

REQUEST FOR PROPOSAL
VOLUME III
DRAFT CONCESSION AGREEMENT (DCA)



“Development of Cold Storage at Kudra, DistKaimur, Bihar on RDFOT (Renovate, Design, Finance, Operate and Transfer) basis under PPP mode for Bihar Rajya Beej Nigam Limited

ISSUED BY:-



Infrastructure Development Authority
1st Floor, UdyogBhawan, East Gandhi Maidan,
Patna - 800004

August 2015

CONCESSION AGREEMENT

THIS CONCESSION AGREEMENT is entered into on this the ----- day of ----- (Month) ----- (Year) at -----.

BETWEEN,

Bihar Rajya Beej Nigam Ltd (BRBN), a Government of Bihar (GoB) undertaking, acting through its Managing Director, is an organization registered under the Companies Act, 1956 having its registered office at Agriculture Farm Campus, Mithapur, Patna: 800 001 hereinafter referred to as "BRBN" (which expression shall include its successors and assigns), of the One Part.

AND

M/s XXXX Limited, a company incorporated under the Companies Act, 1956, having its registered office at ----- hereinafter referred to as the "**Concessionaire**" (which expression shall include its permitted successors and assigns) on the Other Part.

- Authority and Concessionaire are hereinafter collectively referred to as "Parties" and individually as "Party".

WHEREAS,

- A. BRBN is keen to Develop Cold Storage at Kudra, Dist Kaimur, Bihar on RDFOT (Renovate, Design, Finance, Operate and Transfer) under PPP Mode - (more particularly described in Schedule 'C' and hereinafter referred to as "the Project")
- B. The Bihar Rajya Beej Nigam Limited (BRBN) has been designated as State Nodal Agency for development of the Project;
- C. BRBN mandated IDA to invite tenders from eligible persons for implementing the Project and manage the entire bid process;
- D. In response to the aforesaid invitation for tenders, BRBN through IDA received bids from several bidders including the Concessionaire/the Consortium¹ (as hereinafter defined) for implementing the Project;
- E. IDA on behalf of BRBN, after evaluating the aforesaid bids, accepted the bid submitted by the Preferred Bidder /the Consortium and issued the Letter of Intent/ dated ----- (LOI) to the Preferred Bidder/the Consortium;
- F. ²In accordance with the requirements of the said tender/bid submitted by the Consortium, the Consortium has incorporated the Special Purpose Vehicle (SPV) to sign this Agreement and to implement the Project on PPP mode, and BRBN has agreed to grant to the Concessionaire, the Concession (as hereinafter defined) on the terms, conditions and covenants hereinafter set forth in this Agreement.

¹ Reference to Consortium and the related provisions would be relevant only if the successful bidder was a Consortium.

² This recital is Project specific – would be relevant only where the successful bidder being a consortium of bidders has floated SPV to implement the Project in accordance with bid conditions.

NOW THEREFORE THIS AGREEMENT WITNESSETH AS FOLLOWS

ARTICLE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

"Accounting Year" means the financial year commencing from 1st April of any calendar year and ending on 31st March of the next calendar year.

"Agreement" means this agreement including Schedules 'A' through 'J' hereto, and any amendments thereto made in accordance with the provisions of this Agreement.

"Applicable Laws" means all laws, promulgated or brought into force and effected by BRBN through IDA/ Govt of Bihar /Govt of India including regulations and rules made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, as may be in force and effect during the subsistence of this Agreement.

"Applicable Permits" means all clearances, permits, authorizations, consents and approvals under or pursuant to Applicable Laws, required to be obtained and maintained by the Concessionaire, in order to implement the Project and to provide Project Facility in accordance with this Agreement.

"Appointed Date" means the date on which the Concessionaire have fulfill Conditions Precedents in accordance with Article 4 and the Authority shall issue the Letter of Award to the Concessionaire by certifying compliance of Condition Precedents by Concessionaire and it shall be deemed to be the date of commencement of the Concession Period.

"Approval" shall mean all authorizations, consents, approvals, notifications and permissions and any license, permit, ruling, exemption or other authorization of whatsoever nature which is required to be granted by, or any registration or filing with, any authority under Applicable Law for or in respect of this Agreement including for performance of any obligation or exercise of any right by a Party herein but excluding Clearance.

"Arbitration Act" means the Bihar Public Works Contract Arbitral Tribunal Act, 2008 and rules thereunder and shall include any amendment/modifications to or any re-enactment thereof as in force from time to time.

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

"Bid" or "Proposal" means the documents in their entirety comprised in the bid or proposal (technical and financial proposals) submitted by the Preferred Bidder in response to the RFP issued by IDA on behalf of BRBN in accordance with the provisions thereof, annexed hereto as **Schedule K**, which has been accepted by the BRBN and initialed on behalf of each of the Parties.

"Bid Security" means the bank guarantee of Rs.1000000/- (Rupees Ten Lakh) provided by the Preferred Bidder to BRBN ("the Authority") along with its Bid.

"BRBN" means Bihar Rajya Beej Nigam Ltd.

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

- a. the enactment of any new Indian law;
- b. the repeal, modification or re-enactment of any existing Indian law;
- c. the commencement of any Indian law which has not entered into effect until the date of this Agreement;
- d. a change in the interpretation or application of any Indian law by a court of record as compared to such interpretation or application by a court of record prior to the date of this Agreement; or
- e. any change in the rates of any of the Taxes.

"Change of Scope" shall have the meaning ascribed thereto in Article 13.1.

"Change of Scope Order" shall have the meaning ascribed thereto in Article 13.1.

"Change of Scope Notice" shall have the meaning ascribed thereto in Article 13.2.

"COD" means the commercial operations date of the Project, which shall be the date on which the Independent Engineer has issued the Completion Certificate or the Provisional Certificate upon completion of construction and commissioning of the plant of the Project and which shall, subject to the provisions of this Agreement, be not later than 10 months from the letter of award.

"Compliance Date" shall have the meaning ascribed thereto in Article 4.5.2.

"Commencement Date" means the date on which Financial Close is achieved or an earlier date that the Parties may by mutual consent determine. For the avoidance of doubt, every Condition Precedent shall have been satisfied or waived prior to the Commencement Date and in the event all Conditions Precedent are not satisfied or waived, as the case may be, the Commencement Date shall be deemed to occur only when each and every Condition Precedent is either satisfied or waived, as the case may be.

"Completion Certificate" means the certificate issued by the Independent Engineer pursuant to Article 9.3(d).

"Concession" shall have the meaning ascribed thereto in Article 3.1.

"Concession Fee" means Fee payable by the Concessionaire to the Authority (BRBN) annually, equivalent to of each Financial Year, effective from the Commercial Operations Date (COD), in accordance with the provisions of Article 11.1;

"Concession Period" means the period as applicable specified in Article 3.2.

"Concessionaire" means M/s. and shall include its successors and permitted assigns expressly approved by BRBN (the "Authority").

"Consortium"³ means the consortium consisting of (i) **AAAA** (ii) **BBBB** and (iii) **CCCC** formed/ acting pursuant to the joint bidding agreement dated ----- (Appendix IV of ITB Volume II of RFP) entered into by them, for the purpose of bidding for the Project and in the event of being successful to implement the Project through a special purpose vehicle to be formed and incorporated by them in India.

"Construction Works" means all works and things necessary to achieve commercial operation of the Project in accordance with this Agreement.

"Contractors" or "Subcontractor" means a reputed Person with whom the Concessionaire has entered into/ may enter into a contract relating to the Works and subcontractors, including contractors for equipment, procurement and engineering ("EPC Contractors") and contractors for operations and maintenance ("O&M Contractors"), service providers, suppliers and/or any other contractors and sub-contractors, manufacturers or suppliers of Works or part thereof, as the context may admit or require.

"Construction Period" means the period beginning from the Compliance Date and ending on the date of issue of the Completion Certificate.

"Construction and Erection Works" means the works and things necessary for achieving Construction & Erection Completion and Commercial Operations in accordance with the provisions of this Agreement.

"Cure Period" means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default and shall have the meaning ascribed thereto in Article 16.2.

"Debt Due" means the aggregate of the following sums expressed in Rupees outstanding and payable to the Lenders under the Financing Documents:

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

"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.

"Design and Drawings" or Detailed Project Report" includes the detailed project report, conceptual plan, master plan, detailed designs, working drawings, engineering, technical

³ This definition is project specific – would be required only where a consortium is the successful bidder and not otherwise.

information, all calculations, samples, models, specifications related to the Project Facility.

"Directive" means any present or future requirement, instruction, direction, order, regulation or rule of any Competent Authority which is legally binding or which should customarily be observed by a reasonable and prudent owner, designer, operator or construction contractor of facilities similar to the Project Facilities and any modification, extension or replacement thereof from time to time in force.

"Dispute" shall have the meaning ascribed thereto in Article 19.1.

"Dispute Resolution Procedure" means the procedure for resolution of Dispute set forth in Article 19.

"Easementary Rights" means all easements, reservations, rights-of-way, utilities and other similar purposes, or zoning or other restrictions as to the use of real property.

"Encumbrance" means any encumbrance 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 and encroachments on the Project Site.

"Encashment Notice" shall have the meaning ascribed thereto in Article 16.2.

"Equity" means the sum expressed in Rupees representing the equity share capital of the Concessionaire and shall include the funds advanced by any member of the Consortium or by any of its shareholders to the Concessionaire for meeting equity component of the Total Project Cost. Provided, however, that for purposes of computing Termination Payment under this Agreement, Equity shall be reckoned as an amount that is arrived at after excluding from the equity share capital of the Concessionaire the sum by which the capital cost of the Project as stated by the Concessionaire for purposes of claiming Termination Payment exceeded the Total Project Cost unless such excess cost has been incurred with the approval of the Lenders and BRBN. Provided further, any equity brought in after COD shall not be considered or taken into account for the purpose of Termination Payment. In case, any Grant or Incentive is received for the Project that shall not be considered as equity for purpose of Termination Payment

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

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

"Financing Documents" means the documents executed by the Concessionaire in respect of financial assistance (including refinancing) for the Project to be provided by the Lenders by way of loans, advances, subscription to debentures and other debt instruments and guarantees, risk participation, take-out financing or any other form of credit enhancement and shall include loan agreements, guarantee agreements, subscription agreements, notes

and any documents providing security for such financial assistance, and includes amendments or modifications made thereto.

“GOB” means the Government of Bihar, its respective departments or any other authorities, agencies and instrumentalities functioning under the direction or control of the Government of Bihar.

“GOI” means the Government of India, its respective departments or any other authorities, agencies and instrumentalities functioning under the direction or control of the Government of India.

“Good Industry Practice” means those practices, methods, techniques, standards, skills, diligence and prudence which are generally and reasonably expected of and accepted internationally from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this and would mean good engineering practices in the design, engineering, construction and project management and which would be expected to result in the performance of its obligations by the Concessionaire and in the operation and maintenance of the Project in accordance with this Agreement, Applicable laws, Applicable Permits, reliability, safety, environment protection, economy and efficiency. **“Government Agency”** means GoI/GoB/BRBNor Bihar government or governmental, department, commission, board, body, bureau, agency, authority, instrumentality, court or other judicial or administrative body, central, state, or local, having jurisdiction over the Concessionaire, the Project Assets or any portion thereof, or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement.

“Grant or Incentive” shall have the meaning ascribed thereto in Article 11.2.

“Gross Revenue” shall mean all revenues and incomes of any kind derived directly or indirectly from the Project Facilities/implementation of the Project by the Concessionaire at the Project Site, but excluding the service tax, value added tax, and sales tax but not the income tax that are payable/paid by the Concessionaire on such receipts and amounts of money.

“Implementation Period” means the period beginning from the Commencement Date and ending on the COD

“Independent Engineer” means the Independent Engineer appointed pursuant to Article 6.1.

“Indirect Political Event” shall have the meaning ascribed thereto in Article 15.3.

“Lenders” means financial institutions, banks, funds, trusts or trustees of the holders of debentures or other securities their successors and assigns, who provide financial assistance to the Concessionaire under any of the Financing Documents.

“Maintenance Manual” shall have the meaning ascribed to it in Article 9.5.

“Maintenance Programme” shall have the meaning ascribed to it in Article 9.6.

“Maintenance Reports” shall have the meaning ascribed to it in Article 9.9 (a).

“Material Adverse Effect” means material adverse effect on (a) the ability of the Concessionaire to observe and perform any of its rights and obligations under and in

accordance with the provisions of this Agreement and/or (b) the legality, validity, binding nature or enforceability of this Agreement.

"Material Breach" means a breach by either Party of any of its obligations under this Agreement which has/ likely to have a Material Adverse Effect on the Project and which such Party shall have failed to cure within the Cure Period.

"Minimum Obligations" or "Mandatory Facilities and Services" means development of Controlled Atmosphere / Modified Atmosphere type cold storage having ultimate capacity of 9000 Metric Tonnes, and making it functional/operational on Operation Date and provision of Cold Storage as per GoI guidelines thereof.

"Minimum Capacity" means the capacity of the project shall not be less than 5400 (Five Thousand Four Hundred) MT and the Plant and Machineries of the Project should be able to store products of minimum 5400 MT at any given point of time.

"NonPolitical Event" shall have the meaning ascribed thereto in Article 15.2.

"O&M" means the managing, operation and maintenance of the Project during Operations Period and performance of other services incidental thereto.

"O&M Inspection Compliance Report" shall have the meaning ascribed to it in Article 9.9 (b).

"Maintenance Contractor" means the Concessionaire has entered into a Maintenance Contract for discharging maintenance functions for and on behalf of the Concessionaire.

"O&M Inspection Report" shall have the meaning ascribed to it in Article 9.9 (b).

"Operations Period" means the period commencing from COD and ending at the expiry of the Concession Period.

"Parties" means the parties to this Agreement collectively and "Party" shall mean either of the Parties to this Agreement individually.

"Performance Security" means the Performance Security for construction or Performance Security for operation and maintenance as applicable in terms of Article 7.

"Person" means any individual, company, corporation, partnership, joint venture, trust, unincorporated organization, government or Government Agency or any other legal entity.

"Plant & Machinery" means the equipment's for CA / MA type cold storage, utilities and electrical and mechanical fittings with minimum capacity of 5400 MT per annum

"Political Event" shall have the meaning ascribed thereto in Article 15.4.

"Project" means, subject to the provisions of this Agreement and in accordance with Prudent Utility Practices, the (i) development, renovation, modernization, upgradation, financing, design, construction, procurement of machinery, operation, maintenance and management of the Project Facility at the Project Site and all activities incidental thereto such as engineering, testing, commissioning, insurance (ii) provision of CA type Cold Storage and all activities and services incidental thereto (iii) marketing the storage space to end users at market rate by the Concessionaire (iv) transfer of the Facility to the BRBN or its nominated agency by the Concessionaire at the end of Concession Period by efflux of time or prior termination.

"Project Agreements" means collectively this Agreement, any contract for the design, engineering, procurement and construction of the Project, maintenance contract and any other material contract (other than the Financing Documents) entered into or may hereafter be entered into by the Concessionaire in connection with the Project.

"Project Assets" means all physical and other assets relating to and forming part of the Project including but not limited to (i) rights over the Project Site in the form of license, right of way or otherwise, (ii) tangible assets such as civil works including utility infrastructure and cold storage machineries, (iii) Project Facility situate on the Project Site, (iv) the rights of the Concessionaire under any Project Agreements, (v) financial assets, such as security deposits for electricity supply, telephone and other utilities, etc., (vi) insurance proceeds subject to Lenders' rights thereto and (vii) Applicable Permits and authorizations relating to or in respect of the Project.

"Project Completion" shall have the meaning ascribed thereto in Article 9.2.

"Project Completion Schedule" means the progressive Project milestones set forth in Schedule 'D' for the implementation of the Project.

"Project Facility" means collectively the Cold Storage with capacity to store products of 9000 MT at a time along with the utility infrastructure, landscape, other structures that shall be developed, designed, financed, constructed, completed, commissioned and operated and maintained at the Project Site by the Concessionaire in accordance with the provisions hereof, more specifically set out in Schedule 'C'.

"Project Site" means the real estate particulars whereof are set out in **Schedule 'B'** on which the Project is to be implemented and the Project Facility is to be provided in accordance with this Agreement.

"Project Site Lease Deed" means the lease deed to be executed between the Authority (BRBN) and the Concessionaire, in the form set out in **Schedule "A"**, pursuant to which the BRBN shall lease to the Concessionaire effective from the Compliance Date the Project Site vesting the Concessionaire with Vacant Possession thereof for a period coterminous with the Concession Period.

"Provisional Certificate" shall have the meaning ascribed to it in Article 9.3(e).

"Rs." or "Rupees" refers to the lawful currency of the India.

"Request for Proposal" or "RFP" means the Request for Proposal dated 30th March 2015, issued by the Infrastructure Development Authority (IDA) on behalf of the Authority (BRBN) inviting proposals for the Project, and includes any addendum / clarifications issued in respect thereof by the Authority (BRBN);

"SBI PLR" means the prime lending rate per annum for loans with 1 (one) year maturity as fixed from time to time by the State Bank of India, and in the absence of such rate, the average of the prime lending rates for loans with 1 (one) year maturity fixed by the Bank of India and the Bank of Baroda and failing that any other arrangement that substitutes such prime lending rate as mutually agreed between the Parties.

"Scheduled Project Completion Date" shall have the meaning set forth in Article 9.2(c).

"Specifications and Standards" means the specifications and standards relating to the quality, capacity and other requirements for the Project and any modifications thereof, or

additions thereto as included in the design and engineering for the Project submitted by the Concessionaire to, and expressly approved by BRBN/GoB

"Staff" means all persons employed or engaged (including volunteers, agency, casual or contract personnel) by the Concessionaire in the provision of the Project or any activity related to, or connected with the provision of the Project, including Consultants;

"Statutory Auditors" means a reputed firm of Chartered Accountants duly licensed to practice in India acting as statutory auditors of the Concessionaire.

"Steering Group" means the Steering Group constituted pursuant to Article 7.1.

"Substitution Agreement" means the agreement to be entered into among the Concessionaire, BRBN and the Lenders in the form set forth in Schedule 'I' providing, inter alia, for the substitution of the Concessionaire by another Person subject to and in accordance with the provisions of this Agreement and the Substitution Agreement.

"Taxes" means any Indian taxes including excise duties, customs duties, value added tax, sales tax, local taxes, cess and any impost or surcharge of like nature (whether Central, State or local) on the goods, materials, equipment and services incorporated in and forming part of the Project, including maintenance Contract, charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever.

"Termination" means termination of this Agreement and the Concession hereunder pursuant to a Termination Notice or otherwise in accordance with the provisions of this Agreement but shall not, unless the context otherwise requires, include the expiry of this Agreement/Concession due to expiry to the Concession Period in the normal course.

"Termination Date" means the date on which the Termination occurs which shall be the date on which Termination Notice has been delivered or deemed to have been delivered by a Party issuing the same to the other Party in accordance with the provisions of this Agreement.

"Termination Notice" means a communication in writing by a Party to the other Party regarding Termination in accordance with the applicable provisions of this Agreement.

"Termination Payment" means the aggregate of the amounts payable by BRBN to the Concessionaire under this Agreement upon Termination including Termination Payment receivable by the Concessionaire.

"Tests" means the tests to be carried out by Independent Engineer and its certification by the Independent Engineer prior to commencement of commercial operation of the Project.

"Total Project Cost" means the lowest of the following:

- (a) actual capital cost of the Project upon completion of the Project as certified by the Statutory Auditors; or
- (b) Actual capital cost of the Project upon completion of the Project as certified by the appointed Independent Engineer; or
- (b) total project cost as set forth in Financing Documents.

"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 this Agreement;

"Works" means the works relating to design, engineering, procurement, construction, modification, upgradation, renovation, installation, erection and establishment of

apparatus, equipment, machinery, plant and technology, execution, addition or expansion of the civil, mechanical and electrical works etc., functioning, equipping, completion, testing, commissioning, management and operation and maintenance of the Project Facilities (including rectification and remedying of defects) for the provision of Cold Storage under this Agreement, including charging User Fee at market rate subject to any regulatory pricing from GoB / GoI, as the context may require, and any other permanent, temporary or urgent works that may be required, more particularly outlined in Schedule 1;

“WPI” means the wholesale price index published monthly by the Ministry of Industry, GOI and shall include any index which substitutes the WPI.

1.2 Interpretation

- (a) In this Agreement, unless the context otherwise requires any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- (b) references to Indian law shall include the laws, acts, ordinances, rules, regulations, guidelines or byelaws which have the force of law in any State or Union Territory forming part of the Union of India;
- (c) the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organisations or other entities (whether or not having a separate legal entity);
- (d) the headings are for convenience of reference only and shall not be used in, and shall not affect, the/construction or interpretation of this Agreement;
- (e) terms and words beginning with capital letters and defined in this Agreement including the Schedules;
- (f) the words "include" and "including" are to be construed without limitation;
- (g) references to "construction" include, unless the context otherwise requires investigation, design, engineering, procurement of machinery, delivery, transportation, installation, processing, , testing, commissioning, manufacturing and other activities incidental to the construction;
- (h) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (i) any reference to day shall mean a reference to a calendar day;
- (j) any reference to month shall mean a reference to a calendar month;
- (k) the Schedules to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (l) any reference at any time to any agreement, deed, instrument, license or document of any description shall be construed as reference to that agreement, deed, instrument,

license or other document as amended, varied, supplemented, modified or suspended at the time of such reference;

- (m) references to recitals, Articles, sub-articles, clauses, or Schedules in this Agreement shall, except where the context otherwise requires, be deemed to be references to recitals, Articles, sub-articles, clauses and Schedules of or to this Agreement;
- (n) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effectual only if it is in writing under the hands of duly authorised representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;
- (o) any reference to any period commencing "from" a specified day or date and "till" or "until" a specified day or date shall include both such days or dates; and
- (p) the damages payable by either Party to the other of them as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty or liquidated damages;
- (q) unless otherwise expressly provided in this Agreement, any documentation required to be provided or furnished by the Concessionaire to BRBN (the "Authority")/Steering Group and/or the Independent Engineer shall be provided free of cost and in three copies and if BRBN/Steering Group and/or the Independent Engineer is required to return any such documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.

1.2.2 Measurements and Arithmetic Conventions

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

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

- (i) between two Articles of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;
- (ii) between the Articles and the Schedules, the Articles shall prevail;
- (iii) between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- (iv) between the dimension scaled from the Drawing and its specific written dimension, the latter shall prevail;
- (v) between any value written in numerals and that in words, the latter shall prevail.

1.2.4 Priority of Documents

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

- (a) This Concession Agreement;
- (b) Letter of Intent/Notice of Award;

- (c) Written clarifications issued to the bidders;
- (d) Written addenda to the RFP;
- (e) RFP;
- (f) The concessionaire's Bid;
- (g) The RFP Advertisement.

ARTICLE 2

SCOPE OF WORK

- 2.1** The scope of the Project (the “**Scope of the Project**”) shall, interalia, include performance and execution by the Concessionaire, during the Concession Period:
- a. The Concessionaire shall upgrade/renovate/modernise the existing cold storage structure; designing and constructing required ancillary facilities for making it operational; without major alteration of the existing structures. Not limited to the following -
 - i. *Civil Construction and Mechanical Works like– lift chambers, plastering and distemping, pathways, roof waterproofing, construction joint treatment, installation of required machineries for refrigeration and insulation. Required up-gradation for ancillary activities;*
 - ii. *Power Lifts – minimum 2, based on requirement upto 4 can be installed;*
 - iii. *Construction of fencing / boundary walls;*
 - b. Selection of the Plant and Machinery for the CA type Cold Storage of the Project;
 - c. Complete the modernisation and related work to make the cold storage operational within 10months from the Appointed Date;
 - d. Operation and Maintenance of the Project Facilities in accordance with provision of this Agreement and as per the best Industry Practices applicable to the Cold Storage; as well as marketing of the project to the end users;
 - e. Any alteration/augmentation/modernisation/ shall be carried out with prior approval from the Authority to be in line with the local building regulations, and other Applicable Laws;
 - f. The Property, and Project Assets under consideration shall be used only for providing cold storage / storage services and no harmful products / banned products shall be stored;
 - g. Create an adequate waste disposal system for management and disposal of the waste generated through the Project;
 - h. Maintain hygiene and quality standards and providing quality services;
 - i. Provide for adequate security and insurance and ensuring there is no damage or loss to Project Assets;
 - j. The Concessionaire shall be required to undertake all the necessary and ancillary work related to cold storage works like loading, unloading, curing, sorting, temperature and humidity control etc.
 - k. BRBN shall also utilize the cold storage facility for its own purpose like storage of seeds, pulses etc in controlled environment. Concessionaire shall make available 900 MT of cold storage space (in controlled environment) to BRBN free of cost. BRBN shall have full liberty to utilize the said storage space (900 MT) as it deems fit at its discretion.
 - l. BRBN Ltd shall pay the Concessionaire based on the utilization of cold storage for its own purposes at prevailing market rate, over and above, 900 MT.
 - m. to determine, demand, charge, collect, retain, appropriate and periodically revise the rental charge / storage fee; save and except (k) above
 - n. Provision of services, performance and fulfillment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters

incidental thereto or necessary for performance of any or all obligations of the Concessionaire under this Agreement.

- 2.2** The Concessionaire shall have flexibility in terms of undertaking renovation / upgradation / modernization of the Cold Storage facility in maximum of two phases. However, the minimum operating capacity should not be less than 5400 MT. The Concessionaire shall adhere to the 'Minimum Modernisation Obligation Plan' as provided in compliance to Section 4 of Appendix VI of the RFP document.
- 2.3** The scope of Project shall also include the performance and fulfillment of other and incidental obligations by the Concessionaire under this Agreement. The Concessionaire shall undertake the performance of all its obligations under this Agreement at its own cost and expense.

ARTICLE 3

CONCESSION AND PROJECT SITE

3.1 Grant of Concession

Subject to and in accordance with the terms and conditions set forth in this Agreement, Applicable Laws and Applicable Permits, BRBN (the "Authority") hereby grants to the Concessionaire possession of the Property, Project Asset and Project Facility as set forth in Schedule 4 on 'as is where is basis' for the sole purpose of the Project, and grants and authorizes the Concessionaire the exclusive rights and privilege to, investigate target area for cold storage, renovate, design, procure, finance, construct, commissioning of plant, operation & maintenance and marketing of the Project/Project Facility and to exercise and/or enjoy the rights, powers, privileges, authorisations and entitlements as set forth in this Agreement (collectively "the Concession") for the entire duration of the Concession Period or until the earlier Termination of the Concession in accordance with the provisions of this Agreement, and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein. In consideration of the grant of Concession, the Concessioner shall pay to BRBN, by way of concession fee (the "Concession Fee"):

For this purpose, subject to provisions of this Agreement, the BRBN hereby grants the Concessionaire the exclusive right and authority during the Concession Period to:

- (a) Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall entitle the Concessionaire to enjoy and oblige the Concessionaire to undertake the following in accordance with the provisions of this Agreement, the Applicable Laws and Applicable Permits: to investigate, study, procure, finance, renovate, upgrade, modernise, augment, commission, operate, maintain and manage Project Facility and Project Asset according to the provisions of this Agreement;
- (b) Transfer the Property, Project Asset and Project Facility to BRBN or its nominated agency on the expiry or prior termination of the Concession Period;
- (c) fulfill the Minimum Modernisation Obligation Plan in accordance with the Specifications and Standards issued by NHB / MIDH or other relevant authorities, Applicable Laws, terms of Clearances and as per norms of Cold Storage;
- (d) on and from the Operations Date and until the end of Operations Period, the Concessionaire or its Contactors/Licensees shall have full freedom to determine, demand, charge, collect, retain, appropriate and periodically revise the rental charge / storage fee for cold storage as per the provisions of this Agreement;
- (e) enjoy complete and uninterrupted possession of and control over the Project Site that shall be leased to the Concessionaire by BRBN under Project Site Lease Deed for a period co-terminus with the Concession Agreement, including extension thereof;
- (f) manage, operate and maintain the Project Assets without any limitation or restriction other than as expressly set out in this Agreement;
- (g) to fulfill its obligations under this Agreement, undertake activities either itself or through subcontracting arrangements and to appoint subcontractors, agents and without in any way relieving the Concessionaire of its obligations;
- (h) exercise such other rights as BRBN may determine as being necessary or desirable

for the purposes incidental and necessary for implementing the Project;

- (i) bear and pay all expenses, costs and charges incurred in the fulfillment of all the Concessionaire's obligations under this Agreement ;and
- (j) not assign or create any lien or Encumbrance on the Concession hereby granted or on the Project Site nor transfer, lease or part possession therewith save and except as expressly permitted by this Agreement or the Substitution Agreement.

3.2 Concession Period

The Concession hereby granted is for a period of 30 years commencing from the Commencement Date (the "Concession Period") during which the Concessionaire is authorised to implement the Project and to start the operations of Project Facility in accordance with the provisions hereof.

Provided that;

- (a) in the event of Termination, the Concession Period shall mean and be limited to the period commencing from the Commencement Date and ending with the Termination.

3.3 Acceptance of the Concession

The Concessionaire hereby accepts the Concession and agrees and undertakes to implement the Project/provide Project Facility, and to perform/discharge all of its obligations in accordance with the terms and conditions setforth in this Agreement.

3.4 Project Site

(a) BRBN hereby undertakes to handover to the Concessionaire physical possession of the Project Site free from Encumbrance within 30 days from the date of compliance of Condition Precedents in accordance with Article 4.4 by the Concessionaire together with the necessary rights of way for the purpose of implementing the Project in accordance with this Agreement.

(b) BRBN confirms that upon the Project Site being handed over pursuant to the preceding sub-article (a) the Concessionaire shall have the exclusive right to enter upon, occupy and use the Project Site and to make at its costs, charges and expenses such development and improvements in the Project Site as may be necessary or appropriate to implement the Project and to provide Project Facility subject to and in accordance with the provisions of this Agreement.

3.5 Use of the Project Site

The Concessionaire shall not without prior written consent or approval of BRBN use the Project Site for any purpose other than for the purposes of the Project/the Project Facility and purposes incidental thereto as permitted under this Agreement or as may otherwise be approved by BRBN.

3.6 Information about the Project Site

The information about the Project Site set out **in Schedule 'B'** provided by BRBN in good faith and with due regard to the matters for which such information is required by the Concessionaire. BRBN agrees to provide to the Concessionaire, upon a reasonable request, any further information relating to the Project Site, which BRBN may now possess or may hereafter come to possess. Subject to this BRBN makes no representation and gives no warranty to the Concessionaire in respect of the condition of the Project Site.

3.7 Peaceful Possession

BRBN warrants that:

- (a) the Project Site together with the necessary right of way/ way leaves having been acquired through the due process of law belongs to and vested in BRBN, and that BRBN has full powers to hold, dispose of and deal with the same consistent, interalia, with the provisions of this Agreement;
- (b) the Concessionaire shall have no obligation/liability as to payment of any compensation whatsoever to or the rehabilitation and resettlement of any Person from whom the Project Site or any part thereof had been acquired and that the same shall be the sole responsibility of BRBN; and
- (c) the Concessionaire shall, subject to complying with the terms and conditions of this Agreement, remain in peaceful possession of the Project Site during the Concession Period. In the event the Concessionaire is obstructed by any Person claiming any right, title or interest in or over the Project Site or any part thereof or in the event of any enforcement action including any attachment, distraint, appointment of receiver or liquidator being initiated by any Person claiming to have any interest in/ charge on the Project Site or any part thereof, BRBN shall, if called upon by the Concessionaire, defend such claims and proceedings and also keep the Concessionaire indemnified against any direct or consequential loss or damages which the Concessionaire may suffer, on account of any such right, title, interest or charge.

3.8 Rights and Title over the Project Site

- (a) The Concessionaire shall have exclusive rights to the use of the Project Site in accordance with the provisions of this Agreement and for this purpose it may regulate the entry and use of the same by third parties.
- (b) The Concessionaire shall allow access to, and use of the Project Site/ Project Facility for telegraph lines, electric lines or such other public purposes as BRBN may specify, provided that such access or use does not result in a Material Adverse Effect or closure of Project Facility for a period exceeding 120 days and that BRBN undertakes to ensure that the Project Facility is restored at the cost and expenses of BRBN as per the Specifications and Standards. Where such access or use causes any loss of Fee to the Concessionaire, BRBN shall compensate the Concessionaire for such loss of Fee by increasing the Concession Period suitably.
- (c) The Concessionaire shall not part with or create any Encumbrance on the whole or any part of the Project Site save and except as set forth and permitted under this Agreement provided however that nothing contained herein shall be construed or interpreted as restriction on the right of the Concessionaire to appoint any Contractor for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project / Project Facility.

ARTICLE 4
CONDITION PRECEDENT

4.1 Conditions Precedent

4.1.1 Save and except as may otherwise be expressly provided herein, the grant of Concession and the respective rights and obligations of a Party under this Agreement shall be subject to the satisfaction in full of the conditions precedent relating to the other Party (the "Conditions Precedent").

4.2 Conditions Precedent for BRBN(the "Authority")

4.2.1. The obligations of the Concessionaire hereunder are subject to the satisfaction in full of the following Conditions Precedent by BRBN:

The BRBN shall have:

- a) Granted right of way and / or access (as the case may be) to the Project Site to the Concessionaire without any encroachment and encumbrance for the purposes of and to the extent conferred by the provisions of this Agreement;
- b) Issued necessary notification / government orders, if required, exempting the Concessionaire from the applicability of the relevant Land Reforms laws or any other ceiling related Applicable Law in relation to the Project Site for the purposes as contemplated in this Agreement.
- c) executed the Project Site Lease Deed substantially in the form attached hereto in **Schedule "A"** in accordance with the terms of this Agreement for period coterminous with the Concession Period

4.3. Access of the Site

4.3.1 BRBN shall grant the right of way and/ or access/physical possession of the site to the Concessionaire after compliance of Article No. 4.4.1 of Conditions Precedent required to be satisfied by the Concessionaire.

4.4. Conditions Precedent for Concessionaire

4.4.1 The obligations of BRBN hereunder are subject to the satisfaction in full of the following Conditions Precedents by the Concessionaire. The Concessionaire shall have:

- (a) obtained all such Applicable Permits and Clearances for the Project required from applicable regulatory bodies;
- (b) certified true copies of all Project Agreements, in particular, the Financing Documents, the EPC Contract, O&M Contract, if any, as well as the shareholders funding agreement have been delivered by the Concessionaire to BRBN;
- (c) the Performance Security in full has been provided by the Concessionaire to BRBN (the Authority) in accordance with Clause 7.1;
- (d) all of the representations and warranties of the Concessionaire set forth in Article 20 are true and correct as on date of this Agreement and as on the Appointed Date;

- (e) provided the BRBN true copies duly attested by notary/ executive magistrate of its constitutional documents and board resolutions authorizing the execution, delivery and performance of this Agreement by the Concessionaire;
- (f) executed and procured execution of the Escrow Agreement;
- (g) achieved the Financial Closure and delivered to BRBN, **2 (two)** true copies each of the Financing Agreement, the Financial Package and the Financial Model, duly attested by a director of the Concessionaire;
- (h) delivered to BRBN by the shareholders of the Concessionaire that their respective confirmation in original, of the correctness of their Representation and Warranties set forth in this Development Agreement and more particularly in Article 20;
- (i) delivered to BRBN a legal opinion from the legal counsel of the Concessionaire with respect to rights of the Concessionaire to enter into this Concession Agreement and the enforceability of the provisions thereof;
- (j) made all the applications at its cost and expense for the Applicable Permits under the Applicable Law and procured and / or obtained all the Applicable Permits as are required for commencing construction and execution of the Project unconditionally or if subject to conditions then all such conditions have been satisfied in full and such Applicable permits are in full force and effect within **Six (6) months** from signing of this Concessionaire Agreement;

Provided that upon request in writing by the Concessionaire, the BRBN may, in its sole discretion, waive fully or partially any or all the Conditions Precedent set forth in this Article **4.4**.

4.5 Obligations to Satisfy Conditions Precedent:

4.5.1 Each Party shall make all reasonable endeavors its respective cost and expense to procure the fulfillment of the Conditions Precedent relating to it, unless specifically mentioned otherwise within a the date of execution of this Concession Agreement.

4.5.2 The date, within such 180 (One Hundred Eighty) days, when the Concessionaire and the BRBN fulfils its Conditions Precedents, shall be the Compliance Date (the "Compliance Date"), as jointly certified in writing by the Parties/ their authorized representatives forthwith upon such fulfillment, whereupon the obligations of the Parties under this Agreement shall commence. To avoid any confusion, the BRBN and the Concessionaire shall fulfill their respective conditions precedents within the 180 (One Hundred Eighty)days from the date of signing of this Agreement.

4.6 Non-fulfillment of Conditions Precedent:

4.6.1 In the event, the Conditions Precedent of a Party (defaulting party) have not been fulfilled for any reason whatsoever within the stipulated time and the other party (non defaulting party) has not waived, fully or partially, such conditions relating to the defaulting party nor granted any extension of time for compliance in respect thereof, and the non-defaulting party deciding in such event to terminate this Agreement by issuing a notice to the defaulting party to this effect then this Agreement shall cease to have any effect as of that date as mentioned in the notice of termination issued by the non-defaulting party and be deemed to have been terminated by the mutual agreement of the Parties and no Party shall

subsequently have any rights or obligations under this Agreement. In the event of such termination, BRBN shall not be liable in any manner whatsoever to the Concessionaire's or any Persons claiming through or under it. Further, all rights, privileges, claims of the Concessionaire, including those related to this Agreement, shall be deemed to have been ceased with the concurrence of the Concessionaire.

- 4.6.2** All the rights of way and / or access in / to the Site as granted / allowed to the concessionaire shall immediately revert to BRBN, free and clear from any Encumbrance 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 any default on the part of BRBN, BRBN without prejudice to its other rights, claims and contentions shall be fully and legally and lawfully entitled to retain the bid security amount.
- 4.6.4** In the event this Agreement is terminated due to nonfulfillment of BRBN's Conditions Precedent, BRBN shall upon such termination return / refund in full the Performance Security and full Upfront Payment (if paid by the Concessionaire before signing of the Concession Agreement, provided there are no other outstanding claims of BRBN on the Concessionaire unless the BRBN's failure to fulfill its Conditions Precedent is as a result of the Concessionaire's default.
- 4.6.5** Notwithstanding as mentioned hereinabove, instead of terminating this Agreement, the Parties may by mutual agreement extend the time for fulfilling the Conditions Precedent.

ARTICLE 5

OBLIGATIONS AND UNDERTAKINGS

In addition to and not in derogation or substitution of any of the obligations set out elsewhere in this Agreement, the Parties agree and undertake as under:

5.1 General Obligations of the Concessionaire

The Concessionaire shall at its own cost and expense:

- (i) investigate, target area for cold storage, renovate, design, procure, finance, construct, commissioning of plant, operation & maintenance and marketing of the Project/Project Facility in accordance with the provisions of this Agreement, Good Industry Practice and Applicable Laws;
- (ii) obtain all Applicable Permits in conformity with the Applicable Laws and be in compliance with thereof at all times during the Concession Period;
- (iii) procure and maintain in full force and effect, as necessary, appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used in or incorporated into the Project;
- (iv) ensure and procure that each Project Agreement contains provisions that would entitle BRBN or a nominee of BRBN to step into such agreement at BRBN's discretion, in place and substitution of the Concessionaire in the event of Termination pursuant to the provisions of this Agreement;
- (v) provide all assistance to the Independent Engineer/Steering Group as they may reasonably require for the performance of their duties and services under this Agreement;
- (vi) provide to the Steering Group/ Independent Engineer reports on a regular basis during the Implementation Period and the Operations Period in accordance with the provisions of this Agreement;
- (vii) appoint, supervise, monitor and control the activities of Contractors under their respective Project Agreements as may be necessary;
- (viii) make efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire's obligations under this Agreement;
- (ix) develop, implement and administer a surveillance and safety program for the Project/Project Facility and the users thereof and the Contractors personnel engaged in the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Applicable Laws and Good Industry Practice applicable to Cold Storage as per GoI guidelines;
- (x) take all reasonable precautions for the prevention of accidents on or about the Project Site/Project Facility and provide all reasonable assistance and emergency medical aid to accident victims;

- (xi) not to place or create nor to permit any Contractor or other person claiming through or under the Concessionaire to create or place any Encumbrance over all or any part of the Project Assets, or on any rights of the Concessionaire therein, save and except as expressly set forth in this Agreement;
- (xii) make its own arrangements for quarrying, if necessary, and observe and fulfill the environmental and other requirements under the Applicable Laws and Applicable Permits;
- (xiii) be responsible for safety, soundness and durability of the Project Facility including all structures forming part thereof and their compliance with the Specifications and Standards;
- (xiv) ensure that the Project Site remains free from all encroachments and take all steps necessary to remove encroachments, if any;
- (xv) make payment to any Government Agency, if required, for provision of such services as are not provided in the normal course or are available only on payment;
- (xvi) operate and maintain the Project at all times during the Operations Period in conformity with this Agreement and as per the Good Industry Practice applicable to Cold Storage as per GoI guidelines;
- (xvii) remove promptly according to Good Industry Practice, from the Project Site, all surplus construction machinery and materials, waste materials (including, without limitation, hazardous materials and waste water), rubbish and other debris (including without limitation accident debris) and keep the Project Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable Permits;
- (xviii) pay Concession Fee to BRBN;
- (xix) provide 900 MT cold storage space to BRBN, free of cost;
- (xx) determine, demand, charge, collect, retain, appropriate and periodically revise the rental charge / storage fee from the users except (xix) above.

5.2 Obligations of the Concessionaire during Implementation Period

- (a) The Concessionaire shall, before commencement of construction of the Project;
 - (i) submit to the Independent Engineer with due regard to Project Completion Schedule and Scheduled Project Completion Date, its design, engineering and construction time schedule and shall formulate and provide Critical Path Method (CPM)/ Project Evaluation and Review Technique (PERT) charts for the completion of the said activities;
 - (ii) have requisite organisation and designate and appoint suitable officers/ representatives as it may deem appropriate to supervise the Project and to deal with the Independent Engineer/the Steering Group and to be responsible for all necessary exchange of information required pursuant to this Agreement;

- (iii) undertake, do and perform all such acts, deeds and things as may be necessary or required to adhere to the Project Completion Schedule and to achieve Project Completion under and in accordance with this Agreement;
 - (iv) construct, provide and maintain a furnished site office accommodation for the Independent Engineer at the Project Site; and
 - (v) provide and maintain an adequately equipped field laboratory as required for the Project Site control on the quality of materials and the Construction Works.
- (b) The Concessionaire shall, at all times, afford access to the Project Site, to the Steering Group, the authorised representatives of BRBN, the Independent Engineer and officer of any Government Agency having jurisdiction over the Project, including those concerned with safety, security or environmental protection 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.
- (c) The Concessionaire shall apply for and obtain all necessary clearances and/or approvals for the construction and operation of cold storage;
- (d) The Concessionaire shall bear all costs and charges for special or temporary rights of way required by it in connection with access to the Project Site. The Concessionaire shall obtain at its cost such facilities on or outside the Project Site as may be required by it for the purposes of the Project and the performance of its obligations under this Agreement.

5.3 Obligations of BRBN:

BRBN shall:

- (i) hand over the physical possession of Project Site together with necessary right of way/ way leaves to the Concessionaire within 30 days from the date of compliance of Condition Precedents in accordance with Article 4.4 by the Concessionaire and in accordance with **Schedule "A"**;
- (ii) grant or where appropriate provide necessary assistance to the Concessionaire in securing Applicable Permits;
- (iii) grant in a timely manner all such approvals, permissions and authorisations which the Concessionaire may require or is obliged to seek from BRBN in connection with implementation of the Project and the performance of the Concessionaire's obligations under this Agreement;
- (iv) subscribe to the Substitution Agreement within 30 (Thirty) days of intimation by the Concessionaire regarding Financial Close;
- (v) ensure peaceful use of the Project Site by the Concessionaire under and in accordance with the provisions of this Agreement without any hindrance from BRBN or persons claiming through or under it;
- (vi) upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including

water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent facilities/utilities;

- (vii) procure that no barriers are erected or placed by BRBN or any Governmental Agency on the Project Facility/Project Site, except on account of any law and order situation or upon national security considerations;
- (viii) observe and comply with all its obligations set forth in this Agreement.

ARTICLE 6

INDEPENDENT ENGINEER

6.1 Appointment of Independent Engineer

- (a) The Concessionaire shall within 30 days from the date hereof submit to BRBN a panel consisting of atleast three reputed firms or companies or body corporates or a combination thereof, having necessary expertise for appointment of the Independent Engineer, to undertake, perform, carry out the duties, responsibilities, services and activities set forth in Schedule 'E' and elsewhere in this Agreement.
- (b) BRBN shall within 30 days from the date of receipt of such panel, appoint the Independent Engineer from out of such panel, and communicate the same to the Concessionaire. The tenure and the scope of work and the reports to be submitted by the Independent Engineer shall be as set out in Schedule 'E'.
- (c) The Independent Engineer shall submit to the Steering Group reports at least once every month or more frequently as the situation may warrant on the progress of implementation of the Project. Such reports of Independent Engineer shall include but not be limited to the matters and things set forth in said Schedule 'E'.
- (d) The Independent Engineer shall submit bills for periodic payment in accordance with terms of its appointment to BRBN. Upon certification of such bills being intimated in writing by BRBN, the Concessionaire shall within 15 days of such intimation, pay to BRBN 50% of the amount of bills certified by BRBN.
- (e) either party disputes any advice, instruction or decision of the Independent Engineer, the same shall be resolved in accordance with the Dispute Resolution Procedure.

6.2 Termination and Fresh Appointment

If BRBN or the Concessionaire have reason to believe that the Independent Engineer is not discharging its duties in a fair, appropriate and diligent manner, BRBN may terminate the appointment of the Independent Engineer and appoint another Independent Engineer in accordance with the preceding sub - articles (a) and (b) of Article 6.1 above.

6.3 Formation of Steering Group

6.3.1 Constitution

BRBN shall through an office order, constitute a Steering Group comprising of a representative each of the BRBN and the Concessionaire within 60 days of this Agreement.

6.4 Functions

The Steering Group shall hold meetings atleast once every three months to review the progress during the Implementation Period and every six months during the Operations Period. The Steering Group shall carry out such functions and exercise such powers as are prescribed/conferred under this Agreement.

ARTICLE 7

PERFORMANCE SECURITY

7.1 Performance Security

- (a) The Concessionaire shall, for due and punctual performance of its obligations during the Implementation Period, deliver to BRBN, simultaneously with the execution of this Agreement a bank guarantee from a scheduled bank acceptable to BRBN, in the form set forth in Schedule 'G', (the "Performance Security for Construction Period") for a sum of Rs./- (Indian RupeesOnly) equivalent to Minimum Modernisation Obligation Plan as provided in compliance to Section 4 of Appendix VI of the RFP document.
- (b) The Concessionaire shall for due and punctual performance of obligations during the Operations Period deliver to BRBN, on or before the COD, the bank guarantee from a scheduled bank acceptable to BRBN in form set forth in Schedule 'H' (Performance Security for Operation and Maintenance Period) for a sum of Rs./- (Indian RupeesOnly) equivalent to Annual Concession Fee.

7.2 Fresh Performance Security

In the event of the encashment of the Performance Security by BRBN pursuant to Encashment Notice issued in accordance with the provisions of Article 16 the Concessionaire shall within 30 (thirty) days of the Encashment Notice furnish to BRBN fresh Performance Security failing which BRBN shall be entitled to terminate this Agreement in accordance with the provisions of Article 16. The provisions set forth in Article 7.1 above shall apply mutatis mutandis to such fresh Performance Security.

ARTICLE 8

DRAWINGS

8.1 Preparation of Drawings

The Concessionaire shall, at its cost, charges and expenses, cause Drawings to be prepared in accordance with the Specification and Standards. The Concessionaire may, for this purpose, adopt with or without any modifications the Drawings, if any, made available by BRBN, provided, notwithstanding such adoption, the Concessionaire shall be solely responsible for the adequacy of the Drawings.

8.2 Review and Approval of Drawings

- (a) The Concessionaire shall promptly and in such sequence as is consistent with the Project Completion Schedule, submit a copy each of all Drawings to the Independent Engineer and the Steering Group .
- (b) By forwarding the Drawings to the Independent Engineer/ Steering Group pursuant to sub-article (a) above, the Concessionaire represents that it has determined and verified that the design and engineering including field construction criteria related thereto are in conformity with the Specifications and Standards.
- (c) Within 15 (fifteen) days of the receipt of the Drawings, Independent Engineer shall review the same taking into account, inter alia, comments of the Steering Group, if any, on such Drawings made available to the Independent Engineer, and convey its comments/observations, if any, thereon to the Concessionaire with particular reference to the conformity or otherwise with the Specifications and Standards. It is expressly agreed that notwithstanding any review or failure to review by the Independent Engineer/ Steering Group or any comments/observations of the Independent Engineer/ Steering Group, BRBN shall not be liable for the adequacy of the Drawings and that the Concessionaire shall solely be responsible therefor and shall not be relieved or absolved in any manner whatsoever of its obligations, duties and liabilities as set forth in this Agreement.
- (d) If the comments/observations of Independent Engineer indicate that the Drawings are not in conformity with the Specifications and Standards, such Drawings shall be revised by the Concessionaire to the extent necessary and resubmitted to Independent Engineer for further review. Independent Engineer shall give its observations and comments, if any, within 15 (fifteen) days of the receipt of such revised Drawings. Provided, however, that any observations or comments of Independent Engineer or failure of Independent Engineer to give any observations or comments on such revised Drawings shall not relieve or absolve the Concessionaire of its obligation to conform to such Specifications and Standards.
- (e) If the Independent Engineer does not object to the Drawings submitted to it by the Concessionaire within a period stipulated in above sub-article (c) or (d) as applicable, the Concessionaire shall be entitled to proceed with the Project accordingly.
- (f) The Concessionaire shall be responsible for delays in Project Completion and consequences thereof caused by reason of any Drawings not being in conformity with the Specifications and Standards and shall not be entitled to seek any relief in this regard from BRBN.
- (g) Within 90 (ninety) days of the COD, the Concessionaire shall furnish to BRBN three copies of "as built" Drawings duly vetted by the Independent Engineer reflecting the

Project as actually designed, engineered and constructed, including without limitation an "as built" survey illustrating the layout of the Project and setback lines, if any, of the buildings and structures forming part of Project Facility.

ARTICLE 9

PROJECT IMPLEMENTATION AND OPERATIONS

9.1 Monitoring and Supervision during Implementation

- (a) During the Implementation Period, the Concessionaire shall furnish to the Steering Group quarterly reports on actual progress of the Construction Works and furnish any other relevant information as may reasonably be required by the Steering Group.
- (b) For the purposes of determining that Construction Works are being undertaken in accordance with Specifications and Standards and Good Industry Practice and for quality assurance, the Concessionaire shall carry out such Tests at such time and frequency and in such manner as may be required by the Independent Engineer or as may be necessary in accordance with Good Industry Practice. The Concessionaire shall with due diligence carry out all such Tests in accordance with the instructions and under the supervision of the Independent Engineer. The Concessionaire shall promptly carry out such remedial measures as may be necessary to cure the defects or deficiencies, if any, indicated in such Test results. The Independent Engineer shall furnish the results of such Tests to the Steering Group within seven days thereof and also promptly report to the Steering Group the remedial measures taken by the Concessionaire to cure the defects/deficiencies if any indicated in the Test results.
- (c) If the Independent Engineer reasonably determines that the rate of progress of the construction of the Project is such that the Project Completion is not feasible on or before the Scheduled Project Completion Date, it shall so notify the Concessionaire and the Steering Group. Thereupon, the Concessionaire shall within 15 (fifteen) days thereof notify the Steering Group and the Independent Engineer about the steps it proposes to take to expedite progress and the period within which it shall achieve COD.
- (d) Upon recommendation of the Independent Engineer, Steering Group may, by written notice, require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if in the reasonable opinion of the Steering Group such work is being carried on in a manner which threatens the safety of the Construction Works or the users of the Project.
- (e) The Concessionaire shall upon, instructions of the Steering Group pursuant to sub-article (d) above suspend the Construction Works or any part thereof as the case may be, for such time and in such manner as may be specified by Steering Group and the costs if any incurred by BRBN during such suspension to properly protect and secure the Construction Works or such part thereof as is necessary in the opinion of the Steering Group ("Preservation Costs"), shall be borne by the Concessionaire.
- (f) The Concessionaire shall, pursuant to the notice pursuant to sub-article (d) above, suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Steering Group and thereupon carry out remedial measures to secure the safety of suspended works and affected persons or properties. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Steering Group recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Engineer, the Steering Group 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 Steering Group, and the procedure set forth in sub-article (d) above shall be repeated until the suspension hereunder is revoked.

- (g) If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates set forth in the Project Completion Schedule to which the Concessionaire is reasonably entitled, and shall notify BRBN accordingly whereupon the BRBN shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Engineer. In the event that the Scheduled Completion Date is extended pursuant hereto, the Concession Period shall be deemed to be extended by a period equal in length to the period of extension of the Scheduled Completion Date.
- (h) If the Steering Group issues any instructions requiring suspension of Construction Works for any reason other than default or breach of this Agreement by the Concessionaire;
 - (i) the Project Completion Schedule and the Scheduled Project Completion Date shall be extended by the period of suspension, and
 - (ii) the Concession Period shall be extended in accordance with the recommendations of the Independent Engineer pursuant to and in accordance with sub-article (g) above.

9.2 Project Completion

- (a) The Project shall be deemed to be complete and operational only, when the Completion Certificate or the Provisional Certificate is issued by the Independent Engineer in accordance with the provisions of Article 9.3 (the "Project Completion").
- (b) The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the provisions of this Agreement on a date not later than 10 months from the Commencement Date ("the Scheduled Project Completion Date").
- (c) If the Project Completion is not achieved by the Scheduled Project Completion Date for any reason other than Force Majeure or reasons attributable to BRBN, the Concessionaire shall be liable to pay liquidated damages for delay beyond the Scheduled Project Completion Date, to the extent of Rs. 25000 per day for every day of delay. Provided that such liquidated damages do not exceed 10% of the total project cost. Provided further that nothing contained in this sub-article (c) shall be deemed or construed to authorise any delay in achieving Project Completion.
- (d) If the COD does not occur within 180 days from the Scheduled Project Completion Date, BRBN shall subject to the provisions of this Agreement relating to excuse from performance of the Concessionaire's obligations hereunder, be entitled to Terminate this Agreement in accordance with the provisions of Article 16.2.

9.3 Tests

- (a) At least 30 (thirty) days prior to the likely completion of the Project, the Concessionaire shall notify the Independent Engineer and the Steering Group of the same and shall give notice to them of its intent to conduct Tests. The Concessionaire shall give the Independent Engineer and the Steering Group at least 10 (ten) days prior notice of the actual date on which it intends to commence the Tests and at least 7 (seven) days prior notice of the commencement date of any subsequent Tests.
- (b) All Tests shall be conducted as per the Good Industry Practice of Cold Storage industries and the Applicable Laws and Applicable Permits. The Steering Group shall have the right to suspend or postpone any Test if it is reasonably anticipated or

determined during the course of the Test that the performance of the Project or any part thereof does not meet the Specifications and Standards. The Steering Group may designate a representative with suitable qualifications and experience to witness and observe the Tests.

- (c) The Independent Engineer shall monitor the results of the Tests to determine the compliance of the Project with the Specifications and Standards and shall provide to the Steering Group copies of all Test data including detailed Test results.
- (d) Upon the Independent Engineer determining the Tests to be successful, it shall forthwith issue to the Concessionaire a certificate substantially in the form set forth in **Schedule 'F'(the "Completion Certificate ")**.
- (e) The Independent Engineer may at the request of the Concessionaire issue a provisional certificate of completion ("Provisional Certificate") if the Tests are successful and all parts of Project can be legally, safely and reliably opened commercial operation though certain works or things forming part thereof are not yet complete. In such an event, Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire ("Punch List"). All Punch List items shall be completed by the Concessionaire within 120 (one hundred twenty) days of the date of issue of such Provisional Certificate. Upon completion of all Punch List items to the satisfaction of the Independent Engineer, it shall issue the Completion Certificate to the Concessionaire with a copy each marked to BRBN. In the event of the Concessionaire's failure to complete the Punch List items within the said period of 120 days, BRBN may, without prejudice to any other rights or remedy available to it under this Agreement, have such items completed at the risk and costs of the Concessionaire. The Concessionaire shall reimburse to BRBN on demand the entire costs incurred by BRBN in completing the Punch List items.
- (f) If the Independent Engineer certifies that it is unable to issue the Completion Certificate or Provisional Certificate because of events or circumstances which excuse the performance of the Concessionaire's obligations in accordance with this Agreement and as a consequence thereof the Tests could not be held or had to be suspended, the Concessionaire shall re-schedule the Tests and hold the same as soon as reasonably practicable.
- (g) The Concessionaire shall bear all the expenses relating to Tests under this Agreement.

9.4 Operation and Maintenance

The Concessionaire shall in consultation with the BRBN and the Independent Engineer evolve not later than 60 (sixty) days before the Scheduled Construction Completion Date or before the date of Completion Certificate, whichever is earlier, a manual for the operations and regular and preventive maintenance of the Project Facility (the "**O&M Manual**"), and shall ensure and procure that at all times during the Operations Period, the Project Facility is operated and maintained in accordance with the provisions hereof. The Concessionaire shall, at least one month before the Operations Date, provide 5 (five) copies of the O&M Manual to the BRBN. More specifically the Concessionaire shall be responsible for:

- (i) ensuring optimum utilization of the plant capacity by keeping inventory of raw materials as per the requirement;

- (ii) suitable tie ups with suppliers;
- (iii) smooth operation of the plant based on the demand analysis;
- (iv) undertaking routine maintenance including prompt repairs of machineries and plant;
- (v) undertaking maintenance works in accordance with Maintenance Manual and the Maintenance Programme;
- (vi) preventing with the assistance of concerned law enforcement agencies where necessary, any unauthorized entry to and exit from the Project;
- (vii) preventing with the assistance of the concerned law enforcement agencies where necessary, any encroachments on the Project/Project Site and preserving the right of way of the Project;
- (viii) adherence to the Safety Standards set out in Schedule 'I'.

9.5 Maintenance Manual

The Concessionaire shall in consultation with the Steering Group evolve not later than 120 (one hundred twenty) days before the Scheduled Project Completion Date, a manual for the regular and preventive maintenance for the machinery and the plant (the "Maintenance Manual"), and shall ensure and procure that at all times during the Operations Period, the Project is maintained in a manner that it complies with the Specifications and Standards. The Concessionaire shall supply, at least two months before the COD, 10 (ten) copies of the Maintenance Manual to the Steering Group.

9.6 Maintenance Programme

- (a) Not later than forty five (45) days before the beginning of each Accounting Year, the Concessionaire shall provide to Steering Group, its proposed programme of preventive and other scheduled maintenance of the Project subject to the Minimum Maintenance Requirements as per the Good Industry Practice necessary to maintain the Project at all times in conformity with the Specifications and Standards (the "Maintenance Programme"). Such Maintenance Programme shall include but not be limited to the following:
 - (i) intervals and procedures for the carrying out of inspection of all elements of the Project;
 - (ii) criteria to be adopted for deciding maintenance needs;
 - (iii) preventive maintenance schedule;
 - (iv) intervals at which the Concessionaire shall carry out periodic maintenance; and;
 - (v) intervals for major maintenance and the scope thereof.
- (b) Maintenance shall include replacement of plant equipment, consumables, horticultural maintenance and repairs to equipment, structures and other civil works which are part of the Project/Project Facility.
- (c) The Concessionaire shall keep the Project Facility in a clean, tidy and orderly condition free of litter and debris.

9.7 Emergency De-commissioning

- (a) Save and except as otherwise expressly provided in this Agreement, if the Project or any part thereof shall suffer any loss or damage during the Concession Period, from any cause whatsoever, the Concessionaire shall, at its cost and expense rectify and remedy such loss or damage in a manner so as to make the Project conform in every respect to the Specifications and Standards, quality and performance as prescribed by this Agreement.
- (b) In the event the Concessionaire does not maintain and/ or repair the Project or part thereof upto and in accordance with the Specifications and Standards and / or in accordance with the Maintenance Programme or the Maintenance Manual or the O&M Inspection Report, as the case may be, and shall have failed to commence remedial works within (30) thirty days of notice in this behalf of Steering Group, BRBN shall, without prejudice to its rights/remedies under this Agreement, including Termination, be entitled to undertake to cause the repair and maintenance of the Project at the risk and cost of the Concessionaire. The Concessionaire shall, reimburse to BRBN within seven days of demand the costs and expenses incurred for undertaking such repairs and maintenance. .
- (c) If the Concessionaire commences any works for curing any defects or deficiencies in the Project, it shall complete such works expeditiously in accordance with Good Industry Practice.

9.8 Monitoring and Supervision during Operations

- (a) The Concessionaire shall undertake periodic inspection of the Project in accordance with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and this Agreement and shall submit reports of such inspection ("Maintenance Reports") to the Steering Group.
- (b) The Steering Group shall undertake periodic (at least once every calendar quarter) inspection of the Project jointly with the Concessionaire to determine the condition of the Project including its compliance or otherwise with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and this Agreement and make out a report of such inspection (the "O&M Inspection Report') and forward it to the Concessionaire with a copy thereof to the Steering Group. The O&M Inspection Report shall set forth defects and deficiencies. The Concessionaire shall within 30 (thirty) days of the receipt of the O&M Inspection Report from the Steering Group remedy the defects and deficiencies and undertake such tests, if any, set forth therein, without any delay and furnish compliance thereto and/or results thereof to the Steering Group specifying in reasonable detail the measures, if any, that have been undertaken for curing the defects or deficiencies indicated in such results. Such inspection or submission of O&M Inspection Compliance Report by the Concessionaire shall not relieve or absolve the Concessionaire of its obligations and liabilities hereunder in any manner whatsoever. Where the remedying of such defects or deficiencies and/or undertaking such tests is likely to take more than 30 (thirty) days in accordance with Good Industry Practice, the Concessionaire shall undertake the works in accordance with such practice and submit progress reports of such works every fortnight and finally the O&M Inspection Compliance Report.

ARTICLE 10
FINANCING ARRANGEMENT

10.1 Financing Arrangement

- (a) The Concessionaire shall at its cost, expenses and risk make such financing arrangement as would be necessary to finance the Project and to meet its obligations under this Agreement in a timely manner.
- (b) In the event of the Concessionaire employing the funds borrowed from the Lenders to finance the Project, the provisions relating to Lenders including those relating to Financial Close and Substitution Agreement shall apply.
- (c) The Concessionaire shall within 7 days of achieving Financial Close submit to BRBN one set of Financing Documents evidencing Financial Close.

10.2 Amendments to Financing Documents

For the avoidance of doubt the Parties agree that no amendment made to the Financing Documents without express consent of BRBN shall have the effect of enlarging in any manner, the obligation of BRBN in respect of Termination Payment under this Agreement.

ARTICLE 11
ANNUAL CONCESSION FEE

11.1 ANNUAL CONCESSION FEE

Annual Concession Fee means Fee payable by the Concessionaire to the Authority (BRBN) annually in lieu of the Concession during the Concession Period. Annual Concession Fee shall be subject to increment by 15% every 3 years during the Concession Period over last reset year.

- (a) First Annual Concession Fee payable for the 1st year of the concession period shall be amount equivalent to Rs. (amount quoted by Preferred Bidder) for the first year as quoted by the Preferred Bidder in their Financial Proposal submitted for the Bid.

For clarity by way of explanation, the following example may be referred –

If the Preferred Bidder has quoted First Year Concession Fee as Rs 100/- then the Annual Premium payable for the first 3 years shall be Rs 100/- for each year. However from the fourth year till sixth year the amount payable shall be Rs 115/- each year. From the seventh year till the ninth year the amount payable shall be Rs 132.25/- each year, till the end of expiry of Concession Period or termination of the Agreement, whichever is earlier.

- (b) The Concessionaire shall, with effect from the Appointment Date and during the Concession period, pay to the BRBN the Concession Fee in each Financial Year of the Concession Period. The Concession Fee shall be payable by the Concessionaire to the BRBN one installment on every anniversary of the Appointment Date. The First Years concession fees shall be payable on or before the Appointment Date.
- (c) In the event of delay of upto 4 weeks by the Concessionaire in the payment of the Concession Fee from the date the Concession Fee is due and payable, the Concessionaire shall be required to pay BRBN; interest thereon at the rate of SBI PLR plus two percent per annum from due date until the date of such payment. Any delay in the payment of the Concession Fee beyond such four weeks shall constitute a Concessionaire Event of Default shall entitle the BRBN to terminate this Agreement under the provisions of Article 16.
- (e) Without prejudice to its rights at Law and herein, the BRBN may recover the delinquent amounts of the Concession Fee, if any, by retaining and appropriating equivalent amounts from the Performance Security, whereupon the Concessionaire shall be required to replenish the Performance Security in accordance with the provisions hereof.

11.2 GRANT OR INCENTIVE

- 11.2.1 The Project may be eligible for Grants or Incentives under various schemes of Govt of India and / or Govt of Bihar. The Concessionaire may apply for such Grants and Incentives following due procedures. BRBN may be requested to provide assistance, if needed; however, the responsibility of fulfilling the required criteria and requirement shall lie with the Concessionaire.

ARTICLE 12

INSURANCES

12.1 Insurance during the Implementation Period

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

- (a) builders' all risk insurance;
- (b) Plant and Machinery Insurance
- (c) comprehensive third party liability insurance including injury or death to personnel of Persons who may enter the Project Site;
- (d) workmen's compensation insurance;
- (e) any other insurance that may be necessary to protect the Concessionaire, its employees and its assets (against loss, damage or destruction at replacement value) including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (c).

12.2 Insurance during the Operations Period

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

- (a) loss, damage or destruction of the Project Facility, at replacement value;
- (b) the Concessionaire's general liability arising out of the Concession;
- (c) liability to third parties; and
- (d) any other insurance that may be necessary to protect the Concessionaire and its employees, including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (c).

12.3 Insurance Companies

The Concessionaire shall insure all insurable assets comprised in the Project Assets and/or the Project Facility through Indian insurance companies and if so permitted by BRBN, through foreign insurance companies, to the extent that insurances are necessary to be effected through them.

12.4 Evidence of Insurance Cover

All insurances obtained by the Concessionaire in accordance with this Article 12 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 BRBN, 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 BRBN.

12.5 Application of Insurance Proceeds

Subject to the provisions of the Financing Documents, all moneys received under insurance policies shall be promptly applied by the Concessionaire towards repair or renovation or restoration or substitution of the Project Facility or any part thereof which may have been damaged or destroyed. The Concessionaire may designate the Lenders as the loss payees under the insurance policies/assign the insurance policies in their favour as security for the financial assistance. The Concessionaire shall carry out such repair or renovation or restoration or substitution to the extent possible in such manner that the Project Facility or any part thereof, shall, after such repair or renovation or restoration or substitution be as far as possible in the same condition as they were before such damage or destruction, normal wear and tear excepted.

12.6 Validity of the Insurance Cover

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

ARTICLE 13
CHANGE OF SCOPE

13.1 Change of Scope

BRBN may, notwithstanding anything to the contrary contained in this Agreement, require provision of such addition/deletion to the works and services on or about the Project which are beyond the scope of the Project as contemplated by this Agreement ("Change of Scope"), provided such changes do not require expenditure exceeding 5% of Total Project Cost and do not adversely affect the Scheduled Project Completion Date. All such changes shall be made by BRBN by an order (the "Change of Scope Order") issued in accordance with the procedure set forth in Article 13.2.

13.2 Procedure for Change of Scope

- (a) BRBN shall whenever it desires provision of addition/deletion of works and services referred to in Article 13.1 above, issue to the Concessionaire a notice of Change of Scope (the "Change of Scope Notice") through the Independent Engineer.
- (b) Upon receipt of Change of Scope Notice, the Concessionaire shall, within a period of 15 (fifteen) days, provide to the Independent Engineer such information as is necessary and reasonable together with preliminary documentation in support of the following:
 - (i) the impact which the Change of Scope is likely to have on the Project Completion Schedule if the work is required to be carried out before COD, and
 - (ii) the cost to the Concessionaire of complying with such Change of Scope Notice on account of increases in quantities of items of work mentioned in the Bill of Quantities at the rate mentioned therein. In case the Bill of Quantities does not carry certain items of work required under the Change of Scope, the Concessionaire shall provide the analysis of rates for carrying out such items of work.
- (c) Independent Engineer shall review the information provided by the Concessionaire, assess the change in quantities of items of work, verify the analysis of rates if required, determine the additional cost to the Concessionaire as a result of such Change of Scope, add such additional cost to initial investment in the Cashflow Projections and determine the extension, if any, to the Concession Period in order to maintain the Financial Internal Rate of Return (FIRR). Provided, that the projections for years beyond the Concession Period shall be average of three years immediately preceding the last year of the original Cashflow Projections. The Independent Engineer shall communicate its recommendation to the Steering Group within a period of 15 (fifteen) days from the receipt of information from the Concessionaire.
- (d) BRBN shall issue the Change of Scope Order within a period of 15 (fifteen) days from the date of recommendation made by the Independent Engineer in accordance with preceding sub-article (c) above.
- (e) The Change of Scope Order shall be effective and binding upon receipt thereof by the Concessionaire. Notwithstanding a Dispute regarding cost and time for implementation of such order, the Concessionaire shall proceed with the performance of such order promptly following receipt thereof. Any Dispute regarding the extension in the Concession Period recommended by the Independent Engineer shall be resolved in accordance with the Dispute Resolution Procedure.
- (f) All claims by the Concessionaire pursuant to this Article 13.2 shall be supported by such documentation as is reasonably sufficient for Independent Engineer to determine the accuracy thereof, including invoices from Contractors and certification of such claims by the Statutory Auditors.

ARTICLE 14

DELETED

ARTICLE 15
FORCE MAJEURE

15.1 Force Majeure Event

As used in this Agreement, a Force Majeure Event shall mean occurrence in India of any or all of Non Political Event, Indirect Political Event and/or Political Event as defined in Article 15.2, 15.3 and 15.4 respectively which prevent the Party claiming Force Majeure (the "Affected Party") from performing its obligations under this Agreement and which act or event (i) is beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, and (iii) has a Material Adverse Effect on the Project.

15.2 Non Political Event.

For purposes of Article 15.1 hereinabove, Non-Political Event shall mean one or more of the following acts or events:

- (i) acts of God or events beyond the reasonable control of the Affected Party which could not reasonably have been expected to occur, exceptionally adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption or fire (to the extent originating from a source external to the Project Site or beyond design specifications for the Construction Works) or landslide;
- (ii) radioactive contamination or ionizing radiation;
- (iii) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives or attributable to any act or omission of any of them) interrupting supplies and services to the Project for a period exceeding 7 (seven) days in an Accounting Year, and not being an Indirect Political Event set forth in Article 15.3;
- (iv) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (v) any judgement or order of any court of competent jurisdiction or statutory authority in India made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or enforcement of this Agreement or exercise of any of its rights under this Agreement by BRBN;
- (vi) any event or circumstances of a nature analogous to any of the foregoing.

15.3 Indirect Political Event

For purposes of Article 15.1 hereinabove, Indirect Political Event shall mean one or more of the following acts or events :

- (i) An act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action,

civil commotion, or politically motivated sabotage which prevents collection of Fee by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year;

- (ii) Industry wide or state wide or India wide strikes or industrial action which prevent collection of Fees / Rental by the Concessionaire for a period exceeding a continuous period of 7(seven) days in an Accounting Year; or
- (iii) Any public agitation which prevents collection of Fee / Rental by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year.

15.4 Political Event

For purposes of Article 15.1 hereinabove, Political Event shall mean one or more of the following acts or events by or on account of BRBN or any other Government Agency:

- (i) Change in Law, only when provisions of Article 17 cannot be applied;
- (ii) Expropriation or compulsory acquisition by any Government Agency of any Project Assets or rights of the Concessionaire or of the Contractors; or
- (iii) Any unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is Condition Precedent) provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contactor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits.

15.5 Effect of Force Majeure Event.

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

- (a) There shall be no Termination of this Agreement except as provided in Article 15.7 hereinafter;
- (b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;
- (c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to operate the Project and/or to collect Fee, but if it is unable or prevented from doing so, the Concession Period shall, having due regard to the extent of the impact thereof as determined by the Steering Group, be extended by the period for which collection of fee remains affected on account thereof; and
- (d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of the Article 15.6 hereinafter.

15.6 Allocation of costs during subsistence of Force Majeure

Subject to the provisions of Article 15.5 hereinabove, upon occurrence of a Force Majeure Event, the costs arising out of such event shall be allocated as follows:

- (a) When the Force Majeure Event is a Non Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any costs arising out of any such Force Majeure Event;
- (b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the "Force Majeure Costs") shall be borne by the Concessionaire to the extent of the Insurance 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 BRBN to the Concessionaire within 90 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 certified by the statutory Auditors of Concessionaire shall be reimbursed by BRBN to the Concessionaire within 90 days from the date of receipt of Concessionaire's claim therefore; and
- (d) BRBN may at its option reimburse the Force Majeure Costs to the Concessionaire in cash or compensate the Concessionaire for such costs by appropriate extension of the Concession Period, which extension shall also be given effect within the period of 90 days specified in preceding sub-article (b) or (c) as the case may be.

For avoidance of doubt, Force Majeure Costs shall not include loss of fee revenues or any debt repayment obligations but shall include interest payments on such debt, O&M Expenses and all other costs directly attributable to the Force Majeure Event.

15.7 Termination

If a Force Majeure Event continues or is in the reasonable judgment of the Parties is likely to continue beyond a period 120 days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 days, be entitled to terminate this Agreement by issuing Termination Notice.

15.8 Termination Payment for Force Majeure Events

Upon Termination of this Agreement pursuant to Article 15.7 hereinabove, Termination Payment to the Concessionaire shall be made in accordance with the following:

- (a) If the Termination is on account of a Non Political Event, the Concessionaire shall be entitled to receive from BRBN by way of Termination Payment an amount equal to 90% of the Debt Due less pending insurance claims, less Grants or Incentives received, if any. Provided that in the event such insurance claims or any part thereof are not admitted and paid, the Concessionaire shall be entitled to receive from BRBN further sum equal to 90% of amount of such claims not admitted.
- (b) If the Termination is on account of an Indirect Political Event, the Concessionaire shall be entitled to receive from BRBN by way of Termination Payment an amount equal to:
 - (i) the total Debt Due, less pending Insurance claims, less Grants or Incentives received, if any. Provided, however, that if any of such insurance claims are not admitted and paid, the Concessionaire shall be entitled to receive from BRBN further sum equal to 80%(eighty percent) of such claims not admitted, plus

- (ii) 110% (one hundred ten percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived shall be reduced every year by 7.5%(seven and half percent) per annum.
- (c) If the Termination of this Agreement is on account of a Political Event, the Concessionaire shall be entitled to receive from BRBN by way of Termination Payment an amount equal to:
 - (i) the total Debt Due, plus
 - (ii) 150% (one hundred fifty percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived at shall be reduced by 7.5% (seven and half percent) per annum.

15.9 Dispute Resolution

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

15.10 Liability for other losses, damages etc.

Save and except as expressly provided in this Article 15, neither Party hereto shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant to this Article 15.

15.11 Duty to Report

The Affected Party shall discharge the following obligations in relation to reporting the occurrence of a Force Majeure Event to the other Party:

- (a) The Affected Party shall not claim any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party in writing of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event within 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence and the probable material affect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.
- (b) Any notice pursuant to this Article 15.11 shall include full particulars of:
 - (i) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 15 with evidence in support thereof;
 - (ii) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
 - (iii) the measures which the Affected Party is taking, or proposes to take, to alleviate the impact of such Force Majeure Event; and
 - (iv) any other information relevant to the Affected Party's claim.

- (c) For so long as the Affected Party continues to claim to be affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) written reports containing information as required by this Article 15.11 and such other information as the other Party may reasonably request the Affected Party to provide.

15.12 Excuse from performance of obligations

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

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

ARTICLE 16

EVENTS OF DEFAULT AND TERMINATION

16.1 Event of Default

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

a) Concessionaire Event of Default

Any of the following events shall constitute an event of default by the Concessionaire ("Concessionaire Event of Default") unless such event has occurred as a result of BRBN Event of Default or a Force Majeure Event;

- (1) The Concessionaire fails to commence the Construction Works within 30 days from the Commencement Date.
- (2) The Concessionaire fails to achieve COD within 180 days from the Scheduled Project Completion Date.
- (3) Any representation made or warranties given by the Concessionaire under this Agreement is found to be false or misleading.
- (4) The Concessionaire creates any Encumbrance on the Project Site/ Project Facility in favour of any Person save and except as otherwise expressly permitted under Article 21.1.
- (5) The aggregate shareholding of the members of the Consortium falls below the minimum prescribed under Article 20.1 (xi).
- (6) The transfer, pursuant to law of either (a) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or (b) all or material part of the Concessionaire except where such transfer in the reasonable opinion of BRBN does not affect the ability of the Concessionaire to perform, and the Concessionaire has the financial and technical capability to perform, its material obligations under the Project Agreements.
- (7) A resolution is passed by the shareholders of the Concessionaire for the voluntary winding up of the Concessionaire.
- (8) Any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction, provided that, as part of such amalgamation or reconstruction, the property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements, and provided that:
 - (i) the amalgamated or reconstructed entity has the technical capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;

- (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at Commencement Date; and
 - (iii) each of the Project Agreements remains in full force and effect.
- (9) A default has occurred under any of the Financing Documents and any of the Lenders has recalled its financial assistance and demanded payment of the amounts outstanding under the Financing Documents or any of them as applicable.
 - (10) The Concessionaire suspends or abandons the operations of the Project without the prior consent of BRBN, provided that the Concessionaire shall be deemed not to have suspended/ abandoned operation if such suspension/ abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations under this Agreement by BRBN or of under the State Support Agreement.
 - (11) The Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.
 - (12) The Concessionaire suffers an attachment being levied on any of its assets causing a Material Adverse Effect on the Project and such attachment continues for a period exceeding 45 days.
 - (13) The Concessionaire has delayed the payment of Concession Fee that has fallen due under this Agreement and if such delay exceeds 60 (Sixty) days
 - (14) The Concessionaire has delayed any payment that has fallen due under this Agreement and if such delay exceeds 90(ninety) days.
 - (15) The Concessionaire is otherwise in Material Breach of this Agreement.

(b) BRBN Event of Default

The following events shall constitute events of default by BRBN (each a "BRBN Event of Default"), unless any such BRBN Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event:

- (1) BRBN is in breach of this Agreement and has failed to cure such breach within 60 (sixty) days of receipt of notice in that behalf from the Concessionaire;
- (2) BRBN repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.
- (3) Deleted
- (4) BRBN or any Governmental Agency has by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its

obligations by the Concessionaire and has failed to cure the same within 60 days of notice thereof by the Concessionaire.

- (5) Deleted
- (6) Any representation made or warranties given by the BRBN under this Agreement is found to be false or misleading

16.2 Termination due to Event of Default

(a) Termination for Concessionaire Event of Default

- (1) Without prejudice to any other right or remedy which BRBN may have in respect thereof under this Agreement, upon the occurrence of a Concessionaire Event of Default, BRBN shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire, provided that before issuing the Termination Notice, BRBN shall by a notice in writing inform the Concessionaire of its intention to issue the Termination Notice (the "Preliminary Notice"). In case the underlying breach/default is not cured within a period of 60 (sixty) days from the date of the Preliminary Notice (the "Cure Period") BRBN shall be entitled, to terminate this Agreement by issuing the Termination Notice. Provided further, that
 - (a) if the default is not cured within 30 (thirty) days of the Preliminary Notice, BRBN shall be entitled to encash the Performance Security with a notice to the Concessionaire (the "Encashment Notice"),
 - (b) if the default is not cured within 30 (thirty) days of the Encashment Notice and a fresh Performance Security is not furnished within the same period in accordance with Article 7.2, BRBN shall subject to the provisions of the Substitution Agreement be entitled to issue the Termination Notice.
- (2) The following shall apply in respect of cure of any of the defaults and/or breaches of this Agreement :
 - (i) The Cure Period provided in this Agreement shall not relieve the Concessionaire from liability for damages caused by its breach or default;
 - (ii) The Cure Period shall not in any way be extended by any period of suspension under this Agreement;
 - (iii) If the cure of any breach by the Concessionaire requires any reasonable action by Concessionaire that must be approved by BRBN or the Government Agency hereunder the applicable Cure Period shall be extended by the period taken by BRBN or the Government Agency to accord the required approval.
- (3) Upon Termination by BRBN on account of occurrence of a Concessionaire Event of Default during the Operations Period, the BRBN shall pay to the Concessionaire by way of Termination Payment an amount equal to 90% of the Debt Due less pending insurance claims, if any. Provided, however, that in the event of such insurance claims or any part thereof are not admitted and paid, the Concessionaire shall be entitled to receive from BRBN further sum equal to 80% (eighty percent) of amount of such claims not admitted.

(b) Termination for BRBNEvents of Default

- (1) The Concessionaire may, upon the occurrence and continuation of any of BRBNEvent of Default terminate this Agreement by issuing Termination Notice to BRBN.
- (2) Upon Termination of this Agreement by the Concessionaire due to a BRBNEvent of Default, the Concessionaire shall be entitled to receive from BRBN, by way of Termination Payment a sum equal to:
 - (i) the total Debt Due, plus
 - (ii) 150% (one hundred fifty percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year and the adjusted amount so arrived at shall be reduced by 7.5% (seven and half percent) per annum.

16.3 Rights of BRBNon Termination

Upon Termination of this Agreement for any reason whatsoever, BRBN shall have the power and authority to

- (i) take possession and control of Project Assets forthwith;
- (ii) prohibit the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Project Assets/dealing with or any part thereof;
- (iii) step in and succeed upon election by BRBNwithout the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as BRBNmay in its discretion deem appropriate with effect from the date of communication of such election to the counter party to the relative Project Agreements. Provided any sums claimed by such counter party as being due and owing for work and services performed or accruing on account of any act, omission or event prior to such date of election shall and shall always constitute debt between the Concessionaire and such counter party and BRBNshall in no way or manner be liable or responsible for such sums. The Concessionaire shall ensure that the Project Agreements contain provisions necessary to give effect to the provision of this Article 16.3.

16.4 Termination Payments

The Termination Payment pursuant to Article 15 or 16 as the case may be, shall be payable to the Concessionaire by BRBNwithin 30 (thirty) days of demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If BRBNfails to pay Termination Payment in full within the said period of 60 days, the amount remaining unpaid shall be paid along with interest @ SBI PLR plus 2 (two) percent from the Termination Date till payment.

16.5 Mode of Payment

Notwithstanding any instructions to the contrary issued or any dispute raised by the Concessionaire, the Termination Payment, and all other payments that would become payable by BRBN under any of the provisions of this Agreement shall, so long as the Debt Due is remaining outstanding, be made only by way of credit directly to a bank account designated therefor by the Lenders and advised to BRBN and the Concessionaire in writing. Any payment so made shall to the extent of such payment constitute a valid discharge to BRBN of its obligations towards the Concessionaire with regard to the Termination Payment and payment of any other monies due hereunder.

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

ARTICLE 17

CHANGE IN LAW

17.1 Change in Law

If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after tax return or other financial burden, the aggregate financial effect of which exceeds Rs.2000000/- (Indian Rupees TwentyLakh Only) in any Accounting year, the Concessionaire may notify the same to BRBN/the Steering Group and propose amendments to this Agreement, so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. However the Change in law shall be prior approved and accepted by BRBN/Steering Group in writing.

17.2 Extension of Concession Period

The Steering Group shall upon being notified by the Concessionaire of the Change in Law and the proposed amendments to this Agreement, assess the change in the financial position as a result of such Change of Law and determine the extension to the Concession Period so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law and recommend the same to BRBN. The BRBN shall, within 30 days of receipt of such recommendation, extend the Concession Period by such period as has been recommended by the Steering Group.

ARTICLE 18

HANDOVER AND DEFECT LIABILITY PERIOD

18.1 Handing Over of the Project Assets

Upon the expiry of the Concession by efflux of time and in the normal course, the Concessionaire shall at the end of the Concession Period, hand over Building, Plant & Machinery and peaceful possession of the Project Assets including Project Site/Facility at no cost to BRBN.

18.2 Joint Inspection and Removal of Deficiency

The handing over process shall be initiated at least 6 months before the actual date of expiry of the Concession Period by a joint inspection by the BRBN and the Concessionaire. The BRBN shall, within 15 days of such inspection prepare and furnish to the Concessionaire a list of works/jobs/additions/alterations, if any, to be carried out to bring the Project to the prescribed level of service condition at least two months prior to the date of expiry of the Concession Period. In case the Concessionaire fails to carry out the above works, within the stipulated time period the BRBN shall be at liberty to have these works executed by any other Person at the risk and cost of the Concessionaire and any cost incurred by BRBN in this regard shall be reimbursed by the Concessionaire to BRBN within 7 days of receipt of demand. For this purpose, BRBN shall without prejudice to any other right/remedy available to it, under this Agreement, have the right to appropriate the Performance Security and/or to set off any amounts due, if any, and payable by BRBN to the Concessionaire to the extent required/ available and to recover deficit amount, if any, from the Concessionaire.

ARTICLE 19

DISPUTE RESOLUTION

19.1 Amicable Resolution

- (a) Save where expressly stated otherwise in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including incompleteness of the Project between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably by the Steering Group and failing resolution of the same in accordance with the procedure set forth in sub-article (b) below.
- (b) Either Party may require the Dispute to be referred to the Managing Director, BRBN and the Chairman of the Board of Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the two shall meet at the earliest mutual convenience and in any event within 15 days of such reference to discuss and attempt to amicably resolve the Dispute. If the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the two, either Party may refer the Dispute to arbitration in accordance with the provisions of Article 19.2 below.

19.2 Arbitration

a) Arbitrators

Any Dispute which is not resolved amicably as provided in Article 19.1(a) shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties. A Party requiring arbitration shall appoint an arbitrator in writing, inform the other Party about such appointment and call upon the other Party to appoint its arbitrator. If the other Party fails to appoint its arbitrator, the Party appointing arbitrator shall take steps in accordance with Arbitration and Conciliation Act, 1996 and its amendments.

b) Place of Arbitration

The place of arbitration shall be Patna by agreement of the Parties, the arbitration hearings, if required, can be held elsewhere from time to time.

c) English Language

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

d) Procedure

The procedure to be followed within the arbitration, including appointment of arbitrator / arbitral tribunal, the rules of evidence which are to apply shall be in accordance with the Bihar Public Works Contract Arbitral Tribunal Act, 2008.

e) Enforcement of Award

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

f) Fees and Expenses

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

g) Performance during Arbitration

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

ARTICLE 20

REPRESENTATIONS AND WARRANTIES, DISCLAIMER

20.1 Representations and Warranties of the Concessionaire

The Concessionaire represents and warrants to BRBNthat:

- (i) it is duly organized, validly existing and in good standing under the laws of India;
- (ii) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (iii) it has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement;
- (iv) it has the financial standing and capacity to undertake the Project;
- (v) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (vi) it is subject to civil and commercial laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
- (vii) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under or accelerate performance required by any of the terms of the Concessionaire's Memorandum and Articles of Association or any member of the Consortium or any Applicable Laws or any covenant, agreement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (viii) there are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect;
- (ix) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Agency which may result in any material adverse effect or impairment of the Concessionaire's ability to perform its obligations and duties under this Agreement;
- (x) it has complied with all Applicable Laws and has not been subject to any fines, penalties, injunctive relief or any other Civil or criminal liabilities which in the aggregate have or may have Material Adverse Effect;
- (xi) the aggregate equity share holding of the members of Consortium/Sponsors in the issued and paid up equity share capital of the Concessionaire shall not be less than (a) 51% (fifty one per cent) until expiry of 3 (three) years following COD, and (b) 26% (twenty six per cent) during the remaining Operations Period;
- (xii) each member of Consortium was and is duly organised and existing under the laws of the jurisdiction of its incorporation and has full power and authority to consent to and has validly consented to and requested BRBNto enter into this Agreement with the Concessionaire and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (xiii) subject to receipt by the Concessionaire from BRBNof the Termination Payment and any other amount due under any of the provisions of this Agreement, in the manner and to the extent provided for under the applicable provisions of this Agreement all rights and interests of the Concessionaire in and to the Project Assets shall pass to and vest in BRBNon the Termination Date free and clear of all Encumbrances without any further act or deed on the part of the Concessionaire or BRBN;

- (xiv) no representation or warranty by the Concessionaire contained herein or in any other document furnished by it to BRBN or to any Government Agency in relation to Applicable Permits contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading; and
- (xv) no sums, in cash or kind, have been paid or will be paid, by or on behalf of the Concessionaire, to any person by way of fees, commission or otherwise for securing the Concession or entering into of this Agreement or for influencing or attempting to influence any officer or employee of BRBN in connection therewith.

20.2 Disclaimer

- (a) Without prejudice to any express provision contained in this Agreement, 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 Specifications and Standards, Project Site and all the information provided by BRBN, and has determined to the Concessionaire's satisfaction the nature and extent of such difficulties, risks and hazards as are likely to arise or may be faced by the Concessionaire in the course of performance of its obligations hereunder.
- (b) The Concessionaire further acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in (a) above and hereby confirms that BRBN shall not be liable for the same in any manner whatsoever to the Concessionaire.

20.3 Representations and Warranties of BRBN

BRBN represents and warrants to the Concessionaire that:

- (i) BRBN has full power and authority to grant the Concession;
- (ii) BRBN has taken all necessary action to authorize the execution, delivery and performance of this Agreement;
- (iii) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof.

ARTICLE 21
MISCELLANEOUS

21.1 Assignment and Charges

- (a) Subject to sub-articles (b) and (c) hereinbelow, this Agreement shall not be assigned by the Concessionaire save and except with prior consent in writing of BRBN, which consent BRBN shall be entitled to decline without assigning any reason whatsoever.
- (b) Subject to sub-article (c) hereinbelow, the Concessionaire shall not create nor permit to subsist any Encumbrance over or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which Concessionaire is a party except with prior consent in writing of BRBN, which consent BRBN shall be entitled to decline without assigning any reason whatsoever.
- (c) Restraint set forth in sub-articles (a) and (b) above shall not apply to:
 - (i) liens/encumbrances arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project ;
 - (ii) mortgages/pledges/hypothecation of goods/assets other than Project Site, as security for indebtedness, in favour of the Lenders and working capital providers for the Project;
 - (iii) assignment of Concessionaire's rights, title and interest under this Agreement to or in favour of the Lenders pursuant to and in accordance with the Substitution Agreement as security for their financial assistance.
- (d) Upon occurrence of the Concessionaire Event of Default the Lenders shall have the right of substitution as provided in the Substitution Agreement.

21.2 Liability And Indemnity

- (a) General Indemnity
 - (i) The Concessionaire shall indemnify, defend and hold BRBN harmless against any and all proceedings, actions and, third party claims arising out of a breach by Concessionaire of any of its obligations under this Agreement except to the extent that any such claim has arisen due to BRBN Event of Default.
 - (ii) BRBN will, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of defect in title and/or the rights of BRBN and/or arising of a breach by BRBN, its officers, servants and agents of any obligations of BRBN under this Agreement except to the extent that any such claim has arisen due to Concessionaire Event of Default.
- (b) Without limiting the generality of this Article 21.2 the Concessionaire shall fully indemnify, save harmless and defend BRBN including its officers servants, agents and subsidiaries from and against any and all loss and damages arising out of or with respect to (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits, (b) payments of taxes relating to the Concessionaire's Contractors, suppliers and representatives income or other taxes required to be paid by the Concessionaire without reimbursement hereunder, or (c) non-payment of amounts due

as a result of materials or services furnished to the Concessionaire or any of its Contractors which are payable by the Concessionaire or any of its Contractors.

- (c) Without limiting the generality of the provisions of this Article 21.2, the Concessionaire shall fully indemnify, save harmless and defend the BRBN from and against any and all damages which the BRBN may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the suspension of the injunction or restraint order. If, in any such suit claim or proceedings, the Project, or any part, thereof or comprised therein is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for BRBN a license, at no cost to BRBN, authorising continued use of the infringing work. If the Concessionaire is unable to secure such license within a reasonable time, the Concessionaire shall, at its own expense and without impairing the Specifications and Standards either replace the affected work, or part, or process thereof with non-infringing work or parts or process, or modify the same so that it becomes non-infringing.
- (d) In the event that either Party receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 21.2 (the 'Indemnified Party') it shall notify the other Party ("Indemnifying Party") within 14 (fourteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim it may conduct the proceedings in the name of the Indemnified Party subject to the Indemnified Party being secured against any costs involved to its reasonable satisfaction.
- (e) Defence of Claims
- (i) The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder and their reasonable costs and expenses shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the person indemnified in respect of loss to the full extent provided by this Article 21.2, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding liabilities, payments and obligations at its expense and through counsel of its choice provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnified Party unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure, the loss to be indemnified hereunder to the extent so compromised or settled.

- (ii) If the Indemnifying Party has exercised its rights under Article 21.2(d) above, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the indemnifying Party (which consent shall not be unreasonably withheld or delayed).
- (iii) If the Indemnifying Party exercises its rights under Article 21.2(d) above, then the Indemnified Party shall nevertheless have the right to employ its own counsel and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of such Indemnified Party, when and as incurred, unless:
 - (1) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or
 - (2) 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
 - (3) 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
 - (4) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either
 - (a) that there may be specific defences available to it which are different from or additional to those available to the Indemnifying Party; or
 - (b) that such claim, action, suit or proceeding involves or could have a material adverse effect upon it beyond the scope of this Agreement,provided that if sub-articles (2), (3) or (4) of Article 21.2(e)(ii) shall be applicable, counsel for the Indemnified Party shall have the right to direct the defence of such claim, action, suit or proceeding on behalf of the Indemnified Party and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

21.3 Advertising on the Project Site

The Concessionaire shall not undertake or permit any form of commercial advertising, display or hoarding at any place on the Project Site if such advertising, display or hoarding shall affect the safety of users of the Project Facility while driving. Provided, however, that this sub-article shall not apply within the rest areas on the Project Site.

21.4 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 Patna, India shall have jurisdiction over all matters arising out of or relating to this Agreement.

21.5 Waiver

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

(iii) shall not affect the validity or enforceability of this Agreement in any manner.

(b) 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.

21.6 Survival

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

21.7 Amendments

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 agreed to by all the Parties hereto and evidenced in writing.

21.8 Notices

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

If to Government of India

Fax No. -----

If to the Concessionaire

The Managing Director,
----- Limited,

Fax No. -----

Or such address, telex number, or facsimile number as may be duly notified by the respective Parties from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication made by letter, when delivered by hand, by recognised

international courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

21.9 Severability

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

21.10 No Partnership

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

21.11 Language

All notices required to be given under this Agreement and all communications, documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

21.12 Exclusion of Implied Warranties etc.

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

21.13 Counterparts

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

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

SIGNED SEALED AND DELIVERED

For and on behalf of President of India by

(Signature)

(Name)

(Designation)

SIGNED, SEALED AND DELIVERED

For and on behalf of CONCESSIONAIRE by:

In the presence of.

1)

2)

SCHEDULE A
PROFORMA FOR SITE LEASE DEED

THIS PROJECT LEASE DEED made on the ____ day of _____ 201_ by and among

THE GOVERNOR OF THE STATE OF BIHAR in his executive capacity for the Government of the State of **BIHAR** through -----, Government of **BIHAR** (hereinafter the “BRBN” or the “**Lessor**”, which expression shall, unless the context otherwise requires, include its successors and assigns);

AND

M/S ____, a company incorporated under the Companies Act, 1956 and having its registered office at _____, (hereinafter the “**Concessionaire**” or the “**Lessee**”, which expression shall, unless the context otherwise requires, include its successors and permitted assigns);

AND

M/s _ _, having its registered office at ___ [details of members of the Preferred Bidder], the confirming party to this Deed (hereinafter collectively referred to as the “**Preferred Bidder**”, which expression shall, unless the context otherwise requires, include their respective successors and permitted assigns). []

WHEREAS:

- A. The BRBN(the” Authority) has vide the Concession Agreement dated _____ (hereinafter “**Concession Agreement**”) granted Concession to -----(the Concessionaire or the Lessee herein) to implement the Project at Project Site, involving investigation of the target area, study, procure, finance, renovate, upgrade, modernise, augment, commission, operate, maintain and manage **Cold Storage at Kudra , Kaimur, Bihar on RDFOT (Renovate, Design, Finance, Operate and Transfer) basis under PPP mode(The Project)** by the Concessionaire in accordance with the provisions of the Concession Agreement.
- B. Pursuant to and under the Concession Agreement the Lessor is required to vest with the Lessee the land and civil architectural buildings comprising the Project Site and all rights relating thereto for a period co-terminus with the Concession Period under a valid and binding Project Site Lease Deed for the purpose of implementing the Project.
- C. Being the owner of the Project Site with a good and marketable title thereto and having lawful possession thereof, the Lessor is desirous of demising the Project Site unto the Lessee and vesting unencumbered possession thereof with the Lessee, on the terms and conditions hereinafter contained.

NOW THIS INDENTURE OF LEASE WITNESSETH AS FOLLOWS:

1. The words and expressions used in this Deed but not defined shall, unless the context otherwise requires, have the meaning as defined/assigned to them respectively in the Concession Agreement.
2. The interpretation Clause 1.2 of the Concession Agreement shall be deemed to be incorporated in this Deed in extenso mutatis mutandis.
3. The following words and expressions shall, except where the context otherwise requires, have the meaning as hereunder:
 - (a) **“Project Site Lease Deed”** or **“Deed”** means this Project Site Lease Deed;
 - (b) **“Concession Agreement”** shall mean the Concession Agreement dated _____ entered into between the BRBNand -----, with the Preferred Bidder as the confirming party;
 - (c) **“Concession Period”** means the period specified under Clause --- of the Concession Agreement;
 - (d) **“Demised Premises”** means all the lands comprising the Project Site, more particularly delineated in Annexure 1 and demarcated in red on the site plan attached thereto;
 - (e) **“Parties”** shall mean Lessor and Lessee herein, and where the context admits or requires, the Preferred Bidder;
 - (f) **“Lessor”** means BRBN;
 - (g) **“Lessee”** means the Concessionaire;
 - (h) **“Annexure”** means any of the Annexures, supplements and documents annexed to this Agreement.
4. The Lessor hereby demises the Demised Premises unto the Lessee on an “as is where is basis” under the terms of this Deed from the-----day of 2014 (the Compliance Date) for a period of ----- years there from, which period shall be co-terminus with the Concession Period and shall be extended or terminated at a prior date to coincide with the Concession Period. The Lessor hereby undertakes that it shall not terminate this Deed, except upon the due and valid termination of the Concession Period.
5. In consideration of the Concession Agreement between the Lessor and the Lessee, with the Preferred Bidder as the confirming party, and in consideration of the lease rental herein reserved and the covenants on the part of the Lessee, the Lessor hereby demises unto the Lessee the Demised Premises without interruption or interference, free from Encumbrances and together with the full and free right and liberty of way and passage, the Easementary Rights and other rights in relation thereto with delivery of vacant possession thereof.
6. In consideration of the Lessor leasing the Project Site to the Concessionaire, the Concessionaire shall, simultaneously with or prior to the execution of the Project Site Lease Deed, pay to the BRBNthe annual lease rental of Rs. 100.00 (Rupee One Hundred) for the duration of the Concession Period, which amount shall be paid as an advance lease rental in a single lump sum payment of Rupees ----- on or prior to the date of execution of this Deed.
7. The Lessor hereby vests the Demised Premises with the Lessee along with all Easementary Rights, free from any Encumbrance. Any liability arising out of providing the Demised Premises free of Encumbrances shall be borne solely by the Lessor. The Lessor shall remove the utilities, including the existing utilities i.e. the lamp posts, sewer line and electrical

overhead line shown Annexure ---, at, over or under the Demised Premises at its cost and expense.

8. The Lessor hereby vests the Demised Premises with the Lessee under this Deed for the purpose of implementing the Project, including the design, renovate, finance, construction, and operation and maintenance of the Project Facility thereat in accordance with the terms and conditions of the Concession Agreement.
9. The Concessionaire shall not sub-lease the whole or any part of the land comprising the Project Site, leased to it by BRBN under this Deed, to any person in any form or under any arrangement, device or method. Provided that the Concessionaire shall be entitled to enter into Contractual Arrangements, including the sub-leasing, letting, subletting, licensing, franchising or similar arrangements in respect of the Commercial Area (built up area), which, however, shall not involve the transfer of the leasehold rights therein or thereof. Provided further the Concessionaire shall be entitled to appoint Subcontractors for the implementation of the Project at the Demised Premises in accordance with the provisions of the Concession Agreement.
10. The BRBN hereby agrees that for the purpose of raising financial assistance for the Project, the Concessionaire may assign all its rights, title, interest and benefits under the Concession Agreement, limited to the extent of such rights therein, to or in favour of the Lenders in accordance with the provisions of the Concession Agreement. Provided that in the event of the termination of the Concession Agreement such assignment shall stand extinguished.

Provided further the Concessionaire shall not have the right and authority to mortgage, encumber or create any security interest whatsoever on the Project Site, the Project Facility or the commercial built up area thereat or therein, in full or part, in favour of the Lenders or any person in any form, manner, device or method.

11. Upon the occurrence of a Concessionaire Event of Default under the Concession Agreement, the Parties shall in consultation with the Lenders and in accordance with the provisions of the Concession Agreement have the right to replace the Lessee by the Substitute Entity for performing the Lessee's obligations hereunder. Upon appointment of the Substitute Entity, the Substitute Entity shall be deemed to be the Lessee for all the purposes and shall be entitled to all the rights and be bound by all the representations, covenants and obligations of the Lessee under this Deed.
12. In the event of termination of the Concession Agreement by efflux of time or otherwise, this Deed shall be terminated and the lease of the Demised Premises and all rights in relation thereto shall be determined, the Lessee, the Transferees and Persons claiming through or under it/them shall hand over the vacant possession of the Demised Premises to the Lessor and forthwith vacate the Demised Premises without any demur or delay.
13. The Lessor hereby covenants with the Lessee as under:
 - (a) That it shall not increase the lease rental due and payable by the Concessionaire under Clause 6 hereof;
 - (b) That it shall not interfere with or impede in any manner or otherwise limit, restrict or impose conditions in relation to: (i) the complete, free and full enjoyment of the Demised Premises by the Lessee for the purpose of the implementation of the Project and all rights related thereto; (ii) the design, renovate, construction, operation and maintenance of the Project Facility; (iii) the implementation of the Project by the Lessee; and (iii) the possession, control and use by the Lessee of the Demised Premises, the Project Facility constructed thereon and any other facilities developed in the course of implementation of the Project; provided that the same are in compliance with the terms and conditions of the Concession Agreement and this Deed.
 - (c) That it shall not terminate this Deed, except upon the due and valid termination of the Concession Agreement/Concession in accordance with the terms thereof;

- (d) That there are no litigations, claims, demands or any proceedings pending before any authority in respect of acquisition of the Demised Premises or in respect of any other land-dispute, and that the Lessee shall have complete, lawful and uninterrupted possession, control and use of the Demised Premises.
14. The Lessee hereby covenants with the Lessor as follows:
- (a) That it shall develop, establish, design, construct and operate and maintain the Project Facility/Project at the Demised Premises as per its obligations under and the terms and conditions of the Concession Agreement;
- (b) That it shall operate and maintain the Project Facility or cause it to be operated and maintained in accordance with the Concession Agreement;
- (c) That it shall observe and perform all terms, covenants, conditions and stipulations of this Deed and the Concession Agreement;
- (d) That it shall keep the Demised Premises free from encroachments during the Concession Period and carry out its maintenance and repairs in accordance with the provisions of the Concession Agreement;
- (e) That in respect of the Demised Premises it shall pay/cause payment of all municipal rates (other than property tax, the payment of which shall be exempted), levies, taxes, rents, including penalties etc for late payment, at the applicable rates from time to time, to the concerned Competent Authorities/persons and be liable for payments of all rates and charges for the use of utilities and services at the Demised Premises.
15. Each Party hereto represents and warrants that:
- (a) It has full power and authority to execute, deliver and perform its obligations under this Deed and to carry out the transactions contemplated hereby;
- (b) It has taken all necessary actions to authorise the execution, delivery and performance of this Deed; and
- (c) This Deed constitutes its legal, valid and binding obligations that shall be enforceable against it in accordance with the terms hereof.
16. The Parties agree that
- (a) The failure of the Lessee to perform its obligations under this Deed and any breach of covenants or undertakings given and provided for in this Deed by the Lessee shall amount to a Concessionaire Event of Default under the Concession Agreement.
- (b) Any dispute, controversy or claim arising out of or in relation to this Deed or the interpretation of any of its provisions shall be settled in accordance with the Dispute Resolution provision of Article ---- of the Concession Agreement.
- (c) The stamp duty and registration charges for the execution and registration of this Deed shall be borne by the Lessee in accordance with the provisions of the Applicable Laws.
- (d) In case of ambiguities, conflicts or discrepancies between the Concession Agreement and this Deed, the Concession Agreement shall prevail.
- (a) All notices under the terms of this Deed shall be sent either by hand, facsimile or courier to the following addresses:

Lessor (BRBN)

:

Lessee :

Concessionaire :

17. The Preferred Bidder agrees to and confirms the provisions of this Deed and undertakes that it shall ensure, at its cost and consequence, that the Lessee abides by the provisions hereof. The Preferred Bidder is a confirming Party to this Deed.

IN WITNESS WHEREOF the Parties have executed and delivered this Deed by their duly authorised representative on the date first above written:

<p>SIGNED ON BEHALF OF LESSOR</p> <p>_____ (Signature)</p> <p>_____ (Name)</p> <p>_____ (Designation)</p>	<p>SIGNED, SEALED AND DELIVERED</p> <p>Concessionaire/Lessee by the hand of its authorized representative</p> <p>_____ (Signature)</p> <p>_____ (Name)</p> <p>_____ (Designation)</p> <p>pursuant to Resolution dated..... of its board of directors.</p>
--	--

Signed, Sealed and Delivered

For and on behalf of the Preferred Bidder

We agree to be bound by the terms and conditions of this Deed

_____ (Signature)

_____ (Name)

_____ (Designation)

_____ (Signature)

_____ (Name)

_____ (Designation) []

In the presence of

Witnesses:

(i)

(ii)

Date:

Place:

SCHEDULE B
PROJECT SITE

(Attached Separately)

SCHEDULE C

PROJECT AND PROJECT FACILITY

PROJECT:

Development of Cold Storage at Kudra, DistKaimur, Bihar on RDFOT (Renovate, Design, Finance, Operate and Transfer) basis under PPP mode

PROJECT FACILITY:

- 1) Development of the Site and Land scapping**
- 2) Augmentation of the Utility Infrastructure (Power, Water, and other utilities)**
- 3) Renovation / modernization of Building for the Cold Storage**
- 4) Procurement, commissioning of Plant and Machinery# to achieve the Capacity**
- 5) Construction and development of other required facilities and utilities for smooth functioning of cold storage**

The components of the plant and machineries shall be as per specifications and guidelines “Technical Standard Number NHB - CS - Type 03-2010” as issued by Technical Standard Committee on Technical Standards and Protocol for the Cold Chain in India, and as modified from time to time (attached separately).

SCHEDULE D

PROJECT COMPLETION SCHEDULE

(The Project Completion Schedule as agreed to with the Concessionaire would need to be set out).

Sr.No.	Project Milestone	Date for Completion

SCHEDULE E
INDEPENDENT ENGINEER'S SERVICES

TERMS OF REFERENCE

1. OBJECTIVES

The Independent Engineer shall be required to :

- (i) Act independently on behalf of both BRBN and the Concessionaire to review and monitor all activities associated with design, construction, operation and maintenance to ensure compliance with provisions of the Concession Agreement.
- (ii) Visit, inspect, and report to BRBN/Steering Group on various aspects of the project and carry out all such activities as are provided in the Concession Agreement. Without prejudice to this, the scope of services of the Independent Engineer shall be as specified in para 2 to 4.

The Independent Engineer shall have no authority to relieve the Concessionaire of any of its duties or to impose additional obligations other than those expressly provided in the Concession Agreement.

2. SCOPE OF SERVICES

2.1 Pre-implementation Period

- (i) Review the Project Report prepared by the Concessionaire.
- (ii) Review the Implementation Schedule submitted by the Concessionaire.
- (iii) Proof checking of designs, calculations and working drawings prepared by the Concessionaire for the construction of various components of the Project Facility in accordance with provisions of the Concession Agreement.
- (iv) Review the adequacy of the geo-technical studies, sub-soil investigations, hydrological investigation and the topographical survey, if any, carried out by the Concessionaire.
- (v) Review the environmental management plan for the Project during Implementation Period and Operations Period.
- (vi) Review the proposed quality assurance and quality control procedures during the Implementation Period and Operations Period.
- (vii) Review the safety measures proposed during Implementation Period and Operations Period.

2.2 Implementation Period

- (i) Monitor quality assurance and quality control during Implementation period.
- (ii) Review the material testing results, mix designs and order special tests of materials and/or completed works, and/or order removal and substitution of substandard materials and/or works as required.
- (iii) Ensure that the construction work is carried out in accordance with the Specifications and Standards and Good Industry Practice.

- (iv) Identify delays in completion and recommend to the Steering Group/ Concessionaire the remedial measures to expedite the progress.
- (v) Review "As Built" drawings for each component of the works prepared by the Concessionaire.
- (vi) Review the safety measures provided by the Concessionaire.
- (vii) Supervise and monitor various Completion Tests as provided in the Concession Agreement
- (viii) Issue Provisional Completion Certificate or the Completion Certificate, as the case may be, in accordance with the provisions of the Concession Agreement.
- (ix) Review and approve the Maintenance Manual prepared by the Concessionaire.

2.3 General

- (i) Design a Management Information System (MIS) for monitoring of the Project by BRBN.
- (ii) Determine and recommend changes to the Project Completion Schedule, Scheduled Project Completion Date and the Concession Period in accordance with the Concession Agreement.
- (iii) Mediate and assist in resolving disputes between BRBN and Concessionaire.

3. INTERACTION WITH STEERING GROUP

The Independent Engineer shall interact with the Steering Group on a regular basis.

4. REPORTING REQUIREMENTS

The Independent Engineer shall prepare and submit to the Steering Group three copies and to the Concessionaire two copies each of the following reports.

- (a) Implementation Period
 - (i) Monthly Progress Report
- (b) Various other reports as provided in the Concession Agreement such as Completion Report.

5. PERIOD OF SERVICES

The period of services shall be the Implementation/Construction Period.

SCHEDULE F

COMPLETION CERTIFICATE

(To be issued by appointed Independent Engineer)

SCHEDULE G

PROFORMA OF BANK GUARANTEE - I

(FOR CONSTRUCTION/IMPLEMENTATION PERIOD)

(To be issued by a Scheduled Bank in India)

THIS DEED OF GUARANTEE executed on this the ---- day of ---- at ---- by -----
----- (Name of the Bank) having its Head/Registered office at -----
----- hereinafter referred to as "the Guarantor" which expression shall unless it be
repugnant to the subject or context thereof include successors and assigns;

In favour of

The President of India in his executive capacity for the Government of India, represented by the Ministry of Surface Transport, Government of India, hereinafter called "BRBN" (which expression shall include its successors and assigns);

WHEREAS

- A. By the Concession Agreement dated ----- entered into between BRBN and M/s. XXXX Limited, a company incorporated under the Companies Act, 1956 having its registered office at ----- hereinafter called "the Company", ("the Concession Agreement") the Company has been granted the Concession to implement the project envisaging construction, operation and maintenance of ----- on build, operate and transfer basis.
- B. In terms of Article 3.1(a) of the Concession Agreement, the Company is required to furnish to BRBN, an unconditional and irrevocable bank guarantee for an amount of Rs.----- (Rupees ----- only) as security for due and punctual performance/discharge of its obligations under the Concession Agreement during the Implementation Period, substantially in the format annexed as Schedule 'Q' to the Concession Agreement.
- C. At the request of the Company, the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Company of its obligations under the Concession Agreement during the Implementation Period.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS :

1. Capitalised terms used herein but not defined shall have the meaning assigned to them respectively in the Concession Agreement.
2. The Guarantor hereby guarantees the due and punctual performance by the Company of all its obligations under the Concession Agreement during the Implementation Period.
3. The Guarantor shall, without demur, pay to BRBN sums not exceeding in aggregate Rs.----- (Rupees ----- only), within five (5) days of receipt of a written demand therefor from BRBN stating that the Company has failed to meet its performance obligations under the Concession Agreement during the Implementation Period. The Guarantor shall have no obligation to go into the veracity of any demand so made by BRBN and shall pay the amount specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Company or any other Person.
4. In order to give effect to this Guarantee BRBN shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in

the terms and conditions of the Concession Agreement or other documents or by the extension of time for performance granted to the Company or postponement/non exercise/delayed exercise of any of its rights by BRBN or any indulgence shown by BRBN to the Concessionaire and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non exercise, delayed exercise of any of its rights by BRBN or any indulgence shown by BRBN provided nothing contained herein shall enlarge the Guarantor's obligation hereunder.

5. This Guarantee shall be irrevocable and shall remain in full force and effect until discharge by the Guarantor of all its obligations hereunder.
6. This Guarantee shall not be affected by any change in the constitution or winding up of the Company/the Guarantor or any absorption, merger or amalgamation of the Company/the Guarantor with any other Person.
7. The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorised to execute this Guarantee pursuant to the power granted under _____.

IN WITNESS WHEREOF THE GUARANTOR HAS SET ITS HANDS HEREUNTO ON THE DAY, MONTH AND YEAR FIRST HEREINABOVE WRITTEN.

SIGNED AND DELIVERED by ----- Bank by the hand of Shri -----

its ----- and authorised official.

SCHEDULE H

PROFORMA OF BANK GUARANTEE – II

(FOR OPERATIONS PERIOD)

(To be issued by a Scheduled Bank in India)

THIS DEED OF GUARANTEE executed on this the ----- day of --- at ----by -----
----- (Name of the Bank) having its Head/Registered office at -----
----- hereinafter referred to as “the Guarantor” which expression shall unless it be
repugnant to the subject or context thereof include its successors and assigns;

In favour of

The President of India in his executive capacity for the Government of India, represented by the Ministry of Surface Transport, Government of India, hereinafter called “BRBN” (which expression shall include its successors and assigns);

WHEREAS

- A. By the Concession Agreement dated ----- entered into between BRBN and M/s. XXXX Limited, a company incorporated under the Companies Act, 1956 having its registered office at ----- hereinafter called “the Company”, (“the Concession Agreement”) the Company has been granted the Concession to implement the project envisaging construction, operation and maintenance of ----- on build, operate and transfer basis.
- B. In terms of Article 3.1(a) of the Concession Agreement, the Company is required to furnish to BRBN, an unconditional and irrevocable bank guarantee for an amount of Rs.----- (Rupees ----- only) as security for due and punctual performance/discharge of its obligation under the Concession Agreement during the Operations Period substantially in the format annexed as Schedule ‘—’ to the Concession Agreement.
- C. At the request of the Company, the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Company of its obligations under the Concession Agreement during the Operations Period.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS :

1. Capitalised terms used herein but not defined shall have the meaning assigned to them respectively in the Concession Agreement.
2. The Guarantor hereby guarantees the due and punctual performance by the Company of all its obligations under the Concession Agreement during the Operations Period.
3. The Guarantor shall, without demur, pay to BRBN sums not exceeding in aggregate Rs.----- (Rupees ----- only), within five (5) days of receipt of a written demand therefor from BRBN stating that the Company has failed to meet its performance obligations under the Concession Agreement during the Operations Period⁴. The Guarantor

⁴ Banks are unlikely to issue guarantee for the entire Operations Period in one stretch. Initially the guarantee may be issued for a period of 2-3 years. The Company shall have to keep the guarantee valid throughout the Operations Period by seeking extension from time to time.

shall have no obligation to go into the veracity of any demand made by BRBN and shall pay the amounts specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Company or any other Person.

4. In order to give effect to this Guarantee BRBN shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the Concession Agreement or other documents or by the extension of time for performance granted to the Company or postponement/non exercise/delayed exercise of any of its rights by BRBN or any indulgence shown by BRBN to the Concessionaire and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non exercise, delayed exercise of any of its rights by BRBN or any indulgence shown by BRBN provided nothing contained herein shall enlarge the Guarantor's obligation hereunder.
5. This Guarantee shall be irrevocable and shall remain in full force and effect until discharged by the Guarantor of all its obligations hereunder.
6. This Guarantee shall not be affected by any change in the constitution or winding up of the Company/the Guarantor or any absorption, merger or amalgamation of the Company/the Guarantor with any other Person.
7. The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorised to execute this Guarantee pursuant to the power granted under _____.

IN WITNESS WHEREOF THE GUARANTOR HAS SET ITS HANDS HEREUNTO ON THE DAY, MONTH AND YEAR FIRST HEREINABOVE WRITTEN.

SIGNED AND DELIVERED by ----- Bank by the hand of Shri -----

its ----- and authorised official.

SCHEDULE I
SUBSTITUTION AGREEMENT

THIS SUBSTITUTION AGREEMENT is entered into on this the ----- day of ----- (Month) --
-- (Year) at -----.

AMONGST,

The GOVERNOR of THE STATE OF Bihar acting in his executive capacity for the Government of the State of Bihar through -----, hereinafter referred to as "**BRBN**" (which expression shall unless repugnant to the context of meaning thereof include its successors and assigns);

M/s. XXXX Limited, a company incorporated under the provisions of the Companies Act, 1956 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 assigns), AND

YYYY (Financial Institution/ Bank) having its Registered Office/Head Office at -----
----- hereinafter referred to as "**the Lender**".

OR

ZZZZ (Financial Institution/Bank) having its Registered Office/Head Office at-----
----- acting for and on behalf of the Lenders listed in Schedule I hereto (hereinafter referred as "**the Lender's Representative**".

2.1 WHEREAS,

- A. BRBN is keen to implement a project envisaging design, renovate, install and equip machineries, operation and maintenance of -----
(more particularly described in Schedule 'A' and hereinafter referred to as "the Project") with private sector participation on Renovate, Design, Finance, Operate and Transfer (RDFOT) basis;
- B. By the Concession Agreement dated ----- entered into between BRBN and the Concessionaire (hereinafter referred to as "the Concession Agreement") the Concessionaire has been granted the Concession to implement the Project on RDFOT basis;
- C. With a view to facilitate financing of the Project by the Concessionaire, in pursuance of Article ----- of the Concession Agreement, BRBN and the Concessionaire have agreed to enter into Substitution Agreement being these presents with the Lender/s/Lenders' Representative.
- D. As a condition to making any disbursement pursuant to the Financing Documents, the Lender(s) has/ have required that the Substitution Agreement being these presents be entered into, and BRBN and the Concessaionaire have agreed to the same

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AS FOLLOWS :

ARTICLE 1

DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereafter respectively assigned to them.

“Agreement” means this agreement and includes any amendment or modification made to this agreement in accordance with the provisions hereof.

“Financial Assistance” means the financial assistance set forth in Schedule I hereto, agreed to be provided by the Lender(s) to the Concessionaire for financing the the Project.

“Lender(s)” means the financial institutions/banks whose name(s) and addresses are set out in Schedule I hereto.

“Residual Concession Period” means the period which shall be be aggregate remainder of the Concession Period as the Suspension Period.

“Selectee” means a Person proposed by the Lender/Lender’s Representative pursuant to this Agreement and approved by BRBN for substituting the Concessionaire for the residual Concession Period, in accordance with the provisions of this Agreement.

Suspension Period” means the period commencing from the expiry of the Cure Period specified in the Preliminary Notice and ending on the date on which all formalities connected with substitution of the Concessionaire by the Selectee including handing over of Project Site/Project Facility, in accordance with this Agreement are completed and the substitution has become effective.

- 1.2 Capitalised terms used in this Agreement but not defined shall have the meaning assigned to them respectively in the Concession Agreement.

ARTICLE 2

SUBSTITUTION OF THE CONCESSIONAIRE BY THE SELECTEE

2.1 Lenders right to Substitute

BRBN and the Concessionaire hereby irrevocably agree that upon occurrence of an Concessionaire Event of Default, the Lender(s) shall, without prejudice to any other rights or remedies available to them under law/Financing Documents and without being required to exercise or exhaust such rights or remedies, have the right to seek substitution of the Concessionaire by Selectee for the residual Concession under the Concession Agreement in accordance with the provisions of this Agreement. Provided upon substitution the Selectee shall be entitled to the extension of the remainder of the Concession Period by the Suspension Period.

2.2 Preliminary Notice of Termination

BRBN shall as soon as possible but in any case not later than 15 days of its knowledge of the occurrence of the Concessionaire Event of Default issue Preliminary Notice of Termination to the Concessionaire in terms of Article 16.2(a) of the Concession Agreement, with a copy thereof simultaneously to the Lenders. Provided if the Concessionaire Event of Default is the one set out in Article 16.1(a)(9) of the Concession Agreement, the BRBN shall not be obliged to issue Preliminary Termination Notice until receipt by BRBN of the recall notice issued by the Lender(s) to the Concessionaire

2.3 Suspension of Concession and Takeover of the Project Facility

The Concessionaire irrevocably agrees that if the Cure Period specified in the Preliminary Notice of Termination lapses without the Concessionaire Event of Default having been cured, the Concession shall effective from the expiry of such Cure Period stand suspended without any further notice or other act of BRBN being required, and that BRBN shall have the right to enter upon and takeover the Project Site/Project Facility and to take all such steps as are necessary for the continued operation and maintenance of the Project Facility, levy, collection and appropriation of Fee subject to servicing the Debt Due as per the Financing Documents, and the substitution of the Concessionaire by the Selectee in accordance with this Agreement. The Concessionaire hereby irrevocably consents to the takeover of the Project Facility/ Project Site by BRBN forthwith upon suspension becoming effective.

2.4 Substitution Notice

BRBN and the Concessionaire hereby irrevocably agree that in the event of the Concessionaire's failure to cure the Event of Default specified in the Preliminary Notice of Termination. The Lender/Lender's Representative may, within 30 (thirty) days of the expiry of the Cure Period specified therein notify BRBN and the Concessionaire about the intention of the Lender(s) to seek substitution of the Concessionaire by the Selectee for the Residual Concession (the "Substitution Notice").

2.5 Criteria for selection of the Selectee.

The Lender/ Lenders' Representative shall in addition to any other criteria that it may deem fit and necessary, apply the following criteria in the selection of the Selectee:

- (i) the Selectee shall possess the network, experience, technical capability and managerial ability to perform and discharge all the residual duties, obligations and liabilities of the Concessionaire in respect of the Concession, under the Concession Agreement;
- (ii) the Selectee shall have the capability and shall unconditionally consent to assume the liability for the payment and discharge of dues, if any, of the Concessionaire to BRBN under and in accordance with the Concession Agreements and also payment of Debt Due to the Lender(s) upon terms and conditions as agreed to between the Selectee and the Lenders.

ARTICLE 3

MODALITY FOR SUBSTITUTION

3.1 Modalities for Substitution.

The following modalities shall be followed for substitution of the Concessionaire by the Selectee pursuant to this Agreement:

- (i) The Lender(s)/Lenders' Representative shall be entitled, within a period of 120 (one hundred twenty) days from the date of delivery of the Substitution Notice pursuant to the preceding Article 2.2 to invite or procure offers either through private negotiations or public auction or process of tender or otherwise from the eligible Persons, for the substitution of the Concessionaire by the Selectee and propose to BRBN for its approval the Selectee (the "Proposal"). The Proposal of the Lender/Lender's Representative shall contain the particulars and information in respect of the Selectee, the terms of Substitution, particulars of the Debt Due and such data and information as would be necessary and relevant for BRBN to decide

as to the acceptability of the Selectee. The Lender/ Lender's Representative shall provide to BRBN such additional information and clarification in respect of any data, particulars or information contained in the Proposal, as BRBN may promptly and reasonably require.

- (ii) The Proposal shall be accompanied by an unconditional undertaking of the Selectee to the effect that it shall upon acceptance by BRBN of the Proposal observe, comply with, perform and fulfill the residual terms, conditions and covenants of the Concession Agreement as if the Selectee had been the Concessionaire under the Concession Agreement and to assume, discharge and pay the Debt Due on the terms and conditions agreed to by the Selectee with the Lenders. The Selectee shall also undertake to enter into such documents and writings with BRBN and the Lender(s) as may be necessary or required to give effect to the substitution of the Concessionaire by the Selectee.
- (iii) BRBN shall convey to the Lender/ Lenders' Representative its acceptance or otherwise of the Selectee within 30(thirty) days of (a) the date of receipt of the Proposal by BRBN, or (b) the date of receipt of the additional information and clarifications in respect of any data, particulars or information comprised in the Proposal, provided by the Lender/Lender's Representative to the BRBN, whichever is later.
- (iv) At any time prior to the acceptance of the Selectee by BRBN pursuant to this Agreement, BRBN may require the Lender/Lenders' Representative to satisfy it as to the eligibility of the Selectee and the decision of BRBN as to acceptance or rejection of any Selectee (which shall be reasonable), shall be final, conclusive and binding on the Lender(s), the Selectee and the Concessionaire. In the event that BRBN fails to communicate its acceptance or otherwise or the objections if any it has to the acceptance of the Proposal/ the Selectee within a period of 30 days prescribed in preceding sub-article (iii), BRBN shall be deemed to have accepted the Proposal/ the Selectee
- (v) The rejection of the Selectee if made by BRBN shall be reasoned and be made after hearing the Lender/Lenders' Representative. Following the rejection of the Proposal, the Lender/Lenders' Representative shall have the right to submit a fresh Proposal, proposing another Selectee, within 30 days of receipt of communication regarding rejection of the Selectee previously proposed. The provisions of preceding sub-article (iii) and (iv) shall apply mutatis mutandis to such fresh Proposal.
- (vi) If BRBN accepts the Proposal/fresh Proposal, BRBN shall take all necessary steps to substitute the Concessionaire by the Selectee by amendment of the Concession Agreement or by execution of fresh agreement or such other writing as may be required or necessary to give effect to the substitution of the Concessionaire by the Selectee for the Residual Concession Period.
- (vii) The substitution of the Concessionaire by the Selectee shall be deemed to be complete upon the Selectee executing all necessary documents and writings with or in favour of BRBN and the Lender(s) so as to give full effect to the terms and conditions of substitution subject to which the Selectee has been accepted by the Lender(s) and BRBN and upon the delivery by BRBN of the Project Assets to the Selectee. Upon the substitution becoming effective pursuant to this sub-article all the rights of the Concessionaire under the Concession Agreement shall cease to exist. Provided nothing contained in this sub-article shall prejudice any pending/subsisting claims of the Concessionaire against BRBN or any claim of BRBN against the Concessionaire and the Selectee shall incur no liability or

consequence on account of any previous breach/default and shall subject to the terms and conditions of the substitution, have a period of 90 days to cure any breach/default subsisting on the date of substitution and required to be cured.

- (viii) The decision of the Lenders and BRBN in the selection of the Selectee shall be final and binding on the Concessionaire and shall be deemed to have been made with the concurrence of the Concessionaire. The Concessionaire hereby expressly waives all rights to object to or challenge such selection of the Selectee on any ground whatsoever.

3.2 Termination and Termination Payment.

- (i) Where the Lender/Lenders' Representative (on behalf of all the Lenders) communicates in writing that (i) the Lender/ Lender's Representative does not intend to seek substitution of the Concessionaire, or (ii) that the Lender/Lenders' Representative has not been able to find suitable Selectee or (iii) that BRBN has declined to accept the Selectee proposed by the Lender/Lenders' Representative, BRBN shall proceed to terminate the Concession and to make Termination Payment, in accordance with the provisions of the Concession Agreement.
- (ii) Notwithstanding anything contained hereinabove, BRBN shall not upon Termination of the Concession Agreement, be required to take over, the Debt Due save and except to the extent of Termination Payment due and payable under the Concession Agreement. In such an event the BRBN's obligation shall be limited to assumption of such liabilities and payments of Debt Due as BRBN has agreed to bear under the Concession Agreement.
- (iii) Nothing contained in these presents shall mean or be interpreted as provision of any guarantee or surety by BRBN and it is expressly agreed that BRBN has not provided any surety, guarantee or counter guarantee whether directly or indirectly for the recovery of amounts advanced by the Lenders to the Concessionaire.

ARTICLE 4

MODE OF TERMINATION PAYMENTS

4.1 Mode of Payment

- (i) BRBN and Concessionaire hereby irrevocably agree, and confirm that so long as the Debt Due is outstanding the Termination Payment and any other amounts due and payable by BRBN to the Concessionaire under any of the provisions of the Concession Agreement shall be paid only by way of credit directly to a bank account designated therefor by the Lender(s)/Lenders' Representative and advised to BRBN and the Concessionaire in writing. The Lender(s) shall be entitled to receive and appropriate the same without any further reference to or consent of the Concessionaire towards the satisfaction of the Debt Due, subject to payment by the Lender(s) of the surplus amount if any remaining after satisfaction of the Debt Due, to the Concessionaire. Any payment so made shall to the extent of such payment constitute a valid discharge to BRBN of its obligations with regard to the Termination Payment and of any other monies due to the Concessionaire under the Concession Agreement.
- (ii) For the purpose of giving full effect to the provisions contained in the preceding sub-article (i), the Lender(s)/the Lender's Representative shall be entitled to make a demand for payment of the Termination Payment if the Concessionaire has failed to make such demand as required under Article 16.4 of the Concession Agreement

within 15 days from the Termination Date under intimation to the Lender(s)/Lender's Representative.

- (iv) The Concessionaire hereby irrevocably appoints and constitutes the Lender(s)/Lenders' Representative as its agent to make such demand for Termination Payment. Any demand made by the Lender(s)/Lenders' Representative pursuant to the power and authority conferred hereby shall for the purpose of the Article 16.4 of the Concession Agreement be deemed to be a demand for Termination Payment made by the Concessionaire.

ARTICLE 5

GENERAL

5.1 General

- (i) The Parties hereto expressly represent and warrant that they are duly empowered to sign and execute this Agreement and the Lenders Representative is duly and fully authorised by each of the Lenders to enter into this Agreement on their behalf.
- (ii) Notices under this Agreement shall be sent to the Addresses first hereinabove mentioned. Any change in the address of any Party shall be duly notified by a Registered post acknowledgement due and delivered to the other parties.
- (iii) The expressions "BRBN", the "Concessionaire", the "Lender" and the "Lenders' Representative" herein used shall unless there be anything repugnant to the subject or context include the respective successors, legal representatives, administrators and permitted assigns.
- (iv) This Agreement shall not be affected by reorganisation of any Lender, the Concessionaire or BRBN and the successor in interest of the Lender or BRBN shall have the benefit of this Agreement.
- (v) Any dispute, difference or claim arising out of or in connection with or in relation to this Agreement which is not resolved amicably shall be decided finally by arbitration by a Board of Arbitrators comprising of a nominee of each party to the dispute. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The arbitrators shall issue a reasoned award. The venue of such arbitration shall be New Delhi, India. The Award shall be final and binding on the Parties. The Parties agree and undertake to carry out the award of the arbitrators (the "Award") without delay.
- (vi) This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder. The Courts in New Delhi alone shall have jurisdiction over all matters arising out of or relating to the arbitration agreement contained herein or proceedings arising out of or relating to the arbitration proceedings thereunder.
- (vii) The consultation, recommendation or approval of the Lenders' Representative under this Agreement shall always be taken as consultation, recommendation or approval of every concerned Lender and each such Lender shall be bound by the same.
- (viii) This Agreement shall be in addition to and shall not be in derogation of the terms of the Financing Documents.

- (ix) It shall not be necessary for the Lender(s) or the Lenders' Representative to enforce or exhaust any other remedy available to them before invoking the provisions of this Agreement.
- (x) No amendment, variation or modification to this Agreement shall be valid and effectual unless made in writing and executed by the duly authorised representatives of all the Parties hereto.
- (xi) All stamp duties or other imposts and charges as are applicable on this Agreement or on amendment of the Concession Agreement or execution of fresh Concession Agreement for the purpose of substitution as aforesaid shall be borne by and be to the account of the Concessionaire. In the event of the Lenders making such payment for the time being, it shall be deemed to be a part of the Debt Dues.
- (xii) The Parties hereby expressly agree that for the purpose of giving full and proper effect to this Agreement, the Concession Agreement and this Agreement shall be read together and construed harmoniously. The terms of this Agreement shall prevail in the event of any inconsistency with the Concession Agreement.

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

SIGNED SEALED AND DELIVERED

SCHEDULE -J

DELETED

SCHEDULE -K
(Copy of the Proposal/Bid submitted by the Preferred Bidder)