sealed this day of, 20..... at

SIGNED, SEALED AND DELIVERED

For and on behalf of
the BANK by:

(Signature)

(Name)

(Designation)

(Code Number)

(Address)

NOTES:

- (i) The bank guarantee should contain the name, designation and code number

of the officer(s) signing the guarantee.

The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.

SCHEDULE–G

(See Clause 12.1)

PROJECT COMPLETION SCHEDULE

1 Project Completion Schedule

During Construction Period, the Concessionaire shall comply with the requirements set forth in this Schedule-G for each of the Project Milestones and the Scheduled Completion Date (the “**Project Completion Schedule**”). Within 15 (fifteen) days of the date of each Project Milestone, the Concessionaire shall notify the Authority of such compliance alongwith necessary particulars thereof.

2 Project Milestone-I

2.1 Project Milestone-I shall occur on the date falling on the [180th (one hundred and eightieth)] day from the Appointed Date (the “**ProjectMilestone-I**”).

2.2 Prior to the occurrence of Project Milestone-I, the Concessionaire shall have commenced construction of the Project Facilities and expended not less than 10% (ten per cent) of the total capital cost set forth in the Financial Package.

3 Project Milestone-II

3.1 Project Milestone-II shall occur on the date falling on the [365th (three hundred and sixty fifth)] day from the Appointed Date (the “**ProjectMilestone-II**”).

3.2 Prior to the occurrence of Project Milestone-II, the Concessionaire shall have commenced expended not less than 35% (thirty five per cent)] of the total capital cost set forth in the Financial Package.

4 Project Milestone-III

4.1 Project Milestone-III shall occur on the date falling on the [550th (five hundred and fiftieth)] day from the Appointed Date (the “**ProjectMilestone-III**”).

4.2 Prior to the occurrence of Project Milestone-III, the Concessionaire shall have commenced [construction of all Project Facilities and expended not less than 70% (Seventy per cent)] of the total capital cost set forth in the Financial Package.

5 Scheduled Completion Date

5.1 The Scheduled [Completion Date shall occur on the [650th (six hundred and fiftieth)] day from the Appointed Date.

5.2 On or before the Scheduled []Completion Date, the Concessionaire shall have completed the construction of the Project Facilities[] in accordance with this Agreement.

6 Extension of period

Upon extension of any or all of the aforesaid Project Milestones or the Scheduled Completion Date, as the case may be, under and in accordance with the provisions of this Agreement, the Project Completion Schedule shall be deemed to have been amended accordingly.

SCHEDULE –H

(See Clause 12.3)

DRAWINGS

1 Drawings

In compliance of the obligations set forth in Clause 12.3 of this Agreement, the Concessionaire shall furnish to the Independent Engineer, free of cost, all Drawings listed in Annex-I of this Schedule-H.

2 Additional drawings

If the Independent Engineer determines that for discharging its duties and functions under this Agreement, it requires any drawings other than the master plan, it may by notice require the Concessionaire to prepare and furnish such drawings forthwith. Upon receiving a requisition to this effect, the Concessionaire shall promptly prepare and furnish such drawings to the Independent Engineer.

SCHEDULE –I

(See Clause 14.1.2)

TESTS

1 Schedule for Tests

- 1.1 The Concessionaire shall, no later than 30 (thirty) days prior to the likely completion of Project Facilities(defined in Schedule C), notify the Independent Engineer and the Authority of its intent to subject the Project Facilities to Tests, and no later than 7 (seven) days prior to the actual date of Tests, furnish to the Independent Engineer and the Authority detailed inventory and particulars of all works and equipment forming part of Project Facilities(defined in Schedule C).
- 1.2 The Concessionaire shall notify the Independent Engineer of its readiness to subject the Project Facilities(defined in Schedule C)to Tests at any time after 7 (seven) days from the date of such notice, and upon receipt of such notice, the Independent Engineer shall, in consultation with the Concessionaire, determine the date and time for each Test and notify the same to the Authority who may designate its representative to witness the Tests. The Independent Engineer shall thereupon conduct the Tests itself or cause any of the Tests to be conducted in accordance with Article 14 and this Schedule-I.

2 Tests

- 2.1 **Visual and physical Test:** The Independent Engineer shall conduct a visual and physical check of Project Facilities (defined in Schedule C) to determine that all works and equipment forming part thereof conform to the provisions of this Agreement.
- 2.2 **Test drive:** The Independent Engineer shall undertake a test
=====to determine that the quality of service conforms to the provisions of the Agreement.
- 2.3 **Other Tests:** The Independent Engineer may require the Concessionaire to carry out or cause to be carried additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Project with Specifications and Standards.
- 2.4 **Environmental audit:** The Independent Engineer shall carry out a check to determine conformity of the Project with the environmental requirements set forth in Applicable Laws and Applicable Permits.
- 2.5 **Safety review:** Safety audit of the Project shall have been undertaken by the Safety Consultant as set forth in Schedule-L, and on the basis of such audit, the Independent Engineer shall determine conformity of the Project with the provisions of this Agreement.

3 Agency for conducting Tests

All Tests set forth in this Schedule-I shall be conducted by the Independent Engineer or such other agency or person as it may specify in consultation with the Authority.

4 Completion/Provisional Certificate

Upon successful completion of Tests, the Independent Engineer shall issue the Completion Certificate or the Provisional Certificate, as the case may be, in accordance with the provisions of Article 14.

SCHEDULE –J

(See Clauses 14.2 & 14.3)

COMPLETION CERTIFICATE

1. I, (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated (the “Agreement”), for development of the cold chain infrastructure at [Himachal Pradesh] with backward and forward linkages (the “Project ”) on design,,build, finance, operate and transfer (DBFOT) basis, through (Name of Concessionaire), hereby certify that the Tests specified in Article 14 and Schedule-I of the Agreement have been successfully undertaken to determine compliance of the Project Facilities with the provisions of the Agreement, and I am satisfied that the Project can be safely and reliably placed in commercial service of the Users thereof.

2. It is certified that, in terms of the aforesaid Agreement, all works forming part of Project have been completed, and the Project is hereby declared fit for entry into commercial operation on this the day of 20.....

SIGNED, SEALED AND DELIVERED
For and on behalf of
the INDEPENDENT ENGINEER by:

(Signature): _____
(Name) : _____
(Designation) : _____
(Address): _____

PROVISIONAL CERTIFICATE

- 1 I, (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated (the “**Agreement**”), for development of the cold chain infrastructure in [Himachal Pradesh] with backward and forward linkages (the “**Project**”) on design,,build, finance, operate and transfer (DRBFOT) basis through (Name of Concessionaire), hereby certify that the Tests specified in Article 14 and Schedule-I of the Agreement have been undertaken to determine compliance of the Project with the provisions of the Agreement.

- 2 Construction Works that were found to be incomplete and/or deficient have been specified in the Punch List appended hereto, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. (Some of the incomplete works have been delayed as a result of reasons attributable to the Authority or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire,)[@] I am satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Project, pending completion thereof.

- 3 In view of the foregoing, I am satisfied that the Project can be safely and reliably placed in commercial service of the Users thereof, and in terms of the Agreement, the Project is hereby provisionally declared fit for entry into commercial operation on this the day of 20.....

ACCEPTED, SIGNED, SEALED
AND DELIVERED

SIGNED, SEALED AND
DELIVERED

For and on behalf of

For and on behalf of

CONCESSIONAIRE by:

INDEPENDENT ENGINEER by:

(Signature)

(Signature)

(Name and Designation)

(Name and Designation)

(Address)

(Address)

@ Strike out if not applicable.

SCHEDULE –K

(See Clause 17.2)

MAINTENANCE REQUIREMENTS

1 Maintenance Requirements

- 1.1 The Concessionaire shall, at all times, operate and maintain the Project Facilities in accordance with the provisions of the Agreement, Applicable Laws and Applicable Permits. In particular, the Concessionaire shall, at all times during the Operation Period, conform to the maintenance requirements set forth in this Schedule-K (the “Maintenance Requirements”).
- 1.2 The Concessionaire shall maintain the equipment under the Project Facility in line with the maintenance schedule (monthly, quarterly, annual, periodic, major maintenance etc.) prescribed by the Original Equipment Manufacturers’ (OEMs) and the civil structures and other parts of the Project Facilities in line with Good Industry Practice.

2 Emergency repairs/restoration

Notwithstanding anything to the contrary contained in this Schedule-K, if any defect, deficiency or deterioration in the Project Facilities poses a hazard to safety or risk of damage to property, the Concessionaire shall promptly take all reasonable measures for eliminating or minimizing such danger.

3 Daily Inspection by the Concessionaire

The Concessionaire shall, through its engineer, undertake a daily visual inspection of the Project Facilities and maintain a record thereof in a register to be kept in such form and manner as the Independent Engineer may specify. Such record shall be kept in safe custody of the Concessionaire and shall be open to inspection by the Authority and the Independent Engineer at any time during office hours.

4 Divestment Requirements

All defects and deficiencies specified in this Schedule-K shall be repaired and rectified by the Concessionaire so that the Project Facilities conforms to the Maintenance Requirements on the Transfer Date.

5 Display of Schedule - K

The Concessionaire shall display a copy of this Schedule-K at the ===== .

SCHEDULE –L

(See Clause 18.1.1)

SAFETY REQUIREMENTS

1 Guiding principles

- 1.1 The Concessionaire shall comply with the provisions of this Agreement, Applicable Laws and Applicable Permits and conform to Good Industry Practice for ensuring safe operations of the Project Facilities and Value-Add Infrastructure. In particular, the Concessionaire shall develop, implement and administer a surveillance and safety programme for providing a safe environment on or about the Project Sites.
- 1.2 All costs and expenses arising out of or relating to safety requirements shall be borne by the Concessionaire.
- 1.3 Safety Requirements apply to all phases of construction, operation and maintenance with emphasis on identification of factors associated with accidents, consideration of the same, and implementation of appropriate remedial measures.

2 Obligations of the Concessionaire

The Concessionaire shall abide by the following insofar as they relate to safety of the Users:

- (a) Applicable Laws and Applicable Permits;
- (b) relevant Standards/Guidelines of Government of India relating to safety;
- (c) provisions of this Agreement; and
- (d) Good Industry Practice.

3 Appointment of Safety Consultant

For carrying out safety audit of the Project under and in accordance with this Schedule-L, the Authority shall appoint from time to time, one or more qualified firms or organisations as its consultants (the “**Safety Consultant**”). The Safety Consultant shall employ a team comprising, without limitation, -----to undertake safety audit of the Project.

4 Safety measures during Development Period

- 4.1 The Concessionaire shall provide to the Safety Consultant, in four copies, the relevant drawings containing the design details that have a bearing on safety of Users (the “**Safety Drawings**”). Such design details shall include horizontal and vertical alignments; sightlines; The Safety Consultant shall review the design details and forward three copies of the Safety Drawings with its recommendations, if any, to the Independent Engineer who shall record its comments, if any, and forward one copy each to the Authority and the Concessionaire.
- 4.2 The accident data and the design details shall be compiled, analyzed and used by the Safety Consultant for evolving a package of recommendations consisting of safety related measures for the Project. The safety audit shall be completed in a period of three months and a report thereof (the “**Safety Report**”) shall be submitted to the Authority, in five copies. One copy each of the Safety Report shall be forwarded by the Authority to the Concessionaire and the Independent Engineer forthwith.
- 4.3 The Concessionaire shall endeavor to incorporate the recommendations of the Safety Report in the design of the Project, as may reasonably be required in accordance with Applicable Laws, Applicable Permits, Specifications and Standards, and Good Industry Practice. If the Concessionaire does not agree with any or all of such recommendations, it shall state the reasons thereof and convey them to the Authority forthwith. In the event that any or all of the works and services recommended in the Safety Report fall beyond the scope of Schedule-B, Schedule-C or Schedule-D, the Concessionaire shall make a report thereon and seek the instructions of the Authority for funding such works in accordance with the provisions of Article 18.
- 4.4 Without prejudice to the provisions of Paragraph 4.4, the Concessionaire and the Independent Engineer shall, within 15 (fifteen) days of receiving the Safety Report, send their respective comments thereon to the Authority, and no later than 15 (fifteen) days of receiving such comments, the Authority shall review the same alongwith the Safety Report and by notice direct the Concessionaire to carry out any or all of the recommendations contained therein with such modifications as the Authority may specify; provided that any works or services required to be undertaken hereunder shall be governed by the provisions of Article 18.

5 Safety measures during Construction Period

- 5.1 A Safety Consultant shall be appointed by the Authority, no later than 4 (four) months prior to the expected Project Completion Date, for carrying out a safety audit of the completed Construction Works.
- 5.2 The Safety Consultant shall collect and analyze the accident data for the preceding two years in the manner specified in Paragraph 4.1 of this Schedule-L. It shall study the Safety Report for the Development Period and

inspect the Project to assess the adequacy of safety measures. The Safety Consultant shall complete the safety audit within a period of 4 (four) months and submit a Safety Report recommending a package of additional safety measures, if any, that are considered essential for reducing accident hazards on the Project. Such recommendations shall be processed, *mutatis mutandis*, and acted upon in the manner set forth in Paragraphs 4.3, 4.4 and 4.5 of this Schedule-L.

- 5.3 The Concessionaire shall make adequate arrangements during the Construction Period for the safety of workers and in construction zones, and notify the Authority and the Independent Engineer about such arrangements.

6 Safety measures during Operation Period

- 6.1 The Concessionaire shall develop, implement and administer a surveillance and safety programme for Users, including correction of safety violations and deficiencies and all other actions necessary to provide a safe environment in accordance with this Agreement.
- 6.2 The Concessionaire shall establish a Safety Management Unit (the “SMU”) to be functional on and after COD, and designate one of its officers to be in-charge of the SMU. Such officer shall have specialist knowledge and training in engineering by having attended a course conducted by a reputed organization on the subject.
- 6.3 The Concessionaire shall keep a copy of every FIR recorded by the Police with respect to any accident occurring on the Project. The Concessionaire shall also record the exact location of each accident. The aforesaid data shall be submitted to the Authority at the conclusion of every quarter and to the Safety Consultant as and when appointed.
- 6.4 The Concessionaire shall submit to the Authority before the 31st (thirty first) May of each year, an annual report (in ten copies) containing, without limitation, a detailed listing and analysis of all accidents of the preceding Accounting Year and the measures taken by the Concessionaire pursuant to the provisions of Paragraph 6.1 of this Schedule-L for averting or minimizing such accidents in future.
- 6.5 Once in every Accounting Year, a safety audit shall be carried out by the Safety Consultant to be appointed by the Authority. It shall review and analyze the annual report and accident data of the preceding year, and undertake an inspection of the Project. The Safety Consultant shall complete the safety audit within a period of 1 (one) month and submit a Safety Report recommending specific improvements, if any, required to be made. Such recommendations shall be processed, *mutatis mutandis*, and acted upon in the manner set forth in Paragraphs 4.3, 4.4 and 4.5 of this Schedule-L.

7 Costs and expenses

Costs and expenses incurred in connection with the Safety Requirements set forth herein, including the provisions of Paragraph 2 of this Schedule, shall be met in accordance with Article 18, and in particular, the remuneration of the Safety Consultant, safety audit, and costs incidental thereto, shall be met out of the Safety Fund.

SCHEDULE –M

(See Clause 20.1)

SELECTION OF INDEPENDENT ENGINEER

1 Selection of Independent Engineer

- 1.1 The provisions of Part II of the Standard Bidding Documents for Consultancy Assignments: Time Based (Volume V) issued by the Ministry of Finance, GOI in July, 1997 or any substitute thereof shall apply, mutatis mutandis, for invitation of bids and evaluation thereof save as otherwise provided herein.
- 1.2 The Authority shall invite expressions of interest from consulting engineering firms or bodies corporate to undertake and perform the duties and functions set forth in Schedule-N and thereupon shortlist 10 (ten) qualified firms in accordance with pre-determined criteria. The Authority shall convey the aforesaid list of firms to the Concessionaire for scrutiny and comments, if any. The Concessionaire shall be entitled to scrutinise the relevant records of the Authority to ascertain whether the selection of firms has been undertaken in accordance with the prescribed procedure and it shall send its comments, if any, to the Authority within 15 (fifteen) days of receiving the aforesaid list of firms. Upon receipt of such comments, if any, the Authority shall, after considering all relevant factors, finalise and constitute a panel of 10 (ten) firms (the “**Panel of Firms**”) and convey its decision to the Concessionaire.
- 1.3 The Authority shall invite the aforesaid firms in the Panel of Firms to submit their respective technical and financial offers, each in a separate sealed cover. All the technical bids so received shall be opened and pursuant to the evaluation thereof, the Authority shall shortlist 3 (three) eligible firms on the basis of their technical scores. The financial bids in respect of such 3 (three) firms shall be opened and the order of priority as among these firms shall be determined on the basis of a weighted evaluation where technical and financial scores shall be assigned respective weights of 80:20.
- 1.4 In the event that the Authority shall follow the selection process specified in the Model RFP for selection of Technical Consultants, as published by the Ministry of Finance/ Planning Commission, the selection process specified in this Schedule-M shall be deemed to be substituted by the provisions of the said Model RFP and the Concessionaire shall be entitled to scrutinise the relevant records forming part of such selection process.

2 Fee and expenses

- 2.1 In determining the nature and quantum of duties and services to be performed by the Independent Engineer during the Development Period and Construction Period, the Authority shall endeavour that payments to the

Independent Engineer on account of fee and expenses do not exceed 2% (two per cent) of the Total Project Cost. Payments not exceeding such 2% (two per cent) shall be borne equally by the Authority and the Concessionaire in accordance with the provisions of this Agreement and any payments in excess thereof shall be borne entirely by the Authority.

- 2.2 The nature and quantum of duties and services to be performed by the Independent Engineer during the Operation Period shall be determined by the Authority in conformity with the provisions of this Agreement and with due regard for economy in expenditure. All payments made to the Independent Engineer on account of fee and expenses during the Operation Period, shall be borne equally by the Authority and the Concessionaire.

3 Constitution of fresh panel

No later than three years from the date of this Agreement, and every three years thereafter, the Authority shall prepare a fresh panel of firms in accordance with the criteria set forth in this Schedule-M; provided that the Authority may, at any time, prepare a fresh panel with prior written consent of the Concessionaire.

4 Appointment of government entity as Independent Engineer

Notwithstanding anything to the contrary contained in this Schedule, the Authority may in its discretion appoint a government-owned entity as the Independent Engineer; provided that such entity shall be a body corporate having as one of its primary function the provision of consulting, advisory and supervisory services for engineering projects; provided further that a government-owned entity which is owned or controlled by the Authority and/or CONCOR shall not be eligible for appointment as Independent Engineer.

SCHEDULE –N

(See Clause 20.2.1)

TERMS OF REFERENCE FOR INDEPENDENT ENGINEER

1 Scope

- 1.1 These Terms of Reference for the Independent Engineer (the “**TOR**”) are being specified pursuant to the Concession Agreement dated (the “**Agreement**”), which has been entered into between the Authority and (the “**Concessionaire**”) for development of the cold chain infrastructure in [Himachal Pradesh] with backward and forward linkages on design, build, rehabilitate, finance, operate and transfer (DRBFOT) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this TOR.
- 1.2 This TOR shall apply to construction, operation and maintenance of the Project.

2 Definitions and interpretation

- 2.1 The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.
- 2.2 References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.
- 2.3 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Agreement shall apply, mutatis mutandis, to this TOR.

3 Role and functions of the Independent Engineer

- 3.1 The role and functions of the Independent Engineer shall include the following:
- (i) review of the Drawings and Documents as set forth in Paragraph 4;
 - (ii) review, inspection and monitoring of Construction Works as set forth in Paragraph 5;
 - (iii) conducting Tests on completion of construction and issuing Completion/Provisional Certificate as set forth in Paragraph 5;
 - (iv) review, inspection and monitoring of O&M as set forth in Paragraph 6;

- (v) review, inspection and monitoring of Divestment Requirements as set forth in Paragraph 7;
 - (vi) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
 - (vii) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
 - (viii) assisting the Parties in resolution of disputes as set forth in Paragraph 9; and
 - (ix) undertaking all other duties and functions in accordance with the Agreement.
- 3.2 The Independent Engineer shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

4 Development Period

- 4.1 During the Development Period, the Independent Engineer shall undertake a detailed review of the Drawings to be furnished by the Concessionaire along with supporting data, including the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites, topographical surveys. The Independent Engineer shall complete such review and send its comments/observations to the Authority and the Concessionaire within 15 (fifteen) days of receipt of such Drawings. In particular, such comments shall specify the conformity or otherwise of such Drawings with the Scope of the Project and Specifications and Standards.
- 4.2 The Independent Engineer shall review any modified Drawings or supporting Documents sent to it by the Concessionaire and furnish its comments within 7 (seven) days of receiving such Drawings or Documents.
- 4.3 The Independent Engineer shall review the Drawings sent to it by the Safety Consultant in accordance with Schedule-L and furnish its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receiving such Drawings. The Independent Engineer shall also review the Safety Report and furnish its comments thereon to the Authority within 15 (fifteen) days of receiving such report.
- 4.4 The Independent Engineer shall review the detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments within 15 (fifteen) days of receipt thereof.
- 4.5 Upon reference by the Authority, the Independent Engineer shall review and comment on the EPC Contract or any other contract for construction, operation and maintenance of the Project, and furnish its comments within 7

(seven) days from receipt of such reference from the Authority.

5 Construction Period

- 5.1 In respect of the Drawings, Documents and Safety Report received by the Independent Engineer for its review and comments during the Construction Period, the provisions of Paragraph 4 shall apply, *mutatis mutandis*.
- 5.2 The Independent Engineer shall review the monthly progress report furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receipt of such report.
- 5.3 The Independent Engineer shall inspect the Construction Works and the Project Facilities once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out a report of such inspection (the "Inspection Report") setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works with the Scope of the Project and the Specifications and Standards. In a separate section of the Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in the construction of the Project. The Independent Engineer shall send a copy of its Inspection Report to the Authority and the Concessionaire within 7 (seven) days of the inspection.
- 5.4 The Independent Engineer may inspect the Project more than once in a month if any lapses, defects or deficiencies require such inspections.
- 5.5 For determining that the Construction Works conform to Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- 5.6 The sample size of the tests, to be specified by the Independent Engineer under Paragraph 5.5, shall comprise 10% (ten per cent) of the quantity or number of tests prescribed for each category or type of tests in the Quality Control Manuals; provided that the Independent Engineer may, for reasons to be recorded in writing, increase the aforesaid sample size by up to 10% (ten per cent) for certain categories or types of tests.
- 5.7 The timing of tests referred to in Paragraph 5.5, and the criteria for acceptance/ rejection of their results shall be determined by the Independent Engineer in accordance with the Quality Control Manuals. The tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the tests that may be carried out by the Concessionaire for its

own quality assurance in accordance with Good Industry Practice.

- 5.8 In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests to determine that such remedial works have brought the Construction Works into conformity with the Specifications and Standards, and the provisions of this Paragraph 5 shall apply to such tests.
- 5.9 In the event that the Concessionaire fails to achieve any of the Project Milestones, the Independent Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Independent Engineer shall determine that completion of the Project Facilities is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within 15 (fifteen) days the steps proposed to be taken to expedite progress, and the period within which the Project Completion Date shall be achieved. Upon receipt of a report from the Concessionaire, the Independent Engineer shall review the same and send its comments to the Authority and the Concessionaire forthwith.
- 5.10 If at any time during the Construction Period, the Independent Engineer determines that the Concessionaire has not made adequate arrangements for the safety of workers and Users in the zone of construction or that any work is being carried out in a manner that threatens the safety of the workers and the Users, it shall make a recommendation to the Authority forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- 5.11 In the event that the Concessionaire carries out any remedial measures to secure the safety of suspended works and Users, it may, by notice in writing, require the Independent Engineer to inspect such works, and within 3 (three) days of receiving such notice, the Independent Engineer shall inspect the suspended works and make a report to the Authority forthwith, recommending whether or not such suspension may be revoked by the Authority.
- 5.12 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of dates set forth in the Project Completion Schedule, to which the Concessionaire is reasonably entitled, and shall notify the Authority and the Concessionaire of the same.
- 5.13 The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in Schedule-I and issue a Completion Certificate or Provisional Certificate, as the case may be. For carrying out its functions under this Paragraph 5.13 and all matters incidental thereto, the Independent Engineer shall act under and in accordance with the provisions of Article 14 and Schedule-I.
- 5.14 Upon reference from the Authority, the Independent Engineer shall make a

fair and reasonable assessment of the costs of providing information, works and services as set forth in Article 16 and certify the reasonableness of such costs for payment by the Authority to the Concessionaire.

- 5.15 The Independent Engineer shall aid and advise the Concessionaire in preparing the Maintenance Manual.

6 Operation Period

- 6.1 In respect of the Drawings, Documents and Safety Report received by the Independent Engineer for its review and comments during the Operation Period, the provisions of Paragraph 4 shall apply, mutatis mutandis.

- 6.2 The Independent Engineer shall review the annual Maintenance Programme furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 15 (fifteen) days of receipt of the Maintenance Programme.

- 6.3 The Independent Engineer shall review the quarterly status report furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receipt of such report.

- 6.4 The Independent Engineer shall inspect the Project once every quarter, preferably after receipt of the quarterly status report from the Concessionaire, but before the 20th (twentieth) day of the last month of each quarter in any case, and make out an O&M Inspection Report setting forth an overview of the status, quality and safety of O&M including its conformity with the Maintenance Requirements and Safety Requirements. In a separate section of the O&M Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in O&M of the Project. The Independent Engineer shall send a copy of its O&M Inspection Report to the Authority and the Concessionaire within 7 (seven) days of the inspection.

- 6.5 The Independent Engineer may inspect the Project more than once in a quarter, if any lapses, defects or deficiencies require such inspections.

- 6.6 The Independent Engineer shall in its O&M Inspection Report specify the tests, if any, that the Concessionaire shall carry out, or cause to be carried out, for the purpose of determining that the Project is in conformity with the Maintenance Requirements. It shall monitor and review the results of such tests and the remedial measures, if any, taken by the Concessionaire in this behalf.

- 6.7 In respect of any defect or deficiency referred to in Paragraph 3 of Schedule-K, the Independent Engineer shall, in conformity with Good Industry Practice, specify the permissible limit of deviation or deterioration with reference to the Specifications and Standards and shall also specify the time limit for repair or rectification of any deviation or deterioration beyond the permissible limit.

6.8 The Independent Engineer shall determine if any delay has occurred in completion of repair or remedial works in accordance with the Agreement, and shall also determine the Damages, if any, payable by the Concessionaire to the Authority for such delay.

6.9 The Independent Engineer shall monitor and review the curing of defects and deficiencies by the Concessionaire as set forth in Clause 19.4.

6.10 In the event that the Concessionaire notifies the Independent Engineer of any modifications that it proposes to make to the Project, the Independent Engineer shall review the same and send its comments to the Authority and the Concessionaire within 15 (fifteen) days of receiving the proposal.

7 Termination

7.1 At any time, not earlier than 90 (ninety) days prior to Termination but not later than 15 (fifteen) days prior to such Termination, the Independent Engineer shall, in the presence of a representative of the Concessionaire, inspect the Project for determining compliance by the Concessionaire with the Divestment Requirements set forth in Clause 36.1 and, if required, cause tests to be carried out at the Concessionaire's cost for determining such compliance. If the Independent Engineer determines that the status of the Project is such that its repair and rectification would require a larger amount than the sum set forth in Clause 37.2, it shall recommend retention of the required amount in the Escrow Account and the period of retention thereof.

7.2 The Independent Engineer shall inspect the Project once in every 15 (fifteen) days during a period of 90 (ninety) days after Termination for determining the liability of the Concessionaire under Article 37, in respect of the defects or deficiencies specified therein. If any such defect or deficiency is found by the Independent Engineer, it shall make a report in reasonable detail and send it forthwith to the Authority and the Concessionaire.

8 Determination of costs and time

8.1 The Independent Engineer shall determine the costs, and/or their reasonableness, that are required to be determined by it under the Agreement.

8.2 The Independent Engineer shall determine the period, or any extension thereof, that is required to be determined by it under the Agreement.

9 Assistance in Dispute resolution

9.1 When called upon by either Party in the event of any Dispute, the Independent Engineer shall mediate and assist the Parties in arriving at an amicable settlement.

9.2 In the event of any disagreement between the Parties regarding the meaning, scope and nature of Good Industry Practice, as set forth in any provision of

the Agreement, the Independent Engineer shall specify such meaning, scope and nature by issuing a reasoned written statement relying on good industry practice and authentic literature.

10 Other duties and functions

The Independent Engineer shall perform all other duties and functions specified in the Agreement.

11 Miscellaneous

11.1 The Independent Engineer shall notify its programme of inspection to the Authority and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection.

11.2 A copy of all communications, comments, instructions, Drawings or Documents sent by the Independent Engineer to the Concessionaire pursuant to this TOR, and a copy of all the test results with comments of the Independent Engineer thereon shall be furnished by the Independent Engineer to the Authority forthwith.

11.3 The Independent Engineer shall obtain, and the Concessionaire shall furnish in two copies thereof, all communications and reports required to be submitted, under this Agreement, by the Concessionaire to the Independent Engineer, whereupon the Independent Engineer shall send one of the copies to the Authority along with its comments thereon.

11.4 The Independent Engineer shall retain at least one copy each of all Drawings and Documents received by it, including 'as-built' Drawings, and keep them in its safe custody.

11.5 Upon completion of its assignment hereunder, the Independent Engineer shall duly classify and list all Drawings, Documents, results of tests and other relevant records, and hand them over to the Authority or such other person as the Authority may specify, and obtain written receipt thereof. Two copies of the said documents shall also be furnished in micro film form or in such other medium as may be acceptable to the Authority.

SCHEDULE –O

(See Clause 25.1.2)

ESCROW AGREEMENT

THIS ESCROW AGREEMENT is entered into on this theday of20....

AMONGST

- 1LIMITED, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at(hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
- 2name and particulars of Lenders’ Representative and having its registered office atacting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
- 3name and particulars of the Escrow Bank and having its registered office at(hereinafter referred to as the “**Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
- 4 [Name of the Authority]having its principal office at _____(hereinafter referred to as the “**Authority**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).

WHEREAS:

- (A) The Authority has entered into a Concession Agreement datedwith the Concessionaire (the “**Concession Agreement**”) for development of cold chain infrastructure in [Himachal Pradesh] with backward and forward linkages of the Project Facility on design,build, finance, operate and transfer (DBFOT) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.
- (B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (C) The Concession Agreement requires the Concessionaire to establish an Escrow Account, *inter alia*, on the terms and conditions stated therein.

NOW THEREFORE, in consideration of the foregoing and the respective

covenants and agreements set forth in this Agreement, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

“**Agreement**” means this Escrow Agreement and any amendment thereto made in accordance with the provisions contained herein;

“**Concession Agreement**” means the Concession Agreement referred to in Recital (A) above and annexed hereto as Annex-A, and shall include all of its Recitals and Schedules and any amendments made thereto in accordance with the provisions contained in this behalf therein;

“**Cure Period**” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Concessionaire, and shall commence from the date on which a notice is delivered by the Authority or the Lenders’ Representative, as the case may be, to the Concessionaire asking the latter to cure the breach or default specified in such notice;

“**EscrowAccount**” means an escrow account established in terms of and under this Agreement, and shall include the Sub-Accounts;

“**EscrowDefault**” shall have the meaning ascribed thereto in Clause 6.1;

“**Lenders’ Representative**” means the person referred to as the Lenders’ Representative in the foregoing Recitals;

“**Nominated Company**” means a company, incorporated under the provisions of the Companies Act, 1956, or Companies Act, 2013, selected by the Lenders’ Representative, on behalf of Senior Lenders, and proposed to the Authority for assignment/transfer of the Concession as provided under the Substitution Agreement (Schedule R);

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

“**PaymentDate**” means, in relation to any payment specified in Clause 4.1, the date(s) specified for such payment; and

“**Sub-Accounts**” means the respective Sub-Accounts of the Escrow Account, into which the monies specified in Clause 4.1 would be credited every month and paid out if due, and if not due in a month then appropriated

proportionately in such month and retained in the respective Sub Accounts and paid out therefrom on the Payment Date(s).

1.2 Interpretation

- 1.2.1 References to Lenders' Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders' Representative, acting for and on behalf of Senior Lenders.
- 1.2.2 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.
- 1.2.3 References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.
- 1.2.4 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, mutatis mutandis, to this Agreement.

2 ESCROW ACCOUNT

2.1 Escrow Bank to act as trustee

- 2.1.1 The Concessionaire hereby appoints the Escrow Bank to act as trustee for the Authority, the Lenders' Representative and the Concessionaire in connection herewith and authorizes the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.
- 2.1.2 The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the Authority, the Lenders' Representative and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Authority, the Lenders' Representative and the Concessionaire shall have any rights hereunder as the beneficiaries of, or as third party beneficiaries under this Agreement.

2.2 Acceptance of Escrow Bank

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Concessionaire, Senior Lenders or the Authority with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank

shall act in trust for the benefit of, and as agent for, the Authority, the Lenders' Representative and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

2.3 Establishment and operation of Escrow Account

- 2.3.1 Within 30 (thirty) days from the date of this Agreement, and in any case prior to the Appointed Date, the Concessionaire shall open and establish the Escrow Account with the (name of Branch) Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.
- 2.3.2 The Escrow Bank shall maintain the Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.
- 2.3.3 The Escrow Bank and the Concessionaire shall, after consultation with the Lenders' Representative, agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

2.4 Escrow Bank's fee

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Concessionaire. For the avoidance of doubt, such fee and expenses shall form part of the O&M Expenses and shall be appropriated from the Escrow Account in accordance with Clause 4.1.

2.5 Rights of the parties

The rights of the Authority, the Lenders' Representative and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Authority, the Lenders' Representative and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

2.6 Substitution of the Concessionaire

The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Nominated Company, pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the Nominated Company is a Party hereto and the Nominated Company shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Nominated Company.

3 DEPOSITS INTO ESCROW ACCOUNT

3.1 Deposits by the Concessionaire

3.1.1 The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

- (a) all monies received in relation to the Project from any source, including the Senior Lenders, lenders of Subordinated Debt and the Authority;
 - (b) all funds received by the Concessionaire from its share-holders, in any manner or form;
 - (c) all Project Revenues from or in respect of the Project, including the proceeds of any rentals, deposits, capital receipts or insurance claims; and;
- and
- (d) all proceeds received pursuant to any insurance claims.

3.1.2 The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

3.2 Deposits by the Authority

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

- (a) all Project Revenues collected by the Authority in exercise of its rights under the Concession Agreement; and
- (b) Termination Payments:

Provided that, notwithstanding the provisions of Clause 4.1.1, the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire, and the balance remaining shall be deposited into the Escrow Account.

3.3 Deposits by Senior Lenders

The Lenders' Representative agrees, confirms and undertakes that the Senior Lenders shall deposit into and/or credit the Escrow Account with all disbursements made by them in relation to or in respect of the Project; provided that notwithstanding anything to the contrary contained in this Agreement, the Senior Lenders shall be entitled to make direct payments to the EPC Contractor under and in accordance with the express provisions contained in this behalf in the Financing Agreements.

3.4 Interest on deposits

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account; provided that the Escrow Bank shall be entitled to appropriate therefrom the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

4 WITHDRAWALS FROM ESCROW ACCOUNT

4.1 Withdrawals during Concession Period

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date(s):

- (a) all Taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) all payments relating to construction of the Project, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- (e) Concession Fee including Usage Charges, if due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement;
- (h) monthly proportionate provision of Debt Service payments due in an Accounting Year in respect of Subordinated Debt;
- (i) any reserve requirements set forth in the Financing Agreements; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire.

- 4.1.2 No later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

4.2 Withdrawals upon Termination

Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:

- (a) all Taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) outstanding Concession Fee including Usage Charges;
- (d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement and any claims in connection with or arising out of Termination;
- (e) retention and payments arising out of, or in relation to, liability for defects and deficiencies set forth in Article 34 of the Concession Agreement;
- (f) outstanding Debt Service including the balance of Debt Due;
- (g) outstanding Subordinated Debt;
- (h) incurred or accrued O&M Expenses;
- (i) any other payments required to be made under the Concession Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that the disbursements specified in Sub-clause (j) of this Clause 4.2 shall be undertaken only after the Vesting Certificate has been issued by the Authority.

4.3 Application of insufficient funds

Funds in the Escrow Account shall be applied in the serial order of priority

set forth in Clauses 4.1 and 4.2, as the case may be. If the funds available are not sufficient to meet all the requirements, the Escrow Bank shall apply such funds in the serial order of priority until exhaustion thereof.

4.4 Application of insurance proceeds

Notwithstanding anything in this Agreement, the proceeds from all insurance claims, except life and injury, shall be deposited into and/or credited to the Escrow Account and utilised for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

4.5 Withdrawals during Suspension

Notwithstanding anything to the contrary contained in this Agreement, the Authority may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 34 of the Concession Agreement. Any instructions given by the Authority to the Escrow Bank during such period shall be complied with as if such instructions were given by the Concessionaire under this Agreement and all actions of the Authority hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

5 OBLIGATIONS OF THE ESCROW BANK

5.1 Segregation of funds

Monies and other property received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received, and shall be segregated from other funds and property of the Escrow Bank.

5.2 Notification of balances

7 (seven) business days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the Concessionaire and/or the Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Lenders' Representative of the balances in the Escrow Account and Sub-Accounts as at the close of business on the immediately preceding business day.

5.3 Communications and notices

In discharge of its duties and obligations hereunder, the Escrow Bank:

- (a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be

within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;

- (b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;
- (c) shall, within 5 (five) business days after receipt, deliver a copy to the Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and
- (d) shall, within 5 (five) business days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Lenders' Representative in connection herewith.

5.4 No set off

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies and properties held by the Escrow Bank in the Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

5.5 Regulatory approvals

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

6 ESCROW DEFAULT

6.1 Escrow Default

6.1.1 Following events shall constitute an event of default by the Concessionaire (an "Escrow Default") unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority or the Lenders' Representative:

- (a) the Concessionaire commits breach of this Agreement by failing to deposit any receipts into the Escrow Account as provided herein and fails to cure such breach by depositing the same into the Escrow Account within a Cure Period of 5 (five) business days;

- (b) the Concessionaire causes the Escrow Bank to transfer funds to any account of the Concessionaire in breach of the terms of this Agreement and fails to cure such breach by depositing the relevant funds into the Escrow Account or any Sub-Account in which such transfer should have been made, within a Cure Period of 5 (five) business days; or
- (c) the Concessionaire commits or causes any other breach of the provisions of this Agreement and fails to cure the same within a Cure Period of 5 (five) business days.

6.1.2 Upon occurrence of an Escrow Default, the consequences thereof shall be dealt with under and in accordance with the provisions of the Concession Agreement.

7 TERMINATION OF ESCROW AGREEMENT

7.1 Duration of the Escrow Agreement

This Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Concessionaire in respect of the debt, guarantee or financial assistance received by it from the Senior Lenders, or any of its obligations to the Authority remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

7.2 Substitution of Escrow Bank

The Concessionaire may, by not less than 45 (forty five) days prior notice to the Escrow Bank, the Authority and the Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders' Representative and arrangements are made satisfactory to the Lenders' Representative for transfer of amounts deposited in the Escrow Account to a new Escrow Account established with the successor Escrow Bank. The termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

7.3 Closure of Escrow Account

The Escrow Bank shall, at the request of the Concessionaire and the Lenders' Representative made on or after the payment by the Concessionaire of all outstanding amounts under the Concession Agreement and the Financing Agreements including the payments specified in Clause 4.2, and upon confirmation of receipt of such payments, close the Escrow Account and Sub-Accounts and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Escrow Account hereunder, the Escrow Agreement shall be deemed to be terminated.

8 SUPPLEMENTARY ESCROW AGREEMENT

8.1 Supplementary escrow agreement

The Lenders' Representative and the Concessionaire shall be entitled to enter into a supplementary escrow agreement with the Escrow Bank providing, inter alia, for detailed procedures and documentation for withdrawals from Sub-Accounts pursuant to Clause 4.1.1 and for matters not covered under this Agreement such as the rights and obligations of Senior Lenders and lenders of Subordinated Debt, investment of surplus funds, restrictions on withdrawals by the Concessionaire in the event of breach of this Agreement or upon occurrence of an Escrow Default, procedures relating to operation of the Escrow Account and withdrawal therefrom, reporting requirements and any matters incidental thereto; provided that such supplementary escrow agreement shall not contain any provision which is inconsistent with this Agreement and in the event of any conflict or inconsistency between provisions of this Agreement and such supplementary escrow agreement, the provisions of this Agreement shall prevail.

9 INDEMNITY

9.1 General indemnity

- 9.1.1 The Concessionaire will indemnify, defend and hold the Authority, Escrow Bank and the Senior Lenders, acting through the Lenders' Representative, harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.
- 9.1.2 The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfill any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.
- 9.1.3 The Escrow Bank will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfill its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Escrow Bank, its officers, servants and agents.

9.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 9.1 or in respect of which it is entitled to reimbursement (the “Indemnified Party”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “Indemnifying Party”) within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

10 DISPUTE RESOLUTION

10.1 Dispute resolution

10.1.1 Any dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be decided finally by reference to arbitration to a Board of Arbitrators comprising one nominee of each Party to the dispute, and where the number of such nominees is an even number, the nominees shall elect another person to such Board. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”) or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.

10.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be Delhi and the language of arbitration shall be English.

11 MISCELLANEOUS PROVISIONS

11.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Delhi shall have jurisdiction over all matters arising out of or relating to this Agreement.

11.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;

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

11.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

11.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

11.5 Waiver

11.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

11.5.2 Neither the failure by any Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by any Party

to another Party shall be treated or deemed as Waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

11.6 No third party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

11.7 Survival

11.7.1 Termination of this Agreement:

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

11.7.2 All obligations surviving the cancellation, expiration or Termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

11.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10.1 of this Agreement or otherwise.

11.9 Successors and assigns

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

11.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by

facsimile or e-mail. The address for service of each Party, its facsimile number or e-mail are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on a business day, or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

11.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

11.12 Authorised representatives

Each of the Parties shall, by notice in writing, designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

11.13 Original Document

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

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

THE COMMON SEAL OF CONCESSIONAIRE has been affixed pursuant to the resolution passed by the Board of Directors of the Concessionaire at its meeting held on the day of 20..... hereunto affixed in the presence of, Director, who has signed these presents in token thereof and, Company Secretary / Authorised Officer who has countersigned the same in token thereof[§]:

SIGNED, SEALED AND DELIVERED For and on behalf of SENIOR LENDERS by the Lenders' Representative:

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

SIGNED, SEALED AND DELIVERED For and on behalf of ESCROW BANK by:

SIGNED, SEALED AND DELIVERED For and on behalf of **[Name of the Authority]** by:

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

(Signature)
(Name)
(Designation)
(Address)
(Fax No.)
(e-mail address)

In the presence of:

1.

2.

[§] To be affixed in accordance with the articles of association of the Concessionaire.

SCHEDULE –P

(See Clause 27.2.1)

PANEL OF CHARTERED ACCOUNTANTS

1 Panel of Chartered Accountants

Pursuant to the provisions of Clause 27.2.1 of the Agreement, the Authority and the Concessionaire shall prepare a mutually agreed panel of 10 (ten) reputable firms of Chartered Accountants having their registered offices in India (the “Panel of Chartered Accountants”). The criteria for preparing such Panel and the procedure to be adopted in this behalf shall be as set forth in this Schedule-P.

2 Invitation for empanelment

2.1 The Authority shall invite offers from all reputable firms of Chartered Accountants who fulfill the following eligibility criteria, namely:

- (a) the firm should have conducted statutory audit of the annual accounts of at least one hundred companies registered under the Companies Act, 1956 or Companies Act, 2013, of which at least ten should have been public sector undertakings;
- (b) the firm should have at least 5 (five) practicing Chartered Accountants on its rolls, each with a minimum experience of ten years in the profession;
- (c) the firm or any of its partners should not have been disqualified or black-listed by the Comptroller and Auditor General of India or the Authority; and
- (d) the firm should have an office in the State or in an adjacent State with at least 2 (two) practicing Chartered Accountants on its rolls in such State.

2.2 Interested firms meeting the eligibility criteria shall be required to submit a statement of their capability including the bio-data of all the practicing Chartered Accountants on its rolls. In particular, each firm shall be required to furnish year-wise information relating to the names of all the companies with an annual turnover exceeding Rs. 100,00,00,000 (Rs. one hundred crore) whose annual accounts were audited by such firm in any of the preceding 5 (five) Accounting Years.

3 Evaluation and selection

3.1 The information furnished by each firm shall be scrutinized and evaluated by the Authority and 1 (one) point shall be awarded for each annual audit of the companies specified in Paragraph 2.2 above. (For the avoidance of doubt, a

firm which has conducted audit of the annual accounts of any such company for five years shall be awarded five points).

- 3.2 The Authority shall prepare a list of all the eligible firms along with the points scored by each such firm and 10 (ten) firms scoring the highest points shall be identified and included in the draft Panel of Chartered Accountants.

4 Consultation with the Concessionaire

The Authority shall convey the aforesaid panel of firms to the Concessionaire for scrutiny and comments, if any. The Concessionaire shall be entitled to scrutinize the relevant records of the Authority to ascertain whether the selection of firms has been undertaken in accordance with the prescribed procedure and it shall send its comments, if any, to the Authority within 15 (fifteen) days of receiving the aforesaid panel.

5 Mutually agreed panel

- 5.1 The Authority shall, after considering all relevant factors including the comments, if any, of the Concessionaire, finalize and constitute a panel of 10 (ten) firms which shall be deemed to be the mutually agreed Panel of Chartered Accountants.
- 5.2 After completion of every five years from the date of preparing the mutually agreed Panel of Chartered Accountants, or such earlier period as may be agreed between the Authority and the Concessionaire, a new panel shall be prepared in accordance with the provisions of this Schedule - P.

SCHEDULE –Q

(See Clause 32.4)

VESTING CERTIFICATE

- 1 The Chief Executing Officer, [Name of the Authority](the “**Authority**”) refers to the Concession Agreement dated (the “**Agreement**”) entered into between the Authority and (the “**Concessionaire**”) for development of cold chain infrastructure in [Name of the Place] with backward and forward linkages and for modification/redevelopment of the Project Facility (the “**Project**”) on design,build, finance, operate and transfer (“**DBFOT**”) basis.
- 2 The Authority hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 32.1 of the Agreement on the basis that upon issue of this Vesting Certificate, the Authority shall be deemed to have acquired, and all title and interest of the Concessionaire in or about the Project shall be deemed to have vested unto the Authority, free from any encumbrances, charges and liens whatsoever.
- 3 Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

Signed this day of, 20..... at Delhi.

AGREED, ACCEPTED AND SIGNED

SIGNED, SEALED AND DELIVERED

For and on behalf of

For and on behalf of

CONCESSIONAIRE by:

[Name of the Authority] by:

(Signature)

(Signature)

(Name)

(Name)

(Designation)

(Designation)

(Address)

(Address)

In the presence of:

1.

2.

SCHEDULE –R

(See Clause 33.3.1)

SUBSTITUTION AGREEMENT

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

AMONGST

- 1 [Name of the Authority], and represented by its (Designation)and having its principal office at _____ (hereinafter referred to as the “Authority” which expression shall unless repugnant to the context or meaning thereof include its administrators, successors and assigns);
- 2LIMITED, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at, (hereinafter referred to as the “Concessionaire” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns and substitutes);
- 3name and particulars of Lenders’ Representative and having its registered office at, acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “Lenders’ Representative”, which expression shall unless repugnant to the context or meaning thereof include its successors and substitutes);

WHEREAS:

- (A) The Authority has entered into a concession agreement datedwith the Concessionaire (the “Concession Agreement”) for development of cold chain infrastructure in [Himachal Pradesh] with backward and forward linkages on design,build, finance, operate and transfer basis (DBFOT), and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.
- (B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (C) Senior Lenders have requested the Authority to enter into this Substitution Agreement for securing their interests through assignment, transfer and substitution of the Concession to a Nominated Company in accordance with the provisions of this Agreement and the Concession Agreement.

- (D) In order to enable implementation of the Project including its financing, construction, operation and maintenance, the Authority has agreed and undertaken to transfer and assign the Concession to a Nominated Company in accordance with the terms and conditions set forth in this Agreement and the Concession Agreement.

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

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

“**Agreement**” means this Substitution Agreement and any amendment thereto made in accordance with the provisions contained in this Agreement;

“**Financial Default**” means occurrence of a material breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 3 (three) months;

“**Lenders’ Representative**” means the person referred to as the Lenders’ Representative in the foregoing Recitals;

“**Nominated Company**” means a company, incorporated under the provisions of the Companies Act, 1956/2013, selected by the Lenders’ Representative, on behalf of Senior Lenders, and proposed to the Authority for assignment/transfer of the Concession as provided in this Agreement;

“**Notice of Financial Default**” shall have the meaning ascribed thereto in Clause 3.2.1; and

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

1.2 Interpretation

1.2.1 References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Senior Lenders.

1.2.2 References to Clauses are, unless stated otherwise, references to Clauses of

this Agreement.

- 1.2.3 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.
- 1.2.4 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

2 ASSIGNMENT

2.1 Assignment of rights and title

The Concessionaire hereby agrees to assign the rights, title and interest in the Concession to, and in favour of, the Lenders' Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Senior Lenders under the Financing Agreements.

3 SUBSTITUTION OF THE CONCESSIONAIRE

3.1 Rights of substitution

- 3.1.1 Pursuant to the rights, title and interest assigned under Clause 2.1, the Lenders' Representative shall be entitled to substitute the Concessionaire by a Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.
- 3.1.2 The Authority hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Nominated Company selected by the Lenders' Representative in accordance with this Agreement. (For the avoidance of doubt, the Senior Lenders or the Lenders' Representative shall not be entitled to operate and maintain the Project/Project Facilities as Concessionaire either individually or collectively).

3.2 Substitution upon occurrence of Financial Default

- 3.2.1 Upon occurrence of a Financial Default, the Lenders' Representative may issue a notice to the Concessionaire (the "**Notice of Financial Default**") along with particulars thereof, and send a copy to the Authority for its information and record. A Notice of Financial Default under this Clause 3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.

- 3.2.2 Upon issue of a Notice of Financial Default hereunder, the Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Agreements, substitute the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement.
- 3.2.3 At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project in accordance with the provisions of Article 34 of the Concession Agreement, and upon receipt of such notice, the Authority shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority may extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days. For the avoidance of doubt, the Authority expressly agrees and undertakes to terminate the Concession Agreement forthwith, upon receipt of a written request from the Lenders' Representative at any time after 240 (two hundred and forty) days from the date of Suspension hereunder.

3.3 Substitution upon occurrence of Concessionaire Default

- 3.3.1 Upon occurrence of a Concessionaire Default, the Authority shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days' time to the Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.
- 3.3.2 In the event that the Lenders' Representative makes a representation to the Authority within the period of 15 (fifteen) days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the Authority shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days.

3.4 Procedure for substitution

- 3.4.1 The Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Authority under Clause 3.3.2, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the take over and transfer of the Project including the Concession to the Nominated Company upon such Nominated Company's assumption of the liabilities and obligations of the Concessionaire towards the Authority under the Concession Agreement and towards the Senior Lenders under the Financing Agreements.
- 3.4.2 To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfil the eligibility criteria that were laid down by the Authority for shortlisting the bidders for award of the Concession; provided that the Lenders' Representative may represent to the Authority that all or any of such criteria may be waived in the interest of the Project, and if the Authority determines that such waiver shall not have any MaterialAdverseEffecton the Project, it may waive all or any of such eligibility criteria.
- 3.4.3 Upon selection of a Nominated Company, the Lenders' Representative shall request the Authority to:
- (a) accede to transfer to the Nominated Company the right to construct, operate and maintain the Project in accordance with the provisions of the Concession Agreement;
 - (b) endorse and transfer the Concession to the Nominated Company, on the same terms and conditions, for the residual Concession Period; and
 - (c) enter into a Substitution Agreement with the Lenders' Representative and the Nominated Company on the same terms as are contained in this Agreement.
- 3.4.4 If the Authority has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 15(fifteen) days from the date of proposal made by the Lenders' Representative, give a reasoned order after hearing the Lenders' Representative. If no such objection is raised by the Authority, the Nominated Company shall be deemed to have been accepted. The Authority thereupon shall transfer and endorse the Concession within 15(fifteen) days of its acceptance/deemed acceptance of the Nominated Company; provided

that in the event of such objection by the Authority, the Lenders' Representative may propose another Nominated Company whereupon the procedure set forth in this Clause 3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire.

3.5 Selection to be binding

The decision of the Lenders' Representative and the Authority in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Lenders' Representative or the Senior Lenders or the Authority taken pursuant to this Agreement including the transfer/assignment of the Concession in favour of the Nominated Company. The Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assets of the Project or the Concessionaire's shares. It is hereby acknowledged by the Parties that the rights of the Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or Authority and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the Authority or the Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders' Representative.

4 PROJECT AGREEMENTS

4.1 Substitution of Nominated Company in Project Agreements

The Concessionaire shall ensure and procure that each Project Agreement contains provisions that entitle the Nominated Company to step into such Project Agreement, in its discretion, in place and substitution of the Concessionaire in the event of such Nominated Company's assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

5 TERMINATION OF CONCESSION AGREEMENT

5.1 Termination upon occurrence of Financial Default

At any time after issue of a Notice of Financial Default, the Lenders' Representative may by a notice in writing require the Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the Authority shall undertake Termination under and in accordance with the provisions of Article 35 of the Concession Agreement.

5.2 Termination when no Nominated Company is selected

In the event that no Nominated Company acceptable to the Authority is

selected and recommended by the Lenders' Representative within the period of 180 (one hundred and eighty) days or any extension thereof as set forth in Clause 3.3.2, the Authority may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

5.3 Realisation of Debt Due

The Authority and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realisation of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Escrow Account in accordance with the provisions of the Concession Agreement and the Escrow Agreement.

6 DURATION OF THE AGREEMENT

6.1 Duration of the Agreement

This Agreement shall come into force from the date hereof and shall expire at the earliest to occur of the following events:

- (a) Termination of the Agreement; or
- (b) no sum remains to be advanced, or is outstanding to the Senior Lenders, under the Financing Agreements.

7 INDEMNITY

7.1 General indemnity

7.1.1 The Concessionaire will indemnify, defend and hold the Authority and the Lenders' Representative harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

7.1.2 The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the

Authority, its officers, servants and agents.

- 7.1.3 The Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lenders' Representative, its officers, servants and agents.

7.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 7.1 or in respect of which it is entitled to reimbursement (the "**Indemnified Party**"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

8 DISPUTE RESOLUTION

8.1 Dispute resolution

- 8.1.1 Any dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably shall be decided by reference to arbitration to a Board of Arbitrators comprising one nominee each of the Authority, Concessionaire and the Lenders' Representative. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") or such other rules as may be mutually agreed by the Parties, and shall be subject to provisions of the Arbitration and Conciliation Act, 1996.
- 8.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be Delhi and the language of arbitration shall be English.

9 MISCELLANEOUS PROVISIONS

9.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Delhi shall have jurisdiction over all matters arising out of or relating to this Agreement.

9.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

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

9.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

9.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

9.5 Waiver

9.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

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

9.6 No third party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

9.7 Survival

9.7.1 Termination of this Agreement:

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

9.7.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

9.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 8 of this Agreement or otherwise.

9.9 Successors and assigns

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

9.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and e-mail address are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on any day, or on a day that is a public holiday, the notice shall be deemed to be received on the first working day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

9.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

9.12 Authorised representatives

Each of the Parties shall by notice in writing designate their respective authorised representatives through whom only all communications shall be

made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

9.13 Original Document

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

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

THE COMMON SEAL OF CONCESSIONAIRE has been affixed pursuant to the resolution passed by the Board of Directors of the Concessionaire at its meeting held on the day of 20..... hereunto affixed in the presence of, Director, who has signed these presents in token thereof and, Company Secretary / Authorized Officer who has countersigned the same in token thereof[§]:

SIGNED, SEALED AND DELIVERED For and on behalf of

[Name of the Authority]by:

- (Signature)
- (Name)
- (Designation)
- (Address)
- (Fax No.)
- (e-mail address)

SIGNED, SEALED AND DELIVERED

For and on behalf of

SENIOR LENDERS by the Lenders' Representative:

- (Signature)
- (Name)
- (Designation)
- (Address)
- (Fax)
- (e-mail address)

In the presence of:

- 1.
- 2.

[§] To be affixed in accordance with the articles of association of the Concessionaire.

SCHEDULE- S

(See Clause 24.6)

LEASE AGREEMENTS

Appendices

APPENDIX I

LIST OF BID-SPECIFIC CLAUSES¹⁰

A. Clauses with serially numbered footnotes

1. Appendix 1 (Footnote no 9)

B. Clauses with non-numerical footnotes

1. Recital Para 2
2. Clause 16.5.1: Power of the Authority to undertake works
3. Signature/Execution Page of the Concession Agreement
4. Schedule J: Provisional Certificate
5. Schedule S:Substitution Agreement Signature /Execution Page

C. Clauses where curly brackets are used

1. RecitalsPara 2
2. Recitals D, F, G, H and I:
3. Clause 4.1.3(g):Conditions Precedent
4. Clause 7.1(g), (k), (l), (m) and (q): Representations and Warranties of the Concessionaire
5. Clause 8.1.2:Disclaimer
6. Clause 22.1:Concession Fee
7. Clause 22.2.1:Usage Charges
8. Clause 24.4.1(d): Withdrawals upon Termination
9. Article 40:Definitions
 - “Associate or Affiliate”
 - “Bid”
 - “Change in Ownership”
 - “Consortium”
 - “Consortium Member”
 - “Total Project Cost”
10. Schedule S: Escrow Agreement: Clause 4.1.1(g), 4.2(d)

¹⁰This Appendix-I contains a list of clauses that would need to be to be suitably modified for reflecting bid-specific provisions after the Concessionaire has been selected. This Appendix-I may be included in the draft concession agreement forming part of the bid documents. It may however, be deleted when the Concession Agreement is to be executed.

D. Clauses with blank spaces

1. Recital Para 2
2. Recitals C, E and G
3. Clause 22.1:Concession Fee
4. Execution/Signature Page of the Concession Agreement
5. Schedule F: Part A and Part B: Construction Performance Securityand
Operation Performance Security
6. Schedule J: Completion Certificate and Provisional Certificate
7. Schedule N: Terms Of Reference For Independent Engineer: Clause 1.1
8. Schedule O:Escrow Agreement: Para 1, 2 and 3 and RecitalsA, Clause
2.3.1, 4.2(d)
9. Schedule Q: Vesting Certificate
10. Schedule R: Substitution Agreement

- (d) Any entity, which is disqualified from participating in the disinvestment process, would not be allowed to remain associated with it or get associated merely because it has preferred an appeal against the order based on which it has been disqualified. The mere pendency of appeal will have no effect on the disqualification.
- (e) The disqualification criteria would come into effect immediately and would apply to all bidders for various disinvestment transactions, which have not been completed as yet.
- (f) Before disqualifying a concern, a Show Cause Notice why it should not be disqualified would be issued to it and it would be given an opportunity to explain its position.
- (g) Henceforth, these criteria will be prescribed in the advertisements seeking Expression of Interest (EOI) from the interested parties. The interested parties would be required to provide the information on the above criteria, along with their Expressions of Interest (EOI). The bidders shall be required to provide with their EOI an undertaking to the effect that no investigation by a regulatory authority is pending against them. In case any investigation is pending against the concern or its sister concern or against its CEO or any of its Directors/ Managers/ employees, full details of such investigation including the name of the investigating agency, the charge/ offence for which the investigation has been launched, name and designation of persons against whom the investigation has been launched and other relevant information should be disclosed, to the satisfaction of the Government. For other criteria also, a similar undertaking shall be obtained along with EOI.

sd/-

(A.K. Tewari)

Under Secretary to the Government of India

F. No. 5-1/2016 - Infra (ICC)
Govt. of India
Ministry of Food Processing Industries
Panchsheel Bhawan, August Kranti Marg
New Delhi - 110049

Dated: 29.01.2016

OFFICE MEMORANDUM

Subject: Model documents for development of Integrated Cold Chain in India on PPP mode for comments -reg.

The undersigned is directed to refer to the OM number 5(1)/(1)/2014-PPP dated 14.12.2015 on above subject issued by Department of Economic Affairs, Ministry of Finance and to convey the following comments in the matter:

- i. The model framework has considered two business models for the cold chain viz. Service Provision and Trading Operations or a combination of both. Many of the cold chain projects supported by the Ministry, especially in dairy, poultry and marine sector have created captive facilities which have combined temperature controlled storage and transport infrastructure with processing infrastructure for value added products. These projects are marketing/exporting the processed product under their own brand or have tied up with large anchor customers in the retail / QSR sector. This is a model distinct from a pure trading model. DEA may be requested to include this captive business model also in the model framework.
- ii. A large Integrated Cold Chain from farm to the market as envisaged in the model framework may require creation of infrastructure such as collection centre, pack houses, distribution centres, etc. spread over more than one State. Also land / assets (cold storages etc.) may be available with central agencies like Airports Authority of India (AAI), Port Trust, Railways, The Central Rail Side Warehouse Company Ltd. etc. with APEDA support created by AAI. Cold storages at some of the airports are unutilized / underutilized. Private sector investment can generate value from these assets. Therefore, the model framework for PPP may also include Central Government organizations / undertakings as the implementing agency.
- iii. The Threshold Technical Capacity of Rs. 1000 crore revenue over 5 years appear to be on higher side. This will exclude all those players who have set up agribusiness as start up but willing to expand further especially in cold chain infrastructure. This Threshold Technical Capacity may be reduced to Rs. 500 crore.


(Sanjai Bajpai)

Under Secretary to the Govt. of India
Tel. No. 011-26406529
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To
Smt. Abhilasha Mahapatra,
Director,
Department of Economic Affairs,
Ministry of Finance,
North Block, New Delhi

o/c
issued

No. 5(1)/1/2014-PPP (Vol. IV)
Government of India
Ministry of Finance
Department of Economic Affairs
PPP Cell

North Block, New Delhi
February 19, 2015

OFFICE MEMORANDUM

22

Subject: Model Documents for Development of Integrated Cold Chain in India on PPP mode Reg.

Reference is invited to your OM No. 5-5/2015- Infra (ICC), Ministry of Food Processing Industries (MoFPI) conveying comments on the Model Documents for Developing Integrated Cold Chain in India. The para wise reply to the comments given by MoFPI is as under:

1. **Suggestion of including other Business Models:** The documents sent vide OM of even no. dated 14.12.2015 are Model Documents for the sector and would need to be adopted to the specific needs of a project. Therefore, the Business Model suggested other than the two considered in the model framework, viz., Service Provision and Trading Operations, can certainly be considered and the Sponsoring Authority may amend the project documents based on project-specific needs/potential.
2. **Central Government Organization/Undertaking as implementing agency:** As regards the suggestion for including Central Government organizations/undertakings as the Implementing Agency/Sponsor, it may be noted that a PPP Project can be posed by any Ministry, State Government or Public Sector Entity as the Implementing Agency/Sponsor and bid out the PPP Project through a transparent and open competitive bidding process. The selected bidder, a Private Sector Company, i.e. an SPV incorporated under Companies Act, 2013, will then be responsible for delivering the infrastructure asset and services under the contract i.e., the Concession Agreement.

Further, projects which are eligible under the "Scheme and Guidelines for Financial Support to Public Private Partnerships in Infrastructure (VGF Scheme)" as approved

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by the Cabinet Committee on Economic Affairs in its meeting of July 25, 2005 clarifies that:

- **A Public Private Partnership (PPP) Project** means a project based on a contract or concession agreement, between a Government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges.
- Further, Private Sector Company means a company which is not a "Government Company" as defined under Section 2 (45) of the Companies Act 2013. (Copy of the Amendment is enclosed for reference).

3. **Threshold Technical Capacity:** As regards the Threshold Technical Capacity of Rs. 1000 Crore revenue over 5 Years proposed under the clause 2.2.2 of the RFQ, it may be noted that the threshold suggested in the Model Documents is given in square brackets, i.e., it is to be decided on the basis of the specific project financials. In general, the Threshold Technical Capacity is prescribed as twice the indicative Project Cost, therefore the Threshold Technical Capacity would be amended as per the specific needs of the project and the estimated Total Project Cost.


Abhilasha Mahapatra
Director (PPP)
Tel: 2309-4045

To,
Dr. Atya Nand,
Deputy Secretary,
Ministry of Food Processing Industries
Panchell Bhawan,
August Kranti Marg, New Delhi 110049

F.No. 1/4/2014-PPP
Government of India
Ministry of Finance
Department of Economic Affairs
PPP/CELE

New Delhi, the 22nd April, 2015

OFFICE MEMORANDUM

Subject: Amendment in the Guidelines for Financial Support to Public Private Partnerships in Infrastructure issued vide F.No. 1/4/2005-PPP, dated 23rd January, 2006.

In pursuance of the decision of the Cabinet Committee on Economic Affairs at its meeting held on 31st March, 2015, the following amendments are made to the Guidelines for Financial Support to Public Private Partnerships in Infrastructure issued by this Department vide F.No. 1/4/2005-PPP, dated 23rd January, 2006 (hereafter referred to as Guidelines) :-

- i. The definition of Private Sector Company i.e. "Private Sector Company means a company in which 51 percent or more of the subscribed and paid up equity is owned and controlled by a private entity" stated in Para 2 (Definitions) of the Scheme for Support to Public Private Partnership, Annex-I to the Guidelines is substituted and may be read as follows:

"Private Sector Company means a company which is not a "Government Company", as defined under Section 2(45) of the Companies Act, 2013."

- ii. Clause 3.4 of the Guidelines under the heading "Applicability" is amended and may be read as under:

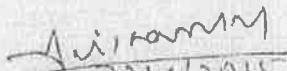
"3.4. The Scheme will apply only if the contract/concession is awarded in favour of a private sector company"

- iii. After Para 9 of the Guidelines, the following para shall be inserted:

"10. Amendment to the Scheme

10.1 Any amendment to the Scheme which does not result in any material alteration to the Scheme may be done with the approval of the Finance Minister."

This issues with the approval of competent authority.


22/4/2015
(V.Srikanth)
Deputy Director (PPP)

Copy to:

CEO, NITI Aayog,
Secretary, Ministry of Road Transport and Highways
Secretary, Ministry of Shipping
Secretary, Ministry of Power
Secretary, Ministry of Urban Development