

**Department of Horticulture, Government of Andhra Pradesh**

***Development, Operation and Maintenance  
of the  
Terminal Market Yard  
located at  
Peapully, Nandyal  
on  
PPP mode***

**REQUEST FOR PROPOSAL**

**JUNE 2023**

**ISSUED BY:**

**HORTICULTURE DEPARTMENT, GOVERNMENT OF ANDHRA PRADESH  
TTPC BUILDING, 1ST FLOOR  
OLD MARKET YARD  
CHUTTUGUNTA (BESIDE MINI RYTHU BAZAR), A.P., GUNTUR - 522004**

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## **Request For Proposal (RFP)**

## Disclaimer

The information contained in this Request for Proposal document (the “**RFP**”) or subsequently provided to Bidders(s), whether verbally or in documentary or any other form, by or on behalf of the Government or any of its employees or advisors, 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 Government 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 the formulation of their Bid for the Project pursuant to this RFP (the “**Bid**”). This RFP includes statements, which reflect various assumptions and assessments arrived at by the Government 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 Government, its employees or advisors 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 this RFP 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 Government accepts no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed herein.

The Government, its employees and advisors make no representation or warranty and shall have no liability to any person, including any 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 for pre-qualification of Bidder(s) and evaluation of financial bids of the Bidder’s for participation in the Bidding Process.

The Government 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 Government 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 Government is bound to select and qualify Bidders for evaluation of financial proposal or to appoint the selected Bidder or Concessionaire, as the case may be, for the Project and the Government reserves the right to reject all or any of the Bids without assigning any reasons 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 Government 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 Government 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.

The Bidders are prohibited from any form of collusion or arrangement in an attempt to influence the selection and award process of the Bid. Giving or offering of any gift, bribe or inducement or any attempt to any such act on behalf of the Bidder towards any officer/employee/ advisor/ representative of Government or to any other person in a position to influence the decision of the Government for showing any favour in relation to this RFP or any other contract, shall render the Bidder to such liability/penalty as the Authority may deem proper, including but not limited to rejection of the Bid of the Bidder and forfeiture of its Proposal Security.

Laws of the Republic of India are applicable to this RFP.

The RFP is solely for the implementation of the Project to be undertaken in accordance with this RFP on the land/ Project Site, the owner of which is and shall always be Government and the land shall always be deemed to be in the actual exclusive possession of government. The Selected Bidder shall only make use of the land to implement the Project and the land on which the proposed Project is to be undertaken shall in no way be deemed to be transferred by any mode to the Selected Bidder. Any attempt to transfer the land by any mode shall be treated as malfeasance and in that event the OMDA shall be terminated forthwith without any notice and reason and Government shall resume the land together with all structures and forfeit the Proposal Security/ Performance Security without any prejudice to any action taken as per law.

This RFP document and the information contained herein are confidential and for use only by the person to whom it is issued. It may not be copied or distributed by the recipient to third parties (other than in confidence to the recipient's professional advisor). In the event that the recipient does not continue with the involvement in the Project in accordance with RFP, the information contained in the RFP document shall not be divulged to any other party. The information contained in the RFP document must be kept confidential.

Mere submission of a responsive Bid/ Proposal does not ensure selection of the Bidder.

## Project Summary

S.No	Parameters	Details
1.	Project Title	<i>Development, Operation and Maintenance of the Terminal Market Yard located at Peapully, Nandyal on PPP mode</i>
2.	Location	Peapully, Nandyal
3.	Authority	<i>Department of Horticulture, Govt of Andhra Pradesh</i>
4.	Project Site Area	~25.93 Acres (Refer Schedule A of the Draft Operation Management & Development Agreement (OMDA) for details)
5.	Estimated Project Cost for proposed components	~Rs 49.07 Crores
6.	Project Facilities	Refer Schedule B of the Draft Operation Management & Development Agreement (OMDA) for details
7.	Institutional Structure for Implementation	Special Purpose Vehicle (SPV) to be created by the Selected Bidder
8.	PPP Format	DBFOT
9.	Term of the Agreement	30 (thirty) Years
10.	Appointed Date	The day of Issuance of Certificate of Compliance after completion of Conditions Precedent by both the parties
11.	Construction Period	<ul style="list-style-type: none"> <li>● 18 Months from the Appointed Date (Refer Clause 11.3.2 of the Draft Operation Management &amp; Development Agreement (OMDA) for details)</li> </ul>
12.	Financial Covenants	Proposal/ Bid Security: Rs 49 Lakh (Rupees Forty Nine Lakh only)
		Performance Security: Rs 2.45 Crore (Rupees Two Crore Forty Five Lakh Only) (Refer Article 9 of the Draft Operation Management & Development Agreement (OMDA) for details)



## Glossary

<b>Associate</b>	As defined in Clause 2.2.9
<b>Bids</b>	As defined in Clause 1.2.3
<b>Bid Due Date</b>	As defined in Clause 1.1.7
<b>Bid Security</b>	As defined in Clause 1.2.2
<b>Bidders</b>	As defined in Clause 1.2.1
<b>Bidding Documents</b>	As defined in Clause 1.1.7
<b>Bidding Process</b>	As defined in Clause 1.2.1
<b>Bid Stage</b>	As defined in Clause 1.2.8
<b>Bidding Process</b>	As defined in Clause 1.2.1
<b>Concessionaire</b>	As defined in Clause 1.1.2
<b>OMDA</b>	As defined in Clause 1.1.2
<b>Conflict of Interest</b>	As defined in Clause 2.2.1(c)
<b>Consortium</b>	As defined in Clause 2.2.1(a)
<b>Eligible Experience</b>	As defined in Clause 3.2.1
<b>Eligible Projects</b>	As defined in Clause 3.2.1
<b>Estimated Project Cost</b>	As defined in Clause 1.1.1
<b>Financial Capacity</b>	As defined in Clause 2.2.2 (B)
<b>Government</b>	As defined in Clause 1.1.1
<b>Highest Bidder</b>	As defined in Clause 1.2.5
<b>Jt. Bidding Agreement</b>	As defined in Clause 2.2.6 (g)
<b>Lead Member</b>	As defined in Clause 2.2.6 (c)
<b>LOA</b>	Letter of Award
<b>Member</b>	Member of a Consortium
<b>Net Worth</b>	As defined in Clause 2.2.4 (ii)

<b>PPP</b>	Public Private Partnership
<b>Project</b>	As defined in Clause 1.1.1
<b>Re. or Rs. or INR</b>	Indian Rupee
<b>RFP or Request for Proposals</b>	As defined in Clause 1.2.1
<b>SPV</b>	As defined in Clause 2.2.6
<b>Technical Capacity</b>	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.

## **Invitation for Proposal**

**GOVERNMENT OF ANDHRA PRADESH**

**DEPARTMENT OF HORTICULTURE**

## 1. INTRODUCTION

### 1.1. *Background*

- 1.1.1 The Department of Horticulture, Government of Punjab (hereinafter referred as the “**Government**”) being responsible for the development of terminal markets in the State of Andhra Pradesh has resolved to undertake the Development, Operation and Maintenance of the Terminal Market Yard at Peapully, Nandyal on PPP mode (hereinafter referred as the “**Project**”) The Government has decided to carry out the bidding process for selection of an entity as the Bidder to whom the Project may be awarded.

#### **Brief particulars of the Project are as follows:**

The Terminal Market Yard is to be constructed on a plot of ~ 25.93 acres at Peapully, Nandyal. The details of the Site Plan and the facilities to be constructed shall be in accordance to the DPR (available with the Government). The estimated Project Cost for the Project is ~Rs 49.07 Crore.

However, the summary of the facilities that shall be mandatorily be a part of the Project include:

1. Wholesale shops – 36 Nos
2. Semi-retail shops – 20 Nos
3. Retail shops – 66 Nos
4. Ripening chamber – 6 Nos (20 MT each)
5. Pre-cooling chamber – 2 Nos (30 MT each)
6. Cold Storage – 4 chambers of 500 MT each
7. Processing Block – 1 MT/ hour
8. R.O System (50 Liters/Hr)
9. STP 20KLD
10. ETP 150KLD
11. Weigh Bridge (60MT)
12. 1.00 Lakhs litre capacity OHT

The Concessionaire shall not be allowed to make any additions to the Project apart from the specified Project Facilities to be constructed as part of the Concession. However, if any extra facility is proposed by the Concessionaire and further approved by the Government then the same shall also be considered as part of the Project.

The Terminal Market shall be declared as a Special Market by the Government and no Market Fee shall be charged from the Concessionaire. The Government shall issue appropriate notifications / circulars regarding the same. The Concessionaire would collect usage fees and rents from the traders / retailers in the market and, in turn, would make the designated concession fee payments to the Government.

The detailed scope of work for the Concessionaire of the Terminal Market, Peapully, Nandyal has been attached in Schedule-A of the Draft Operation Management & Development Agreement (OMDA).

- 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 OMDA (the

**“Concessionaire”**) shall be responsible for the development of the Project and thereupon, operation and maintenance of the Project under and in accordance with the provisions of a Operation Management & Development Agreement (the **“OMDA”**) to be entered into between the Concessionaire and the Government in the form provided by the Government as part of the Bidding Documents pursuant hereto.

- 1.1.3 The scope of work will broadly include the development of Terminal Market at demarcated Project Site, collection of User Fee and operation & maintenance of the Project for pre-determined Concession Period. The Concessionaire shall be required to carryout the Maintenance Works of the Terminal Market, as mentioned in the bidding document.

As part of the Bidding Document, the Government will provide Detailed Project Report and other information pertaining / relevant to the Project available with it. The Bidders shall be required to examine and carry out its own due diligence w.r.t the Project in greater detail for submitting their respective Bids for award of the Concession including implementation of the Project.

- 1.1.4 The assessment of actual costs towards construction of Terminal Market, operation and maintenance works will have to be made by the Bidders. 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.
- 1.1.5 The OMDA 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”**). As part of the Bidding Document, the Government will provide a draft OMDA.
- 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 OMDA or the Government’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 Government.
- 1.1.7 The Government shall receive Bids pursuant to this RFP in accordance with the terms set forth herein as modified, altered, amended and clarified from time to time by the Government (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”**). The Bids shall be valid for a period of not less than 120 days (one hundred twenty days) from 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 Government has adopted a single stage process (referred to as the **“Bidding Process”**) through e-tendering as specified in Section 2 for selection of the bidder for award of the Project. The first step shall include evaluation of the Technical Proposals to qualify the interested parties/consortia who make a Bid in accordance with the

provisions of this RFP (the “**Bidder**”, which expression shall, unless repugnant to the context, include the Members of the Consortium) and second step shall refer to evaluation of Financial Proposals of the technically qualified Bidders. Along with the Bid, the Bidder shall also submit to the Government, a sum of Rs. 5,000 (Rupees Five thousand only) non-refundable, as the cost of the Bidding Process and Bidding Documents.

- 1.2.2 In terms of the RFP, a Bidder will be required to deposit, along with its Bid, a bid security of **Rs. 49 lakh (Rupees Forty Nine lakh)** (the “**Bid Security**”), refundable once the bid process is completed, except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided the Performance Security. The Bid shall be summarily rejected if it is not accompanied by the Bid Security.
- 1.2.3 The Bidders would be required to furnish all the information specified in this RFP. The Bidders shall be qualified and short-listed on the basis of evaluation of Technical Proposal. The Financial Proposals shall be opened in respect of only the Bidders qualified by the Government.
- 1.2.4 Bids will be invited for the Project on the basis of the highest first year Concession Fee (the “**Annual Concession Fee**”) offered by a Bidder to the Government for award of the Concession and implementing the Project. The Concession Fee shall be increased as specified in OMDA.
- 1.2.5 The concession period is pre-determined, as indicated in the OMDA. The Annual Concession Fee amount shall constitute the sole criteria for evaluation of Bids. Subject to Clause 2.18, the Project will be awarded to the Bidder quoting the highest first year Concession Fee.

In this RFP, the term “**Highest Bidder**” shall mean the Bidder who is offering the highest first year Concession Fee.

- 1.2.6 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 Government may, in its discretion, either invite fresh Bids from the remaining Bidders or annul the Bidding Process.
- 1.2.7 Deleted
- 1.2.8 Further and other details of the process to be followed at the Bid Stage and the terms thereof are set out in this RFP.
- 1.2.9 Any queries or request for additional information concerning this RFP shall be submitted in writing or by e-mail i.e. **shmcell.ap@gmail.com**. The envelopes/ communications shall clearly bear the following identification/ title:

**“Queries/ Request for Additional Information: RFP for Development, Operation and Maintenance of the Terminal Market Yard located at Peapully, Nandyal on PPP mode”.**

### 1.3. Schedule of Bidding Process

The Government shall endeavour to adhere to the following schedule:

Sl. No.	Event Description	Estimated Date
1	Availability of RFP Document	From 3 <sup>rd</sup> June 2023
2	Last date for receiving queries	20 <sup>th</sup> June 2023 upto 1500 hrs
3	Pre-Bid Conference	20 <sup>th</sup> June 2023  <b>Conference Room, Horticulture Department, Government of Andhra Pradesh, TTPC Building, 1<sup>st</sup> Floor, Old Market Yard, Chuttugunta (Beside Mini Rythu Bazar), A.P., Guntur – 522004</b>  <b>Also, VC link shall be shared on the website and the Bidders may join through the link.</b>
4	<b>Bid Due Date</b>	13 <sup>th</sup> July 2023 up to 1500 hrs.

Note: Bids have to be submitted in hard copy, latest by the date as specified above, and as per procedure laid down in Section 2.12 to 2.17.

Sl. No.	Event Description	Estimated Date
5	Opening of Technical Proposal	13 <sup>th</sup> July 2023 at 1530 hours
6	Opening of Financial Proposals	To be intimated
7	Letter of Award (LOA)	Within 45 days of Bid Due Date
8	Submission of Construction Performance Security	Within 45 days of award of LOA
9	Signing of OMDA	Within 60 days of award of LOA

## 2. INSTRUCTIONS TO BIDDERS

### A. GENERAL

#### 2.1 *Scope of Bids*

- 2.1.1 The Government invites Bids/ Proposals comprising of “Technical Proposal” and “Financial Proposal” for the Project wherein the Selected Bidder shall be required to develop the Terminal Market at Peapully, Nandyal and thereupon, collection of User Fees, operation and maintenance of the Project. Based on evaluation of Technical Proposal, prospective bidders shall be qualified and the technically qualified Bidders shall be informed.
- 2.1.2 Subsequently “Financial Proposal” of qualified Bidders shall be opened and evaluated pursuant to provisions of Section 3.
- 2.1.3 The Bidders shall bear all of the costs associated with the preparation of their Bids and their participation in the Bidding Process. The Government will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.
- 2.1.4 The Bids are required to be submitted in the office of Horticulture Department, latest by the date as specified in Section 1.3, and as per procedure laid down in Section 2.12 to 2.17.

#### 2.2 *Eligibility of Bidders*

- 2.2.1 For determining the eligibility of Bidders for their qualification/short-listing hereunder, the following shall apply:
- (a) The Bidder for qualification /short-listing may be a single entity or a group of entities (the “**Consortium**”), coming together to implement the Project. However, no bidder applying individually or as a member of a Consortium, as the case may be, can be member of another Bidder. The term Bidder used herein would apply to both a single entity and a Consortium.
  - (b) A Bidder may be a natural person, private entity or government 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) The 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. 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 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% (twenty six per cent) 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, or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder, or any Associate thereof 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 others’ 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 Government in the preparation of any documents, design or technical specifications of the Project.
- (d) A Bidder shall be liable for disqualification if any legal, financial or technical adviser of the Government in relation to the Project is engaged by the Bidder, 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 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 this RFP. 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 a Bidder is a Consortium, then the term Bidder as used in this Clause 2.2.1, shall include each Member of such Consortium.

2.2.2 To be eligible for qualification and short-listing, a Bidder shall fulfill the following conditions of eligibility:

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

- (i) paid for, or received payments for, construction of Eligible Project(s) in Category 3 and/ or Category 4 specified in Clause 3.2.2; 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. 49.07 crore (Rupees Forty Nine crore and Seven Lakh) (the “**Threshold Technical Capacity**”).

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

(B) **Financial Capacity:** The Bidder shall have a minimum Net Worth (the “**Financial Capacity**”) of Rs. 12.26 crore (Rupees Twelve crore and Twenty-Six lakh) in each of the last 3 (three) years from the Bid Due Date.

In case of a Consortium, the combined technical capacity and net worth of those Members, who have and shall 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:

- (i) Not less than 26% (twenty six per cent) of the subscribed and paid up equity of the SPV shall be held by one member and not less than 51% (fifty one per cent) of the subscribed and paid up equity of the SPV shall be held by the Lead Member; and
- (ii) 5% (five per cent) of the Total Project Cost specified in the OMDA throughout the Concession Period.

2.2.3 **O&M Experience:** The Bidder shall engage an experienced O&M contractor or hire qualified and trained personnel for operation and maintenance of the project in conformity with the provisions of the OMDA.

2.2.4 The Bidders shall submit, as part of its Bid, 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 (five) 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 Bidder (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;
  - (ii) certificate(s) from its statutory auditors specifying the net worth of the Bidder, for the last 3 (three) financial year from the Bid Due Date, 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 RFP, net worth (the “**Net Worth**”) shall mean the sum of subscribed and paid up equity and reserves from which shall be deducted from the sum of revaluation reserves, miscellaneous expenditure not written off and reserves not available for distribution to equity share-holders;
  - (iii) Bid Security pursuant to Clause 2.13.5; and
  - (iv) Payment of Rs. 5,000 (Rupees five thousand only) towards the cost of the bidding process and bidding document.
- 2.2.5 The Bidder should upload a Power of Attorney as per the format at Appendix-II, authorizing the signatory of the Bid to commit the Bidder. In the case of a Consortium, the Members should upload a Power of Attorney in favour of the Lead Member as per format at Appendix-III.
- 2.2.6 Where the Bidder is a single entity, it shall be required to form an appropriate Special Purpose Vehicle, incorporated under the Indian Companies Act, 1956/ 2013 (the “**SPV**”), to execute the OMDA and implement the Project. In case the Bidder is a Consortium, it shall, in addition to forming a SPV, comply with the following additional requirements:
- (a) Number of members in a consortium shall not exceed 2 (two);
  - (b) subject to the provisions of sub-clause (a) above, the Bid 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 51% (fifty-one 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 Bid 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 Bidder cannot at the same time be member of a Consortium applying for qualification and selection as Concessionaire for the Project. Further, a member of a particular Bidder Consortium cannot be member of any other Bidder Consortium applying for qualification and selection as Concessionaire for the Project;
  - (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 submitting this Bid. The Jt. Bidding Agreement, to be submitted along with the Bid, shall, inter alia:
  - (i) convey the intent to form an SPV with shareholding/ ownership equity commitment(s) in accordance with this RFP, which would enter into the OMDA and subsequently perform all the obligations of the Concessionaire in terms of the OMDA, 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, 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 (i) Not less than 26% (twenty six per cent) of the subscribed and paid up equity of the SPV shall be held by one member and not less than 51% (fifty one per cent) of the subscribed and paid up equity of the SPV shall be held by the Lead Member; and (ii) not less than 5% (five per cent) of the Total Project Cost specified in the OMDA throughout the Concession Period;
  - (v) members of the Consortium undertake that they shall collectively hold at least 75% (seventy-five per cent) of the subscribed and paid up equity of the SPV at all times during the Concession Period;
  - (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 OMDA; and
  - (vii) except as provided under this RFP and the Bidding Documents, there shall not be any amendment to the Jt. Bidding Agreement without the prior written consent of the Government.

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, DBFOT, OMT or otherwise), and the bar subsists as on the date of Bid, would not be eligible to submit the Bid, either individually or as member of a Consortium.

2.2.8 A Bidder 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 Bidder, 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 Bidder, Consortium Member or Associate.

2.2.9 In computing the Technical Capacity and Net Worth of the Bidder / 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 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.

2.2.10 The following conditions shall be adhered to while uploading the Bid:

- (a) Bidders should attach/ upload clearly marked and referenced continuation sheets in the event that the space provided in the prescribed forms in the Annexes is insufficient. Alternatively, Bidders may format the prescribed forms making due provision for incorporation of the requested information;
- (b) Information supplied by a Bidder (or other constituent Member if the Bidder is a Consortium) must apply to the Bidder, Member or Associate named in the Bid and not, unless specifically requested, to other associated companies or firms;
- (c) For responding to the qualification/short-listing, Bidders should demonstrate their capabilities in accordance with Clause 3.1 below; and
- (d) In case the Bidder is a Consortium, each Member should substantially satisfy the pre-qualification requirements to the extent specified herein.

2.2.11 Deleted

2.2.12 Notwithstanding anything to the contrary contained herein, in the event that the Bid Due Date falls within three (3) months of the closing of the latest financial year of a Bidder, it shall ignore such financial year for the purposes of its Bid and furnish all its information and certification with reference to the 5 (five) years, preceding its latest financial year. For the avoidance of doubt, financial year shall, for the purposes of a Bid hereunder, mean the accounting year followed by the Bidder in the course of its normal business.

**2.3 Deleted**

## **2.4 *Change in Ownership***

2.4.1 By submitting the Bid, the Bidder acknowledges that the pre-qualification and short-listing of the Bidder shall be carried out on the basis of Technical Capacity and Financial Capacity of those of its Consortium Members who shall hold (i) Not less than 26% (twenty six per cent) of the subscribed and paid up equity of the SPV shall be held by one member and not less than 51% (fifty one per cent) of the subscribed and paid up equity of the SPV shall be held by the Lead Member; and (ii) not less than 5% (five per cent) of the Total Project Cost specified in the OMDA. 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 the OMDA, and a breach hereof shall, notwithstanding anything to the contrary contained in the OMDA, be deemed to be a breach of the OMDA and dealt with as such thereunder. For the avoidance of doubt, the provisions of this Clause 2.4.1 shall apply only when the Bidder is a Consortium.

- 2.4.2 By submitting the Bid, the Bidder shall also be deemed to have acknowledged and agreed that there shall be no change in control of a Consortium Member or an Associate whose Technical Capacity and/ or Financial Capacity shall be taken into consideration for the purposes of short-listing in accordance with the RFP. In the event such change in control occurs on/ before the issuance of Letter of Award and also, after signing of the OMDA, notwithstanding anything to the contrary contained in the OMDA but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the OMDA, be deemed to be a breach of the OMDA, and the same shall be liable to be terminated without the Government being liable in any manner whatsoever to the Concessionaire. In such an event, notwithstanding anything to the contrary contained in the OMDA, the Government shall be entitled to forfeit and appropriate the Bid Security or Construction Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Government under the Bidding Documents and/ or the OMDA or otherwise.

## **2.5 *Number of Bids and costs thereof***

- 2.5.1 No Bidder shall submit more than one Bid for the Project. A bidder applying 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. If such case is found then the Government shall have the right to forfeit the Bid Security and debar the Bidder for 1 (one) year.
- 2.5.2 The Bidders shall be responsible for all of the costs associated with the preparation of their Bids and their participation in the Bid Process. The Government will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.

## **2.6 *Site visit and verification of information***

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

## **2.7 *Acknowledgement by Bidders***

- 2.7.1 It shall be deemed that by submitting the Bid, the Bidder has:
- (a) made a complete and careful examination of the RFP, Bidding documents;
  - (b) received all relevant information requested from the Government;
  - (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 Government relating to any of the matters referred to in Clause 2.6 above;
  - (d) satisfied itself about all matters, things and information including matters referred to in Clause 2.6 hereinabove necessary and required for submitting a

Bid, execution of the Project, operation and maintenance 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 2.6 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 Government, or a ground for termination of the OMDA 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.

2.7.2 The Government 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 RFP, Bidding Documents or the Bidding Process, including any error or mistake therein or in any information or data given by the Government.

## **2.8 Verification and Disqualification**

2.8.1 The Government reserves the right to verify all statements, information and documents submitted by the Bidder in response to the RFP or the Bidding Documents and the Bidder shall, when so required by the Government, 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 Government shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Government thereunder.

2.8.2 The Government 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 Government, the supplemental information sought by the Government 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 may be disqualified/ rejected. If such disqualification/ rejection occurs after the Bids have been opened and the Highest Bidder gets disqualified/ rejected, then the Government reserves the right to:

- (i) invite the remaining Bidders to match the Highest Bidder/ submit their Bids in accordance with Clauses 3.6.4 and 3.6.5; or
- (ii) take any such measure as may be deemed fit in the sole discretion of the Government, including annulment of the Bidding Process.

2.8.3 In case it is found during the evaluation or at any time before signing of the OMDA or after its execution and during the period of subsistence thereof, including the Concession thereby granted by the Government, that one or more of the 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 OMDA, and if the Bidder has already been issued the LOA or has entered into the OMDA, 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 Government to the Selected Bidder or the Concessionaire, as the case may be, without the Government being liable in any manner whatsoever to the Selected Bidder or Concessionaire. In such an event, the Government 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 which the Government may have under this RFP, the Bidding Documents, and/or the OMDA or under applicable law.

## **B. DOCUMENTS**

### **2.9 Contents of the RFP**

This RFP comprises the disclaimer set forth hereinabove, the contents as listed below, and will additionally include any Addenda issued in accordance with Clause 2.11.

#### **Invitation for Bid**

Section 1	Introduction
Section 2	Instructions to Bidders
Section 3	Criteria for Evaluation
Section 4	Fraud & Corrupt Practices
Section 5	Pre Bid Conference
Section 6	Miscellaneous

#### **Appendices**

- I. Letter comprising the Bid - Technical Proposal
- II. Power of Attorney for signing of Bid
- III. Power of Attorney for Lead Member of Consortium
- IV. Joint Bidding Agreement for Consortium
- V. Letter comprising the Financial Proposal

The draft OMDA and the Site Project Report provided by the Government as part of the Bid Documents shall be deemed to be a part of this RFP.

### **2.10 Clarifications**

- 2.10.1 Bidders requiring any clarification on the RFP may notify the Government in writing or by fax and e-mail in accordance with Clause 1.2.9. They should send in their queries before the date specified in the schedule of Bidding Process contained in Clause 1.3. The Government shall endeavour to respond to the queries within the period specified



therein, but no later than 7 (seven) days prior to the Bid Due Date (date of submission of Bid). The responses will be sent by fax and/or e-mail.

- 2.10.2 The Government shall endeavour to respond to the questions raised or clarifications sought by the Bidders. However, the Government 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 Government to respond to any question or to provide any clarification.
- 2.10.3 The Government may also on its own motion, if deemed necessary, issue interpretations and clarifications to all Bidders. All clarifications and interpretations issued by the Government shall be deemed to be part of the Bidding Documents. Verbal clarifications and information given by Government or its employees or representatives shall not in any way or manner be binding on the Government.

## **2.11 Amendment of RFP/ Bidding Documents**

- 2.11.1 At any time prior to the Bid Due Date, the Government may, for any reason, whether at its own initiative or in response to clarifications requested by a Bidder, modify the RFP / Bidding Documents by the issuance of Addenda.
- 2.11.2 Any Addendum/ Clarifications/ Corrigendum thus issued will only be posted on the website <https://horticulture.ap.nic.in/>.

## **C. PREPARATION AND SUBMISSION OF BID**

### **2.12 Language**

The Bid and all related correspondence and documents in relation to the Bidding Process shall be in English language. Supporting documents and printed literature furnished by the Bidder with the Bid 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 Bidder. Supporting materials, which are not translated into English, may not be considered. For the purpose of interpretation and evaluation of the Bid, the English language translation shall prevail.

### **2.13 Format and signing of Bid**

- 2.13.1 The Bidder shall provide all the information sought under this RFP. The Government will evaluate only those Bids that are received in the required formats and complete in all respects. Incomplete and /or conditional Bids shall be liable to rejection.
- 2.13.2 The Bidder shall submit the bid and shall comprise of the original copies of following documents by the stipulated date and time:
- (i) Bid in the prescribed format (Appendix-I) along with Annexes and supporting documents;
  - (ii) Power of Attorney for signing the Bid 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) Jt. Bidding Agreement, in case of a Consortium, substantially in the format at Appendix-IV;
- (v) Bidder's duly audited balance sheet and profit and loss account for the preceding five (5) years, (summary only);
- (vi) Bid Security as per Clause 2.13.5; and
- (vii) Confirmation w.r.t successful transaction of payment of Rs. 5,000 (Rupees five thousand only) towards the cost of the bidding process and bidding document.

Invitation for RFP Notice/RFP Document/OMDA/Site Studies Report can be downloaded from the website. The document downloaded from the website shall not be tempered. If any tempering is detected before signing of the agreement, the bid security of the Bidder shall be forfeited and the Bidder shall be debarred for a period of 6 (six) months for bidding in Department of Horticulture, Govt of Andhra Pradesh.

**2.13.3** The Bid shall be typed or written in indelible ink and signed by the authorized 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 initialed. All the alterations, omissions, additions or any other amendments made to the Bid shall be initialed by the person(s) signing the Bid.

In case of any discrepancy between the documents as submitted in physical form (if asked for by the Government), the bid will be rejected and the bid security shall be forfeited and the Bidder shall be debarred for tendering in Department of Horticulture, Government of Andhra Pradesh for a period of 6 (six) months.

#### **2.13.4 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 Government.

#### **2.13.5 Bid Security**

- 2.13.5.1 The Bidder shall furnish as part of its Bid, a Bid Security of Rs. 49 lakh (Rupees Forty Nine lakh only) to be deposited in the form of Demand Draft.
- 2.13.5.2 The Government shall not be liable to pay any interest on the Bid Security deposit so made and the same shall be interest free.
- 2.13.5.3 Any Bid not accompanied by the Bid Security shall be summarily rejected by the Government as non-responsive.
- 2.13.5.4 Save and except as provided in Clauses 1.2.2 above, the Bid Security of unsuccessful Bidders will be returned by the Government, 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 Government.
- 2.13.5.5 The Selected Bidder's Bid Security will be returned, without any interest, upon

furnishing of the Performance Security within 45 (forty-five) days from the date of award of LOA and in accordance with the provisions thereof. The Government may, at the Selected Bidder's option, adjust the amount of Bid Security in the amount of Performance Security to be provided by him in accordance with the provisions thereof.

2.13.5.6 The Government shall be entitled to forfeit and appropriate the Bid Security as Damages inter alia in any of the events specified in Clause 2.13.5.7 herein below. The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Government 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.

2.13.5.7 The Bid Security shall be forfeited as Damages without prejudice to any other right or remedy that may be available to the Government under the Bidding Documents and/ or under the OMDA, or otherwise, under the following conditions:

- (a) If a Bidder is non-responsive;
- (b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Section 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 Government;
- (d) In case of any discrepancy between the documents as submitted;
- (e) 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 OMDA; or
  - (iii) to furnish the Performance Security within the period of 45 (forty five) days from the date of award of LOA.

## **2.14 Sealing and Marking of Bids**

2.14.1 The Bidder shall submit the hard copy of the Bid, "Technical Proposal" and "Financial Proposal" at the address mentioned below.

**Horticulture Department, Government of Andhra Pradesh,  
TTPC Building, 1<sup>st</sup> Floor,  
Old Market Yard,  
Chuttugunta (Beside Mini Rythu Bazar), A.P., Guntur - 522004**

## **2.15 Bid Due Date**

- 2.15.1 Bids should be submitted in hard copy at the address mentioned in Clause 2.14.1 before 1500 hours IST on the Bid Due Date (hard copy of submission of Bid). The Bidder should submit its bid sufficiently in advance to avoid any last minute problem/ delay.
- 2.15.2 The Government may, in its sole discretion, extend the Bid Due Date by issuing an Addendum in accordance with Clause 2.11 uniformly for all Bidders.
- 2.15.3 Deleted

## **2.16 Late Bids**

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

## **2.17 Modifications/ substitution of Bids**

- 2.17.1 Before the Bid Due Date, the bids submitted can be modified or substituted. However, once the Bid has been submitted, the withdrawal of the same shall not be permitted.

## **2.18 Rejection of Bids**

- 2.18.1 Notwithstanding anything contained in this RFP, the Government 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 Government rejects or annuls all the bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.
- 2.18.2 The Government 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.

## **D. EVALUATION PROCESS**

### **2.19 Opening and Evaluation of Bids**

- 2.19.1 The Government shall open the Bids at 1530 hours IST on the Bid Due Date, in the office of Horticulture Department, Government of Andhra Pradesh, TTPC Building, 1st Floor, Old Market Yard, Chuttugunta (Beside Mini Rythu Bazar), A.P., Guntur – 522004 and in the presence of the Bidders who choose to attend.
- 2.19.2 In case of any discrepancy between the documents as submitted and those submitted in physical form (whenever asked for by the Government), the Bid will be rejected and the bid security shall be forfeited and the Bidder shall be debarred for tendering in the Government for a period of 6 (six) months.
- 2.19.3 The Government will subsequently examine and evaluate Bids in accordance with the provisions set out in Section 3.
- 2.19.4 The Bidders are advised that qualification/short-listing of Bidders will be entirely at the discretion of the Government. Bidders 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.

- 2.19.5 Any information contained in the Bid shall not in any way be construed as binding on the Government, its agents, successors or assigns, but shall be binding against the Bidder if the Project is subsequently awarded to it on the basis of such information.
- 2.19.6 The Government reserves the right not to proceed with the Bidding Process at any time without notice or liability and to reject any or all Bid(s) without assigning any reasons.
- 2.19.7 If any information furnished by the Bidder is found to be incomplete, or contained in formats other than those specified herein, the Government may, in its sole discretion, exclude the relevant project from technical evaluation.
- 2.19.8 In the event that a Bidder claims credit for an Eligible Project, and such claim is determined by the Government as incorrect or erroneous, the Government 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 Bidder, make a further deduction equivalent to the claim rejected thereunder. Where any information is found to be patently false or amounting to a material misrepresentation, the Government reserves the right to reject the Bid in accordance with the provisions of Clauses 2.8.2 and 2.8.3.

## **2.20 Confidentiality**

Information relating to the examination, clarification, evaluation and recommendation for the qualification /short-listing of Bidders and evaluation of financial proposals shall not be disclosed to any person who is not officially concerned with the process or is not a retained professional advisor advising the Government in relation to or matters arising out of or concerning the Bidding Process. The Government 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 Government 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 Government or as may be required by law or in connection with any legal process.

## **2.21 Tests of responsiveness**

Prior to evaluation of Bids, the Government shall determine whether each Bid is responsive to the requirements of the RFP. A Bid shall be considered responsive only if:

- (a) it is uploaded as per format at Appendix-I;
- (b) it is uploaded by the Bid Due Date including any extension thereof pursuant to Clause 2.15.2;
- (c) deleted;
- (d) the upload bid 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 RFP;
- (f) it contains information in formats same as those specified in this RFP;
- (g) it contains certificates from its statutory auditor's in the formats specified at

- Appendix-I of the RFP for each Eligible Project;
- (h) it contains successful receipt of electronic payment of Rs. 5,000 (Rupees five thousand only) towards the cost of the bidding process and bidding document;
- (l) it contains successful receipt of electronic payment of the Bid Security as specified in Clause 2.13.5;
- (j) it is accompanied by the Jt. Bidding Agreement (for Consortium), specific to the Project, as stipulated in Clause 2.2.6(g);
- (k) it is accompanied by the Financial Proposal (Appendix- V);
- l) there is no discrepancy between the documents as submitted and those submitted in physical form (whenever asked for by the Government);
- (m) it does not contain any condition or qualification; and
- (n) it is not non-responsive in terms hereof.

2.21.2 The Government 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 Government in respect of such Bid.

## **2.22 Clarifications**

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

2.22.2 If a Bidder does not provide clarifications sought under Clause 2.22.1 above within the prescribed time, its Bid shall be liable to be rejected. In case the Bid is not rejected, the Government may proceed to evaluate the Bid by construing the particulars requiring clarification to the best of its understanding, and the Bidder shall be barred from subsequently questioning such interpretation of the Government.

## **E. QUALIFICATION AND BIDDING**

### **2.23 Short-listing and notification**

After the evaluation of "Technical Proposal", the Government would announce a list of qualified/short-listed Bidders whose "Financial Proposal" will be opened on a date and time to be intimated to the qualified/short-listed Bidders. At the same time, the Government would notify the other Bidders that they have not been qualified/ short-listed. The Government will not entertain any query or clarification from Bidders who fail to qualify.

### **2.24 Proprietary data**

All documents and other information supplied by the Government or submitted by a Bidder to the Government shall remain or become the property of the Government. 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 Government will not return any Bid or any information provided along therewith.

### **2.25 Correspondence with the Bidder**

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

### 3. CRITERIA FOR EVALUATION

#### 3.1 Evaluation parameters

- 3.1.1 Only those Bidders who meet the eligibility criteria specified in Clause 2.2.2 above shall qualify for evaluation under this Section 3. Bids of firms/ consortia who do not meet these criteria shall be rejected.
- 3.1.2 The Bidder'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 evaluation

- 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 Agribusiness sector that qualify under Clause 3.2.3      |
| Category 2: | Project experience on Eligible Projects in Core sector that qualify under Clause 3.2.3              |
| Category 3: | Construction experience on Eligible Projects in Agribusiness sector that qualify under Clause 3.2.4 |
| Category 4: | Construction experience on Eligible Projects in Core sector that qualify under Clause 3.2.4         |

For the purpose of this RFP:

**(i) Agribusiness sector** would be deemed to include Fruits, Vegetables, Flowers, Spices, Aromatics, Herbs, Medicinal Plants, Meat Products, Poultry Products, Dairy Products and Fish and Marine products. The Bidders in this sector shall have experience in the following categories:

- i. Agri-inputs
- ii. Agri- Processing
- iii. Trading of Agri-Commodities
- iv. Agri Infrastructure<sup>1</sup> Developers
- v. Marketing/Whole selling of Agri-Commodities
- vi. Commodity / Spot exchanges

---

1



## vii. O&M of Wholesale Markets

Note: Agri infrastructure shall include infrastructure used for production and storage of agri input, infrastructure used for production & harvesting of agri commodities, infrastructure used for processing of agri produce, infrastructure used for distribution, retailing and export of agri commodities; and

- (ii) **core sector** would be deemed to include highway, power, telecom, ports, airports, railways, metro rail, industrial parks/ estates, logistic parks, pipelines, irrigation, water supply, sewerage and real estate development (exclusive of residential flats).

Where: Real Estate Development would include hotels / resorts, convention Centres, exhibition centres, commercial complex, community centres, commercial offices, clubs, banquets, retail high street / malls etc.

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

- 3.2.3 For a project to qualify as an Eligible Project under Categories 1 and 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. 5 crore (Rupees five crore); and
- (d) the entity claiming experience shall, during the last 5 (five) financial years preceding the Bid 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 highways, airports, ports and railway infrastructure, but shall not include revenues from sale or provision of goods or services such as electricity, gas, petroleum products, telecommunications or fare/freight revenues 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 Bidder 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 Bid 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 5 crore (Rupees five crore) 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 Bidder shall quote experience in respect of a particular Eligible Project under any one category only, even though the Bidder (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 Subject to the provisions of Clause 3.2.7, a Bidder'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 Bidder 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 categories**

<b>Category</b>	<b>Factor</b>
Category 1	1.25
Category 2	1.00
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 Bidder should furnish the details of Eligible Experience for the last 5 (five) financial years immediately preceding the Bid Due Date.
- 3.3.2 The Bidders must provide the necessary information relating to Technical Capacity as per format at Annex-II of Appendix-I.
- 3.3.3 The Bidders 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 Bid must be accompanied by the Audited Annual Reports of the Bidder (of each Member in case of a Consortium) for the last 5 (five) financial years, preceding the year

in which the Bid is made.

- 3.4.2 In case the annual accounts for the latest financial year are not audited and therefore the Bidder cannot make it available, the Bidder shall give an undertaking to this effect and the statutory auditor shall certify the same. In such a case, the Bidder 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 Bidder 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 Qualification/Short-listing of Bidders**

- 3.5.1 The credentials of eligible Bidders 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 Bidder. In case of a Consortium, the Aggregate Experience Score of each of its Members, who have an equity share of at least 26% (twenty six per cent) in such Consortium, shall be summed up for arriving at the combined Aggregate Experience Score of the Consortium.
- 3.5.2 Deleted

### **3.6 Selection of Bidder**

- 3.6.1 The **Envelope B** containing the Financial Proposal of the qualified/short-listed Bidders shall be opened on a date and time to be intimated to them in the presence of their authorized representatives who may like to be present.
- 3.6.2 Subject to the provisions of Clause 2.18, from among qualified /short-listed Bidders, the Bidder who offers the highest first year Annual Concession Fee to the Government shall be declared as the selected Bidder (the "**Selected Bidder**"). In the event that the Government rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.
- 3.6.3 In the event that two or more Bidders quote the same amount of first year Concession Fee, as the case may be (the "**Tie Bidders**"), the Government 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.
- 3.6.4 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 Government 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.

- 3.6.5 In the event that no Bidder offers to match the Highest Bidder in the second round of bidding as specified in Clause 3.6.4, the Government 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.
- 3.6.6 After selection, a Letter of Award (the **“LOA”**) shall be issued, in duplicate, by the Government 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 Government 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.
- 3.6.7 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Concessionaire to execute the OMDA within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the OMDA.

### **3.7 Contacts during Bid Evaluation**

Bids shall be deemed to be under consideration immediately after they are opened and until such time the Government 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 Government and/or their employees/ representatives on matters related to the Bids under consideration.

#### 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 OMDA. Notwithstanding anything to the contrary contained herein, or in the LOA or the OMDA, the Government may reject a Bid, withdraw the LOA, or terminate the OMDA, 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 Government shall be entitled to forfeit and appropriate the Bid Security or Construction Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Government under the Bidding Documents and / or the OMDA, or otherwise.
- 4.2 Without prejudice to the rights of the Government under Clause 4.1 hereinabove and the rights and remedies which the Government may have under the LOA or the OMDA, or otherwise, if a Bidder or Concessionaire, as the case may be, is found by the Government 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 LOA or the execution of OMDA, such Bidder or Concessionaire shall not be eligible to participate in any tender or RFP issued by the Government during a period of 2 (two) years from the date such Bidder or Concessionaire, as the case may be, is found by the Government 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 Section 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 Government 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 OMDA 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 Government, 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 OMDA, as the case may be, any person in respect of any matter relating to the Project or the LOA or the OMDA, who at any time has been or is a legal, financial or technical adviser of the Government 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 Government 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 A Pre-Bid conference of the interested parties shall be convened at the designated date, time and place. A maximum of three representatives of each Bidder shall be allowed to participate on production of authority letter from the prospective Bidder.
- 5.2 During the course of Pre-Bid conference, the prospective Bidders will be free to seek clarifications and make suggestions for consideration of the Government. The Government 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.

Note: The Bidders may submit their queries regarding the RFP document to the Government at email id. shmcell.ap@gmail.com on / before 20<sup>th</sup> June 2023. The responses to the pre-bid queries and resulting Addendum/ Corrigendum (if any) shall be uploaded on <https://horticulture.ap.nic.in/>. The Bidders are required to keep on referring the above mentioned websites only for any further update on the Project.

## **6. MISCELLANEOUS**

- 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at Peapully, Nandyal shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process.
- 6.2 The Government, 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) pre-qualify or not to pre-qualify any Bidder and/ or to consult with any Bidder in order to receive clarification or further information;
  - (d) retain any information and/ or evidence submitted to the Government by, on behalf of, and/ or in relation to any Bidder; 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 Bidder.
- 6.3 It shall be deemed that by submitting the Bid, the Bidder agrees and releases the Government, 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 law, any and all rights and/ or claims it may have in this respect, whether actual or contingent, whether present or in future.



## **Appendices**

APPENDIX-I

**Letter Comprising the Bid (Technical Proposal)**

(Refer Clause 2.13.2)

Dated:

To,

**Horticulture Department, Government of Andhra Pradesh,  
TTPC Building, 1<sup>st</sup> Floor,  
Old Market Yard,  
Chuttugunta (Beside Mini Rythu Bazar), A.P., Guntur - 522004**

**Subject: BID for Development, Operation, and Transfer of Development, Operation and Maintenance of the Terminal Market Yard located at Peapully, Nandyal on PPP mode**

**Dear Sir,**

With reference to your RFP document dated ....., I/we, having examined the Bidding Documents and understood its contents, hereby submit my/our Bid for the aforesaid project. The Bid is unconditional and unqualified.

2. I/ We acknowledge that the Government will be relying on the information provided in the Bid and the documents accompanying Bid for qualification/ short-listing of the Bidders and 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 qualifying as a Bidder and selection as Concessionaire for the construction of Project Facilities, minor and major maintenance works, operation and maintenance of the aforesaid Project.
4. I/ We shall make available to the Government any additional information it may find necessary or require to supplement or authenticate the Bid and Qualification Information.
5. I/ We acknowledge the right of the Government 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 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:
  - (a) I/ We have examined and have no reservations to the RFP document, including any Addendum issued by the Government; and
  - (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 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 Government 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 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; and
  - (e) the undertakings given by us along with the Bid for the Project are 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 for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.19.6 of the RFP 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 RFP document and is /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 submitting 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/ any Member of the Consortium or against our/ their Associates or against our CEO or any of our directors/ managers/ employees.

14. I/ We acknowledge and undertake that our Consortium on the basis of Technical Capacity and Financial Capacity of those of its members on whose strength Consortium would be qualified/short-listed shall hold (i) Not less than 26% (twenty six per cent) of the subscribed and paid up equity of the SPV shall be held by one member and not less than 51% (fifty one per cent) of the subscribed and paid up equity of the SPV shall be held by the Lead Member; and (ii) not less than 5% (five per cent) of the Total Project Cost specified in the OMDA throughout the Concession Period. We further agree and acknowledge that the aforesaid obligation shall be in addition to the obligations contained in the OMDA in respect of Change in Ownership.
15. I/ We acknowledge that in the event of change in control of an Associate whose Technical Capacity and/or Financial Capacity was taken into consideration for purpose of short-listing and pre-qualification under and in accordance with the RFP, I/We shall inform the Government forthwith along with all relevant particulars and the Government 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 OMDA, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed a breach thereof, and the OMDA shall be liable to be terminated without the Government being liable to us in any manner whatsoever.
16. The Statement of Legal Capacity as per format provided at Annex-V in Appendix-I of the RFP document, and duly signed, is enclosed. The power of attorney for signing of bid and the power of attorney for Lead Member of consortium, as per format provided at Appendices II and III respectively of the RFP, are also enclosed.
17. 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 OMDA.
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 Government in connection with the qualification/short-listing of Bidders, 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. In the event of my/ our being declared as the Selected Bidder, I/ we agree to enter into a OMDA 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 highway and traffic. We understand that except to the extent as expressly set forth in the OMDA, we shall have no claim, right or title arising out of any documents or information provided to us by the Government or in respect of any matter arising out of or relating to the Bidding Process including the award of Concession.
22. I/ We certify that in terms of the RFP, my/our Networth is Rs. ....

(Rupees.....) (in words), Rs ..... (Rupees ..... ) (in words)  
and Rs .....(Rupees ..... ) respectively for the years ..... ,  
.....and .....

23. We agree and undertake to be jointly and severally liable for all the obligations of the Concessionaire under the OMDA till occurrence of the termination in accordance with the OMDA or completion of the Concession Period, as the case may be. {Applicable in case of Consortium}
24. I/ We have offered a Bid Security of Rs. \_\_\_\_ lakh (Rupees \_\_\_\_ lakh) to the Government in accordance with the RFP Document.
25. I/ We shall keep this offer valid for 120 (one hundred and twenty) days from the Bid Due Date specified in the RFP.
26. 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.
27. The Concession Fee has been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft OMDA, our own estimates of costs and traffic and after careful assessment of the site and all the conditions that may affect the project cost and implementation of the project.
28. I/ We agree and undertake to abide by all the terms and conditions of the RFP document.

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 the Bidder/ Lead Member

**Annex-I**

***Details of Bidder***

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. Details of individual(s) who will serve as the point of contact/ communication for the Government:
  - (a) Name:
  - (b) Designation:
  - (c) Company:
  - (d) Address:
  - (e) Telephone Number:
  - (f) E-Mail Address:
  - (g) Fax Number:
4. Particulars of the Authorized Signatory of the Bidder:
  - (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 Bid.

- (c) Information regarding the role of each Member should be provided as per table below:

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.			

- \* The role of each Member, as may be determined by the Bidder, 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 Bidder/ member of Consortium:**

No.	Criteria	Yes	No
1.	Has the Bidder / 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 Bid?		
3.	Has the Bidder / constituent of the Consortium paid liquidated damages of more than 5% (five per cent) 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 Bidder 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):

**ANNEX-II**

**Technical Capacity of the Bidder<sup>@</sup>**

(Refer to Clauses 2.2.2(A), 3.2 and 3.3 of the RFP)

Bidder type <sup>#</sup>	Member Code*	Project Code**	Category <sup>§</sup>	Experience* (Equivalent Rs. crore) <sup>§§</sup>			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 Bidder		A					
		B					
		C					
		D					
Consortium Member 1		1a					
		1b					
		1c					
		1d					
Consortium Member 2		2a					
		2b					
		2c					
		2d					
Aggregate Experience Score =							

<sup>@</sup> Provide details of only those projects that have been undertaken by the Bidder 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 Bid Due Date falls within 3 (three) months of the close of the latest financial year, refer to Clause 2.2.12.

<sup>#</sup> A Bidder consisting of a single entity should fill in details as per the row titled Single entity Bidder and ignore the rows titled Consortium Member. In case of a Consortium, the row titled Single Entity Bidder may be ignored. In case credit is claimed for an Associate, necessary evidence to establish the relationship of the Bidder 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 Bidder. For other Members, the following abbreviations are suggested viz. LM means Lead Member, TM means Technical Member, FM means Financial Member, OM means Operation & Maintenance 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 75 (seventy five) 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 Bid 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 Bidder**

(Refer to Clauses 2.2.2(B), 2.2.4 (ii) and 3.4 of the RFP)

(In Rs. crore<sup>\$\$</sup>)

Bidder type <sup>\$</sup> (1)	Member Code <sup>#</sup> (2)	Net Worth				
		Year 1 (3)	Year 2 (4)	Year 3 (5)	Year 4 (6)	Year 5 (7)
Single entity Bidder						
Consortium Member 1						
Consortium Member 2						
TOTAL						

€

**Name & address of Bidder's Bankers:**

<sup>\$</sup> A Bidder consisting of a single entity should fill in details as per the row titled Single entity Bidder and ignore the rows titled Consortium Members. In case of a Consortium, row titled Single entity Bidder may be ignored.

<sup>#</sup> For Member Code, see instruction 4 at Annex-IV of this Appendix-I.

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

<sup>\$\$</sup> For conversion of other currencies into rupees, see note below Annex-II of Appendix-I.

**Instructions:**

1. The Bidder / its constituent Consortium Members shall attach copies of the balance sheets, financial statements and Annual Reports for 5 (five) years preceding the Bid Due Date. The financial statements shall:
  - (a) reflect the financial situation of the Bidder or Consortium Members and its/ Associates where the Bidder 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 Bid 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 RFP document.
- 6. The Bidder shall also provide the name and address of the Bankers to the Bidder.
- 7. The Bidder shall provide an Auditor's Certificate specifying the net worth of the Bidder and also specifying the methodology adopted for calculating such net worth in accordance with Clause 2.2.4 (ii) of the RFP document.

**Annex-IV*****Details of Eligible Projects***

(Refer to Clauses 2.2.2(A), 3.2 and 3.3 of the RFP)

**Project Code:****Member Code:**

<b>Item</b>  (1)	<b>Refer Instruction</b>  (2)	<b>Particulars of the Project</b>  (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)	15	

**Instructions:**

1. Bidders 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 RFP, as the case may be. Information provided in this section is intended to serve as a back up for information provided in the Bid. Bidders should also refer to the Instructions below.
2. For a single entity Bidder, the Project Codes would be a, b, c, d etc. In case the Bidder is a Consortium then for Member 1, the Project Codes would be 1a, 1b, 1c etc. and for Member 2 the Project Codes shall be 2a, 2b, 2c, etc..

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 Bidder. For other Members, the following abbreviations are suggested viz. LM means Lead Member, TM means Technical Member, FM means Financial Member. In case the Eligible Project relates to an Associate of the Bidder or its Member, write "Associate" along with Member Code.
5. Refer to Clause 3.2.1 of the RFP 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 Bid 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). 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 3.2.4. 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/ Government/ 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 Eligible Project. Refer to Clauses 3.2.3 and 3.2.4.
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 Bidder, 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).
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 counting by a consortium in respect of the same experience shall be permitted in any manner whatsoever.
12. Certificate from the Bidder's statutory auditor<sup>s</sup> 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 Bidder / Member/ Associate may provide the requisite certification.
13. If the Bidder is claiming experience under Category 1 & 2, it should provide a certificate from its statutory auditor in the format below:

---

**Certificate from the Statutory Auditor regarding PPP projects<sup>Φ</sup>**

Based on its books of accounts and other published information authenticated by it, this is to certify that ..... (name of the Bidder /Member/Associate) is/ was an equity shareholder in ..... (title of the project company) and holds/ held Rs. .... cr. (Rupees ..... crore) of equity (which constitutes .....%<sup>Ε</sup> of the total paid up and subscribed equity capital) of the project company from ..... (date) to..... (date)<sup>Ψ</sup>. The project was/is likely to be commissioned on ..... (date of commissioning of the project).

We further certify that the total estimated capital cost of the project is Rs. .... cr. (Rupees..... crore), of which Rs. .... cr. (Rupees ..... crore) of capital expenditure was incurred during the past five financial years as per year-wise details noted below:

.....  
.....

We also certify that the eligible annual revenues collected and appropriated by the aforesaid project company in terms of Clauses 3.2.1 and 3.2.3 (d) of the RFP during the past five financial years were Rs. .... cr. (Rupees..... crore) as per year-wise details noted below:

.....  
.....

Name of the audit firm:

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

Date

<sup>§</sup> In case duly certified annual financial statements containing the requisite details are provided, a separate certification by statutory auditors would not be necessary.

14. If the Bidder is claiming experience under Category 3 & 4<sup>★</sup>, 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<sup>Φ</sup>**

Based on its books of accounts and other published information authenticated by it, {this is to certify that ..... (name of the Biddert/Member/Associate) was engaged by ..... (title of the project company) to execute ..... (name of project) for ..... (nature of project)}<sup>Ψ</sup>. 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 Bidder/ 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. (Rupees .....crore), of which the Bidder/Member/Associate received/paid Rs. .... cr. (Rupees ..... crore), in terms of Clauses 3.2.1 and 3.2.4 of the RFP, during the past five financial years as per yearwise details noted below:

.....  
.....

<sup>Φ</sup> 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.

<sup>Ε</sup> Refer instruction no. 10 in this Annex-IV

<sup>Ψ</sup> In case the project is owned by the Bidder company, this language may be suitably modified to read: "It is certified that .....(name of Bidder) constructed and / or owned the .....(name of project) from .....(date) to ..... (date)."

*{It is further certified that the payments/ receipts indicated above are restricted to the share of the Bidder 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.

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

**Certificate from Statutory Auditor/ Company Secretary regarding Associate<sup>§</sup>**

Based on the authenticated record of the company, this is to certify that more than 50% (fifty per cent) of the subscribed and paid up voting equity of ..... (name of Associate) is held, directly or indirectly<sup>£</sup>, by ..... (name of Bidder/ Consortium Member). By virtue of the aforesaid share-holding, the latter exercises control over the former, who is an Associate in terms of Clause 2.2.9 of the RFP.

A brief description of the said equity held, directly or indirectly, is given below:

{Describe the share-holding of the Bidder /Consortium Member and the Associate. In the event the Associate is under common control with the Bidder/ Consortium Member, the relationship may be suitably described and similarly certified herein.}

-----

Name of the audit firm:

Seal of the audit firm:

(Signature, name and designation of the authorised signatory).

Date:

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 technical evaluation<sup>Θ</sup>.

<sup>§</sup> In the event that the Bidder/ consortium Member exercise 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.

<sup>£</sup> 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% (fifty per cent) in order to establish that the chain of "control" is not broken.

<sup>Θ</sup> Refer Clause 3.2.6 of the RFP.

**ANNEX-V**

***Statement of Legal Capacity***

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

Ref.

Date:

To,

**Horticulture Department, Government of Andhra Pradesh,  
TTPC Building, 1<sup>st</sup> Floor,  
Old Market Yard,  
Chuttugunta (Beside Mini Rythu Bazar), A.P., Guntur - 522004**

Dear Sir,

We hereby confirm that we/ our members in the Consortium (constitution of which has been described in the bid) satisfy the terms and conditions laid out in the RFP 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 RFP. Further, the authorized 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 Bid

(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 Bid for the **"Development, Operation and Maintenance of the Terminal Market Yard located at Peapully, Nandyal on PPP mode"** (the "Project") proposed to be operated and maintained by the Department of Horticulture, Government of Andhra Pradesh (the "Government") including but not limited to signing and submission of bids and other documents and writings, participate in Pre-Bid and other conferences and providing information/ responses to the Government, representing us in all matters before the Government, signing and execution of all contracts including the OMDA and undertakings consequent to acceptance of our bid, and generally dealing with the Government 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 OMDA with the Government.

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.

(Notarized)

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 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 Apostille certificate.

### APPENDIX-III

#### Power of Attorney for Lead Member of Consortium

(Refer Clause 2.2.5)

Whereas the Department of Horticulture, Government of Andhra ("the Government") has invited Bids from interested parties for the "**Development, Operation and Maintenance of the Terminal Market Yard located at Peapully, Nandyal on PPP mode**" (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 document (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 at ....., and M/s ..... having our registered office at ....., (hereinafter collectively referred to as the "Principals") do hereby irrevocably designate, nominate, constitute, appoint and authorize 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"). 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 qualification/short-listing of the Consortium and evaluation of its bid for the Project, including but not limited to signing and submission of all 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 to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Government, 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 OMDA is entered into with the Government.

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)

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 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**  
**Joint Bidding Agreement**

(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)

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

**WHEREAS**

- (A) The Department of Horticulture, Government of Punjab and having its principal offices at \_\_\_\_\_ hereinafter referred to as the “**Government**” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) has invited Bids (the “**Bids**”) by its Request for Proposal No. .... dated..... (the “**RFP**”) selection of Bidder for ***Development, Operation and Maintenance of the Terminal Market Yard located at Peapully, Nandyal on PPP mode*** (the “**Project**”).
- (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 RFP document and other bid documents in respect of the Project, and
- (C) It is a necessary condition under the RFP document that the members of the Consortium shall enter into a Joint Bidding Agreement and furnish a copy thereof with the Bid.

**NOW IT IS HEREBY AGREED as follows:**

**1. Definitions and Interpretations**

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

## **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, 1956 for entering into a OMDA with the Government and for performing all its obligations as the Concessionaire in terms of the OMDA 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 OMDA when all the obligations of the SPV shall become effective;
- (b) Party of the Second Part shall be {the Technical/ Financial 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 RFP and the OMDA, till the completion of the Concession Period or termination, as the case may be, under and in accordance with the OMDA.

## **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:

- 6.2 The Parties undertake that the Lead Member shall hold minimum 51% (fifty one per cent) of the subscribed and paid up equity share capital of the SPV and the other member shall hold 26% (twenty six per cent) of the subscribed and paid up equity share capital of the SPV, at all times, whose experience and networth have been reckoned for the purposes of qualification /short-listing of Bidders for the Project in terms of the RFP.

- 6.3 The Parties undertake that each of the Parties specified in Clause 6.2 above shall, at all times during the Concession Period 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 75% (seventy five per cent) of the subscribed and paid up equity share capital of the SPV at all times during the Concession Period.
- 6.5 The Parties undertake that they shall comply with all equity lock-in requirements set forth in the OMDA.
- 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 SPV in terms of OMDA.

## **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 organized, 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 authorized 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 organizational documents thereof;
  - (iv) violate any clearance, permit, concession, grant, license or other governmental authorization, approval, judgement, order or decree or any mortgage agreement, indenture or any other instrument to which such Party is a party or by which such 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 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 Affiliates 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 Termination/ successful completion of the Project is achieved under and in accordance with the OMDA, in case the Project is awarded to the Consortium. However, in case the Consortium is either not qualified/short-listed for the Project or does not get selected for award of the Project, the Agreement will stand terminated in case the Bidder is not qualified or upon return of the Bid Security by the Government 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 Government.

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

SIGNED, SEALED AND DELIVERED  
on behalf of  
LEAD MEMBER by:

SIGNED, SEALED AND DELIVERED For and  
For and on behalf of  
SECOND PART by:

(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-V**

### **Letter comprising the Financial Proposal**

(Refer Clauses 2.1.5 and 2.14)

Dated:

To

**Horticulture Department, Government of Andhra Pradesh,  
TTPC Building, 1<sup>st</sup> Floor,  
Old Market Yard,  
Chuttugunta (Beside Mini Rythu Bazar), A.P., Guntur - 522004**

**Subject: Financial Proposal - Bid for the Development, Operation and Maintenance of  
the Terminal Market Yard located at Peapully, Nandyal on PPP mode**

**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 Government 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 construction of Project Facilities, minor and major maintenance works, operation and maintenance of the aforesaid Project.
4. I/ We shall make available to the Government any additional information it may find necessary or require to supplement or authenticate the Bid.
5. I/ We acknowledge the right of the Government 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 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:

- (a) I/ We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Government; and
  - (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 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 Government 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 Technical Proposal in response to the RFP for the Project are true and correct as on the date of making the Bid 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 2.8 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 RFP 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 acknowledge and undertake that our Consortium on the basis of Technical Capacity and Financial Capacity of those of its members on whose strength Consortium

would be qualified/short-listed shall 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 OMDA throughout the Concession Period. We further agree and acknowledge that the aforesaid obligation shall be in addition to the obligations contained in the OMDA in respect of Change in Ownership.

15. 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 pre-qualification under and in accordance with the RFP, I/We shall inform the Government forthwith along with all relevant particulars and the Government 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 OMDA, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed a breach thereof, and the OMDA shall be liable to be terminated without the Government being liable to us in any manner whatsoever.
16. 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 OMDA.
17. 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 Government 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.
18. In the event of my/ our being declared as the Selected Bidder, I/we agree to enter into a OMDA 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.
19. I/ We have studied all the Bidding Documents carefully and also surveyed the project highway and the traffic. We understand that except to the extent as expressly set forth in the OMDA, we shall have no claim, right or title arising out of any documents or information provided to us by the Government or in respect of any matter arising out of or relating to the Bidding Process including the award of Concession.
20. 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.
21. I/We hereby confirm that we are in compliance of/ shall comply with the O&M requirements specified in Clause 2.2.3.
22. The Concession Fee has been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft OMDA, our own estimates of costs and traffic and after a careful assessment of the site and all the conditions that may affect the project cost and implementation of the project.

23. I/ We agree and undertake to abide by all the terms and conditions of the RFP document.
24. We, the Consortium Members agree and undertake to be jointly and severally liable for all the obligations of the Concessionaire under the OMDA till termination/ successful completion of the Project in accordance with the OMDA.
25. I/ We shall keep this offer valid for 120 (one hundred and twenty) days from the Bid Due Date specified in the RFP.
26. I/ We hereby submit our Bid and offer the first year Concession Fee as Rs \_\_\_\_\_ (Rupees \_\_\_\_\_) and payable in accordance with Clause 21.1.2 of the OMDA for undertaking the aforesaid Project in accordance with the Bidding Documents and the OMDA.

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



# **Draft Operation Management & Development Agreement (OMDA)**



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**Part I**  
**Preliminary**



## **DRAFT OPERATION MANAGEMENT & DEVELOPMENT AGREEMENT (OMDA)**

**THIS AGREEMENT** is entered into, on this the \_\_\_\_\_ day of \_\_\_\_\_, 2023 at \_\_\_\_\_.

### **BETWEEN**

**The Department of Horticulture, Government of Andhra Pradesh** represented by the \_\_\_\_\_ and having its principal office at \_\_\_\_\_ (hereinafter referred to as the **“Government”** which expression shall, unless the context otherwise requires, include its administrators, successors and assigns) of **ONE PART**;

### **AND**

**M/s \_\_\_\_\_**, a company incorporated under the provisions of the Companies Act, 2013, represented by \_\_\_\_\_ and having its registered office at \_\_\_\_\_ (hereinafter referred to as the **“Concessionaire”** which expression shall, unless the context otherwise requires) of the **SECOND PART**.

### **AND**

**M/s \_\_\_\_\_**, a company incorporated under provisions of the Companies Act, 1956/ 2013, represented by \_\_\_\_\_ and having its registered office at \_\_\_\_\_ in its capacity as **Confirming Party** to the Agreement (hereinafter referred to as the **“Selected Bidder”** which expression shall, unless the context otherwise requires) of the **THIRD PART**.

### **WHEREAS**

- A. The Government has decided to undertake the Development, Operation and Maintenance of the Terminal Market Yard located at Peapully, Nandyal on Public Private Partnership (PPP) format (hereinafter referred to as the **“Project”**) *(The details w.r.t the built-up area and facilities to be made part of the Terminal Market Yard has been laid down in Schedule – B of the Operation Management & Development Agreement (OMDA)).*
- B. The Government is in the prime ownership and possession of the aforesaid Terminal Market Yard at Peapully, Nandyal, which shall be given on license by the Government to the Concessionaire.
- C. With an objective to seek private sector participation in the aforesaid Project, the Government, through \_\_\_\_\_, undertook the process of selection of a suitable Concessionaire through competitive bidding process, after issuing a Request for Proposal document (RFP) dated \_\_\_\_\_ 2023 inviting Bids from prospective Bidders to implement the said Project.
- D. After evaluation of the Bids received, the Government had accepted the Bid of the .....{Selected bidder i.e. Single Bidder or Consortium (whichever is applicable)} and issued its Letter of Award No. ....dated..... (hereinafter called the **"LoA"**) to the {selected bidder i.e. Single Bidder or Consortium (whichever is applicable)} requiring, *inter alia*, the execution of this Operation Management & Development Agreement (OMDA) within 60 (sixty) days of award of LoA.
- E. The Selected Bidder (i.e. Single Bidder/ Consortium) has requested the Government to accept the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the Selected Bidder under the LOA, including the obligation to enter into this Operation Management & Development Agreement (OMDA) pursuant to the LOA for executing the Project.
- F. \_\_\_\_\_[Single Entity/ Consortium (whichever is applicable)] has promoted the Concessionaire (“Special Purpose Vehicle” or “SPV”) in accordance with the terms of RFP document and has requested the Government through a letter bearing number \_\_\_\_ dated \_\_\_\_ to accept

the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the Selected Bidder under the Letter of Award, including the obligation to enter into this Agreement pursuant to the Letter of Award for implementing the Project.

G. By its letter dated ....., the Concessionaire has also joined in the said request of the Selected Bidder to the Government to accept it as the entity which shall undertake and perform the obligations and exercise the rights of the Selected Bidder including the obligation to enter into this Operation Management & Development Agreement (OMDA) pursuant to the LOA. The Concessionaire has further represented to the effect that it has been promoted by the Selected Bidder for the purposes hereof.

H. The Selected Bidder has, in compliance with the terms of the LoA and as per the RFP document, made the following payments on behalf of the Concessionaire to the Government an irrevocable, unconditional, bank guarantee, in the name of the Government, issued by

\_\_\_\_\_,  
\_\_\_\_\_, [name & address of the issuing bank] for an amount equal to Rs. \_\_\_\_\_/- (Rupees \_\_\_\_\_ only), as a guarantee for the performance of its obligation under this Operation Management & Development Agreement (OMDA) by the Concessionaire in relation to the Project (herein the 'Performance Security').

I. In response to the Selected Bidder / Concessionaire complying with the terms of the LoA, the Government has agreed to the said request of the Concessionaire, and has accordingly agreed to enter into this Operation Management & Development Agreement (OMDA) with the Concessionaire for execution of the Project 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 Operation Management & Development Agreement (OMDA), the receipt and sufficiency of which is

hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

## **1 ARTICLE 1: DEFINITIONS AND INTERPRETATIONS**

### **1.1 Definitions**

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 41) 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) Any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such for modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- b) Reference to laws of Government of Andhra Pradesh, laws of India or Indian Laws or regulation having force of law shall include the laws, acts, ordinances, rules, regulations, guidelines or byelaws which have the force of law in State of Andhra Pradesh;
- 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 and sub-headings are for convenience and 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" or "refurbishment" include, unless the context otherwise requires, construction, renovation, 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) Words importing Person or Parties shall include firms and corporations and any organisation having legal capacity to sue and be sued in its name;
- j) Words importing the singular shall include the plural and vice-versa where the Concession requires;
- k) References to a "business day" shall be construed as a reference to a day (other than a Sunday) on which banks in Nandyal are generally open for business;
- l) Any reference to day shall mean a reference to a calendar day;
- m) Any reference to month shall mean a reference to a calendar month as per Gregorian Calendar;
- n) References to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- o) The Schedules of 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;

- p) Any reference at any time to any agreement, deed, instrument or document of any description shall be construed as reference to that agreement, deed, instrument or other document as amended, varied, supplemented, modified or suspended at the time of such reference;
- q) References to recitals, Articles, sub-articles or Schedules in this Agreement shall, except where the context otherwise requires, be deemed to be references to recitals, Articles, sub-articles and Schedules of or to this Agreement;
- r) References to the "winding-up", "dissolution", "insolvency", or "reorganization" of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- s) Any Agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effective only if it is in writing under the hands of duly authorised representative of such party, as the case may be, in this behalf and not otherwise;
- t) 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 next business day.
- u) The damages payable by either Party to the other 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.
- v) 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 Government and/ or the Expert shall be provided free of cost and in three copies, and if the Government and/or the Expert is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.
- 1.2.3 The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply.
- 1.2.4 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act 1897 shall not apply.

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

All measurements and calculations shall be in metric system and calculations done in 2 decimals places, with the third digit of 5 or above rounded up and below 5 rounded down except in Fee calculation which shall be rounded off to nearest Indian Rupee Hundred (100).

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

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

### **1.5 Priority of Documents**

The documents forming this Operation Management & Development Agreement (OMDA) are to be taken as mutually explanatory of one another. If there is an ambiguity or discrepancy in the documents, the Government shall issue any necessary clarification or instruction to the Concessionaire, and the priority of the documents shall be as follows:

- a) This signed Operation Management & Development Agreement (OMDA) (including its Schedules), along-with any Addendums issued to the RFP document dated \_\_\_\_\_;
- b) Instructions to Bidders (ITB) (Section I of the RFP document dated \_\_\_\_\_), enclosed/ attached with this signed Operation Management & Development Agreement (OMDA); and
- c) All other documents enclosed / attached with this signed Operation Management & Development Agreement (OMDA).



## **Part II**

### **The Concession**

## 2 ARTICLE 2: SCOPE OF THE PROJECT

The Department of Horticulture, Government of Andhra Pradesh intends to develop the Terminal Market Yard, for which the Concessionaire shall be required to do the following during the Concession Period:

**2.1. To develop the following facilities within the Terminal Market Yard, during the Construction Period:**

- a) Wholesale Shops – 36 nos. (59,546 sq ft)
- b) Retail Shops – 48 nos. (16,103 sq ft)
- c) Retail Shops (with Cafeteria) – 18 nos. (8,051 sq ft)
- d) Semi Retail Shops – 20 nos. (12,120)
- e) Cold Chamber & Processing Block (26,748 sq ft)
- f) Non-Core Infrastructure (15,532 sq ft) consisting following components:
  - i. Bank & Post Office Block (1,960 sq ft)
  - ii. Admin Block (6,728 sq ft)
  - iii. Auction Hall (2,830 sq ft)
  - iv. Rest Shed (2,970 sq ft)
  - v. Toilet Block (528 sq ft)
  - vi. Security Room and Weigh Bridge Office (260 sq ft)
  - vii. Electrical Room (260 sq ft)
- g) Basic Enabling Infrastructure

***NOTE: The construction of Cold Storage shall be as per Technical Standards detailed out by National Horticulture Mission (NHM). Similarly, construction of Ripening Chamber shall be as per Technical Standards Number NHB-CS-Type 04-2011.***

2.2. Pursuant to the completion of all the above stated mandatory developments, operation and maintenance of the Terminal Market Yard, for the entire Concession Period;

2.3. Generate Revenues from the Terminal Market Yard, as per the prevalent market rates;

2.4. Make timely payments, as provided in the Operation Management & Development Agreement (OMDA), to the Government during the

subsistence of the Operation Management & Development Agreement (OMDA);

2.5. Performance and fulfilment of all other obligations of the Concessionaire in accordance with the Operation Management & Development Agreement (OMDA) and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Concessionaire Agreement.

2.6. Transfer the Terminal Market Yard, at zero cost, on successful completion of the Project/ Concession Period or on early termination of the Operation Management & Development Agreement (OMDA), whichever is applicable.

*It is clarified herewith that pertaining to the above-stated “Scope of Project”, the Concessionaire shall be required to perform all the activities as detailed out in the RFP document / Operation Management & Development Agreement (OMDA)/ Schedules hereof.*

### **3 ARTICLE 3: CONCESSION**

#### **3.1 The Concession**

3.1.1 Subject to and in accordance with the terms and conditions set forth in this Operation Management & Development Agreement (OMDA), the Government hereby grants to the Concessionaire and the Concessionaire hereby accepts the Concession for a period of 30 (thirty) years, commencing from the Appointed Date, including the exclusive right, license, authority and authorization during the subsistence of this Agreement, including extension thereof, to develop, operate, maintain, and manage the Project for the Concession Period.

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) To develop, operate and maintain the Project as per the Scope of Work of the Project more specifically mentioned in the Schedule A of this Operation Management & Development Agreement (OMDA).
- b) To enjoy complete and uninterrupted access and license to run the Market for a period that shall be co-terminus with the Operation Management & Development Agreement (OMDA).
- c) To have access and liberty to finance, operate and maintain the proposed Market with the associated facilities and services during the Concession Period in accordance with the provisions of this Operation Management & Development Agreement (OMDA) & Schedules thereof. Any refurbishment made by the Concessionaire on the specified Market immovable property in respect of the Project shall be deemed to be the property of the Government and the Concessionaire relinquishes all his rights in such property in favor of Government.
- d) Exclusive right and authority, during the Concession Period, to carry out the specified activities in relation to the Project.

- e) License the use of the Project to demand, collect, enforce Commercial Charges and to periodically revise the same as per prevailing market rates in conformity with the conditions mentioned in the RFP. Within the limitations of statutory provisions and decency of operations, the Concessionaire shall make all the efforts to maximize the market efficiency and share to the farmers and to keep the Government informed of actions taken and results thereof.
- f) Manage, operate and execute rights over all or any part of the Assets without any limitation or restriction other than those expressly set out in this Operation Management & Development Agreement (OMDA).
- g) Obtain all clearances required for running of a market with assistance from Government.
- h) Exercise such other rights as the Government may determine as being necessary or desirable for the purposes incidental and necessary for financing, managing, operating, running & maintaining the Project.
- i) Bear and pay all expenses, costs and charges incurred in the fulfillment of all the Concessionaire's obligations under this Agreement.

Nothing contained herein, including the act of granting permission to upgrade the Project at the designated area shall vest or create any proprietary interest in the Project or any part thereof including any permanent fixtures, fittings etc. installed in the structure of the Project in favour of the Concessionaire or any person claiming through or under the Concessionaire. The Concessionaire shall not in any manner sell, transfer, assign, mortgage, charge, create lien or otherwise encumber or deal with the Project in any manner. The Concessionaire acknowledges, accepts and confirms that the covenant contained herein is an essence of this Agreement.

### **3.2 Concession Period**

3.2.1 The Concession Period for “the Project” shall commence from the Appointed Date and shall extend for a period of 30 (thirty) years from such date (the “Concession Period”) and during which the Concessionaire is authorized to design, engineer, finance, procure and construct the facilities in the Project and to operate and maintain the complete Project in accordance with the provisions hereof. For the avoidance of doubt, the Concession Period shall include the Construction Period. In the event of early Termination, the period of Agreement shall be limited to the period commencing from the Appointed Date and ending with the Termination Date.

3.2.2 It is hereby made clear that:

- a) In the event of the Concession Period being extended by Government beyond the said period, in accordance with the provisions of this Operation Management & Development Agreement (OMDA), the Concession Period shall include the period / aggregate period by which the Concession is so extended, and
- b) In the event of Termination, the Concession Period shall mean and be limited to the period commencing from the Appointed Date and ending with the Termination.

3.2.3 At the end of the Concession Period or sooner termination of this Operation Management & Development Agreement (OMDA) for any reason whatsoever, all rights given under this Operation Management & Development Agreement (OMDA) shall cease to have effect and the Terminal Market in good and operational condition, shall transfer to the Government without any obligation of Government to pay or adjust any consideration or other payment to the Concessionaire. For more details please refer Article 29 of this Operation Management & Development Agreement (OMDA).

## 4 ARTICLE 4: CONDITIONS PRECEDENT

Save and except as expressly provided in Articles 4, 5, 6, 7, 8, 9, 10, 23, 33 and 35, 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 Conditions Precedent for Government

The Concessionaire may, at any time after 120 (one hundred and twenty) days from the date of Agreement or on an earlier day acceptable to the Government, require the Government to satisfy any or all of the Conditions Precedent set forth in this Clause, and the Conditions Precedent required to be satisfied by the Government shall be deemed to have been fulfilled when the Government shall:

- a) Handed over to the Concessionaire the Right of Way of the Project Site, through License Rights (the exact area details laid down in Schedule – B) along with all easement related rights and free from encumbrances. *However, it is to be noted that the Project Site shall be handed over to the Concessionaire, at the last, when both the Parties have complied with the Conditions Precedent;*
- b) Issue government orders or gazette notifications as necessary for implementing the Project, if required.
- c) Study, modify for changes if any and accordingly approve the Project Development Plan for the Terminal Market Yard within 30 (thirty) days of its submission.
- d) Assist in necessary approvals to the Concessionaire for the smooth running of the Terminal Market.

### 4.2 Conditions Precedent for Concessionaire

The Conditions Precedent required to be satisfied by the Concessionaire within a period of 120 (one hundred and twenty) days from the date of this Agreement shall be deemed to have been fulfilled when the Concessionaire shall have:

- a) Submit the Project Development Plan including the area statement of the Terminal Market Yard to the Government, within a period of not more than 45 (forty five) days from the Date of Agreement.
- b) Submit 3 (three) hard copies and 1 (one) soft copy of the Project Development Plan to the Government for approval;
- c) Incorporate the comments / observations (if any) on the Project Development Plan of the Project, as proposed by Government and re-submit for approval, within 15 (fifteen) days from the date of receipt of comments / observations. However, it is clarified here that the Concessionaire shall not start the Construction until and unless the Government approves the Project Development Plan of the Terminal Market Yard again after carrying out necessary comments / observations (if any);
- d) Procure the regulatory approvals required for Construction and Operation of the facilities in the Market.
- e) Provide an undertaking that all of the Representations and Warranties of the Concessionaire set forth in Article 7 are true and correct as on date of this Agreement and as on the Appointed Date and thereafter;
- f) Provide the Government copies (certified as true copies by an authorized officer of the Concessionaire) of its constitutional documents;
- g) Provide the Government copies (certified as true by the Director of the Concessionaire) of all resolutions adopted by the Board of Directors of the Concessionaire authorizing the execution, delivery and performance of this Agreement by the Concessionaire;
- h) Receive from the Indian Legal Counsel of the Concessionaire a legal opinion with respect to the authority of the Concessionaire to enter into this Agreement and the Project Agreements and the Financing Documents and the enforceability of the provisions thereof;

Provided that upon request in writing by the Concessionaire, Government, may, at its sole discretion and in writing, waive fully or partially any or all the Conditions Precedent set forth in this Article 4.2.



### **4.3 Obligations to satisfy Condition Precedents**

- a) Each Party hereto shall use all reasonable endeavors at its cost and expense to procure the satisfaction in full of its respective Conditions Precedent set out above within 120 (One Hundred and Twenty) days from Date of this Agreement.
- b) Upon satisfaction in full of all Conditions Precedent for a Party, the other Party shall forthwith issue to such Party a Certificate of Compliance with Conditions Precedent (the “Certificate of Compliance”).
- c) The later of the date of issue of Certificate of Compliance to the Concessionaire or the Government shall be the Appointed Date, whereupon the obligations of the Parties under this Operation Management & Development Agreement (OMDA) shall commence and whereon the Government shall issue the Certificate of Compliance to the Concessionaire. However, it is being clarified here that any work of whatever nature, which the Concessionaire elects to carry out prior to the Date of Agreement including investigations, surveys etc. shall be entirely at the risk and cost of the Concessionaire. Also, the Concessionaire shall not be permitted to commence the work at any part of the Terminal Market Yard prior to the issuance of Certificate of Compliance.
- d) Each Party shall bear its respective costs and expenses of satisfying such Condition Precedents unless otherwise expressly provided.

### **4.4 Damages for the Delay by Government**

In the event that (i) the Government does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1 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 Government shall pay to the Concessionaire, Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum of 20% (twenty per cent) of the Performance Security.

#### **4.5 Damages for delay by the Concessionaire**

In the event that (i) the Concessionaire does not fulfill any or all of the Conditions Precedent set forth in Clause 4.2 within a period of 90 (ninety) days from the Proposal Acceptance Date, and (ii) the delay has not occurred as a result of failure to fulfill the obligations under any breach of this Agreement by the Government, or due to Force Majeure, the Concessionaire shall pay to the Government, Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum of 20% (twenty per cent) of the Performance Security.

#### **4.6 Non-fulfillment of Conditions Precedent**

4.6.1 In the event the Conditions Precedent for a Party have not been satisfied within the stipulated time and the Party has not waived, fully or partially, such conditions relating to the other Party, the other Party shall have the right to terminate this Agreement and on Termination of this Agreement in exercise of right under this sub-clause, no Party shall subsequently have any rights or obligations under this Agreement and either Party shall not be liable in any manner whatsoever to the other Party or Persons claiming through or under it.

4.6.2 In the event that the Project Site has been delivered to the Concessionaire prior to the fulfillment in full of the Conditions Precedent, upon the Termination of this Agreement under this Clause 4.6, the Vacant Possession of the Project Site shall immediately revert to the Government, free and clear from any Encumbrances and along with all easementary rights, irrespective of any outstanding mutual claims between the Parties.

- 4.6.3 In the event this Agreement is Terminated due to non-fulfillment of the Concessionaire's Conditions Precedent and the same is not due to Government default, Government shall be entitled to forfeit the Performance Security, as the case may be, provided by the Concessionaire as damages and any payments made by the Concessionaire.
- 4.6.4 In the event this Agreement is terminated due to non-fulfillment of Government's Conditions Precedent and unless the Government's failure to fulfill its Conditions Precedent is not a result of the Concessionaire's default, Government shall upon such Termination, return/refund in full the Performance Security to the Concessionaire; provided there are no outstanding claims of Government on the Concessionaire.
- 4.6.5 Instead of terminating this Agreement as provided in this Clause 4.6, the Parties may by mutual agreement extend the time for fulfilling the Conditions Precedent.

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

### **5.1 General Obligations**

- a) The Concessionaire within the Construction Period as specified in clause 11.3 of the Operation Management & Development Agreement (OMDA), shall observe, undertake, comply with and perform, in addition to and not in derogation of its obligations elsewhere set out in this Operation Management & Development Agreement (OMDA), the following:
- i) Obtain any and all permits, necessary approvals, clearances and sanctions from the Competent Authority (ies), as and when they may be required, for the Concessionaire and its employees to perform their obligations under this Operation Management & Development Agreement (OMDA);
  - ii) Comply and observe at all times with all Applicable Permits, approvals and applicable laws, norms / standards in the performance of its obligations under this Agreement;
  - iii) Start Project operation upon issuance of the Construction Completion Certificate at the end of the Project Construction Period, provided that the Concessionaire shall not be in breach of this Article 5.1(a) if any non-fulfillment or the delay in fulfillment of its obligation are caused by (i) the occurrence of an event of Force Majeure or (ii) a Government Event of Default or any other act or omission of the Government in contravention of its obligations under this Concession;
  - iv) Carry out the works strictly in accordance with the Project Development Plan as approved by the Government, provisions of this Operation Management & Development Agreement (OMDA) and the Schedules of this Operation Management & Development Agreement (OMDA), and all works not mentioned in this Operation Management & Development Agreement (OMDA) but which may be

inferred to be necessary for safe, reliable and efficient Construction and operation of the Project;

- v) Be responsible from the date of issue of “Construction Completion Certificate” for all liabilities arising out of Construction, Operation and Maintenance of the Project. The Concessionaire shall plan, organize and execute the works so that there is least disruption to the movement on adjoining roads and minimal inconvenience to the neighboring residents. The Government and / or shall assist the Concessionaire in all respects with reference to such works, but the assistance or denial thereof shall not release the Concessionaire from its obligations.
- vi) To be responsible for safety, soundness and durability of the Project, including other services forming part thereof and their compliance with the applicable laws.
- vii) To ensure that no structural damage(s) is caused to the Project as a result of Concessionaire’s activities or any of its agents, contractors etc.
- viii) To ensure that all the comments/ suggestions as provided by the Exxpert(s) of the Government are complied with.
- ix) The Concessionaire shall ensure that any / all consumables / materials / equipments and machinery used during the Construction Period are of best quality.
- x) To pay at its own costs all applicable expenses arising out of preparation of project development plan and its Construction.
- xi) To pay at its own cost all applicable existing and future taxes / charges / fees / levies including the services tax, property tax, stamp duty, registration charges and any other legal documentation charges, if any, in respect of the said Project, as leviable.

- xii) To provide all assistance to the Expert / Independent Technical Auditor / Arbitrator as it may require for the performance of their duties and services.
- xiii) To duly supervise, monitor and control the activities of its employees and agents under their respective Project Agreements as may be necessary.
- xiv) To effect and maintain, or cause to be effected and maintained, at its own expense, insurance policies as may be required to be maintained by the Senior Lenders, under Applicable Laws and / or such insurances that are necessary or desirable in accordance with Good Industry Practice.
- xv) To take all reasonable precautions for the prevention of accidents in the Project and provide all reasonable assistance along with emergency medical aid to accident victims (if any).
- xvi) Not to permit any person, claiming through or under the Concessionaire, to create or place any security interest over all or any part of the Project or on any rights of the Concessionaire therein or under this Agreement, save and except as expressly permitted in this Agreement.
- xvii) Shall within the time permitted by the Expert / Government, make good all the defects and ensure that the items or materials complies with the Operation Management & Development Agreement (OMDA).
- xviii) Shall ensure that if any designated equipments, materials or any process covered by letters of “**Patents**” or “**Copyrights**”, the right for such use shall be secured by the Concessionaire by suitable legal arrangements and agreements with the owner of the Patents. A copy of the agreement shall be filed with the Government.

- xix) The Concessionaire shall make its own arrangements for the engagement of all its faculty, staff and labour, local or otherwise, and for their payment, boarding, lodging and transport. The Concessionaire shall be solely responsible for the liability, cost, and responsibility for all the laws relating to labour employed by Concessionaire and for their conditions under this Article. However, it is being clarified here that the Concessionaire shall be under no obligation to recruit any or part of the staff and labour from amongst persons in the service of the Government.
- xx) Shall be solely and primarily responsible to Government for observance of all the provisions of this Operation Management & Development Agreement (OMDA) on behalf of the Concessionaire, its employees and representatives or any person acting under or for and on behalf of the Concessionaire as fully as if they were the acts or defaults of the Concessionaire.
- xxi) Shall be liable for and shall indemnify, protect, defend and hold harmless Government, Government's officers, employees and agents from and against any and all demands, claims, suits and causes of actions and any and all liability, costs, expenses, settlements and judgments arising out of the failure of the Concessionaire to discharge its obligations under this Operation Management & Development Agreement (OMDA) and to comply with the provisions of Applicable Laws and Applicable Permits.
- xxii) The Concessionaire shall acknowledge and recognize that time is of the essence of this Agreement and that the performance of its obligations shall be construed accordingly.
- xxiii) The Concessionaire shall not be authorised to incur any expenditure on behalf of the Government to enter into any commitment as agent of the Government, unless specifically and explicitly authorised by the Government under the terms of this Operation

Management & Development Agreement (OMDA). The Concessionaire shall not amend, terminate, modify or supplement any agreement on behalf of or in the name of the Government.

xxiv) Comply with and perform its respective obligations under this Operation Management & Development Agreement (OMDA) and shall work and cooperate in good faith with the other Party with respect to all the obligations and rights hereunder of the other Party.

xxv) Carry out their obligations during the Construction Period and Operation & Maintenance Period.

xxvi) Understand that the title to and ownership of the Market shall at all times vest in the Government and shall not under any circumstance whatsoever pass over or be deemed to pass over to the Concessionaire or Persons or any other Third Party claiming by, under or through the Concessionaire. All the movable assets as brought in by the Concessionaire shall be owned by the Concessionaire during and after the Concession Period.

xxvii) The Concessionaire and / or its associates shall not engage into transactions / trade / auctions / procurement / buying-selling / supplies for themselves during the entire duration of the Concession Period.

**b) Minimum Equity requirements**

The aggregate shareholding of the Consortium Partners {in case of Consortium} or Associate/s (in case of Individual Bidder) in the issued and paid-up equity share capital of the Concessionaire (here the term "Concessionaire" connotes only the special purpose company as formed by the Consortium Partners or the Single Bidder) shall be not less than:

(i) 75% (seventy-five per cent) of the subscribed and paid up equity of the SPV at all times during the Concession Period.



In addition to the above obligations, the Lead Member of the Consortium i.e., ----- shall maintain a minimum equity component of \_\_\_\_% in the stipulated issued and paid-up equity share capital of the Concessionaire as specified under Article 5.1(b)(i).

- c) At no stage shall any change in the Equity Components / shareholding patterns be made by the Successful Bidder or by any of the Associates without obtaining prior approval from Government. On an application made for the purpose, Government may permit the change of Equity Components / shareholding patterns, provided Government is satisfied that the proposed changes shall be in the interest of the Construction of the Project in future and would not be detrimental to any of the rights or interests of the Government. However, no such change in the Equity Components / shareholding pattern shall be permitted by Government, which would make the Consortium non-compliant with Articles 5.1(b) above.
- d) In case any such change in composition of Consortium has been agreed upon, the modified Consortium would be required to submit a revised Memorandum of Understanding to the Government.

## **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 Expert/ Government the drafts of all Project Agreements, or any amendments or replacements thereto, for its review and comments, and the Government 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 Government 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, no review and / or observation of the Government 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 Government be liable for the same in any manner whatsoever.

## **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 written approval of the Government.
- 5.3.2 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that:
- a) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any

Equity, in aggregate of not less than 15% (fifteen per cent) of the total Equity of the Concessionaire; or

- b) acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him, shall constitute a Change in Ownership requiring prior approval of the Government from national security and public interest perspective, the decision of the Government 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 Government. For the avoidance of doubt, it is expressly agreed that approval of the Government hereunder shall be limited to national security and public interest perspective, and the Government shall endeavour to convey its decision thereon expeditiously. It is also agreed that the Government 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 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.

#### **5.5 Branding of the Project**

The Project or any part thereof shall not be branded in any manner to advertise, display or reflect the name or identity of the Concessionaire or its shareholders. The Concessionaire undertakes that it shall not, in any manner, use the name or entity of the Project to advertise or display its own identity, brand equity or business interests, including those of its shareholders, save and except as may be necessary in the normal course of business. 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 Users. It is further agreed that the Project shall be known, promoted, displayed and advertised by the name as decided by the Government at a later date.

#### **5.6 Facilities for physically challenged and elderly persons**

The Concessionaire shall, in conformity with the guidelines issued from time to time by the Ministry of Social Justice and Empowerment, or a substitute thereof, procure a barrier free environment for the physically or visually challenged and for elderly persons using the Project.

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

### **6.1 General Obligations**

It shall be the Government's obligation to ensure that the following are made available or executed by the Government within the Construction Period as specified in Clause 11.3 of the Operation Management & Development Agreement (OMDA):

- a) Assist Concessionaire in obtaining any and all permits, necessary approvals, clearances and sanctions from the Competent Authority (ies), with respect to setting up and making the Terminal Market Yard's facilities operational; as and when they may be required, for the Concessionaire and its employees to perform their obligations under this Operation Management & Development Agreement (OMDA);
- b) Circulate relevant orders to waive off the Terminal Market Fee.
- c) All litigation involving the Project, prior to the date of issue of Construction Completion Certificate and wherein the actions have been filed against the Government, the same shall be contested and conducted solely by the Government. The Concessionaire shall be in no way held responsible or liable as a reason thereof. The Government shall indemnify the Concessionaire and shall hold it free of any claim or consequent cost that may arise as a result of any such litigation.
- d) Any liability arising out of providing the Project free of encumbrances shall be borne solely by the Government. The Government shall indemnify the Concessionaire and shall hold it harmless from any claim or consequential cost that may arise as a result of any such transfer of the Project.
- e) The Government shall bear and be responsible for all costs, expense or charges incurred in making available the Project in accordance with Article 4.1. Further, the Government shall hold the Concessionaire harmless from all costs, expenses or charges incurred in relocating, rehabilitating or resettling Persons in connection with making available

the possession of the Market free from all Encumbrances to the Concessionaire.

- f) Selection and appointment of an Expert for various activities related to the Project mentioned in Schedule E of the Operation Management & Development Agreement (OMDA).

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

Prior to Appointed Date, the Government shall maintain the Project, at its own cost and expense, so that its worthiness are at no time materially inferior as compared to its condition 7 (seven) days prior to the last date for submission of the Bid, and in the event of any material deterioration or damage other than normal wear and tear, undertake repair thereof, or pay to the Concessionaire the cost and expense, as determined by the Expert, for undertaking such repair after Appointed Date. For the avoidance of doubt, the Government shall undertake only routine maintenance prior to Appointed Date, 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.

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

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

The Concessionaire represents and warrants to the Government that:

- a) It is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;
- b) It has full power and authority to execute, deliver and perform its obligations under this Concession and to carry out the transactions contemplated hereby;
- c) It has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Operation Management & Development Agreement (OMDA);
- d) It has the financial standing and capacity to undertake the Project;
- e) This Operation Management & Development Agreement (OMDA) constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- f) It is subject to civil and commercial laws of India with respect to this Operation Management & Development Agreement (OMDA) and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
- g) All the information furnished in the Concessionaire's Bid / Proposal is, and shall be, true and correct as on the Proposal Acceptance Date & throughout the Concession Period / subsistence of the Operation Management & Development Agreement (OMDA) and the Balance Sheet and Profit and Loss Account of the Concessionaire for each of the Financial Years after the Proposal Acceptance Date furnished to the Government shall give true and fair view of the affairs of the Concessionaire. If in case any false or misleading information, as

furnished by the Concessionaire (as a Bidder) in its Bid/Proposal, is found at a later stage after the signing of the Operation Management & Development Agreement (OMDA), it shall entitle Government to terminate the said signed Operation Management & Development Agreement (OMDA) between the Parties. The costs and risks for such termination shall be entirely borne by the Concessionaire;

- h) It shall furnish a copy of the audited accounts of the Concessionaire within 180 (one hundred and eighty) days of the close of each Financial Year after the Proposal Acceptance Date and any material change subsequent to the date of such accounts shall be notified to the Government by the Concessionaire within 30 (thirty) days of its occurrence and warrants that the accounts and the information furnished as aforesaid shall be true and correct;
- i) The execution, delivery and performance of this Operation Management & Development Agreement (OMDA) will not conflict with, result in the breach of, constitute a default under or accelerate performance required by any of the terms of the Concessionaire's Memorandum and Articles of Association or any Applicable Laws or any covenant, agreement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- j) There are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of or constitute a default of the Concessionaire under this Concession or which individually or in the aggregate may result in any Material Adverse Effect on its business, properties or assets or its condition, financial or otherwise, or in any impairment of its ability to perform its obligations and duties under this Operation Management & Development Agreement (OMDA);



- 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 {existing promoters}, together with {its / their} Associates, hold not less than 33% (thirty three per cent) of its issued and paid-up Equity as on the date of this Agreement; and that no member of the Consortium whose technical and financial capacity was evaluated for the purposes of qualification and short-listing in response to the Request for Proposal shall hold less than 26% (twenty six per cent) of such Equity during the Concession Period;
- l) The Concessionaire 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 Competent Authority which may result in any Material Adverse Effect or impairment of the Concessionaire's ability to perform its obligations and duties under this Operation Management & Development Agreement (OMDA);
- m) {the selected single bidder / each Consortium Members} is duly organized and validly existing under the laws of the jurisdiction of its incorporation, and has requested the Government to enter into this Agreement with the Concessionaire pursuant to the Notice of Award, and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- n) The Concessionaire has complied with all Applicable Laws and has not been subject to any fines, penalties, injunctive relief or any other Civil or criminal liabilities which in the aggregate have or may have Material Adverse Effect on its financial condition or its ability to perform its obligations and duties under this Operation Management & Development Agreement (OMDA);
- o) The aggregate equity share holding of the Consortium Partners and their Associates (in case of a Consortium or equity share holding of the Associates (in case of individual bidder) in the issued and paid up equity

share capital of the Concessionaire are in accordance with the requirements stipulated in Article 5.1;

- p) Each Consortium Member was and is duly organised and existing under the laws of the jurisdiction of its incorporation and has full power and authority to consent to and has consented to the Concessionaire entering into this Concession and has agreed to and unconditionally accepted the terms and conditions set forth in this Operation Management & Development Agreement (OMDA);
- q) All rights and interests of the Concessionaire in the Project shall pass to and vest in the Government on the Transfer Date free and clear of all liens, claims, and encumbrances without any further act or deed on the part of the Concessionaire or the Government and that none of Assets including materials, supplies or equipment forming part thereof shall be acquired by the Concessionaire subject to any agreement under which a security interest or other lien or encumbrance is retained by any person save and except as expressly provided in this Operation Management & Development Agreement (OMDA);
- r) No representation or warranty by the Concessionaire contained herein or in any other document furnished by it to the Government, or to any Competent Authority in relation to clearances contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading; and
- s) The Concessionaire warrants that no sums, in cash or kind, have been paid or will be paid by or on behalf of the Concessionaire, to any person by way of commission or otherwise for securing the Concession or entering into of this Operation Management & Development Agreement (OMDA) or for influencing or attempting to influence any officer or employee of the Government.

## **7.2 Representations and Warranties of the Government**

The Government represents and warrants to the Concessionaire that:

- a) The Government has full power and authority to execute, deliver and perform its obligations under this Operation Management & Development Agreement (OMDA) and to carry out the transactions contemplated hereby;
- b) The Government have taken all necessary action to authorize the execution, delivery and performance of this Operation Management & Development Agreement (OMDA);
- c) This Operation Management & Development Agreement (OMDA) constitutes a legal, valid and binding obligation enforceable against the Government in accordance with the terms hereof;
- d) The Government is subject to civil and commercial laws of India with respect to this Concession and it hereby expressly and irrevocably waives any sovereign immunity in any jurisdiction in regard to matters set forth in this Operation Management & Development Agreement (OMDA);
- e) The Concessionaire shall have complete, lawful and uninterrupted Site Possession of the Project by way of lease in accordance with this Operation Management & Development Agreement (OMDA);
- f) All information provided by the Government in the RFP document in connection with the Project is to the best of its knowledge and true and accurate in all material respects; and
- g) The Government has the financial standing and capacity to perform its obligations under the Operation Management & Development Agreement (OMDA).

### **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.

## **8 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 Proposal, Scope of the Project, Specifications and Standards, Site, existing structures, local conditions and all information provided by the Government 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 Government 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 Government 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 Government shall not be liable for the same in any manner whatsoever to the Concessionaire 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 Government to give any notice pursuant to this Clause 8.1.4 shall not prejudice the disclaimer of the Government contained in Clause 8.1.1 and shall not in any manner shift to the Government 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 Government shall not be liable in any manner for such risks or the consequences thereof.

## **Part III**

### **Development and Operations**

## **9 ARTICLE 9: PERFORMANCE SECURITY**

### **9.1 Performance Security**

9.1.1 The Concessionaire has, for the performance of its obligations hereunder during the Concession Period, provided to the Government, before signing of the Operation Management & Development Agreement (OMDA), an irrevocable and unconditional guarantee from a Bank for a sum equivalent to **INR 2.45 Crore (Rupees Two Crore Forty Five Lakh only)** in the form set forth in Schedule C (the "Performance Security"), in favour of the Government. The Performance security shall be increased at a rate of 10% after every 3 (three) years from the preceding amount.

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

Upon occurrence of a Concessionaire Default or failure to meet any Condition Precedent, the Government shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages for such Concessionaire Default or failure to meet any Condition Precedent. Upon such encashment and appropriation from the Performance Security, the Concessionaire shall, within 15 (fifteen) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Concessionaire shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which the Government shall be entitled to terminate this Agreement in accordance with Article 29. Upon replenishment or furnishing of a fresh Performance Security, as the case may be, as aforesaid, the Concessionaire shall be entitled to an additional Cure Period of 60 (sixty) days for remedying the Concessionaire Default or to meet any Condition Precedent, and in the event of the Concessionaire not curing its default or to meet any Condition Precedent within such Cure Period, the Government shall be entitled to encash and appropriate such Performance Security as Damages, and to terminate this Agreement in accordance with Article 29.



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

The Performance Security shall remain in force and effect for the Concession Period and shall cease to be in force and effect only when the Government shall have issued the Vesting Certificate to the Concessionaire.

### **9.4 OMDA Completion Certificate**

- a) At the end of the Operation Management & Development Agreement (OMDA) period, transfer of the Terminal Market Yard and Immovable Assets in good and operational condition, to the Government. Additionally, the Concessionaire shall not be allowed to remove any permanent fixtures put up during the Concession Period. However, all the movable assets brought in by Concessionaire shall be the property of the Concessionaire and shall be transferred to him after the end on the Concession Period.
- b) Within 90 (ninety) days of the end of the Concession Period, the Government shall issue the “OMDA Completion Certificate”, which concludes the Concessionaire's liability under this Operation Management & Development Agreement (OMDA). This certificate shall be issued after the Concessionaire submits to Government a written request for issue of such certificate. The form shall be as approved by Government and shall include a detailed condition survey of the Terminal Market Yard including the Assets.
- c) On the expiry of the Concession Period, the Concessionaire shall prepare a detailed inventory of the Assets (including all movable and immovable assets, whether provided by the Government or brought in by the Concessionaire) present within the Project. The detailed inventory shall be submitted to the Government within 15 days of the expiry of the Concession Period.
- d) The Performance Security furnished by the Concessionaire shall be released only after the issuance of the OMDA Completion Certificate.

## **10 ARTICLE 10: PROJECT**

### **10.1 The Site**

The site of the Project forms part of the 25.93 acres development scheme which comprise of the real estate described in the Schedule A & B and in respect of which the Terminal Market Yard shall be granted by the Government to the Concessionaire as a licensee under and in accordance with this Agreement (the "**Site**").

## **10.2 License and Access**

- 10.2.1 The Government hereby grants to the Concessionaire access to the Site for carrying out any surveys and investigations that the Concessionaire may deem necessary prior to Appointed Date, it being expressly agreed and understood that the Government shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.
- 10.2.2 In consideration of the Concession Fee, this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Government, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from Appointed Date, lease and license rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule A and B hereto, on an "as is where is" basis, free of any Encumbrances, to develop, operate and maintain the said premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.
- 10.2.3 It is expressly agreed that the license granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Government to terminate the License, upon the Termination of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Site by the Concessionaire or its sub-licensees, the licence in respect of the Site shall automatically terminate, without any further act of the Parties, upon Termination of this Agreement.

### **10.3 Site to be free from Encumbrances**

The Site shall be made available by the Government to the Concessionaire pursuant hereto free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to the Government on account of any costs, compensation, expenses and charges for the acquisition and use of such Site for the duration of the Concession Period, except insofar as otherwise expressly provided in this Agreement.

### **10.4 Protection of Site from encroachments**

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

### **10.5 Access to Government**

The license and right to the project granted to the Concessionaire hereunder shall always be subject to the right of access of the Government and their employees for inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.

## **11 ARTICLE 11: DEVELOPMENT AND CONSTRUCTION OF PROJECT FACILITIES**

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

Prior to commencement of Construction Works for project facilities, the Concessionaire shall:

- a) Submit to the Government and the Expert its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of the Project Facilities;
- b) Appoint its representative duly authorized to deal with the Government 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; and
- d) Make its own arrangements for quarrying of materials needed for the Project under and in accordance with the Applicable Laws and Applicable Permits.

The Concessionaire shall develop the specified Project Facilities as part of the Concession, mentioned in the Operation Management & Development Agreement (OMDA).

## **11.2 Drawings**

In respect of the Concessionaire's obligations with respect to the Drawings of the Project Facilities, the following shall apply:

- a) The Concessionaire shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Facilities Completion Schedule, three copies each of all Drawings to the Expert for review;
- b) By submitting the Drawings for review to the Expert, 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 10 (ten) days of the receipt of the Drawings, the Expert 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 Expert on the Drawings submitted pursuant hereto beyond the said 10 (ten) days period and may begin or continue Construction Works at its own discretion and risk;
- d) If the aforesaid observations of the Expert 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 Expert for review. The Expert shall give its observations, if any, within 7 (seven) days of receipt of the revised Drawings;

- e) No review and / or observation of the Expert 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 Expert or the Government be liable for the same in any manner; and
- f) Before completion of Project Construction Period, the Concessionaire shall furnish to the Government and the Expert a complete set of as-built Drawings, in 2 (two) hard copies and 1 (one) soft-copy as may be acceptable to the Government, reflecting the Project as actually designed, engineered and constructed, including the buildings and structures forming part of Project Facilities.

### **11.3 Completion of Project Facilities**

11.3.1 On or after Appointed Date, the Concessionaire shall undertake construction of Project Facilities as specified in Schedule A & B, and in conformity with the Specifications and Standards as per Good Industry Practice. Each of the Project Facilities shall be specified by the Expert in accordance with Good Industry Practice and the Concessionaire agrees and undertakes that Project Facilities shall be completed within the Project Construction Period.

11.3.2 The Construction of the Terminal Market Yard shall be done as follows:

The “**Construction Period**” or “**Time for Completion of Construction**” for project facilities at the Terminal Market Yard shall be a period of **18 ( eighteen) months** (starting from the Appointed Date), wherein the Concessionaire shall be required to comply with the following obligations:

- (i) Take all necessary / mandatory clearances, permits etc. which are required for commencing the operations and maintenance of the

additional components of the Terminal Market Yard, so that all such conditions have been satisfied in full, and all such Clearances, Permits, etc. are in full force and effect.

- (ii) Prepare, submit and get approval for the Project Development Plan which includes -
  - a. Encompassing activities like Facility Planning, Infra Planning, management terms, details of required personal, equipments, furniture & fixtures and consumables
  - b. Charges to be levied on the facilities where user charges or rentals are applicable like – market area, etc.
  - c. Prepare and get approved the Operation & Maintenance Manual.
- (iii) Recruit and maintains the required staff for management, operation and maintenance of the Terminal Market Yard.
- (iv) Procure and install equipments, machinery, furniture & fixtures and other consumables in accordance with the Project Development Plan as approved by Government.
- (v) Install the machines, equipments, furniture and fixtures in accordance with the Project Development plan as approved by the Government.
- (vi) Assist Government to procure full insurance cover for the Terminal Market Yard and provide the necessary information to the Government.

11.3.3 The Concessionaire guarantees that the Time for Completion of Construction for the Project shall be achieved in accordance with the provisions of this Operation Management & Development Agreement (OMDA) and not later than the Construction Period, as specified in this Article 11.3.3, from the Appointed Date.

11.3.4 In the event that Construction completion is not achieved for any reason other than Force Majeure or reasons attributable to the Government or any Competent Authority, the Concessionaire shall, subject to sub-clause 11.4 below, pay to the Government damages for delay beyond the date of Construction Completion to the extent of 0.1% of the Performance Security per day for every day of delay or part thereof until Construction Completion is achieved. Provided that nothing contained in this sub-clause shall be deemed or construed to authorize any delay by the Concessionaire in achieving the Construction Completion.

#### **11.4 Termination due to Failure to Complete Project Facilities**

In the event that Construction completion does not occur within 60 (sixty) days from the date of Construction completion decided, the Government shall be entitled to invoke the Performance Security and to terminate this Operation Management & Development Agreement (OMDA) for a Concessionaire Event of Default in accordance with the provisions of Article 29 hereof. Provided that instead of terminating this Agreement, the Government may at its sole option extend the time for achieving Construction completion on such terms and conditions as it deems fit in its sole discretion.

#### **11.5 Quarterly progress reports**

During the Construction Period, the Concessionaire shall, no later than 7 (seven) days after the close of each quarter, furnish to the Government and the Expert a Quarterly report on progress of the Development Works and shall promptly give such other relevant information as may be required by the Expert.

#### **11.6 Inspection**

During the period of construction of Project Facilities, the Expert shall inspect the Project at least once a quarter 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



Government 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 Expert shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever.

## **11.7 Tests**

- 11.7.1 For determining that the Construction Works conform to the Specifications and Standards, the Expert 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 Expert from time to time, in accordance with Good Industry Practice for quality assurance. The Concessionaire shall, with due diligence, carry out or cause to be carried out all the tests in accordance with the instructions of the Expert and furnish the results thereof to the Expert. 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.
- 11.7.2 In the event that results of any tests conducted under this Clause 11.7 establish any defects or deficiencies in the Construction Works, the Concessionaire shall carry out remedial measures and furnish a report to the Expert in this behalf. The Expert 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 11.7 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 11.7 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 Expert forthwith.

## **11.8 Delays during Construction**

- 11.8.1 The Concessionaire may apply for an extension of the Time for Completion of Construction if it is or shall be delayed either before or after the Time for Completion of Construction , by any of the following causes:
- i) A Variation;

- ii) A Force Majeure Event;
- iii) A cause of delay giving an explicit and express entitlement to extension of time under any Articles in this Operation Management & Development Agreement (OMDA), unless the Concessionaire has not complied with such Article;
- iv) Any delay, impediment or prevention by the Government;
- v) Any delay caused by Competent Authorities.

- 11.8.2 Provided that the Concessionaire shall at all times use its best endeavors to minimize any delay in the performance of its obligations under this Operation Management & Development Agreement (OMDA), whatever may be the cause of such delay.
- 11.8.3 If the Concessionaire intends to apply for an extension of the Time for Completion of Construction, the Concessionaire shall give notice to the Government of such intention as soon as possible and in any case within 28 (twenty eight) days of the start of the event giving rise to any such delay, together with any other notice required by this Operation Management & Development Agreement (OMDA) and relevant to such cause. Any such notice shall state the extent of the actual and anticipated delay and its anticipated effect on the Time for Completion of Construction, and shall specify the steps the Concessionaire proposes to take to minimize such delay. The Concessionaire shall keep such records as may be necessary to substantiate any application, at a location acceptable to the Government and such other records as may reasonably be requested by Government. The Concessionaire shall provide and permit Government to inspect all such records.
- 11.8.4 Within 28 (twenty-eight) days of the first day of such delay (or such other period as may be agreed by Government and/ or), the Concessionaire shall submit full supporting details of its application. Except that, if the Concessionaire cannot submit all relevant details within such period because the cause of delay continued for a period exceeding 7 (seven) days, the Concessionaire shall submit interim details at intervals of not more than 28 (twenty-eight) days (from the first day of such delay) and full and final supporting details of its application within 21 (twenty-one) days of the last day of delay.

11.8.5 Provided that the Concessionaire has complied with this Article, the Government shall proceed in accordance with Article 29.1 to determine either prospectively or retrospectively such adjustment as may be due, taking into account all relevant circumstances. The Government shall notify the Concessionaire accordingly. When determining each extension of time, Government shall review its previous determinations and may revise, but shall not decrease, the extension, and provided that the extension of time is not a consequence of any negligence, default or breach of Operation Management & Development Agreement (OMDA) by the Concessionaire or those for whom it is responsible.

11.8.6 However, the Concessionaire shall not be entitled to an extension of the Time for Completion of Construction, to the extent that the delay in respect of which the extension of time is requested is attributable to any negligence, default or breach of this Operation Management & Development Agreement (OMDA) by the Concessionaire or those for whom it is responsible, as determined by the Government or Expert.

## **11.9 Suspension of unsafe Construction Works**

11.9.1 Upon recommendation of the Expert to this effect, the Government 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 Government such work threatens the safety of the Members.

- 11.9.2 The Concessionaire shall, pursuant to the notice under Clause 11.9.1, suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Government and thereupon carry out remedial measures to secure the safety of suspended works and the Users. The Concessionaire may by notice require the Expert to inspect such remedial measures forthwith and make a report to the Government recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Expert, the Government 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 Government, and the procedure set forth in this Clause 11.9 shall be repeated until the suspension hereunder is revoked.
- 11.9.3 Subject to the provisions of Clause 25, 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 Government, the Preservation Costs shall be borne by the Government.

#### **11.10 Construction Completion Certificate**

Upon the Expert determining that a Project Facility conforms to the Specifications and Standards and has been completed in accordance with the provisions of this Agreement, it shall forthwith issue to the Concessionaire and the Government a Construction Completion Certificate thereof (the "Construction Completion Certificate"). It is expressly agreed that the Expert shall, for the purposes of determining that such Project Facility conforms to the Specifications and Standards, be entitled to require the Concessionaire to carry out or cause to be carried out such tests as the Expert may deem appropriate in accordance with the Good Industry Practice and the nature of such Project Facility including its intended use. The date and time of each such test shall be determined by the Expert in consultation with the Concessionaire. If it is reasonably anticipated or determined by the Expert

during the course of any such tests that such Project Facility 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 such test, the Expert shall provide copies of all such test data and results thereof to the Concessionaire with copy to the Government. Costs of all such tests shall be borne by the Concessionaire.

The Construction Completion Certificate shall be given by the Government within 28 (twenty-eight) days after:

- i. The Concessionaire has provided the Project Development Plan with as built Drawings for the works carried out;
- ii. The Concessionaire has remedied any defects in the works carried out;
- iii. The Concessionaire has completed and tested all the works, as specified by the Government / external expert appointed by the Government;
- iv. The Works are in conformity with the provisions laid down in the Operation Management & Development Agreement (OMDA) and its Schedules.

#### **11.11 Rectification**

If the Concessionaire is obliged to carry out adjustments, repairs, replacements or modifications after completion of Construction to maintain the Works, etc the Government shall permit the Concessionaire to carry out all such adjustments, repairs, replacements or modifications as may be necessary. If the adjustment, repair, replacement or modification cannot be made without stopping the operations, then such request shall only be granted if the Concessionaire's request is reasonable under all the circumstances, having regard to the Government's obligations to keep the operation of the Project open during all hours of the day.

## **12 ARTICLE 12: COMMENCEMENT OF OPERATIONS**

### **12.1 Commercial Operation Date (COD)**

- 12.1.1 **Construction Completion Certificate:** The commercial operation of all the facilities of the Project shall be the date on which the Construction Completion Certificate is issued for the completion of facilities.
- 12.1.2 The Concessionaire hereby agrees and undertakes that it shall achieve COD within the time as given in Article 11.3.3.

### **12.2 Termination due to delay**

- 12.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to Clause 25.5.1, in the event that COD does not occur, for any reason whatsoever, within the period set forth in Clause 11.3, 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 Operation Management & Development Agreement (OMDA) shall be deemed to have been terminated by mutual agreement of the Parties.
- 12.2.2 Upon Termination under clause 12.2.1, the Government shall be entitled to encash the Performance Security and appropriate the proceeds as Damages; provided, however, if COD has not occurred solely as a result of the Government being in default of any of its obligations under Clause 4.1, it shall, upon Termination, return the Performance Security.



## **13 ARTICLE 13: CHANGE OF SCOPE**

### **13.1 Change of Scope**

- 13.1.1 The Government 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 ("Change of Scope"). Any such Change of Scope shall be made in accordance with the provisions of this Article 13 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the Government in accordance with Clause 13.3.
- 13.1.2 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 Government to consider such Change of Scope. The Government shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings therefore in accordance with this Article 13. The Government shall have the right for not accepting such Change of Scope without providing any reasons for the same.
- 13.1.3 Any works or services which are provided under and in accordance with this Article 13 shall form part of the Project and the provisions of this Agreement shall apply mutatis mutandis to such works or services.

### **13.2 Procedure for Change in Scope**

- 13.2.1 In the event of the Government 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").

- 13.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Government such information as is necessary, together with preliminary Documentation in support of the options for implementing the proposed Change in Scope and the effect, if any, each such option would have on the costs and time thereof, including 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 Government to the 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 Government to the extent the cost is certified by the Expert as reasonable.
- 13.2.3 Upon receipt of information set forth in Clause 13.2.2, if the Government 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 Expert, thereupon make good faith efforts to agree upon the time and costs for Construction thereof. Upon reaching an agreement, the Government 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 Government 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 13.5.
- 13.2.4 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 13.

### **13.3 Payment for Change in Scope**

Within 7 (seven) days of issuing a Change of Scope Order, the Government 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 Expert. The Concessionaire shall, after commencement of work, present to the Government 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 Government to determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the Government shall disburse to the Concessionaire such amounts as are certified by the Expert 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.

### **13.4 Power of the Government to undertake works**

- 13.4.1 Notwithstanding anything to the contrary contained in Clauses 13.1.1, 13.2 and 13.3, the Government may, after giving notice to the Concessionaire and considering its reply thereto, award any works or services specified in a Change of Scope Order, or award any works or services, contemplated under Clause 13.1.1, 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 Government (the Government shall transfer 75% of the amount as received from Concessionaire to the first ranked bidder whose bid shall have been marked by the Concessionaire), 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 percent) thereof. It is also agreed that the Concessionaire shall provide access, assistance and cooperation to the person who undertakes the works or services hereunder.
- 13.4.2 The works undertaken in accordance with this Clause 13.5 shall conform to the Specifications and Standards, as given in Schedule J 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 13.5.

### **13.5 Reduction in the Scope of the Projects**

- 13.5.1 If the Concessionaire shall have failed to complete any Construction Works on account of Force Majeure or for reasons solely attributable to the Government, the Government may, in its discretion, require the Concessionaire to pay 80% (eighty percent) of the sum saved therefrom, and upon such payment to the Government, the obligations of the Concessionaire in respect of 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 Government under this Clause 13.6 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.
- 13.5.2 For determining the obligations of the Concessionaire under this Clause 13.6, the provisions of Clauses 13.1, 13.2 and 13.4 shall apply *mutatis mutandis*, and upon issue of Change of Scope Order by the Government hereunder, the Concessionaire shall pay forthwith the sum specified therein.

## **13.6 Rectification of latent defects**

- 13.6.1 Notwithstanding anything to the contrary contained in this Agreement, in the event that a material defect of deficiency appears in the Project after the date of this Agreement and the defect of deficiency is not on account of any failure on the part of the Concessionaire to comply with Maintenance Requirements and is such that it could not have been detected or anticipated by the Concessionaire prior to such date with the exercise of due diligence in accordance with Good Industry Practice, the repair and rectification thereof shall be undertaken as if it were a Change in Scope; provided that the provisions of this Clause 13.7.1 shall not apply if the cost of such repair and rectification is less than the amount equal to 25% of the Performance Security.
- 13.6.2 The works and services forming part of Change of Scope under Clause 13.7.1 shall be undertaken in accordance with procedure specified in this Article 13; provided that if such works and services are of urgent nature and need to be undertaken forthwith, the Concessionaire may, with the consent of the Expert, commence such works and services pending determination of the costs thereof, and the provisions of Clause 13.2 and 13.3 shall apply mutatis mutandis to the determination of such costs.

### **13.7 Variations Initiated by the Government**

- a) Variations may be initiated by Government at any time during the Concession Period, either by instruction or by a request for the Concessionaire to submit a proposal. The Concessionaire shall not make any alteration or modification of the Works, unless and until Government instructs or approves a Variation. If the development carried out during the Construction Period, Works, or Operation and Maintenance Procedures are not in accordance with this Operation Management & Development Agreement (OMDA), the rectification, repair or remedy thereof shall not constitute a Variation.
- b) If Government requests a proposal, prior to instructing a Variation, the Concessionaire shall submit as soon as practicable:

- i) A description of the proposed work to be performed and a programme for its execution.
  - ii) The Concessionaire's proposal for any necessary modifications to the Project Development Plan, as proposed and thereafter, approved by the Government.
  - iii) The Concessionaire's proposal for adjustment to the Concession Period, Time for Completion of Construction and/ or modifications to this Operation Management & Development Agreement (OMDA).
- c) Government shall, as soon as practicable after receipt of such proposals, respond with approval, rejection or comments. If Government instructs or approves a Variation, it shall proceed in accordance with Article 13.10 to agree or determine adjustments to the Concession Period.

### **13.8 Variations Initiated by Concessionaire**

- a) The Concessionaire may, at any time during the Concession Period, initiate a variation, by submitting to Government a written proposal which in the Concessionaire's opinion will reduce the cost of Construction, maintaining or operating the works, or improve the efficiency or value to the Government of the completed works, or otherwise be of benefit to the Government or to rectify a divergence between any law or directive and the Performance Standards. Any such proposal shall be prepared at the cost of the Concessionaire and shall include the items listed in Article 13.8 (b).
- b) Government shall, as soon as practicable after receipts of such proposals respond with approval, rejection or comments. If Government approves a Variation, it shall proceed in accordance with Article 13.10 to agree or determine adjustments of the Concession Period.

### **13.9 Government's Determination**

- a) When Government is required to determine the adjustment (increase or decrease) to the Concession Period, it shall consult with the Concessionaire in an endeavour to reach agreement within 30 (thirty) days of the receipt of notice wherein the Government is required to determine such adjustment to the Concession Period. The Government's determination on adjustment of the Concession Period shall be intimated to the Concessionaire within 30 (thirty) days of the date of receipt of the notice requesting any such adjustment.
- b) If the Concessionaire disputes Government's determination of adjustment to the Concession Period, the matter shall be referred to the Government in accordance with the following provisions:
  - (i) If the Concessionaire disagrees with the adjustment determined by Government it shall give notice in writing of its intention to Government, as soon as may be reasonable and in any event within 7 (seven) days after receipt of notice of the adjustment and thereafter within a further period of 7 (seven) days to notify the Government of such dispute.
  - (ii) The Government upon receipt of a notice under this Article shall furnish to the Concessionaire all the reasons, records and documents based upon which Government had determined the adjustment.
  - (iii) The Concessionaire shall permit the Government to inspect all records and shall supply him with copies thereof and with all such further information as and when the Government shall so require.

### **13.10 Adjustment of the Concession Period**

- a) The Concession Period shall not be adjusted for changes in the cost of labour, materials or other matters. The Concession Period shall only be adjusted as expressly and explicitly stated in the Articles to this Operation Management & Development Agreement (OMDA) and there



shall be no other implied adjustments for any other reasons whatsoever.

- b) Subject to the Change in Law, the Concessionaire shall pay all applicable taxes, duties, levies, as per the Applicable Laws.
- c) If the Concessionaire suffers (or will suffer) delays or incurs (or will incur) additional costs or loss in revenue resulting from such Changes in Law, made after the Proposal Acceptance Date, the Concessionaire shall give notice to the Government. After receipt of such notice Government shall proceed in accordance with Article 13.11 to agree or determine any adjustment to the Concession Period to which the Concessionaire is entitled, and shall notify the Concessionaire accordingly. The Concession Period shall be adjusted taking into account any increase or decrease in the costs resulting from Changes in Law specifically in relation to the Project, made after the Proposal Acceptance Date.

The guiding principle in the operation of this Article shall be so as to place the Concessionaire in subsequently the same legal, commercial and financial position as it was prior to such Change in Law.

## **14 ARTICLE 14: OPERATION AND MAINTENANCE**

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

14.1.1 During the Concession Period, the Concessionaire shall operate and maintain the Project in accordance with this Agreement by itself, modify, repair or otherwise make improvements to the Project to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Specifications and Standards and Good Industry Practice. The obligations of the Concessionaire shall include:

- a) The Concessionaire shall be required to take care of the operational expenses arising out of the Project and shall be required to maintain the internal and external civil work and other associated infrastructure of the Terminal Market Yard during the Concession Period.
- b) The Concessionaire shall have the right to sub- license a part of the Terminal Market Yard, Peapully, Nandyal for the Concession Period in accordance with the provisions of the Operation Management & Development Agreement (OMDA).
- c) The Concessionaire shall obtain prior approval of the Government for a format of the standard Sub-License Agreement before its execution with any sub-licensee. In case, any deviation in this format of standard Sub-License Agreement is required, the Licensee shall again obtain prior approval of the Government before entering into an agreement with the sub-licensee. The Government reserves the sole right to provide comments/ suggest changes in the format submitted and the Concessionaire shall be required to modify the same.
- d) The Concessionaire is expected to invest in furnishing and making the facility operational. It would provide best-in-class facilities and adhere to minimum service level benchmarks as stipulated in the Schedules of this Operation Management & Development Agreement (OMDA) and defined best practices.
- e) The Concessionaire shall remove promptly from the Project all surplus construction machinery and materials, waste materials

(including hazardous materials and waste water), rubbish and other debris (including, without limitation, accident debris) and keep the Project in a clean, tidy and orderly condition, and in conformity with the Applicable Laws, Applicable Permits and Good Industry Practice.

14.1.2 The details of Scope of Work / Obligations of Concessionaire during Operations and Maintenance Period have been mentioned in Schedule A.

## **14.2 Maintenance Requirements**

The Concessionaire shall procure that at all times during the Concession Period; the Project conforms to the maintenance requirements set forth in Schedule D.

## **14.3 Maintenance Manual**

14.3.1 Not later than 90 (ninety) days from COD, the Concessionaire shall, in consultation with the Expert, evolve a repair and maintenance manual (the "Maintenance Manual") for the regular and preventive maintenance of the Project in conformity with the Specifications and Standards, Maintenance Requirements, Safety Requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the Government and 2 (two) copies to the Expert. The Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 14.3 shall apply, mutatis mutandis, to such revision.

14.3.2 Without prejudice to the provision of Clause 14.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Assets and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Assets, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

## **14.4 Maintenance Programme**

14.4.1 On or before COD and no later than 45 (forty-five) later than days prior to the beginning of each Accounting Year during the Concession Period, as the case may be, the Concessionaire shall provide to the Government and the Expert, 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:

- (i) preventive maintenance schedule;
- (ii) arrangements and procedures for carrying out urgent repairs;
- (iii) criteria to be adopted for deciding maintenance needs;
- (iv) intervals and procedures for carrying out inspection of all elements of the Project;
- (v) intervals at which the Concessionaire shall carry out periodic maintenance;
- (vi) arrangements and procedures for carrying out safety related measures; and
- (vii) intervals for major maintenance works and the scope thereof.

14.4.2 Within 15 (fifteen) days of receipt of the Maintenance Programme, the Expert 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.

14.4.3 The Concessionaire may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 14.4.1 and 14.4.2 shall apply mutatis mutandis to such modifications.

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

14.5.1 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 Government shall be entitled to recover Damages, to be calculated and paid for each day of delay until the breach is cured, at 0.1% (zero point one per cent) of the cost of such repair or rectification as estimated by the Expert. Recovery of such Damages shall be without prejudice to the rights of the Government under this Agreement, including the right of Termination thereof.

14.5.2 The Damages set forth in Clause 14.5.1 may be assessed and specified forthwith by the Expert; provided that the Government 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.

#### **14.6 Government' right to take remedial measures**

- 14.6.1 In the event the Concessionaire does not maintain and/or repair the Project 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 Government or the Expert, as the case may be, the Government 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 Government as Damages. For the avoidance of doubt, the right of the Government under this Clause 14.6.1 shall be without prejudice to its rights remedies provided under Clause 14.5.
- 14.6.2 The Government shall have the right, and the Concessionaire hereby expressly grants to the Government the right, to recover the costs and Damages specified in Clause 14.6.1 directly from the Trust and Retention Account as if such costs and Damages were O&M Expenses, and for 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.

## **14.7 Overriding powers of the Government**

- 14.7.1 If in the reasonable opinion of the Government, 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 Members, the Government 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.
- 14.7.2 In the event that the Concessionaire, upon notice under Clause 14.7.1, fails to rectify or remove any hardship or danger within a reasonable period, the Government may exercise overriding powers under this Clause 14.7.2 and take over the performance of any or all the obligations of the Government 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 Government 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 Government in discharge of its obligations hereunder shall be deemed to be O&M Expenses, and the Government shall be entitled to recover them from the Concessionaire in accordance with the provisions of Clause 14.7 along with the Damages specified therein.

14.7.3 In the event of a national emergency, civil commotion or any other act specified in Clause 23.3, the Government may take over the performance of any or all the obligations of the Concessionaire to the extent deemed necessary by it, and exercise such control over the Project or give such directions to the Concessionaire as may be deemed necessary; provided that the exercise of such overriding powers by the Government shall be of no greater scope and of no longer duration than is reasonably required in the circumstances which caused the exercise of such overriding power by the Government. For the avoidance of doubt, it is agreed that the consequences of such action shall be dealt in accordance with the provisions of Article 23. It is also agreed that the Concessionaire shall comply with such instructions as the Government may issue in pursuance of the provisions of this Clause 14.7, and shall provide assistance and cooperation to the Government, on a best effort basis, for performance of its obligations hereunder.

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

Save and except as otherwise expressly provided in this Agreement, in the event that the Project or any part thereof suffers any loss or damage during the Concession Period from any cause whatsoever other than Indirect Political Event or Political Event, 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.

#### **14.9 Modifications to the Project**

The Concessionaire shall not carry out any material modifications to the Project save and except where such modifications are necessary for the Project to operate in conformity with the Specifications and Standards, Maintenance Requirements and Good Industry Practice and Applicable Laws; provided that the Concessionaire shall notify the Expert 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 Expert 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.

#### **14.10 Excuse from performance of obligations**

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

- a) an event of Force Majeure;
- b) measures taken to ensure the safe use of the Project 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 Government or the directions of any Government Instrumentality, the effect of which is to close all or any part of the Project

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

#### **14.11 Advertising on the Site**

The Concessionaire shall not undertake or permit any form of commercial advertising, display or hoarding at any place on the Site. All advertising on the Project shall also conform to Good Industry Practice. For the avoidance of doubt, it is agreed that the rights of the Concessionaire hereunder shall be subject to Applicable Laws, as in force and effect from time to time, and no compensation shall be claimed on account thereof.

## **15 ARTICLE 15: MONITORING OF OPERATION AND MAINTENANCE**

### **15.1 Quarterly status reports**

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

### **15.2 Inspection**

The Expert shall inspect the Project 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 Government and the Concessionaire within 7 (seven) days of such inspection.

### **15.3 Tests**

For determining that the Project conforms to the Maintenance Requirements, the Expert 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 Expert and furnish the results of such tests forthwith to the Expert. One half of the costs incurred on such tests, and to the extent certified by the Expert as reasonable, shall be reimbursed by the Government to the Concessionaire.

## **15.4 Remedial measures**

15.4.1 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 15.3 and furnish a report in respect thereof to the Expert and the Government 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.

15.4.2 The Expert shall require the Concessionaire to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Project into compliance with the Maintenance Requirements and the procedure set forth in this Clause 14.4 shall be repeated until the Project conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the Government shall be entitled to recover Damages from the Concessionaire under and in accordance with the provisions of Clause 14.5.

## **15.5 Quarterly fee statement**

During the Concession Period, the Concessionaire shall furnish to the Government, within 7 (seven) days of completion of each quarter, a statement of Fee. The Concessionaire shall also furnish to the Government such other information as the Government may reasonably require, at specified intervals, in discharge of its statutory functions.

## **15.6 Reports of unusual occurrence**

The Concessionaire shall, prior to the close of each day, send to the Government and the Expert, by facsimile or e-mail, a report stating accidents and unusual occurrences on the Project relating to the safety and security of the Users and Project. A weekly and monthly summary of such reports shall

also be sent within 3 (three) days of the closing of each week and month, as the case may be. For the purposes of this Clause 15.6, accidents and unusual occurrences on the Project shall include:

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

## **16 ARTICLE 16: SAFETY REQUIREMENTS**

### **16.1 Safety Requirements**

16.1.1 The Concessionaire shall comply with the provisions of this Agreement, Applicable Laws and Applicable Permits and conform to Good Industry Practice for securing the safety of Market facility users. In particular, the Concessionaire shall develop, implement and administer a surveillance and safety programme for providing a safe environment on or about the Project, and shall comply with the safety requirements.

16.1.2 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 15.

## **17 ARTICLE 17: MANAGEMENT COMMITTEE**

### **17.1 Appointment**

Within 21 (twenty-one) days from the Date of Agreement, the Government shall constitute a Management Committee of five members. The Management Committee shall consist of:

- 3 (three) representatives of the Government, and
- 2 (two) representatives of the Concessionaire

A representative of the Government shall be the chairman of the Management Committee. The Management Committee shall have powers and duties as mentioned in the section below.

### **17.2 Powers and Duties**

- a) The Management Committee shall have the powers and duties set out in this Operation Management & Development Agreement (OMDA) or any other powers required for the proper project development, operation and maintenance of the Project, including & without limitation:
  - (i) The Management Committee shall assist (wherever possible) Concessionaire to get all regulatory approvals and certificates for Operations and Maintenance.
  - (ii) The Management Committee shall approve or provide comments/ observations (if any) to the Project Development Plan, as envisaged by the Concessionaire, within the Conditions Precedents period from the date of receipt of documents.
  - (iii) The Management Committee shall approve any improvements or modifications (that are not Variations) proposed by any of the members of the Management Committee.
  - (iv) The Management Committee shall ensure that from the date of the Notice to Commence and till the completion of the Concession Period, the Concessionaire has access to the Project for the purpose of carrying out the Concessionaire's obligations under this Operation Management & Development Agreement (OMDA).

- (v) The Management Committee shall, at all reasonable times and upon reasonable notice, have access to the Project for the purpose of discharging its duties under this Operation Management & Development Agreement (OMDA).
  - (vi) The Management Committee shall undertake inspections, at such times as it deems appropriate, to determine the progress during the Construction Period and the extent of compliance with provisions stipulated in this Operation Management & Development Agreement (OMDA) and notify the Government and the Concessionaire of any deviations there from within 7 (seven) days of such inspections.
  - (vii) The Management Committee shall ensure compliance to the approved Project Development Plan
  - (viii) The Management Committee shall review the Concessionaires quarterly reports as given in Article 15.1;
  - (ix) The Management Committee shall review and verify the Construction of Variations;
  - (x) The Management Committee shall review Performance Security requirements;
  - (xi) The Management Committee shall impose penalties on the Concessionaire as stipulated in this Agreement;
  - (xii) The Management Committee would monitor the Project accounts and pay-outs;
  - (xiii) The Management Committee would monitor when the Annual Concession Fee from the Concessionaire is due.
  - (xiv) The Management Committee reserves the right to decide and take actions in all cases of dispute between the Concessionaire and the Government.
- b) The Management Committee shall have the power to appoint Expert(s) in any area required, for a review of the operation, maintenance and planning of the Project. Such person(s) shall act as an "Expert(s)", whose expert professional opinion, once confirmed by the Management Committee shall be binding on the Parties and the Management Committee.

- c) The Concessionaire and the Government shall extend full co-operation to the Management Committee and to any Expert(s) appointed by the Management Committee. All the expenses of the Management Committee shall be borne by the Government.
- d) During the project Construction period, the Management Committee shall meet at least once every quarter of the calendar year or at the request of either Party, at such time & venue as may be indicated by the Convenor and notified to all the members of the Management Committee well before the date of the meeting.
- e) During the project operations and maintenance period, the Management Committee shall meet at least once every calendar year or at the request of either Party and at such time and venue as may be indicated by the Convenor and notified to all the members of the Management Committee, well before the date of the meeting.
- f) **Any expenditure, related to inspection, monitoring etc. arising out of the project in future, as approved by the Management Committee, during the Concession Period, shall be payable by the Government.**



## **Part IV**

### **Financial Covenants**

## **18 ARTICLE 18: GRANT AND CONCESSION FEE**

### **18.1 Grant**

18.1.1 In order to develop the said Project, the Government has sanctioned a grant amount of Rs 12 Crore (Rupees Twelve Crores) which shall be disbursed to the Concessionaire during the Construction Period.

However, the Concessionaire shall be required to first utilize, in full, its own equity being quoted in the Financial Closure Documents. Pursuant to the full utilization of the equity of the Concessionaire, the Grant shall be disbursed by the Concessionaire as under:

- (i) First instalment to be disbursed on completion of 25% of project ----- 15% of the approved subsidy
- (ii) Second instalment on completion of 50% of project ----- 20% of the approved subsidy
- (iii) Third instalment on completion of 75% of project ----- 25% of the approved subsidy
- (iv) Fourth instalment on completion of 100% of project ----- 30% of the approved subsidy
- (v) Fifth instalment on completion of one year of operation of project --- --- 10% of the approved subsidy

## **18.2 Concession Fee**

18.2.1 In consideration of the grant of Concession, the Concessionaire shall pay to the Government the following sums by way of annual concession fee (the "Concession Fee"). The Annual Concession Fee (ACF) shall be quoted as a fixed sum that the Government would charge on an annual basis; as quoted by the Successful Bidder in its Financial Proposal, dated \_\_\_\_\_.

18.2.2 The Concession Fee for 1st (first) year of the Concession Period, to be paid as per Clause 18.2.5, shall be a sum of Rs. \_\_\_\_\_ (Rupees .....); and

18.2.3 After every 3<sup>rd</sup> (third) year of the Concession Period, the Concession Fee shall be determined by increasing the amount by 10% (ten per cent) as compared to immediately preceding year. For the avoidance of doubt, and by way of illustration, if the concession Fee for the first year is Rs. 40 lakh (Rupees Forty Lakh), the Concession Fee for the 4th (fourth) and 7th (seventh) years shall be Rs. 44 lakh (Rupees Forty Four Lakh) and Rs. 48.4 lakh (Rupees Forty Eight lakh Forty Thousand) respectively..

18.2.4 The Annual Concession Fee payable for each year under the provisions of this Article 18 shall be due and payable every year in advance. Within 3 (three) days from the date on which the first Annual Concession Fee was paid, the Concessionaire shall pay to the Government the Concession Fee for the year due through Demand Draft/Pay order in favour of \_\_\_\_\_ payable at Peapully, Nandyal.

18.2.5 The first Annual Concession Fee shall be due and payable by the Concessionaire from the Commercial Operations Date (COD) and shall be paid by the Concessionaire within 7 (seven) days from COD.

18.2.6 The Annual Concession Fee shall not be decreased in any circumstances involving any changes in the taxes applicable on the Concessionaire.

## **19 ARTICLE 19: USER FEE**

### **19.1 Collection and appropriation of Fee**

19.1.1 The Concessionaire shall levy, collect and appropriate (reasonable) Charges on behalf of Government, from the traders, retailers and farmers for the Period after the Operations Date and until the last date of the Concession Period, in accordance with the provisions of this Agreement.

19.1.2 The Government expressly recognises the right of the Concessionaire or its Subcontractors to levy, demand, collect, retain, and to appropriate Project Revenues/ Commercial Charges in accordance (i) with the terms of this Operation Management & Development Agreement (OMDA) and (ii) to exercise all rights and remedies available under Law and under this Operation Management & Development Agreement (OMDA) for the recovery of Project Revenues/ Commercial Charges.

### **19.2 Sources of Revenue**

The different sources of revenue are as follows:

#### **a) Income from Terminal Market Services**

##### **1. Sub-License Rentals**

The Concessionaire shall have the right to sub-license the shops to Traders / Retailers in **Market / SCO Area** through public notice for the same. The sub-license agreement with the traders / retailers shall be limited to tenure of 10 years, subject to further renewal.

##### **2. Usage Charges**

Additionally, the Concessionaire shall collect User Charges and/ or Sub-License Rentals and/ or CAM charges from the following market services with prior approval from the Government:

- Market/ SCO Area
- Retail Area
- Cold Storage
- Ripening Chamber

- Pack-house
- Weighbridge facility

**b) Income from Other Utility Areas**

The Concessionaire may sub-license the area prescribed for Restaurant, ATMs, etc and collect rentals from the same.

**c) Miscellaneous Income**

Any other income that the Concessionaire may receive for other services offered in the operations of the Market, if any.

**Note :-**

- The commodities to be marketed in the Market will include all perishables Fruits, Vegetables, Flowers, Spices, Aromatics, Herbs, Medicinal Plants, Meat Products, Poultry Products, Dairy Products and Fish and Marine products.
- The Perishable Horticulture produce handled by the market should not be less than 70% of the throughput of the capacity.
- Market will be allowed to handle other Perishable products and Non-perishable products shall not exceed 30% of the throughput.

## **20 ARTICLE 20: TRUST AND RETENTION ACCOUNT**

### **20.1 Trust and Retention Account**

20.1.1 The Concessionaire shall, prior to COD, open and establish an Trust and Retention Account with a Bank (the "Escrow Bank") in accordance with this Agreement read with the Escrow Agreement.

20.1.2 The nature and scope of the Trust and Retention Account are fully described in the agreement (the "Escrow Agreement") to be entered into amongst the Concessionaire, the Government, and the Escrow Bank, which shall be substantially in the form set forth in Schedule-G.

### **20.2 Deposits into Trust and Retention Account**

The Concessionaire shall deposit or cause to be deposited the following inflows and receipts into the Trust and Retention Account:

- a) all monies received in relation to the Project from banks, insurance and shareholders for execution of the Project;
- b) all Fee and any other revenues from or in respect of the Project;
- c) all payments by the Government, after deduction of any outstanding Concession Fee; and
- d) Termination Payments.

### **20.3 Withdrawals during Concession Period**

20.3.1 The Concessionaire shall, at the time of opening the Trust and Retention Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, *inter alia*, that deposits in the Trust and Retention 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 Trust and Retention 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) Concession Fee due and payable to the Government;

- c) All payments relating to capital expenditure of Project Facilities;
- d) usage charges collected from Traders / Retailers payable to Government;
- e) O&M Expenses;
- f) all payments and damages certified by the Government as due and payable to it by the Concessionaire; and
- g) balance, if any, in accordance with the instructions of the Concessionaire

20.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 20.3.1, except with the prior written approval of the Government.

## **20.4 Withdrawals upon Termination**

20.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Trust and Retention 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) outstanding Concession Fee;
- c) all payments and damages certified by the Government as due and payable to it by the Concessionaire;
- d) cost of repair and restoration of damages to the Project on account of a Non-Political Event;
- e) all outstanding debt and interest thereon;
- f) retention and payments relating to the liability for defects and deficiencies set forth in Article 30;
- g) incurred or accrued O&M Expenses;
- h) any other payments required to be made under this Agreement; and
- i) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that no appropriations shall be made under Sub-clause (i) of this Clause 20.4.1, until a Vesting Certificate has been issued by the Government under the provisions of Article 30.

20.4.2 The provisions of this Article 20 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 20.4.1 have been discharged.



## **21 ARTICLE 21: INSURANCE**

### **21.1 Insurance during Concession Period**

The Concessionaire shall effect and maintain at its own cost, during the Concession Period, such insurances for such maximum sums as may be required under the Applicable Laws, and such insurances as may be necessary or prudent in accordance with Good Industry Practice to cover third party claims and Non Political Event (the “**Insurance Cover**”). The Concessionaire shall procure that in each insurance policy, the Government shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Trust and Retention Account.

### **21.2 Notice to the Government**

Not later than 45 (forty-five) days prior to commencement of the Concession Period, the Concessionaire shall by notice furnish to the Government, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 21. Within 30 (thirty) days of receipt of such notice, the Government 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.

### **21.3 Notice to the Government**

Not later than 45 (forty-five) days prior to commencement of the Concession Period, the Concessionaire shall by notice furnish to the Government, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 21. Within 30 (thirty) days of receipt of such notice, the Government 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.

## **21.4 Evidence of Insurance Cover**

All insurances obtained by the Concessionaire in accordance with this Article 21 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 15 (fifteen) days of obtaining any insurance cover, the Concessionaire shall furnish to the Government, notarized true copies of the certificate(s) of insurance, copies of insurance policies and premia payment receipts in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 45 (forty five) days after notice of such proposed cancellation, modification or non-renewal has been delivered by the Concessionaire to the Government.

## **21.5 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 Government 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.

## **21.6 Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Concessionaire pursuant to this Article 21 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, *inter alia*, the Government, 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.

## **21.7 Concessionaire's waiver**

The Concessionaire hereby further releases, assigns and waives any and all rights of subrogation or recovery against, *inter alia*, the Government 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.

#### **21.8 Application of insurance proceeds**

The proceeds from all insurance claims, except life and injury, shall be paid to the Concessionaire by credit to the Trust and Retention Account and it shall, notwithstanding anything to the contrary contained in Clause 20.3, apply such proceeds 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.

#### **21.9 Compliance with conditions of insurance policies**

The Concessionaire expressly acknowledges and undertakes to fully indemnify the Government from and against all losses and claims arising from the Concessionaire's failure to comply with conditions imposed by the insurance policies effected in accordance with the Agreement.

## **22 ARTICLE 22: ACCOUNTS AND AUDIT**

### **22.1 Audited accounts**

22.1.1 The Concessionaire shall maintain books of accounts recording all its receipts (including all revenues derived/collected by it from or on account of the Project and/or its use), income, expenditure, payments (including payments from the Trust and Retention 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 Government 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 Government 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.

22.1.2 The Concessionaire shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to the Government 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.

22.1.3 On or before the first day of August each Year, the Concessionaire shall provide to the Government, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarized information on (a) Fee charged and received and other revenues derived from the Project, and (b) such other information as the Government may reasonably require.

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

Any claim or document provided by the Concessionaire to the Government 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. In the event of there being any difference or dispute in respect thereof, such Dispute shall be resolved by recourse to the Dispute Resolution Procedure. 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 Quarterly Fee Statements under Clause 15.5.

## **Part V**

### **Force Majeure and Termination**

## **23 ARTICLE 23: FORCE MAJEURE**

### **23.1 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 23.2, 23.3 and 23.4 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.

### **23.2 Non-Political Event**

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

- a) Acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, extreme adverse weather or environmental conditions, lightning, earthquakes, heavy rains, cyclones, tempest, whirlwind, landslides, storms, floods, volcanic eruptions, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent originating from a source external to the Market or not designed for in Construction Works);
- 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 23.3;
- c) 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 (ii) on account of breach of any Applicable Law or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Government; or

- d) any other event or circumstance of a nature analogous to the foregoing, to the extent that insurance is available at a reasonable cost to cover the occurrence of any of the natural events. The Concessionaire will ensure that it has insured itself against such risks.

### **23.3 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 public agitation which prevents collection of Commercial Charges by the Concessionaire for a period exceeding a continuous of 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.

### **23.4 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) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;
- b) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorization, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;
- c) 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
- d) any event or circumstance of a nature analogous to any of the foregoing.

### **23.5 Duty to report Force Majeure Event**

23.5.1 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 23 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.

23.5.2 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 not 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.

23.5.3 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 23.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

## **23.6 Exceptions Applicable to the Concessionaire**

The Concessionaire shall not have the right to consider any of the following circumstances to be an event of Force Majeure that would suspend the performance or excuse the non-performance of its obligations under this Operation Management & Development Agreement (OMDA) other than the circumstances resulting from an event of Force Majeure:-

- a) Delay in performance by the Concessionaire, Subcontractor(s), agents and employees of the Concessionaire; or
- b) Breakdown or ordinary wear and tear of materials, equipment machinery or parts relating to the Project.

## **23.7 Exceptions Applicable to the Government**

The Government shall not have the right to consider any of the following circumstances to be an event of Force Majeure that would suspend the performance or excuse the non-performance of its obligations under this Operation Management & Development Agreement (OMDA):

- a) the expropriation, confiscation, nationalisation or requisition of the Project, Assets by the Government;
- b) the imposition of any blockade, embargo, restrictions, rationing or allocation by the Government or any Competent Authority; or

- c) any delay or difficulty in handing over the Market as a result of any intervention or directive of the Government or any Competent Authority.

### **23.8 Effect of Force Majeure before the issue of Notice to Commence**

Upon occurrence of any Force Majeure Event prior to the issuance of the Construction Completion Certificate, the following shall apply:

- a) There shall be no Termination except as provided in Article 23.11.
- b) The Appointed Date shall be extended by the period of which such Force Majeure event shall subsist and
- c) The Parties shall bear their respective costs arising out of such Force Majeure Event.

### **23.9 Effect of Force Majeure after Appointed Date**

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

- a) There shall be no Termination of this Operation Management & Development Agreement (OMDA) except as provided in Article 23.11.
- b) Where the Force Majeure Event occurs before the issue of Construction Completion Certificate or Provisional Certificate, the dates set forth in the Design Documents and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;
- c) Where the Force Majeure Event occurs after the issuance of Construction Completion Certificate, the Concessionaire shall make all reasonable efforts to collect Project Revenues, but if he is unable to collect Project Revenues during the subsistence of such Force Majeure Event, the Concession Period shall be extended by the period for which collection of Fees remains suspended on account thereof and
- d) All cost arising out or concerning such Force Majeure Event shall be borne in accordance with provisions of Article 23.10.

### **23.10 Allocation of costs during the subsistence of Force Majeure**

Upon occurrence of a Force Majeure Event after Appointed Date, the cost arising out of such event shall be allocated as follows:

- a) When the Force Majeure Event is a Non Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any cost arising out of any such Force Majeure Event;
- b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the Force Majeure Costs) shall be borne by the Concessionaire to the extent of Insurance Cover, and to the extent Force Majeure Costs as duly certified by the Statutory Auditors exceed the Insurance Cover, one half of the same shall be reimbursed by the Government to the Concessionaire within 120 (one hundred and twenty) days from the date of receipt of Concessionaire's claim therefore;
- c) Where the Force Majeure Event is a Political Event, the Force Majeure Costs to the extent actually incurred and duly certified by the Statutory Auditors shall be reimbursed by the Authority to the Concessionaire in one lump sum not later than 120 (one hundred and twenty) days after the end of the Force Majeure Event and receipt of notice by the Government to that effect.

For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses, any increase in the costs directly attributable to the Force Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent it is relevant.

### **23.11 Termination Notice for Force Majeure Event**

If the Force Majeure Event subsists for a period of 270 (two hundred seventy) days or more within a continuous period of 365 (three hundred sixty five) days, either Party may in its sole discretion terminate this Operation Management & Development Agreement (OMDA) by giving 30 (thirty) days Termination Notice in writing to the other Party without being liable in any manner whatsoever, save and except as per the provisions of in Article 23.12

### **23.12 Termination Payment for Force Majeure Event**

Upon Termination of this Operation Management & Development Agreement (OMDA) pursuant to Article 23.11, Termination Payment to the Concessionaire shall be made in accordance with the following:

- (i) If Termination is on account of a Non-Political Event, the Government shall make a Termination Payment to the Concessionaire in an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover.
- (ii) If Termination is on account of an Indirect Political Event, the Government 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.
- (iii) If Termination is on account of a Political Event, the Government shall make a Termination Payment to the Concessionaire in an amount that would be payable under Clause 26.3.2 as if it were a Government Default.

The Termination Payments pursuant to this Article 23.12 shall become due and payable to the Concessionaire by the Government upon actual or constructive transfer of the Assets by the Concessionaire to the Government free from all Encumbrances, charges and liens whatsoever, unless expressly directed by the Government otherwise.

### **23.13 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 as under Article 33, provided however that the burden of proof as to the occurrence or existence of such Force Majeure event shall be upon Party claiming relief and/or excuse on the account of such Force Majeure Event.

### **23.14 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.

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

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

## **24 ARTICLE 24: COMPENSATION FOR BREACH OF AGREEMENT**

### **24.1 Compensation for default**

24.1.1 Subject to the provisions of Clause 24.4, In the event of the Concessionaire being in material default or breach of this Agreement, it shall pay to the Government by way of compensation, all direct costs suffered or incurred by the Government as a consequence of such material default or breach, within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 24.1 for any material breach or default in respect of which Damages are expressly specified and payable under this Agreement or for any consequential losses incurred by the Government.

24.1.2 Subject to the provisions of Clause 24.4, In the event of the Government being in material default or breach of this Agreement at any time after COD, 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 or breach within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any material 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, and all other costs directly attributable to such material default or breach but shall not include loss of Fee revenues, debt repayment obligations or other consequential losses.

### **24.2 Extension of Concession Period**

Subject to the provisions of Clause 24.4, in the event that a material default or breach of this Agreement set forth in Clause 24.1.2 leads to suspension of or reduction in collection of Fee, as the case may be, the Government shall, in addition to payment of compensation under Clause 24.1.2, extend the Concession Period, such extension being equal in duration to the period by which the collection of Fee remained suspended on account thereof.

### **24.3 Compensation to be in addition**

Compensation payable under this Article 24 shall be in addition to, and not in substitution for, or derogation of, Termination Payment, if any.

### **24.4 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.



## **25 ARTICLE 25: SUSPENSION OF CONCESSIONAIRE'S RIGHTS**

### **25.1 Suspension upon Concessionaire Default**

Upon occurrence of a Concessionaire Default, the Government 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 Fee, and other revenues pursuant hereto, 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 Government to the Concessionaire and may extend up to a period not exceeding 120 (one hundred and twenty) days from the date of issue of such notice; provided that upon written request from the Concessionaire, the Government shall extend the aforesaid period of 120 (one hundred and twenty) days by a further period not exceeding 90 (ninety) days.

## **25.2 Government to act on behalf of Concessionaire**

25.2.1 During the period of Suspension, the Government shall, on behalf of the Concessionaire, collect all Fee and revenues under and in accordance with this Agreement and deposit the same in the Trust and Retention Account. The Government shall be entitled to make withdrawals from the Trust and Retention Account for meeting the costs incurred by it for remedying and rectifying the cause of Suspension, and thereafter for defraying the expenses incurred.

25.2.2 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 Government 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 Government for all costs incurred during such period. The Concessionaire hereby licences and sub-licences respectively, the Government or any other person authorised by it under Clause 25.1 to use during Suspension, all Intellectual Property belonging to or licensed to the Concessionaire with respect to the Terminal Market Yard, Peapully, Nandyal and its development, operation and maintenance, and which is used or created by the Concessionaire in performing its obligations under the Agreement.

## **25.3 Revocation of Suspension**

25.3.1 In the event that the Government 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 Government may, in its discretion, revoke the Suspension at any time, whether or not the cause of Suspension has been rectified or removed hereunder.

25.3.2 Upon the Concessionaire having cured the Concessionaire Default within a period not exceeding 90 (ninety) days from the date of Suspension, the Government shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement.

#### **25.4 Substitution of Concessionaire**

At any time during the period of Suspension, the Lenders', 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 Government shall withhold Termination for a period not exceeding 120 (one hundred and twenty) days from the date of Suspension, and any extension thereof under Clause 25.1 for enabling the Lenders' Representative to exercise its rights of substitution on behalf of Senior Lenders.

#### **25.5 Termination**

25.5.1 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 120 (one hundred and twenty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 25.1, the Operation Management & Development Agreement (OMDA) 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 Government upon occurrence of a Concessionaire Default.



## **26 ARTICLE 26: TERMINATION**

### **26.1 Termination for Concessionaire Default**

26.1.1 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 "Concessionaire Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Government or due to Force Majeure. The defaults referred to herein shall include:

- a) the Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a period 15 (fifteen) days;
- b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to cure, within a Cure Period of 60 (sixty) days, the Concessionaire Default for which whole or part of the Performance Security was appropriated;
- c) the Concessionaire abandons or manifests intention to abandon the operation of the Project without the prior written consent of the Government;
- d) the Concessionaire fails to undertake or complete the Construction of the Project Facilities in accordance with Clause 11.3;
- e) the Concessionaire is in breach of the Maintenance Requirements or the Safety Requirements, as the case may be;
- f) the Concessionaire has failed to make any payment to the Government within the period specified in this Agreement;
- g) an Escrow Default has occurred and the Concessionaire fails to cure the default within a period of 15 (fifteen) days;
- h) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;

- i) the Concessionaire creates any Encumbrance in breach of this Agreement;
- j) the Concessionaire repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- k) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- l) 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;
- m) an execution levied on any of the assets of the Concessionaire has caused a Material Adverse Effect;
- n) 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;
- o) 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 Government, a Material Adverse Effect;
- p) 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:
  - 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;

- 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 COD; and each of the Project Agreements remains in full force and effect;
- q) The Concessionaire and / or its associates engages in transactions / auctions / trade / procurement / buying-selling / supply for self thus creating a conflict of interest with farmers in discovery of price and risk management.
- r) any representation or warranty of the Concessionaire herein contained which is, as of the date hereof, found to be materially false, incorrect or misleading or the Concessionaire is at any time hereafter found to be in breach thereof;
- s) the Concessionaire submits to the Government any statement, notice or other document, in written or electronic form, which has a material effect on the Government's rights, obligations or interests and which is false in material particulars;
- t) the Concessionaire has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
- u) the Concessionaire commits a default in complying with any other provision of this Agreement if such default causes a Material Adverse Effect on the Government.

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

## **26.2 Termination for Government Default**

26.2.1 In the event that any of the defaults specified below shall have occurred, and the Government 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 Government shall be deemed to be in default of this Agreement (the "**Government 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 Government 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 Government repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement.

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

## **26.3 Termination Payment**

26.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the Government 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.

26.3.2 Upon Termination on account of a Government Default, the Government 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.

26.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Government with the necessary particulars, and in the event of any delay, the Government 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 Government of its payment obligations in respect thereof hereunder.

26.3.4 The Concessionaire expressly agrees that Termination Payment under this Article 26 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.

## **26.4 Other rights and obligations of the Government**

Upon Termination for any reason whatsoever, the Government 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 Site;
- c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;
- d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 27.1; and
- e) succeed upon election by the Government, without the necessity of any further action by the Concessionaire, to the interests of the

Concessionaire under such of the Project Agreements as the Government 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 Government elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Government shall not in any manner be liable for such sums. It is further agreed that in the event the Government elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Government for this purpose shall be deducted from the Termination Payment.

## **26.5 Survival of rights**

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 26.3.4, 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.

## **27 ARTICLE 27: DIVESTMENT OF RIGHTS AND INTEREST**

### **27.1 Divestment Requirements**

27.1.1 Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements:

- a) notify to the Government forthwith the particulars of all Project Assets;
- b) deliver forthwith the actual or constructive possession of the Project, free and clear of all Encumbrances;
- c) cure all Project Assets, of all defects and deficiencies so that the Project is compliant with the Maintenance Requirements;
- d) deliver and transfer relevant records, reports, Intellectual Property and other licences pertaining to the Project and its operation and maintenance, including all programmes and manuals pertaining thereto, 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 operation and maintenance of the Project and shall be assigned to the Government 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 Government 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 Government, absolutely unto the Government 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 Government or to its nominee.

27.1.2 Subject to the exercise by the Government 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.

## **27.2 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 Expert shall verify, after giving due notice to the Concessionaire specifying the time, date and venue of such verification, compliance by the Concessionaire with the Maintenance Requirements. Defaults, if any, in the Maintenance Requirements shall be cured by the Concessionaire at its cost and the provisions of Article 31 shall apply, *mutatis mutandis*, in relation to curing of defects or deficiencies under this Article 27.

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

27.3.1 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 Site.

27.3.2 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 Government, its concessionaire or agent may reasonably require for operation of the Project until the expiry of 6 (six) months after the Transfer Date.

27.3.3 The Government 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 27.1.1 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.

## **27.4 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 Government shall, without unreasonable delay, thereupon issue a certificate substantially in the form set forth in Schedule H (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 Government 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 Government or its nominee on, or in respect of, the Project on the footing that all Divestment Requirements have been complied with by the Concessionaire.

## **27.5 Divestment costs etc.**

27.5.1 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 Government 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 Government.

27.5.2 In the event of any dispute relating to matters covered by and under this Article 27, the Dispute Resolution Procedure shall apply.

## **28 ARTICLE 28: DEFECTS LIABILITY AFTER TERMINATION**

### **28.1 Liability for defects after Termination**

The Concessionaire shall be responsible for all defects and deficiencies in the Project for a period of 60 (sixty) days after Termination, and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Expert in the Project during the aforesaid period. In the event that the Concessionaire fails to repair or rectify such defect or deficiency within a period of 15 (fifteen) days from the date of notice issued by the Government in this behalf, the Government shall be entitled to get the same repaired or rectified at the Concessionaire's risk and cost so as to make the Project conform to the Maintenance Requirements. All costs incurred by the Government hereunder shall be reimbursed by the Concessionaire to the Government within 15 (fifteen) days of receipt of demand thereof, and in the event of default in reimbursing such costs, the Government shall be entitled to recover the same from the Trust and Retention Account.

## **28.2 Retention in Trust and Retention Account**

28.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 28.2, a sum equal to the Performance Security shall be retained in the Trust and Retention Account for a period of 90 (ninety) days after Termination for meeting the liabilities, if any, arising out of or in connection with the provisions of Clause 28.1.

28.2.2 Without prejudice to the provisions of Clause 28.2.1, the Expert shall carry out an inspection of the Project at any time between 150 (one hundred and fifty) and 120 (one hundred and twenty) days prior to the Termination and if it recommends that the status of the Project is such that a sum larger than the amount stipulated in Clause 28.2.1 should be retained in the Trust and Retention Account and for a period longer than the aforesaid 90 (ninety) days, the amount recommended by the Expert shall be retained in the Trust and Retention Account for the period specified by it.



## **Part VI**

### **Other Provisions**

## **29 ARTICLE 29: ASSIGNMENT AND CHARGES**

### **29.1 Restrictions on assignment and charges**

29.1.1 Subject to Clauses 26.2, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the Government, which consent the Government shall be entitled to decline without assigning any reason.

29.1.2 Subject to the provisions of Clauses 29.2, 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 Government, which consent the Government shall be entitled to decline without assigning any reason.

### **29.2 Permitted assignment and charges**

The restraints set forth in Clauses 29.1 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; and
- b) liens or encumbrances required by any Applicable Law.

### **29.3 Substitution Agreement**

29.3.1 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 Government and the Lenders' Representative, on behalf of Senior Lenders', substantially in the form set forth in Schedule K.

29.3.2 Upon substitution of the Concessionaire under 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; provided that where the Concessionaire is in breach of this Agreement on the date of such substitution, the Government shall by notice grant a Cure Period of 120(one hundred and twenty) days to the Concessionaire for curing such breach.

### **29.4 Assignment by the Government**

Notwithstanding anything to the contrary contained in this Agreement, the Government 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 Government, capable of fulfilling all of the Government's then outstanding obligations under this Agreement.

### **30 ARTICLE 30: LIABILITY AND INDEMNITY**

#### **30.1 General indemnity**

30.1.1 The Concessionaire will indemnify, defend, save and hold harmless the Government and its officers, servants, agents, Government Instrumentalities and Government owned and/or controlled entities/enterprises, ("**Government 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 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 Government Indemnified Persons.

30.1.2 The Government 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 Government in the land comprised in the Site, and/or (ii) breach by the Government 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.

#### **30.2 Indemnity by the Concessionaire**

30.2.1 Without limiting the generality of Clause 30.1, the Concessionaire shall fully indemnify, hold harmless and defend the Government and the Government Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

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

30.2.2 Without limiting the generality of the provisions of this Article 30, the Concessionaire shall fully indemnify, hold harmless and defend the Government Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Government 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 Government a licence, at no cost to the Government, 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.

### **30.3 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 30 (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.

### **30.4 Defence of claims**

30.4.1 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 34, 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 defense. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

30.4.2 If the Indemnifying Party has exercised its rights under Clause 30.3, 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).

30.4.3 If the Indemnifying Party exercises its rights under Clause 30.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:



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

30.4.4 Provided that if Sub-clauses (b), (c) or (d) of this Clause 30.4.3 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.

### **30.5 No consequential claims**

Notwithstanding anything to the contrary contained in this Article 30, 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 except as expressly provided in this Agreement.

### **30.6 Survival on Termination**

The provisions of this Article 30 shall survive Termination.

## **31 ARTICLE 31: RIGHTS AND TITLE OVER THE SITE**

### **31.1 Licensee rights**

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

### **31.2 Access rights of the Government and others**

The Concessionaire shall allow free access to the Site at all times for the authorised representatives of the Government and the Expert, to inspect the Project and to investigate any matter within their authority, and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.

### **31.3 Property taxes**

All property taxes on the Site shall be payable by the Government as owner of the Site; provided, however, that any such taxes payable by the Concessionaire under Applicable Laws for use of the Site shall not be reimbursed or payable by the Government.

### **31.4 Restriction on sub-contracting for operations**

The Concessionaire shall not sub-contract or sub-let the whole of the Site, save and except as may be expressly set forth in this Agreement. However, the concessionaire shall be allowed to license/ sub contract part of facility of Market with prior approval of the Government. To clarify, the restrictions on sub-contracting mentioned in this Article 31.4 is only limited to sub-contracting / licensing of part operations activity and not to sub-licensing of wholesale / retail shops to traders. All agreements or arrangements with the sub-licensees shall specifically have stipulation of a covenant that the sub-licenses / sub-contracts shall be co-terminus with the termination of this agreement.

- a. Subcontracting for operations can be done only to firms which have prior experience in the field / background for atleast 3 years.

- b. The subcontracting period shall not exceed one year after which the contract shall be renewed by the Concessionaire.
- c. The subcontractor however cannot subcontract /sub- license the space further to another party. The subcontractor shall be involved directly in the operation and maintenance of the facility outsourced.

## **32 ARTICLE 32: DISPUTE RESOLUTION**

### **32.1 Dispute Resolution**

32.1.1 Any dispute, difference or controversy of whatever nature regarding the validity, interpretation, Construction , or the rights and obligations arising out of or in relation to, or however arising under of, in relation to this Concession between the Parties, and so notified in writing by either Party to the other Party (the "**Dispute**") shall be subject to the dispute resolution procedure set in this Article 33. It is specially clarified here that in case of any ambiguity regarding the Works, the practices existing at the time of submission of the proposal as per Good Industry Practice would prevail.

### **32.2 Direct Discussion between Parties**

The Parties agree that any dispute may arise between them shall first be submitted for direct discussion between the Parties. For this purpose, the notice of Dispute ("**The Notice of Dispute**") sent by one Party to the other Party under article 32.1 shall be considered an invitation for direct discussion, and it should specify a reasonable time and venue for conduct of the negotiation proceedings. In addition, the Notice of Dispute shall specify the basis of the Dispute and the amount claimed. In the direct discussion proceedings, each Party shall be represented by officials or employees with sufficient knowledge and authority over the subject matter of Dispute in order for the discussion to be meaningful. At the Discussion proceedings, the Party that has given the Notice of Dispute shall present an offer of a settlement, which may form the starting point of discussions between the two Parties during the discussion proceedings.

### **32.3 Arbitration or Adjudication**

32.3.1 In the event that the parties are unable to resolve the Dispute through direct discussion under Article 32.2, the Parties shall submit the Dispute for arbitration in accordance with the Arbitration and Conciliation Act, 1996. There shall be a Board of 3 (three) arbitrators of whom one shall be appointed by the Government, one shall be appointed by the Concessionaire, and the third shall be appointed by the two arbitrators appointed as aforesaid.

32.3.2 The arbitrators shall make a reasoned award and any award made pursuant to this Article 32 shall be final and binding on the Parties as from the date on which it is made, and the Concessionaire and the Government agree to undertake to carry out such award without delay.

32.3.3 The arbitration proceedings shall be conducted in the English Language and in Peapully, Nandyal only.

32.3.4 The Cost incurred on the process of arbitration including inter alia the fees of the arbitral tribunal and the cost of proceedings shall be borne by the Parties in equal proportions. Each Party shall bear its own legal fees incurred as a result on any Dispute under this Article 32.

### **32.4 Performance during Dispute**

Performance of this Operation Management & Development Agreement (OMDA) shall continue during the settlement of any Dispute under this Article 32. The provisions for dispute settlement shall be binding upon the successors; assigns and any trustee or receive of either the Government or the Concessionaire.

## **33 ARTICLE 33: DISCLOSURE**

### **33.1 Disclosure of Specified Documents**

The Concessionaire shall make available for inspection by any person, copies of this Operation Management & Development Agreement (OMDA), 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 project location and 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.

### **33.2 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.

### **33.3 Withholding of documents**

Notwithstanding the provisions of Clauses 33.1 and 33.2, the Government 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 33.1 and 33.2, or portions thereof, the disclosure of which the Government is entitled to withhold under the provisions of the Right to Information Act, 2005.

## **34 ARTICLE 34: REDRESSAL OF PUBLIC GRIEVANCES**

### **34.1 Complaints Register**

34.1.1 The Concessionaire shall maintain a public relations office at the facility where it shall keep a register (the "**Complaint Register**") open to public access at all times for recording of complaints by (the "**Complainant**"). Information relating to the availability of and access to the Complaint Register shall be prominently displayed by the Concessionaire at the project facility so as to bring it to the attention of all Users.

34.1.2 The Complaint Register shall be securely bound and each page thereof shall be duly numbered. It shall have appropriate columns including the complaint number, date, name and address of the Complainant, substance of the complaint and the action taken by the Concessionaire. Immediately after a complaint is registered, the Concessionaire shall give a receipt to the Complainant stating the date and complaint number.

34.1.3 Without prejudice to the provisions of Clauses 34.1.1 and 34.1.2, the Government may, in consultation with the Concessionaire, specify the procedure for making complaints in electronic form and for responses thereto.

### **34.2 Redressal of complaints**

34.2.1 The Concessionaire shall inspect the Complaint Register every day and take prompt and reasonable action for redressal of each complaint. The action taken shall be briefly noted in the Complaint Register and a reply stating the particulars thereof shall be sent by the Concessionaire to the Complainant under a certificate of posting.

34.2.2 Within 7 (seven) days of the close of each month, the Concessionaire shall send to the Government and to the Expert a true photocopy each of all the pages of the Complaint Register on which any entry has been recorded during the course of such month, and upon perusal thereof, the Government may, in its discretion, advise the Concessionaire to take such further action as the Government may deem appropriate for a fair and just redressal of any grievance. The Concessionaire shall consider such advice and inform the Government of its decision thereon, and if the Government is of the opinion that the Complainant is entitled to further relief, it may refer the matter to the competent forum for its disposal under the Consumer Protection Act, 1986, and advise the Complainant to pursue the complaint at his own risk and cost.



## **35 ARTICLE 35: MISCELLANEOUS**

### **35.1 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 Nandyal shall have jurisdiction over matters arising out of or relating to this Agreement.

### **35.2 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).

### **35.3 Depreciation and interest**

35.3.1 For the purposes of depreciation under the Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project Facilities shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the Government shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under the Applicable Laws.

35.3.2 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.

### **35.4 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.

### **35.5 Waiver**

35.5.1 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.

35.5.2 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.

### **35.6 Liability for review of Documents and Drawings**

Except to the extent expressly provided in this Agreement:

- a. no review, comment or approval by the Government or the Expert of any Project Agreement, Document or Drawing submitted by the Concessionaire nor any observation or inspection of the operation or maintenance of the Project nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Concessionaire from its obligations, duties and liabilities under this Agreement, the Applicable Laws and Applicable Permits; and
- b. the Government shall not be liable to the Concessionaire by reason of any review, comment, approval, observation or inspection referred to in Sub-clause (a) above.

### **35.7 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.

### **35.8 Survival**

35.8.1 Termination shall:

- a) not relieve the Concessionaire or the Government, 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.

35.8.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.

### **35.9 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 Proposals, as the case may be, shall be deemed to form part of this Agreement and treated as such.

### **35.10 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.

### **35.11 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.

### **35.12 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.

### **35.13 Successors and Assigns**

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

### **35.14 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 Government; provided that notices or other communications to be given to an address outside Nandyal 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 Government;
- b) in the case of the Government, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the Secretary to Government with a copy delivered to the Government Representative or such other person as the Government may from time to time designate by notice to the Concessionaire; provided that if the

Concessionaire does not have an office in Nandyal 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.

### **35.15 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.

### **35.16 Counterparts**

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

## **36 ARTICLE 36: TRANSFER OF PROJECT**

**36.1** On the Transfer Date, the Concessionaire shall, transfer and assign to the Government or its nominated agency, as the case may be, free and clear of any charges, liens and Encumbrances created or suffered by the Concessionaire after the Appointed Date of all the Concessionaire's right, title and interest in and to the Works/ movable and immovable assets. The Concessionaire shall also deliver to the Government or its nominated agency on such date such operating and maintenance manuals, plans, reports, accounts and other information as may reasonably be required by the Government or its nominated agency to enable it to continue the operation of the Project either directly or by its nominated agency. The personnel of the Concessionaire shall continue to be the employees of the Concessionaire and the transfer of all the immovable assets shall not in any manner affect their status as employees of the Concessionaire and they shall have no claim to any type of employment or compensation from the Government or its nominated agency.

**36.2** The Concessionaire shall to the extent possible assign to the Government or its nominated agency at the time of transfer all unexpired guarantees and warranties by Subcontractors and suppliers and all insurance policies on immovable assets. The Concessionaire shall ensure that any rights, which are to be so assigned, are capable of assignment and the counterpart to the Concessionaire has approved such assignment under the terms and conditions of the relevant contract.

**36.3** The Concessionaire shall, to the extent possible at the time of transfer, assign to the Government or its nominated agency all contracts, supply contracts and all other contracts relating to the Project entered into by the Concessionaire and subsisting at the time of transfer except any contracts with employees.

**36.4** Six months prior to the Transfer Date, the Government shall be entitled to appoint any Consulting Expert to assess the condition of the Project. Such Consulting Expert shall be entitled to have free access to inspect the Project, provided that such inspection is reasonable and is carried out with minimum disruption to normal operation of the Project.

- 36.5** Until the Transfer Date, all risks shall lie with the Concessionaire for loss of or damage to the whole or any part of the Project, unless such loss or damage is due to an act or omission of the Government in contravention of its obligations under this Operation Management & Development Agreement (OMDA).
- 36.6** The Concessionaire shall provide fair and just compensation to its employees as required under the Laws or under this Operation Management & Development Agreement (OMDA), and shall indemnify the Government against any claims from any such employees for their loss of office, redundancy, loss of employment or otherwise. The Government shall accept absolutely no liability on account of any matter pertaining to the Concessionaire's employees, staff, labour etc.
- 36.7** The Government shall be responsible for the costs and expenses, including stamp duties, taxes, legal fees and expenses, incurred in connection with the Transfer of the Project to it by the Concessionaire.
- 36.8** On the Transfer Date, the Concessionaire shall hand over the Project with all the immovable and movable assets to the Government or its nominated agency at zero cost.
- 36.9** From the Transfer Date, the obligations and the rights of the Concessionaire under this Operation Management & Development Agreement (OMDA) shall terminate vis-à-vis the Government and the Government or its nominated agency shall take over the Project and the operation and maintenance and any other rights or obligations arising out of this Operation Management & Development Agreement (OMDA) which either expressly or implicitly survive termination of this Operation Management & Development Agreement (OMDA); provided, however, that the Concessionaire may continue with any other business operations arising other than in connection with this Operation Management & Development Agreement (OMDA) and; provided further that the Concessionaire shall no longer act in its capacity as Concessionaire in relation or pursuant to this Operation Management & Development Agreement (OMDA).



**36.10** On completion of the transfer by the Concessionaire to the Government, the Government and shall issue a 'OMDA Completion Certificate' to the Concessionaire. The OMDA Completion Certificate will have the effect of constituting evidence of transfer of all rights, titles and interests in the Project by the Concessionaire, and their vesting in the Government hereto.

## **37 ARTICLE 37: DEFINITIONS**

### **37.1 Definitions**

In this Operation Management & Development Agreement (OMDA), unless repugnant to the context in which these words and expressions appear the words and expressions defined below shall have the meanings assigned to them: -

- 1. “Applicable Laws”** means all laws which are applicable to the Project and / or the Concessionaire extending to the State of Andhra Pradesh, having been enacted or brought into force by Government of India or GoAP including regulations and rules made thereunder, and judgments, decrees, injunctions, writs and orders of any Court of Record, as may be in force and effect during the subsistence of this Agreement.
- 2. “Associates”** means in relation to either Party and / or Joint Venture partners, a person who controls, is controlled by, or is under the common control with such Party or Joint Venture Member. As used in this definition, the expression “control” means with respect to a person which is a corporation, the ownership, directly or indirectly, of more than 50% of the voting shares of such person, and with respect to a person which is not a corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise.
- 3. “Government”** means “The Department of Horticulture, Government of Andhra Pradesh.
- 4. “Clearance”** means, as on the date of execution of this Agreement, any consents, licenses, approvals, permits, exemptions, registrations, filings or other authorization(s) of whatever nature, which is necessary for effective Construction of the Project.

5. **“COD”** means the commercial operations date of the Project which shall be the date on which the Construction Completion Certificate is issued by the Government to the Concessionaire.
6. **“Contract” or “Concession” or “Operation Management & Development Agreement (OMDA)”** means and includes this signed Operation Management & Development Agreement (OMDA) (including the Schedules of the Operation Management & Development Agreement (OMDA), the “Notice of Award” issued by Horticulture Department, Govt. of Andhra Pradesh the written clarification(s), addendums, amendments, etc. to the RFP Document issued subsequently to the Bidders and all other documents/papers attached as annexure/ appendix).
7. **“Concessionaire”** means \_\_\_\_\_, [a Special Purpose Company incorporated, either by the Joint Venture (JV) Members or the Individual Successful Bidder under the Companies Act, 1956/2013 for development of the Project], having its registered office at \_\_\_\_\_
8. **“Concessionaire's Representative”** means the Person appointed by the Concessionaire
9. **“Concession Period”** is the period for which this Concession is granted, commencing from the Appointed Date as mentioned in the RFP and Operation Management & Development Agreement (OMDA) hereof.
10. **“Conditions Precedent”** means the conditions set out in Article 4 hereof.
11. **“Competent Authority”** means any agency, authority, department, ministry, public or statutory Person of the Government of Andhra Pradesh or Government of India, or any local authority, or any other sub-division thereof with authority over aspects of Construction of the Project 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 Operation Management & Development Agreement (OMDA).

**12. "Appointed Date"** means the latter of the date of issuance of the Certificate of Compliance to the Government or Concessionaire under Article 4.3.

**13. "OMDA Completion Certificate"** means the certificate issued under Article 9.4, after the termination of this Operation Management & Development Agreement (OMDA).

**14. "Change of Scope"** shall have the meaning set forth in Clause 13.1;

**15. "Cost"** means all expenditure properly incurred (or to be incurred) by the Concessionaire, on the Project, including overheads and similar charges, but does not include profit.

**16. "Day"** means calendar day, **"Month"** means 30 (thirty) days and **"Year"** means 365 days.

**17. "Directive"** means any present or future requirement, instruction, direction, order, rule or regulation issued by any Competent Authority which is legally binding or which is notified by the Government to the Concessionaire, and any modification, extension or replacement thereof from time to time in force.

**18. "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 Government 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;

**19. "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;

**20. "Encumbrances"** mean 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 without limitation any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances or encroachments on the Market where applicable herein.

**21. "Equity"** means the sum expressed in Indian Rupees representing the equity share capital of the Concessionaire and shall include the funds advanced by any Joint Venture Member or by any of the shareholders of the Concessionaire for meeting the equity component of the Total Project Cost.

**22. "Trust and Retention 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 Trust and Retention Account;

**23. "Escrow Agreement"** shall have the meaning set forth in Clause 20.1;

**24. "Escrow Bank"** shall have the meaning set forth in Clause 20.1;

**25. "Expert"** shall mean a person with relevant expertise in Operations and Management in Agribusiness as detailed in Schedule E;

**26. "Finance"** means the funds required to operate, maintain and manage the market and its components.

**27. "Financial Year"** means the year commencing from 1<sup>st</sup> April of any calendar year to the 31<sup>st</sup> March of the next calendar year except in the first and the last calendar year of the subsistence of this Agreement. In the first year of subsistence of this Agreement, it means the period from the Appointed Date to the 31<sup>st</sup> March of next calendar year. In the last year of subsistence of this agreement, it means the period from 1<sup>st</sup> April to the Transfer Date.

**28. "Financing Documents"** means the documents executed by the Concessionaire in respect of financing of the Project 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 arrangements, and other documents.

**29. "Force Majeure" or "Force Majeure Event"** shall mean an act, event, condition or occurrence specified in the Article 23.

**30. "Good Industry Practice"** means the protocols and standards provided by the National Horticulture Mission (NHM)/ Government. In case of absence of any such relevant protocols and standards by NHM, then, 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;

**31. “GOAP”** means the Government of the State of Andhra Pradesh, its respective departments or any other authorities, agencies and instrumentalities functioning under the direction or control of the Government of Andhra Pradesh and its administrators, successors and assigns.

**32. “Expert”** shall have the meaning as ascribed in Schedule E

**33. “Construction Completion Certificate”** means the certificate issued under Article 12.10.

**34. “Construction Period” or “Time for Completion of Construction ”** means the period from the Appointed Date to the date of issue of Construction Completion Certificate, wherein the development of the Market has been completed and made operational and all other applicable provisions of this Operation Management & Development Agreement (OMDA).

**35. “Market” or “Terminal Market Yard”** means the facility as being constructed by the Concessionaire, as per the provisions of the Operation Management & Development Agreement (OMDA).

**36. “Material Adverse Effect”** means consequences of events outside the control of the Affected Party which (a) render any right vested in a Party by the terms of this Concession ineffective, or (b) significantly impairs or frustrates the ability of any Party to observe and perform in

a timely manner its obligations under this Operation Management & Development Agreement (OMDA), or (c) frustrates a material provisions of this Operation Management & Development Agreement (OMDA) or any of the Project Agreements.

**37. “Operation and Maintenance Period”** is the period commencing from the Operations Date and terminating at the Transfer Date.

**38. “Operations Date” or “Date of Issuance of Construction Completion Certificate”** means the date on which Government issues an Construction Completion Certificate for the management of Market and the Concessionaire commences the commercial operation of the “Project”.

**39. “Operator”** means the Concessionaire who will undertake the work of set-up, operation, maintenance and management of the Terminal Market Yard at Peapully, Nandyal, Andhra Pradesh.

**40. “Party”** means any of the parties to this Operation Management & Development Agreement (OMDA).

**41. “Performance Security”** means a Bank Guarantee for an amount as defined in Article 9.1 of Operation Management & Development Agreement (OMDA); and shall be in the format as set out in Schedule C, from a scheduled bank approved by the Government.

**42. “Person”** means any natural person, firm, corporation, company, partnership, joint venture, trust or other entity, having legal capacity to sue and be sued in its name.

**43. “Project”** means, subject to the provisions of this Operation Management & Development Agreement (OMDA), develop, Set-up, operations and maintenance of Terminal Market Yard, Peapully, Nandyal on PPP, as per the terms and conditions of the Operation Management & Development Agreement (OMDA) and Schedules hereof and transfer



of the Market and the Immovable Assets in good and operational condition, to the Government at the end of the Concession Period or on prior termination of the Operation Management & Development Agreement (OMDA) on Concessionaire/ Government Event of Default or otherwise. The movable assets can be taken away by the Concessionaire after the end of the Concession Period.

**44. "Project Agreements"** means, collectively, this Operation Management & Development Agreement (OMDA), the Financing Documents, hire purchase agreements, Construction Agreements and Operation & Maintenance Agreements, in each case as amended, supplemented or otherwise modified from time to time.

**45. "Project Development Plan"** means the detailed project information regarding project concept, details of project facilities, details of resources, work plan etc as stated in Schedule A & B of Operation Management & Development Agreement (OMDA).

**46. "Date of Agreement"** means the date of signing of this Operation Management & Development Agreement (OMDA).

**47. "Project Insurance"** means the insurance taken out by or on behalf of the Concessionaire pursuant to the provisions of this Operation Management & Development Agreement (OMDA).

**48. "RFP"** means the Request for Proposal document as issued by the Government. The terms "RFP" and "Request for Proposal" are synonymous with "Tender Documents" and "Bidding Documents".

**49. "Schedules"** mean the Schedules to this Operation Management & Development Agreement (OMDA).

**50. "Senior Lender"** means the financial institutions, funds and banks who have advanced or agreed to advance term loan to the Concessionaire

under any of the Financing Documents for meeting all or part of the Total Project Cost.

**51. “Service level benchmarks”** means the standards to which the operation and maintenance of the Project must adhere to and which the Concessionaire undertakes to meet. Those practices, methods, techniques, standards, skill, diligence and prudence which are generally and reasonably expected and accepted from a reasonably skilled, prudent and experienced operator engaged in construction and operation of projects akin to the Project. It would include good engineering practices in the design, furnishing, fitting and project management and operation and maintenance which would be expected to result in the performance of its obligation by the Concessionaire and in operation and maintenance of the Project in accordance with this Operation Management & Development Agreement (OMDA), Applicable Laws, Clearances, reliability, safety, environment protection, economy and efficiency.

**52. “Statutory Auditors”** means an independent, recognised and reputable firm of the chartered accountants duly licensed to practice in India acting as the Independent statutory auditors of the Concessionaire under the provisions of Companies Act, 1956 including any statutory modification or re-enactment or replacement thereof, for the time being in force.

**53. “Substitution Agreement”** shall have the meaning as set forth in Clause 29.3.1

**54. “Successful Bidder”** means the shortlisted bidder who quoted the highest Annual Concession Fee.

**55. “Tax”** means any tax, duty, levy, charge whatsoever charged, imposed or levied under Applicable Laws. Here, for this Project, the Concessionaire shall, at its own cost, pay all applicable existing and future taxes/ charges/ fees/ levies including the property tax, house tax, service tax,

stamp duty, registration charges and any other charges payable/ leviable in respect of the said Project.

**56. “Tender/ Bid/ Proposal”** means the Concessionaire's quoted Financial Proposal and detailed Proposal for the Project, including the Concessionaire's Proposal, submitted to the Government and as accepted by the Government.

**57. “Termination Date”** means the date on which this Operation Management & Development Agreement (OMDA) terminates by efflux of time or by issuance of a Termination Notice.

**58. “Termination Notice”** means the communication issued in accordance with this Operation Management & Development Agreement (OMDA) by a Party to the other Party for terminating this Operation Management & Development Agreement (OMDA).

**59. “Termination Payment”** means the amount payable by the Government to the Concessionaire upon the termination of this Operation Management & Development Agreement (OMDA).

**60. “Third Party”** means any Person, real or judicial, or entity other than the Parties to this Operation Management & Development Agreement (OMDA).

**61. “Total Project Cost”** means the lowest of the following:

- a. Total Project Cost as set forth in the Financing Documents.
- b. Actual Capital Cost of the Project upon completion of the Project as certified by Statutory Auditors.
- c. The Total Cost of Project estimated and submitted by Concessionaire as part of its Conditions Precedent.

**62. “Transfer Date”** means the day immediately following the last day of the Concession Period, including any extensions thereto or earlier

termination thereof, in accordance with the terms of the Operation Management & Development Agreement (OMDA).

**63. "User"** means any Person using one or more facilities present in the Terminal Market Yard, Peapully, Nandyal

**64. "Variation"** means an improvement in the Works, services, and facilities etc to be carried out by the Concessionaire, such that the cost of implementing the improvement and can be recovered through a 30-day adjustment of the Concession Period.

**65. "Vesting Certificate"** shall have the meaning set forth in Clause 27.4; and

**66. "Works"** means the development, operations and maintenance of the Market as the context may require, and all the appurtenances thereof, any other permanent, temporary or urgent works required under this Operation Management & Development Agreement (OMDA).

Witness whereof the Parties have executed and delivered this Operation Management & Development Agreement (OMDA) as of the date first above written.

**SIGNED SEALED AND DELIVERED**

for and on behalf of

\_\_\_\_\_ **(Government) by:**

\_\_\_\_\_ (Signature)

\_\_\_\_\_ (Name)

\_\_\_\_\_ (Designation)

**SIGNED SEALED AND DELIVERED**

for and on behalf of

**M/s** \_\_\_\_\_ **(Concessionaire) by:**

\_\_\_\_\_ (Signature)

\_\_\_\_\_ (Name)

\_\_\_\_\_ (Designation)

**In the presence of**

1. \_\_\_\_\_ (Signature)

\_\_\_\_\_ (Name)

\_\_\_\_\_ (Designation)

2. \_\_\_\_\_ (Signature)

\_\_\_\_\_ (Name)

\_\_\_\_\_ (Designation)

## Section 3 – Schedules to Operation Management & Development Agreement (OMDA)

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## **1 SCHEDULE A- THE PROJECT AND SCOPE OF WORK**

### **1.1 Scope of work of the Concessionaire**

The Concessionaire shall take all necessary / mandatory clearances, permits etc which are required for construction of additional components along with operations and maintenance of Terminal Market at Peapully, Nandyal on PPP mode -

1. Such that all such conditions have been satisfied in full and all such Clearances, Permits etc. to construct, operate and maintain are in full force and effect.
2. **Prepare and get approved a Project Development Plan**  
Project Development Plan to detail out the facilities envisaged by the Concessionaire, details of capital expenditure to be incurred on each facility (cold storage, ripening chamber, packhouse, testing laboratory, etc), marketing plan for the Project, etc
3. **Develop the Facility**  
The Concessionaire shall be required to design, engineer, finance, procure and construct the Project components within as per the approved Project Development Plan and in accordance with the Development Standards in Schedule J of this RFP. In addition, procurement and installation of equipment for Market/ SCO Area, Retail Area, Cold Storage, Ripening Chamber, Packhouse, other utilities, etc in the market.
4. **Sub-licensing to traders and retailers**  
The Concessionaire shall execute sub-license agreements with traders and/ or retailers for Market Area, for a pre-determined time period.
5. **Operate and manage the facility**
  - a. **Provide manpower to manage the facility**  
The Concessionaire shall hire adequate manpower required for operation and maintenance of requisite facilities. The Concessionaire will be required to submit a detail project development plan in which he will provide the need of the adequate manpower required for the project. The manpower should be both skilled and unskilled and would have experience in working and maintaining the kind of facilities.
  - b. **Maintenance of all facilities provided in the Market**  
The Concessionaire shall ensure that the basic objective of the market shall be met. All the facilities in the market should be properly managed and maintained as per the guidelines issued by the Government.
  - c. **Managing the operations in the Market**

The Concessionaire should ensure that the market is being managed properly as per its guidelines and operation manual. The market must be fully operational after the period of implementation period and shall provide facilities to the traders, retailers, farmers, and users of the market facilities.

**d. Managing Operational Expenses**

The Concessionaire is required to undertake and manage all kinds of operational expenses like consumables, salaries, water, electricity, repair and maintenance, etc. of the facilities during the concession period.

**e. Repair and Maintenance**

The Concessionaire is required to undertake the repair and maintenance work of all the existing facilities present at the Market. He will be required to bear all the cost related to the same.

**f. Create and Maintain a Website**

The Concessionaire shall create, maintain and manage a website for the Project detailing out different information required for operating the market efficiently. The Concessionaire shall also update the website every 3 months.

**6. Periodic refurbishment of Infrastructure**

The Concessionaire is required to undertake any required refurbishment in existing infrastructure present at the facility.

**7.** Through-out the Concession Period, the Concessionaire, shall be required to extend cordial relations to the annual audits conducted by the Technical Auditor appointed by the Government and to other Experts as and when appointed by the Government.

**8.** The Concessionaire shall ensure that adequate competitors operate in the market to prevent monopoly by a few players.

**9.** The Concessionaire shall be required to meet the following minimum service levels for the various facilities within the Project:

- Capacity for additional components such as Cold Storage, Ripening Chamber, Packhouse, etc. as mentioned in this RFP.
- Free access to registered persons taking part in activities related to the operations.
- Market will be open for business everyday in line with the market requirements.
- The hours of each of activities/facilities carried out in the market will be decided by the Concessionaire after consultation with the Government.
- All facilities capable of 24 hour operations.

- Safety, sanitary and medical requirements must be fully complied with relevant act, rules and regulations prescribed by the law or the Concessionaire.

**10. Additionally,**

- All the machines and equipments installed in the Project shall be ISO certified or at par quality control / testing certification.
- All the machines and equipment to remain operational through-out the Concession Period. Replacement and repair should be undertaken within 48 hours and not more than 7 days. Case to case basis exceptions at the approval of the Government may be granted.
- No illegal / anti-social activities would be permitted within the Project premises.

**11. The Concessionaire would be required to follow all the applicable rules for Construction, Operations and Maintenance of the Market facilities.**

**12. The Concessionaire shall fulfill all other obligations in accordance with the provisions of this Operation Management & Development Agreement (OMDA) and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Operation Management & Development Agreement (OMDA) and its Schedules thereof.**

**13. The fully functional and operational project shall be transferred back to Government after the expiry of Concession Period or in case of premature termination for any reason whatsoever.**

***It is clarified herewith that in addition to the above-stated “Scope of Work”, the Concessionaire shall be required to carry out any incidental works and services as required and to comply with all the provisions of the Operation Management & Development Agreement (OMDA), the Schedules to the Operation Management & Development Agreement (OMDA) and as per the requirements of applicable byelaws/ norms etc, while completing the development of the Project.***

## **2 SCHEDULE B-PROJECT FACILITIES**

The Terminal market shall be constructed on a plot of ~ 25.93 acres. The details of the Site Plan and the facilities to be constructed shall be in accordance to the DPR (available with the Government).

However, the summary of the facilities that shall be mandatorily a part of the Project include:

1. Wholesale shops – 36 Nos
2. Semi-retail shops – 20 Nos
3. Retail shops – 66 Nos
4. Ripening chamber – 6 Nos (20 MT each)
5. Pre-cooling chamber – 2 Nos (30 MT each)
6. Cold Storage – 4 chambers of 500 MT each
7. Processing Block – 1 MT/ hour
8. R.O System (50 Liters/Hr)
9. STP 20KLD
10. ETP 150KLD
11. Weigh Bridge (60MT)
12. 1.00 Lakhs litre capacity OHT

### **3 SCHEDULE C-PERFORMANCE SECURITY**

**Department of Horticulture  
Government of Andhra Pradesh**

WHEREAS:

- (A) ..... (the “Concessionaire”) and Department of Horticulture, Government of Andhra Pradesh [hereinafter referred to as the “Government”] have entered into a Operation Management & Development Agreement (OMDA) dated ..... (the “Agreement”) whereby the Government has agreed to the Concessionaire undertaking Development, Operation and Maintenance of Terminal Market Yard, Peapully, Nandyal subject to and in accordance with the provisions of the Agreement.
- (B) The Agreement requires the Concessionaire to furnish a Performance Security to the Government in a sum of **INR \_\_\_\_ Crore** (Rupees \_\_\_\_ **Crore** only) (the “Guarantee Amount”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the Concession Period (as defined in the Agreement).
- (C) We, ..... through our Branch at ..... (the “Bank”) have agreed to furnish this Bank Guarantee by way of Performance Security.

Now, therefore, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Concessionaire’s obligations during the Concession Period, under and in accordance with the Agreement, and agrees and undertakes to pay to the Government, 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 Government shall claim, without the Government 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 Government, under the hand of an Officer not below the rank of \_\_\_\_\_, 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 Government shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Concession Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Government and the Concessionaire, or any dispute between them pending before any

- court, tribunal, arbitrators or any other Government or body, or by the discharge of the Concessionaire for any reason whatsoever.
3. In order to give effect to this Guarantee, the Government 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 Government to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
  5. The Government 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 Government 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 Government, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Government 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 Government 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 Government in respect of or relating to the Agreement or for the fulfillment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
  7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for the period specified in paragraph 8 below and unless a demand or claim in writing is made by the Government on the Bank under this Guarantee, no later than 6 (six) months from the date of expiry of this Guarantee, all rights of the Government 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 Government shall have granted the Vesting Certificate to the Concessionaire under and in accordance with this Agreement.
  9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Government 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 authorised 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 Government 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 from the date hereof or until it is released earlier by the Government pursuant to the provisions of the Agreement

Signed and sealed this ..... day of ....., 20..... at .....

SIGNED, SEALED AND DELIVERED

For and on behalf of

the BANK by:

(Signature)

(Name)

(Designation)

(Code Number)

(Address)

NOTES:

- (i) The bank guarantee should contain the name, designation and code number of the officer(s) signing the guarantee.
- (ii) The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.

## **4 SCHEDULE D-MAINTAINANCE REQUIREMENTS**

### **4.1 Maintenance Requirements**

- 4.1.1 The Concessionaire shall, at all times, operate and maintain the Project in accordance with the provisions of the Agreement, Applicable Laws and Applicable Permits. In particular, the Concessionaire shall, at all times during the Concession Period, conform to the operation and maintenance requirements set forth in Annexure-1 of this Schedule.
- 4.1.2 The Concessionaire shall repair or rectify any defect or deficiency set forth in Paragraph 2 of this Schedule-D within the standard time limit and any failure in this behalf shall constitute a breach of the Agreement. Upon occurrence of any breach hereunder, the Government shall be entitled to recover Damages as set forth in Clause 14.5 of the Agreement, without prejudice to the rights of the Government under the Agreement, including Termination thereof.

### **4.2 Repair/rectification of defects and deficiencies**

- 4.2.1 The obligations of the Concessionaire in respect of Maintenance Requirements shall include repair and rectification of the defects and deficiencies in accordance with Good Industry Practice.
- 4.2.2 The Expert, may in conformity with Good Industry Practice, specify the permissible limit of deviation or deterioration with reference to the Specifications and Standards, and any deviation or deterioration beyond the permissible limit shall be repaired or rectified by the Concessionaire within the time limit specified by the Expert, as and when required.

### **4.3 Extension of time limit**

Notwithstanding anything to the contrary specified in this Schedule-D, if the nature and extent of any defect or deficiency justifies more time for its repair or rectification than the standard time, the Concessionaire shall be entitled to additional time in conformity with Good Industry Practice. Such additional time shall be determined by the Expert and conveyed to the Concessionaire and the Government with reasons thereof.

### **4.4 Emergency repairs/restoration**

Notwithstanding anything to the contrary specified in this Schedule-D, if any defect, deficiency or deterioration, in a Project poses a hazard to safety or risk of damage to the property, the Concessionaire shall promptly take all reasonable measures for eliminating or minimizing such dangers.



#### **4.5 Daily inspection by the Concessionaire**

The Concessionaire shall, through its Expert, undertake a daily visual inspection of the Project and maintain a record thereof in a register to be kept in such form and manner as the Expert may specify. Such record shall be kept in safe custody of the Concessionaire and shall be open to inspection by the Government and the Expert at any time during office hours.

#### **4.6 Divestment requirements**

All defects and deficiencies specified shall be repaired and rectified by the Concessionaire so that the project conforms to the Maintenance Requirements on the Transfer Date.

## **Annexure – 1**

*(Schedule D)*

### **Operations and Maintenance Standards and Requirements**

#### **Operation Planning Principles**

The operation and maintenance of the Market will at all times be in compliance with the following:

- i. Ensure that the electronic auction, cold storage, ripening chamber and other infrastructure are operated and are maintained in accordance with the stated provisions at the Market;
- ii. Ensure that appropriate arrangements are in place at the Market to prevent man/animal nuisance in and around the operational area;
- iii. Ensure that suitable contingency arrangements are in place at the Market to deal with the following events:
  - a. Removal of disabled machinery/equipment from the market complex;
  - b. Equipment/ machine damage/ accidents in and around the vicinity of the Market;
  - c. Fires at the Market;
  - d. Natural calamities and disasters;
  - e. Strikes at the Market;
- iv. Ensure that emergency alarm bells have been installed to link the facility to the emergency services (fire, medical and police) and to the Market manager;
- v. The Concessionaire shall at all times maintain and upgrade the Market equipment as per the provisions of the Project Development Plan.

#### **Objective Service Quality Requirements\***

1.	Labor Availability	98% of all instances inspected on a random Basis
2.	Loading and Unloading Bay availability for Material	99% of all instances inspected on a random Basis
3.	Availability of cold storage space for Material	At least 10% free space 95% of all instances inspected on a random basis
4.	Document Processing Time(minutes) [4]	15
5.	Receipt of docs to handover of Cash to farmer (minutes)	20
6.	Turn-around-time (from material entry into Market to Auction (minutes)	90
7.	Waiting Time in queue per individual	10

	Operation (minutes)	
8.	Processing Time in queue per Individual operation (minutes) [5]	20
9.	Maximum time for produce to be in open environment (minutes)	30
10.	Maximum complaint handling time (hours)	24
11.	Cleanliness	Achieve a satisfactory Cleanliness rating of 95% of all instances inspected on a random Basis
12.	Access to Emergency Services	100% of all instances inspected on a random basis

\* These are just indicative numbers and need to be decided as per discussions with the Government.

\*\* Depends on the factor whether animals are allowed or not

[1] Includes employees and labor force

[2] Includes population incident during peak hours including visitors, traders, retailers, etc.

[3] Includes registration and procedural documents such as receipts and records, etc.

[4] Operation is defined as an activity related to the core material flow such as weighment, bagging, loading and unloading of each material lot of 10 metric tones

Default:

At any time after the Concessionaire is obligated to achieve and maintain a particular Objective Service Quality Requirement, in the event that the immediately succeeding quarterly report show that the Market (or any part thereof) is rated below the respective Objective Service Quality Requirement, the Concessionaire will achieve the particular Objective Service Quality Requirement within 30 days of the last submitted quarterly report.

## **5 SCHEDULE E-EXPERT(S)**

### **5.1.1 Appointment of Expert**

The Government may appoint an Expert (the “**Expert**”) at no expense to the Concessionaire.

### **5.1.2 Duties and functions**

- I. The Expert shall discharge its duties and functions substantially in accordance with the terms of reference set forth below
- II. The Expert shall submit regular periodic reports (at least once every quarter) to the Government in respect of its duties and functions set forth in Schedule-F.

### **5.1.3 Termination of appointment**

- i. The Government shall endeavour that Expert as appointed shall continue for as long period as possible but may, in its discretion, appoint another Expert in any unavoidable circumstances.
- ii. If the Concessionaire has reason to believe that the Expert is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Government and seek termination of the appointment of the Expert. Upon receipt of such representation, the Government shall hold a tripartite meeting with the Concessionaire and Expert for an amicable resolution of the Dispute, and if any difference or disagreement between the Government and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the change of Expert is considered appropriate, the Government shall appoint forthwith another Expert.

### **5.1.4 Dispute resolution**

If either Party disputes any advice, instruction, decision, direction or award of the Expert, 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.

## **6 SCHEDULE F-TERMS OF REFERENCE FOR EXPERT**

### **6.1 Role and functions of the Expert**

6.1.1 The role and functions of the Expert shall include the following:

- I. review of the Drawings and Documents;
- II. determine the Project Facilities Completion Schedule;
- III. review, inspection and monitoring of Construction Works;
- IV. conducting Tests on completion of construction and issuing Completion/ Provisional Certificate;
- V. review, inspection and monitoring of Operations & Maintenance;
- VI. review, inspection and monitoring of Divestment Requirements;
- VII. determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
- VIII. determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- IX. assisting the Parties in resolution of disputes; and undertaking all other duties and functions in accordance with the Agreement.
- X. The Expert shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

### **6.2 Review of Drawings and Documents**

- 6.2.1 The Expert shall undertake a detailed review of the Drawings to be furnished by the Concessionaire along with supporting data. The Expert shall complete such review and send its comments / observations to the Government 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.
- 6.2.2 The Expert 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.
- 6.2.3 The Expert shall review the Drawings sent to it by the Safety Consultant in accordance and furnish its comments thereon to the Government and the Concessionaire within 7 (seven) days of receiving such Drawings. The Expert shall also review the Safety Report and furnish its comments thereon to the Government within 15 (fifteen) days of receiving such report.
- 6.2.4 The Expert 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.

### **6.3 Construction Works**

- 6.3.1 In respect of the Drawings, Documents and Safety Report received by the Expert for its review and comments during the Construction Period, the provisions of Paragraph 2 shall apply, *mutatis mutandis*.
- 6.3.2 The Expert shall review the quarterly progress report furnished by the Concessionaire and send its comments thereon to the Government and the Concessionaire within 7 (seven) days of receipt of such report.
- 6.3.3 The Expert shall inspect the Construction Works and the Project once every month, preferably after receipt of the quarterly 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 Expert shall describe in reasonable detail the lapses, defects or deficiencies observed by it in the construction of the Project Facilities. The Inspection Report shall also contain a review of the maintenance of the existing lanes in conformity with the provisions of the Agreement. The Expert shall send a copy of its Inspection Report to the Government and the Concessionaire within 7 (seven) days of the inspection.
- 6.3.4 The Expert may inspect the Project more than once in a month if any lapses, defects or deficiencies require such inspections.
- 6.3.5 For determining that the Construction Works conform to Industry Specifications and Standards, the Expert shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Expert in accordance with Good Industry Practice for quality assurance. The Expert 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.
- 6.3.6 In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Expert 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 3 shall apply to such tests.
- 6.3.7 In the event that the Concessionaire fails to achieve any of the Project Facilities Completion Schedule, the Expert shall undertake a review of the progress of construction and identify potential delays, if any. If the Expert shall determine that completion of the Project Facility 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 completion shall be achieved. Upon receipt of a report from the Concessionaire, the Expert shall review the same and send its comments to the Government and the Concessionaire forthwith.

- 6.3.8 If at any time during the Concession Period, the Expert 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 Government forthwith identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- 6.3.9 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 Expert to inspect such works, and within 3 (three) days of receiving such notice, the Expert shall inspect the suspended works and make a report to the Government forthwith, recommending whether or not such suspension may be revoked by the Government.
- 6.3.10 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Expert shall determine the extension of dates set forth in the Project Facilities Completion Schedule, to which the Concessionaire is reasonably entitled, and shall notify the Government and the Concessionaire of the same.
- 6.3.11 The Expert shall issue a Completion Certificate upon completion of each Project Facility and Major Maintenance Work, if any, specified under and in accordance with this Agreement.
- 6.3.12 Upon reference from the Government, the Expert 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 Government to the Concessionaire.
- 6.3.13 The Expert shall aid and advise the Concessionaire in preparing the Maintenance Manual.

#### **6.4 Operation & Maintenance**

- 6.4.1 The Expert shall review the annual Maintenance Programme furnished by the Concessionaire and send its comments thereon to the Government and the Concessionaire within 15 (fifteen) days of receipt of the Maintenance Programme.
- 6.4.2 The Expert shall review the quarterly status report furnished by the Concessionaire and send its comments thereon to the Government and the Concessionaire within 7 (seven) days of receipt of such report.
- 6.4.3 The Expert 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 each month 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 Expert shall describe in reasonable detail the lapses, defects or deficiencies observed by it in O&M of the Project. The Expert shall send a copy of its O&M Inspection Report to the Government and the Concessionaire within 7 (seven) days of the inspection.
- 6.4.4 The Expert may inspect the Project more than once in a month, if any lapses, defects or deficiencies require such inspections.
- 6.4.5 The Expert 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.

- 6.4.6 In respect of any defect or deficiency, the Expert 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.
- 6.4.7 The Expert 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 Government for such delay.
- 6.4.8 The Expert shall examine the request of the Concessionaire for closure of any facility (ies) for undertaking maintenance/repair thereof, keeping in view the need to minimise disruption in operations and the time required for completing such maintenance/repair in accordance with Good Industry Practice. It shall grant permission with such modifications, as it may deem necessary, within 3 (three) days of receiving a request from the Concessionaire. Upon expiry of the permitted period of closure, the Expert shall monitor the re-opening of such facility (ies), and in case of delay, determine the Damages payable by the Concessionaire to the Government under Clause 14.5.
- 6.4.9 The Expert shall monitor and review the curing of defects and deficiencies by the Concessionaire as set forth in Clause 15.4.
- 6.4.10 In the event that the Concessionaire notifies the Expert of any modifications that it proposes to make to the Project, the Expert shall review the same and send its comments to the Government and the Concessionaire within 15 (fifteen) days of receiving the proposal.

## **6.5 Termination**

- 6.5.1 At any time, not earlier than 90 (ninety) days prior to Termination but not later than 15 (fifteen) days prior to such Termination, the Expert 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 27.1 and, if required, cause tests to be carried out at the Concessionaire's cost for determining such compliance. If the Expert 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 OMDA, it shall recommend retention of the required amount in the Trust and Retention Account and the period of retention thereof.
- 6.5.2 The Expert 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 this Agreement and Operation Management & Development Agreement (OMDA), in respect of the defects or deficiencies specified therein. If any such defect or deficiency is found by the Expert, it shall make a report in reasonable detail and send it forthwith to the Government and the Concessionaire.

## **6.6 Determination of costs and time**

- 6.6.1 The Expert shall determine the costs, and/or their reasonableness, that are required to be



determined by it under the Agreement.

- 6.6.2 The Expert shall determine the period, or any extension thereof, that is required to be determined by it under the Agreement.

#### **6.7 Assistance in Dispute resolution**

- 6.7.1 When called upon by either Party in the event of any Dispute, the Expert shall mediate and assist the Parties in arriving at an amicable settlement.
- 6.7.2 In the event of any disagreement between the Parties regarding the meaning, scope and nature of Good Industry Practice, as set forth in any provision of the Agreement, the Expert shall specify such meaning, scope and nature by issuing a reasoned written statement relying on good industry practice and authentic literature.

#### **6.8 Other duties and functions**

- 6.8.1 The Expert shall perform all other duties and functions specified in the Agreement.

#### **6.9 Miscellaneous**

- 6.9.1 The Expert shall notify its programme of inspection to the Government and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection.
- 6.9.2 A copy of all communications, comments, instructions, Drawings or Documents sent by the Expert to the Concessionaire pursuant to this TOR, and a copy of all the test results with comments of the Expert thereon shall be furnished by the Expert to the Government forthwith.
- 6.9.3 The Expert 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 Expert, whereupon the Expert shall send one of the copies to the Government along with its comments thereon.
- 6.9.4 The Expert 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.
- 6.9.5 Upon completion of its assignment hereunder, the Expert shall duly classify and list all Drawings, Documents, results of tests and other relevant records, and hand them over to the Government and obtain written receipt thereof. Two copies of the said document shall also be furnished in micro film form or in such other medium as may be acceptable to the Government.
- 6.9.6 Wherever no period has been specified for delivery of services by the Expert, the Expert shall act with the efficiency and urgency necessary for discharging its functions in accordance with Good Industry Practice.

## 7 SCHEDULE G-ESCROW AGREEMENT

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

AMONGST

- i. .... Limited, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at ..... (hereinafter referred to as the “Concessionaire” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
- ii. .... (name and particulars of the Escrow Bank) and having its registered office at ..... (hereinafter referred to as the “Escrow Bank” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
- iii. The Department of Horticulture, Government of Andhra Pradesh (hereinafter referred to as the “Government” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).

WHEREAS:

- (A) The Government has entered into a Operation Management & Development Agreement (OMDA) dated ..... with the Concessionaire (the “**Operation Management & Development Agreement (OMDA)**”) for Development, Operation and Maintenance of Terminal Market, Peapully, Nandyal and a copy of which is annexed hereto.
- (B) The Operation Management & Development Agreement (OMDA) requires the Concessionaire to establish an Trust and Retention 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:

### 7.1 Definitions and Interpretation

#### 7.1.1 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;

**“Operation Management & Development Agreement (OMDA)”** means the Operation Management & Development Agreement (OMDA) referred to in Recital (A) above and annexed hereto, 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 Government to the Concessionaire asking the latter to cure the breach or default specified in such notice;

**“Trust and Retention Account”** means an Trust and Retention Account established in terms of and under this Agreement, and shall include the Sub-Accounts;

**“Escrow Default”** shall have the meaning ascribed thereto in Clause 20;

**“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;

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

**“Payment Date”** means, in relation to any payment specified in this RFP, the date(s) specified for such payment; and

**“Sub-Accounts”** means the respective Sub-Accounts of the Trust and Retention Account, into which the monies specified in Clause 20.3.1 of Operation Management & Development Agreement (OMDA), 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).

#### **7.1.2 Interpretation**

- i. 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 Operation Management & Development Agreement (OMDA) shall, unless repugnant to the context, have the meaning ascribed thereto in the Operation Management & Development Agreement (OMDA).
- ii. References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.
- iii. The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Operation Management & Development Agreement (OMDA) shall apply, mutatis mutandis, to this Agreement.

### **7.2 Trust and Retention Account**

#### **7.2.1 Escrow Bank to act as trustee**

1. The Concessionaire hereby appoints the Escrow Bank to act as trustee for the Government and the Concessionaire in connection herewith and authorises 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. The Concessionaire hereby declares that all rights, title and interest in and to the Trust and Retention Account shall be vested in the Escrow Bank and held in trust for the Government and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Government and the Concessionaire shall have any rights hereunder as the beneficiaries under this Agreement.

#### **7.2.2 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 Trust and Retention Account during the term of this Agreement and shall treat the amount in the Trust and Retention Account as monies deposited by the Concessionaire or the Government 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 Government and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

#### **7.2.3 Establishment and operation of Trust and Retention Account**

1. Within 30 (thirty) days from the date of this Agreement, and in any case prior to the COD Date, the Concessionaire shall open and establish the Trust and Retention Account with the \_\_\_\_\_ (name of Branch) Branch of the Escrow Bank. The Trust and Retention Account shall be denominated in Rupees.
2. The Escrow Bank shall maintain the Trust and Retention 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.
3. The Escrow Bank and the Concessionaire shall agree on the detailed mandates, terms and conditions, and operating procedures for the Trust and Retention 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.

#### **7.2.4 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 Trust and Retention Account in accordance with Clause 7.4.1

#### **7.2.5 Rights of the parties**

The rights of the Government and the Concessionaire in the monies held in the Trust and Retention Account are set forth in their entirety in this Agreement and the Government and the Concessionaire shall have no other rights against or to the monies in the Trust and Retention Account.

### **7.3 Deposits into Trust and Retention Account**

#### **7.3.1 Deposits by the Concessionaire**

1. The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Trust and Retention Account with:
  - (a) all monies received in relation to the Project from any banks, insurance claims and shareholders;
  - (b) all user fee, rentals and any other revenues from or in respect of the Project, including the proceeds of insurance claims; and
  - (c) any other receipts or revenues, rentals, deposits or capital receipts, as the case may be, from or in respect of the Project.
2. Provided that the Concessionaire may at any time make deposits of its other funds into the Trust and Retention Account, provided that the provisions of this Agreement shall apply to such deposits.

#### **7.3.2 Deposits by the Government**

The Government agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Trust and Retention Account with:

- (a) all Fee collected by the Government in exercise of its rights under the Operation Management & Development Agreement (OMDA), if any
- (b) Termination Payments

#### **7.3.3 Interest on deposits**

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Trust and Retention Account shall be credited to the Trust and Retention 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 Trust and Retention Account and credit the balance remaining to the Trust and Retention Account.

### **7.4 Withdrawals from Trust and Retention Account**

#### **7.4.1 Withdrawals during Concession Period**

1. At the beginning of every month, or at such shorter intervals as the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Trust and Retention 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) Concession Fee due and payable to the Government;
  - c) all payments relating to construction of the Project Facilities;
  - d) O&M Expenses, subject to the ceiling set by the Engineer in accordance with Good Industry Practice;
  - e) O&M Expenses and other costs and expenses incurred by the Government in accordance with the provisions of this Agreement, and certified by the Government as due and payable to it;
  - f) monthly proportionate provision of Debt Service due in an Accounting Year;
  - g) all payments and Damages certified by the Government as due and payable to it by the Concessionaire; and
  - h) balance, if any, in accordance with the instructions of the Concessionaire.
2. No later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 7.4.1; provided that such amounts may be subsequently modified, with prior written approval of the Government if fresh information received during the course of the year makes such modification necessary.

#### **7.4.2 Withdrawals upon Termination**

Upon Termination of the Operation Management & Development Agreement (OMDA), all amounts standing to the credit of the Trust and Retention 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. outstanding Concession Fee;
- c. all payments and Damages certified by the Government as due and payable to it by the Concessionaire;
- d. cost of repair and restoration of damages to the Project on account of a Non Political Event;
- e. all outstanding debt and interest thereon;
- f. retention and payments arising out of, or in relation to, liability for defects and deficiencies set forth in Article 28 of Operation Management & Development Agreement (OMDA);
- g. incurred or accrued O&M Expenses;
- h. any other payments required to be made under the Agreement; and

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

Provided that the disbursements specified in Sub-clause (i) of this Clause shall be undertaken only after the Vesting Certificate has been issued by the Government.

**7.4.3 Application of insufficient funds**

Funds in the Trust and Retention Account shall be applied in the serial order of priority set forth in Clauses 7.4.1 and 7.4.2, 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.

**7.4.4 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 Trust and Retention 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 of this Agreement.

**7.4.5 Withdrawals during Suspension**

Notwithstanding anything to the contrary contained in this Agreement, the Government may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 25 of the Operation Management & Development Agreement (OMDA). Any instructions given by the Government 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 Government hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

**7.5 Obligations of the Escrow Bank**

**7.5.1 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.

**7.5.2 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 to the relevant Payment Dates), the Escrow Bank shall notify the Government of the balances in the Trust and Retention Account and Sub-Accounts as at the close of business on the immediately preceding business day.

**7.5.3 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 Government of any notice or document received by the Escrow Bank 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 the Escrow Bank from the Government in connection herewith.

#### **7.5.4 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 Trust and Retention 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 Trust and Retention 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.

#### **7.5.5 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 Trust and Retention 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.

### **7.6 Escrow Default**

#### **7.6.1 Escrow Default**

- 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 Government:
  - a) the Concessionaire commits breach of this Agreement by failing to deposit any receipts into the Trust and Retention Account as provided herein and fails to cure such breach by depositing the same into the Trust and Retention 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 Trust and Retention 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.
- 2) Upon occurrence of an Escrow Default, the consequences thereof shall be dealt with under and in accordance with the provisions of the Operation Management & Development Agreement (OMDA).

## **7.7 Termination of Escrow Agreement**

### **7.7.1 Duration of the Escrow Agreement**

This Agreement shall remain in full force and effect so long as any of its obligations to the Government remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

### **7.7.2 Substitution of Escrow Bank**

The Concessionaire may, by not less than 45 (forty five) days prior notice to the Escrow Bank and the Government, terminate this Agreement and appoint a new Escrow Bank, provided that arrangements are made satisfactory to the Government for transfer of amounts deposited in the Trust and Retention Account to a new Trust and Retention 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.

### **7.7.3 Closure of Trust and Retention Account**

The Escrow Bank shall, at the request of the Concessionaire made on or after the payment by the Concessionaire of all outstanding amounts under the Operation Management & Development Agreement (OMDA) including the payments specified in Clause 7.4.2, and upon confirmation of receipt of such payments, close the Trust and Retention Account and Sub-Accounts and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Trust and Retention Account hereunder, the Escrow Agreement shall be deemed to be terminated.

## **7.8 Supplementary Escrow Agreement**

### **7.8.1 Supplementary escrow agreement**

Any lender providing financial assistance for the Project 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 matters not covered under this Agreement such as the rights and obligations of lenders, 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 Trust and Retention 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.

## **7.9 Indemnity**

### **7.9.1 General indemnity**

1. The Concessionaire will indemnify, defend and hold the Government and Escrow Bank 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.
2. The Government 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 Government to fulfil any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Operation Management & Development Agreement (OMDA) or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the Government, its officers, servants and agents.
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 Operation Management & Development Agreement (OMDA) 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.

### **7.9.2 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 7.9.1 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.

## **7.10 Dispute Resolution**

### **7.10.1 Dispute Resolution**

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.
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 Chandigarh and the language of the arbitration shall be English.

## **7.11 Miscellaneous Provisions**

### **7.11.1 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 Chandigarh shall have jurisdiction over all matters arising out of or relating to this Agreement.

### **7.11.2 Waiver of sovereign immunity**

The Government 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 Government 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).

### **7.11.3 Priority of agreements**

In the event of any conflict between the Operation Management & Development Agreement (OMDA) and this Agreement, the provisions contained in the Operation Management & Development Agreement (OMDA) shall prevail over this Agreement.

### **7.11.4 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.

**7.11.5 Waiver**

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.
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.

**7.11.6 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.

**7.11.7 Survival**

- I. 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.
- II. 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.

**7.11.8 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 7.10.1 of this Agreement or otherwise.

**7.11.9 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.

**7.11.10 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 and 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.

**7.11.11 Language**

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

**7.11.12 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.

**7.11.13 Original Document**

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

## **8 SCHEDULE H-VESTING CERTIFICATE**

### **Vesting Certificate**

1. The \_\_\_\_\_ (the “**Government**”) refers to the Operation Management & Development Agreement (OMDA) dated ..... (the “**Agreement**”) entered into between the Government and ..... (the “**Concessionaire**”) for construction of Terminal Market and operation and maintenance of \_\_\_\_\_ Market (the “**Project**”).
2. The Government hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 27.4 of the Agreement on the basis that upon issue of this Vesting Certificate, the Government 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 Government, free from any encumbrances, charges and liens whatsoever.
3. Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

Signed this .....day of ....., 20.... at.....

AGREED, ACCEPTED AND SIGNED

SIGNED, SEALED AND DELIVERED

For and on behalf of

For and on behalf of

CONCESSIONAIRE by:

THE GOVERNMENT by:

(Signature)

(Signature)

(Name)

(Name)

(Designation)

(Designation)

(Address)

(Address)

In the presence of:

1.

2.

## **9 SCHEDULE I-LIST OF SERVICES**

The Concessionaire shall ensure provision of services as detailed out in DPR (as available with the Government).

## 10 SCHEDULE J-DEVELOPMENT STANDARDS

1. **National Building Code (India):** Confirm to the National Building Code (NBC) which sets out safety and durability aspects to be incorporated into building structure.
2. **Indian Standard Codes:** Confirm to the relevant code for the specific aspect of development. The Indian Standard Codes are a comprehensive range of Standards and practices as per Bureau of Indian Standards, to be adopted in all aspects of design and construction in India.
3. **Electrical Specifications:** All electrical equipments, wiring and provisions for the supply of power and lighting at Market shall conform to the relevant standards laid down in the Indian Electricity Act
4. **Fire Safeties:** Conform to appropriate Fire Safety Standards as applicable
5. **Statutory Agency Requirements:** Meet all requirements of the statutory agencies, including Ministry of Agriculture, Customs authorities, Ministry of Environment & Forests, Pollution Control Board
6. **Applicable Laws:** Adhere to all conditions, regulations, measures and all requirements of whatever kind imposed by local byelaws and other applicable Central, State and Local Government laws.

**Default:**

- i. If after the review of such reports furnished by the Concessionaire and independent verification carried out by the Independent Consultant, the Independent Consultant certifies that a particular development under progress at the Market (or any portion thereof) is below the respective Development Standards and Requirement, which post notification of the Government to Concessionaire is not rectified prior to completion of that development; or
- ii. The completion report of any development submitted by the Concessionaire shows that the development at the Market (or any portion thereof) is not as per the Development Standards; or
- iii. Two consecutive quarterly reports of various developments in progress show that the Market (or any portion thereof) is not as per the Development Standards,



## **11 SCHEDULE K-SUBSTITUTION AGREEMENT**

### **Substitution Agreement**

THIS SUBSTITUTION AGREEMENT is entered into on this the \*\*\*day of \*\*\*20\*\*.

#### **AMONGST**

- i. The \_\_\_\_\_ (hereinafter referred to as the “Government” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).
- ii. \_\_\_\_\_ 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); and
- iii. \_\_\_\_\_(insert name and particulars of Lenders Representative] and having its registered office at \_\_\_\_\_, acting for and on behalf of the Senior Lenders as their duly authorized agent with regard to matters arising out of or in relation to this Agreement (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 Government has entered into a Operation Management & Development Agreement (OMDA) dated \_\_\_\_\_with the Concessionaire (the “Operation Management & Development Agreement (OMDA)”) on PPP format the Development, Operation and Maintenance of the Terminal Market located at Peapully, Nandyal), 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 thee Government 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 Operation Management & Development Agreement (OMDA).

- (D) In order to enable implementation of the Project including its planning, designing, engineering financing, construction, operation and maintenance, the Government 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 Operation Management & Development Agreement (OMDA).

NOW IT IS HEREBY AGREED as follows:

**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 intended to be legally bound hereby, the Parties agree as follows:

### **11.1 Definitions and Interpretation**

#### **11.1.1 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, 2013, selected by the Lenders’ Representative, on behalf of Lenders, and proposed to the Government for assignment/transfer of the Concession as provided in this Agreement;

**“Notice of Financial Default”** shall have the meaning ascribed thereto in Clause 11.3.2; and **“Parties”** Means the parties to this agreement collectively and **“Party”** shall mean any of the Parties to this Agreement individually.

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

#### **11.1.2 Interpretation**

- i. 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 Lenders.
- ii. References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.
- iii. 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 Operation Management & Development Agreement (OMDA) shall, unless repugnant to the context, have the meaning ascribed thereto in the Operation Management & Development Agreement (OMDA).
- iv. The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Operation Management & Development Agreement (OMDA) shall apply, *mutatis mutandis*, to this Agreement.

## **11.2 Assignment**

### **11.2.1 Assignment of rights and title**

The Concessionaire hereby assigns 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 Operation Management & Development Agreement (OMDA) by way of security in respect of financing by the Lenders under the Financing Agreements.

## **11.3 Substitution of The Concessionaire**

### **11.3.1 Rights of substitution**

- I. Pursuant to the rights, title and interest assigned under Clause 11.2.1, 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 Operation Management & Development Agreement (OMDA).
- II. The Government hereby agrees to substitute the Concessionaire by endorsement on the Operation Management & Development Agreement (OMDA) in favour of the Nominated Company selected by the Lenders' Representative in accordance with this Agreement. (For the avoidance of doubt, the Senior Lenders or the Lenders' Representative shall not be entitled to operate and maintain the Project as Concessionaire either individually or collectively).

### **11.3.2 Substitution upon occurrence of Financial Default**

- I. 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 Government for its information and record. A Notice of Financial Default under this Clause 11.3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.
- II. Upon issuance 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.

- III. At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Government to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project in accordance with the provisions of the Operation Management & Development Agreement (OMDA), and upon receipt of such notice, the Government shall undertake Suspension under and in accordance with the provisions of the Operation Management & Development Agreement (OMDA). 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 120 (one hundred and twenty) days from the date of such Suspension, the Government may terminate the Operation Management & Development Agreement (OMDA) forthwith by issuing a Termination Notice in accordance with the provisions of the Operation Management & Development Agreement (OMDA); provided that upon written request from the Lenders' Representative and the Concessionaire, the Government may extend the aforesaid period of 120 (one hundred and twenty) days by a period not exceeding 90 (ninety) days.

**11.3.3 Substitution upon occurrence of Concessionaire Default**

- I. Upon occurrence of a Concessionaire Default, the Government 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.
- II. In the event that the Lenders' Representative makes a representation to the Government within the period of 15 (fifteen) days specified in Clause 11.3.3, 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 120 (one hundred and twenty) days from the date of such representation, and the Government shall either withhold Termination or undertake Suspension for the aforesaid period of 120 (one hundred and twenty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the Government shall extend the aforesaid period of 120 (one hundred and twenty) days by a period not exceeding 90 (ninety) days.

**11.3.4 Procedure for substitution**

- I. The Government and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Government under Clause 11.3.3, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the 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 Government under the Operation Management & Development Agreement (OMDA) and towards the Lenders under the Financing Agreements.

- II. To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfill the eligibility criteria that were laid down by the Government for short listing the bidders for award of the Concession; provided that the Lenders' Representative may represent to the Government that all or any of such criteria may be waived in the interest of the Project, and if the Government determines that such waiver shall not have any Material Adverse Effect on the Project, it may waive all or any of such eligibility criteria.
- III. Upon selection of a Nominated Company, the Lenders' Representative shall request the Government 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 Operation Management & Development Agreement (OMDA);
  - (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.
- IV. If the Government 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 Government, the Nominated Company shall be deemed to have been accepted. The Government 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 Government, the Lenders' Representative may propose another Nominated Company whereupon the procedure set forth in this Clause 11.3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire.
- V. The transfer of Concession hereunder to a Nominated Company may, notwithstanding anything to the contrary in this Agreement and the Operation Management & Development Agreement (OMDA), be undertaken by transfer of no less than 75%(seventy five per cent) of the equity of the Concessionaire to the Nominated Company, and upon such transfer hereunder, the Concessionaire shall be deemed to be the Nominated Company under and in accordance with the provisions of this Agreement and the Operation Management & Development Agreement (OMDA).

#### 11.3.5 Selection to be binding

The decision of the Lenders' Representative and the Government 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 Lenders or the Government 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 Government and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the Government or the Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders' Representative.

#### **11.4 Project Agreements**

##### **11.4.1 Substitution of Nominated Company in Project Agreement**

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 Operation Management & Development Agreement (OMDA).

#### **11.5 Termination of Operation Management & Development Agreement (OMDA)**

##### **11.5.1 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 Government to terminate the Operation Management & Development Agreement (OMDA) forthwith, and upon receipt of such notice, the Government shall undertake Termination under and in accordance with the provisions of Article 20 of the Operation Management & Development Agreement (OMDA).

##### **11.5.2 Termination when no Nominated Company is selected**

In the event that no Nominated Company acceptable to the Government is selected and recommended by the Lenders' Representative within the period of 120 (one hundred and twenty) days or any extension thereof as set forth in Clause 11.3, the Government may terminate the Operation Management & Development Agreement (OMDA) forthwith in accordance with the provisions thereof.

##### **11.5.3 Realization of Debt Due**

The Government 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 Operation Management & Development Agreement (OMDA). For realization of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Trust and Retention Account in accordance with the provisions of the Operation Management & Development Agreement (OMDA) and the Escrow Agreement.

#### **11.6 Duration of the Agreement**

##### **11.6.1 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 Lenders, under the Financing Agreements.

## **11.7 Indemnity**

### **11.7.1 General indemnity**

- I. The Concessionaire will indemnify, defend and hold the Government 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.
- II. The Government 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 Government to fulfill any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Operation Management & Development Agreement (OMDA) or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Government, its officers, servants and agents.
- III. 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 fulfill its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Operation Management & Development Agreement (OMDA), 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.

### **11.7.2 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 11.7.1 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.

## **11.8 Dispute Resolution**

### **11.8.1 Dispute resolution**

- i. 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.
- ii. The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be Chandigarh and the language of the arbitration shall be English.

## **11.9 Miscellaneous Provisions**

### **11.9.1 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 Chandigarh shall have jurisdiction over all matters arising out of or relating to this Agreement.

### **11.9.2 Waiver of sovereign immunity**

The Government 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 Government 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 judgment 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 judgment that may be made or given in connection therewith).

### **11.9.3 Priority of agreements**

In the event of any conflict between the Operation Management & Development Agreement (OMDA) and this Agreement, the provisions contained in the Operation Management & Development Agreement (OMDA) shall prevail over this Agreement.

### **11.9.4 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 authorized representatives of the Parties.

**11.9.5 Waiver**

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

**11.9.6 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.

**11.9.7 Survival**

- I. 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.
- II. 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.

**11.9.8 Severability**

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

nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 11.9.8 of this Agreement or otherwise.

**11.9.9 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.

**11.9.10 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. The address for service of each Party and its facsimile number 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 5.00 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. 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.

**11.9.11 Language**

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

**11.9.12 Authorized representatives**

Each of the Parties shall by notice in writing designate their respective authorized representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorized representative by similar notice.

**11.9.13 Original Document**

This Agreement may be executed in three counterparts, each of which were executed and delivered shall constitute an original of this Agreement. **IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.**

SIGNED, SEALED AND DELIVERED

For and on behalf of CONCESSIONAIRE

[\*\*] by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of GOVERNMENT by the Government's Representative:

(Signature)

(Name)

(Designation)

(Address)

(Fax)

SIGNED, SEALED AND DELIVERED

For and on behalf of LENDERS by the Lenders' Representative:

(Signature)

(Name)

(Designation)

(Address)

(Fax)

In the presence of:

1

2