

**BIDDING DOCUMENTS  
FOR**

***SETUP OF PRODUCTION UNIT FOR PRODUCTION  
OF CONCENTRATED POPPY STRAW (CPS) FROM  
OPIUM POPPY CROP AND EXTRACTIONS OF  
SEMI REFINED MORPHINE ON PPP BASIS***

**Volume II: Draft Concession Agreement**

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**(International Competitive Bidding)**

**Office of the Chief Controller of Factories,**

**Government Opium & Alkaloid Factories,**

**Department of Revenue, Ministry of Finance, Government of India**

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**[Name of the Procuring Entity]  
Government of Rajasthan  
Single Stage-Two Envelopes (Two Parts) Bid**

**Volume II: Draft Concession Agreement (DCA)  
{Standard Bidding Document}**

## **Part I – Preliminary**

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## Concession Agreement

This CONCESSION AGREEMENT is entered into on this the .....day of ....., 2023

BETWEEN

1. **Government Opium and Alkaloids Factories (GOAF)** an organisation under the aegis of **Department of Revenue (DOR), Ministry of Finance, Government of India**, represented by its ..... [Designation of the signing Authority] and having its principal office at **CCF, Government Opium and Alkaloid Factories, Block J, Ground floor, near NSIC Technical Centre Okhla Industrial Estate, Phase III, New Delhi 110020, India** (hereinafter referred to as the **“Authority”** which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of **One Part**;

AND

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

WHEREAS:

- (a) The Authority had resolved to resolved to establish an opium poppy straw/ husk processing plant at \_\_\_\_\_ district \_\_\_\_\_ state \_\_\_\_\_ with an installed capacity of processing of 10,000 MT of Poppy Husk per annum, with private sector participation on design, build, finance, own and operate (the **“DBFOO”**) basis on a suitable land parcel<sup>1</sup> of \_\_\_\_\_ Acre<sup>2</sup> in accordance with the terms and conditions to be set forth in a Concession Agreement to be entered into. The proposed project is to **“Setup of Production Unit for production of Concentrated Poppy Straw (CPS) from Opium Poppy Crop and Extraction of Semi Refined Morphine on PPP basis”** ( the **“Project”**).
- (b) The Authority had prescribed the technical and commercial terms and conditions, vide bidding documents (the **“Bidding Documents”**, which included **RFP** and **DCA**), for undertaking the Project and, accordingly issued Notice Inviting Tender (NIT), and invited Bids from interested Bidders vide NIT No:....., dated ..... 2023.
- (c) After evaluation of the Bids received, the Authority had accepted the Bid of M/s. .... and issued Letter of Award No. .... dated ..... 2023 (hereinafter called the **“LOA”**) to the M/s. .... requiring, inter alia, the execution of this Concession Agreement within 45 (forty-five) of the date of issue thereof.
- (d) The [Selected Bidder/ Consortium]<sup>3</sup> has since promoted and incorporated the Concessionaire as a special Purpose Vehicle (the **“SPV”**), which is a limited liability company under the Companies Act 2013, and has requested the Authority to accept the Concessionaire as the entity which shall undertake and perform the obligations and exercise the rights of the

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<sup>1</sup> Land parcel of adequate size identified on the basis of the Bidder's assessment, to be procured by the Selected Bidder and transferred in the name of the Concessionaire.

<sup>2</sup> The Concessionaire is expected to procure requisite land parcel to develop the Project with processing facility with desired capacity to process 10,000 MT of Poppy Husk per annum.

<sup>3</sup> To retain term that is applicable and delete the other term at all locations within this Concession Agreement document while finalising it for execution.

[Selected Bidder/ Consortium] under the LOA, including the obligation to enter into this Concession Agreement pursuant to the LOA for undertaking the Project.

- (e) By its letter dated ....., the Concessionaire has also joined in the said request of the [Selected Bidder/ Consortium] to the Authority to accept it as the entity which shall undertake and perform the obligations and exercise the rights of the [Selected Bidder/ Consortium] including the obligation to enter into this Concession Agreement pursuant to the LOA. The Concessionaire has further represented to the effect that it has been promoted by the [Selected Bidder/ Consortium] for the purposes hereof.
- (f) The Authority has agreed to the said request of the [Selected Bidder/ Consortium] and the Concessionaire, and has accordingly agreed to enter into this Concession Agreement with the Concessionaire for implementation of the Project on DBFOO basis, subject to and on the terms and conditions set forth hereinafter.
- (g) The Concessionaire represents and warrants that it has duly fulfilled all the terms and condition necessary for the execution of this Agreement as per the terms and condition in Bidding documents and are in a position to execute this Agreement and implement the Project as envisaged in the Bidding Documents and the Bid submitted by the Selected Bidder.

With deemed assurance from the Concessionaire of fulfillment of the respective conditions precedents before execution of this Agreement, the Authority has agreed to enter into this Agreement vesting the rights for the implementation of the Project with the Concessionaire on the terms, conditions, and covenants hereinafter set forth in this Agreement.

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

## Article 1 – Definitions and Interpretation

### 1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement shall, unless repugnant to the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the schedules and used therein shall have the meaning ascribed thereto in the Schedules of the Concession Agreement.

Term	Definition
<b>Accounting Year</b>	: means the year commencing from the first day of October of any calendar year and ending on the thirtieth day of September of the next calendar year except in the first and the last calendar year of the subsistence of this Agreement. In the first year of subsistence of this Agreement, it means the period from the signing of Concession Agreement to the immediately following, 30st September. In the last year of subsistence of this Agreement, it means the period from 1st October to the Transfer Date;
<b>Adjusted Equity</b>	: means the Equity funded in Indian Rupees and adjusted on the first day of the current month (the “Reference Date”), in the manner set forth below, to reflect the change in its value on account of depreciation and variations in WPI, and for any Reference Date occurring:  (a) on or before COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Project, revised to the extent of one half of the variation in WPI occurring between the first day of the month of Appointed Date and the Reference Date;  (b) from COD and until the 4th (fourth) anniversary thereof, an amount equal to the Adjusted Equity as on COD shall be deemed to be the base (the “Base Adjusted Equity”) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following COD to the extent of variation in WPI occurring between COD and the Reference Date;  (c) after the 4th (fourth) anniversary of COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by 0.28% (zero point twenty-eight per cent) thereof at the commencement of each month following the 4th (fourth) anniversary of COD and the amount so arrived at shall be revised to the extent of variation in WPI occurring between COD and the Reference Date;  For the avoidance of doubt, the Adjusted Equity shall, in the event of Termination, be computed as on the Reference Date immediately preceding the Transfer Date; provided that no reduction in the Adjusted Equity shall be made for a period equal to the duration, if any, for which the Concession Period is extended, but the revision on account of WPI shall continue to be made;
<b>Affected Party</b>	: shall have the meaning as set forth in Clause 25.1;

Term	Definition
<b>Agreement Concession Agreement</b>	or : means this Agreement, including the Recitals, Schedules, and documents appended hereto, as amended, supplemented or modified from time to time in accordance with the provisions hereof;
<b>Alkaloid</b>	: means the term 'alkaloid' as may be notified by the central government and permitted by the Authority, which may be revised from time to time;
<b>Appendix</b>	: means any of the schedules, supplements or documents, appended to this Agreement;
<b>Applicable Laws</b>	: means all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;
<b>Applicable Permits</b>	: means all clearances, licenses, permits, authorizations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the construction, operation and maintenance of the Project during the subsistence of this Agreement;
<b>Appointed Date</b>	: means the date on which Financial Close is achieved and every Condition Precedent is either satisfied or waived, as the case may be, in accordance with the provisions of this Agreement, and such date shall be the date of commencement of the Concession Period;
<b>Arbitration</b>	: shall have the meaning set forth in Clause 40.3
<b>Arbitration Act</b>	: means the Arbitration and Conciliation Act, 1996 and shall include modifications to or any re-enactment thereof, as in force from time to time;
<b>Associate Affiliate</b>	or : means, in relation to either Party and/or Consortium Members, a person who controls, is controlled by, or is under the common control with such Party or Consortium Member (as used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);
<b>Authority</b>	: shall have the meaning attributed thereto in the array of Parties as set forth in the Paragraph the Recitals of this Agreement;
<b>Authority Event of Default</b>	: shall have the meaning as set forth in Clause 28.2.1;

Term	Definition
<b>Authority Representative</b>	: means such person or persons as may be authorized in writing by the Authority to act on its behalf under this Agreement and shall include any person or persons having authority to exercise any rights or perform and fulfil any obligations of the Authority under this Agreement;
<b>Bank</b>	: means a bank incorporated in India and having a minimum net worth of INR 1,000 crore (India Rupees one thousand crore) or any other bank acceptable to Senior Lenders, but does not include a bank in which any Senior Lender has an interest;
<b>Bank Rate</b>	: means the rate of interest specified by the Reserve Bank of India from time to time in pursuance of Section 49 of the Reserve Bank of India Act, 1934 or any replacement of such Bank Rate for the time being in effect;
<b>Bid</b>	: means the documents in their entirety comprised in the Bid submitted by the Selected Bidder/ Consortium in response to the Request for Proposal in accordance with the provisions thereof;
<b>Bids</b>	: shall mean the bids submitted by any and all pre-qualified bidders;
<b>Bid Date</b>	: means the last date on which the Bid may have been submitted in accordance with the provisions of the Request for Proposal;
<b>Bid Security</b>	: means the security provided by the Selected Bidder/ Consortium to the Authority along with the Bid in a sum of INR ..... (India Rupees ..... only), in accordance with the Request for Proposal, and which is to remain in force until substituted by the Performance Security to be furnished by the Concessionaire;
<b>COD Commercial Operation Date</b>	<b>or</b> : shall have the meaning as set forth in Clause 14.4;
<b>Certificate of Compliance</b>	<b>of</b> : shall have meaning set forth in Clause 4.1.4;
<b>Change in Law</b>	: means the occurrence of any of the following after the Bid Date: <ul style="list-style-type: none"> <li>(a) the enactment of any new Indian law;</li> <li>(b) the repeal, modification or re-enactment of any existing Indian law;</li> <li>(c) the commencement of any Indian law which has not entered into effect until the Bid Date; or</li> <li>(d) a change in the interpretation or application of any Indian law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the Bid Date;</li> </ul>

Term	Definition
<b>Change Ownership</b>	<b>in</b> : shall have the meaning as set forth in Clause 5.8;
<b>Change of Scope</b>	: shall have the meaning set forth in Clause 15.1;
<b>Commencement Notice</b>	: shall have the meaning set forth in Clause 14.2;
<b>Company</b>	: means the company acting as the Concessionaire under this Agreement;
<b>Completion Notice</b>	: shall have the meaning as set forth in Clause 14.1;
<b>Competent Authority</b>	: means any agency, authority, department, ministry, public or statutory Person of the or Government of India, or any local authority, or any other sub-division thereof with authority over aspects of implementation of the Project having jurisdiction over all or any part of the Project Site or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Concession;
<b>Concentrated Poppy Straw</b>	: Shall have the meaning as defined in the Narcotic Drugs and Psychotropic Substances Act, 1985 and further in <b>chapter 30A</b> of the Narcotic Drugs and Psychotropic Substances Rules, 1985;
<b>Concession</b>	: shall have the meaning as set forth in Clause 3.1.1;
<b>Concessionaire</b>	: shall have the meaning attributed thereto in the array of Parties as set forth in the Paragraphs 1 and 2 of the Recitals of this Agreement;
<b>Concession Period</b>	: means the period starting on and from the Appointed Date and ending on the Transfer Date;
<b>Concessionaire's Representative</b>	: means the Person appointed by Concessionaire under Clause 5.6;
<b>Concessionaire Event of Default</b>	: shall have the meaning as set forth in Clause 28.1.1;
<b>Condition Precedent</b>	: shall have the meaning as set forth in Clause 4.1;
<b>{Consortium}</b>	: {shall have the meaning as set forth in Paragraph (d) of the Recitals of this Agreement;}
<b>{Consortium Member}</b>	: {means a company as set forth in Paragraph (d) of the Recitals of this Agreement, as a member of the Consortium;}
<b>Construction Period</b>	: means the period beginning from the Appointed Date and ending on COD;

Term	Definition
<b>Construction Performance Security</b>	: shall have meaning as set forth in Clause 9.1.1 (a);
<b>Construction Works</b>	: means all the works and things necessary to complete the Project in accordance with this Agreement;
<b>Contractor</b>	: means the person or persons, as the case may be, with whom the Concessionaire has entered into any of the EPC Contract, the O&M Contract, or any other material Agreement or contract for construction, operation and/or maintenance of the Project or matters incidental thereto, but does not include a person who has entered into an Agreement for providing Financial Assistance to the Concessionaire;
<b>Cure Notice</b>	: shall have meaning as set forth in Clause 14.2;
<b>Cure Period</b>	: 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: <ul style="list-style-type: none"> <li>(a) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;</li> <li>(b) not relieve any Party from liability to pay Damages or compensation under the provisions of this Agreement; and</li> <li>(c) not in any way be extended by any period of Suspension under this Agreement; provided that if the cure of any breach by the Concessionaire requires any reasonable action by the Concessionaire that must be approved by the Authority or the Independent Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the Authority or the Independent Engineer to accord their approval;</li> </ul>
<b>Damages</b>	: shall have the meaning as set forth in Sub-Clause (y) of Clause 1.2.1;
<b>DBFOO or Design Build, Finance, Own and Operate</b>	: shall have the meaning as set forth in Paragraph (b) of the Recitals of this Agreement;
<b>Debt Due</b>	: means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date: <ul style="list-style-type: none"> <li>(a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the "principal") but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;</li> </ul>

Term	Definition
	<p>(b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-Clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and</p> <p>(c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;</p> <p>provided that if all or any part of the Debt Due is convertible into Equity at the option of Senior Lenders and/or the Concessionaire, it shall for the purposes of this Agreement be deemed to be Debt Due even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;</p>
<b>Debt Service</b>	: 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;
<b>Detailed Project Report or DPR</b>	: means the detailed design and engineering report for the Project, as indicated in the Clause 12.3;
<b>Designs and Drawings</b>	: means the conceptual and detailed designs, drawings and engineering, project master plans, backup technical information required for the Project Facilities and all calculations, samples, patterns, models, specifications and other technical information relating to the Project, submitted by the Concessionaire from time to time in accordance with the provisions of this Agreement;
<b>Dispute</b>	: shall have the meaning as set forth in Clause 35.1.1;
<b>Dispute Resolution Procedure</b>	: means the procedure for resolution of Disputes set forth in <b>Article 35</b> ;
<b>Divestment Requirements</b>	: means the obligations of the Concessionaire for and in respect of Termination as set forth in Clause 29.1;
<b>Document or Documentation</b>	: means documentation in printed or written form, or in tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form; and also including drawings, calculations, computer application software (programs), samples, patterns, models, operation and Maintenance Manuals, and other manuals and information of a similar nature prepared in relation to the Project;
<b>Effective Date</b>	: shall mean the date on which the Concession Agreement has been executed by the Parties;

Term	Definition
<b>Emergency</b>	: means a condition or situation that is likely to endanger the security of the individuals on or about the Project, including public, or which poses an immediate threat of material damage to any of the Project Assets;
<b>EPC Contract</b>	: means the engineering, procurement and construction contract or contracts entered into by the Concessionaire with one or more Contractors for, inter alia, engineering and construction of the Project in accordance with the provisions of this Agreement;
<b>EPC Contractor</b>	: means the person with whom the Concessionaire has entered into an EPC Contract;
<b>Equity</b>	: means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost, and shall for the purposes of this Agreement include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Company, and any interest-free funds advanced by any shareholder of the Company for meeting such equity component, but does not include Equity Support;
<b>Escrow Account</b>	: means an Account which the Concessionaire shall open and maintain with a Bank in which all inflows and outflows of cash on account of capital and revenue receipts and expenditures shall be credited and debited, as the case may be, in accordance with the provisions of this Agreement, and includes the Sub-Accounts of such Escrow Account;
<b>Escrow Agreement</b>	: shall have the meaning as set forth in Clause 22.1.2;
<b>Escrow Bank</b>	: shall have the meaning as set forth in Clause 22.1.1;
<b>Escrow Default</b>	: shall have the meaning as set forth in <b>Schedule Q</b> ;
<b>Financial Close</b>	: means the fulfillment of all conditions precedent to the initial availability of funds under the Financing Agreements;
<b>Financial Default</b>	: shall have the meaning set forth in <b>Schedule S</b> ;
<b>Financial Model</b>	: means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein;
<b>Financial Package</b>	: means the financing package indicating the total capital cost of the Project and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements, Subordinated Debt and Equity Support, if any;

Term	Definition
<b>Financing Agreements</b>	: means the agreements executed by the Concessionaire in respect of Financial Assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.1.1 (d);
<b>Force Majeure Event</b>	: shall have the meaning ascribed to it in Clause 25.1;
<b>GOI</b>	: means the Government of India;
<b>Good Industry Practice</b>	: means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence followed and practiced globally, which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Concessionaire in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner and for providing safe, economical, reliable and efficient Project Facilities;
<b>Government Instrumentality or Government Authority or Government</b>	: means any department, division or sub-division of the Government or the State Government and includes any commission, board, authority, agency or municipal and other local authority or statutory body including Panchayat, under the control of the Government of India or the State Government, as the case may be, and having jurisdiction over all or any part of the Project or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement;
<b>Indemnified Party</b>	: means the Party entitled to the benefit if an indemnity pursuant to Clause 33.4.1;
<b>Indemnifying Party</b>	: means the Party obligated to indemnify the other party pursuant to Clause 33.4;
<b>Independent Engineer</b>	: shall have the meaning as set forth in Clause 19.1;
<b>Independent Testing Laboratory</b>	: shall have the meaning as set forth in Clause 37.1;
<b>Indirect Force Majeure Event</b>	: shall have the meaning as set forth in Clause 25.3;

Term	Definition
<b>Inspection Report</b>	: shall have the meaning as set forth in Clause 13.2;
<b>Insurance Cover</b>	: means the aggregate of the maximum sums insured under the insurances taken out by the Concessionaire pursuant to <b>Article 23</b> , and includes all insurances required to be taken out by the Concessionaire under Clause 23.2 but not actually taken, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable or deemed to be insured and payable in relation to such act or event;
<b>Intellectual Property</b>	: means all patents, trademarks, service marks, logos, get-up, trade names, internet domain names, rights in designs, blue prints, programmes and manuals, drawings, copyright (including rights in computer software), database rights, semi-conductor, topography rights, utility models, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world;
<b>LOA or Letter of Award</b>	: means as setforth in the Paragraph (c) of the Recitals of this Agreement;
<b>Lenders</b>	: means any Person based in India or abroad providing Financial Assistance under the Financing Documents and includes financial institutions, banks, non-banking financial companies, funds, trusts who provide for Financial Assistance (including refinancing) to the Concessionaire and includes subscribers to/trustee for the holders of the debentures/bonds or other securities issued by the Concessionaire to meet the debt component of the cost of the Project and whose identity has been notified to the Authority by the Concessionaire from time to time. It is clarified that Lenders for the purposes of this Agreement, shall not include promoter entity or Affiliates of the Selected Bidder or the Concessionaire;
<b>Lender's Representative</b>	: means the person duly authorized by the Senior Lenders to act for and on behalf of the Senior Lenders with regard to matters arising out of or in relation to this Agreement, and includes his successors, assigns and substitutes;
<b>Maintenance Manual</b>	: shall have the meaning ascribed to it in Clause 16.3.1;
<b>Maintenance Programme</b>	: shall have the meaning ascribed to it in Clause 16.4.1;
<b>Maintenance Requirements</b>	: shall have the meaning as set forth in Clause 16.2;

Term	Definition
<b>Material Adverse Effect</b>	: means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;
<b>Material Breach</b>	: means a breach by either Party of any of its obligations under this Agreement which has or is likely to have a Material Adverse Effect on the Project and which such Party shall have failed to cure;
<b>Nominated Company</b>	: means a Company selected by the Lenders' Representative and proposed to the Authority for substituting the Concessionaire in accordance with the provisions of the Substitution Agreement;
<b>Non-Political Force Majeure Event</b>	: shall have the meaning as set forth in Clause 25.2;
<b>O&amp;M</b>	: means the operation and maintenance of the Project and includes all matters connected with or incidental to such operation and maintenance, provision of services and facilities, in accordance with the provisions of this Agreement;
<b>O&amp;M Contract</b>	: means the operation and maintenance contract that may be entered into between the Concessionaire and the O&M Contractor for performance of all or any of the O&M obligations;
<b>O&amp;M Contractor</b>	: means the person, if any, with whom the Concessionaire has entered into an O&M Contract for discharging O&M obligations for and on behalf of the Concessionaire;
<b>O&amp;M Expenses</b>	: means expenses incurred by or on behalf of the Concessionaire or by the Authority, as the case may be, for all O&M including (a) cost of salaries and other compensation to employees, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all Taxes, duties, cess and fees due and payable for O&M, (e) all repair, replacement, reconstruction, reinstatement, improvement and maintenance costs, (f) payments required to be made under the O&M Contract or any other contract in connection with or incidental to O&M, and (g) all other expenditure required to be incurred under Applicable Laws, Applicable Permits or this Agreement;
<b>O&amp;M Inspection Report</b>	: shall have the meaning as set forth in Clause 18.2;
<b>Operation Performance Security</b>	: shall have meaning as set forth in Clause Clause 9.1.1 (b);
<b>Operation Period</b>	: means the period commencing from COD and ending on the Transfer Date;

Term	Definition
<b>Panel Chartered Accountants</b>	<b>of</b> : shall have the meaning as set forth in Clause 24.2.1;
<b>Parties</b>	: means the parties to this Agreement collectively;
<b>Party</b>	: shall mean any of the parties to this Agreement individually;
<b>Political Force Majeure Event</b>	: shall have the meaning as set forth in Clause 25.4;
<b>Poppy Husk</b>	: means, the raw material supplied by the Authority to be processed by the Concessionaire, which shall comprise of crushed poppy straw and bulb having alkaloid content;
<b>Preservation Costs</b>	: shall have the meaning as set forth in Clause 13.5.3;
<b>Project</b>	: means, subject to the provisions of this Agreement, the (i) designing, financing, construction, implementation, installation, commissioning, operation, management and maintenance of the Project Facilities (including the Production Unit) and all activities incidental thereto, such as engineering, testing, commissioning and insurance etc., by the Concessionaire during the Concession Period;
<b>Project Agreements</b>	: means this Agreement, the Financing Agreements, EPC Contract, O&M Contract, and any other material agreements or contracts entered into or may hereafter be entered into by the Concessionaire with any person in connection with matters relating to, arising out of or incidental to the Project, but does not include the Escrow Agreement, Substitution Agreement;
<b>Project Assets</b>	: shall mean and comprise of all tangible and intangible assets relating to the Project/ Project Facilities, as the case may be, including land and not limited to, (a) rights over the Site in the form of license, right-of-way or otherwise, (b) each of tangible assets comprising the Project Facilities such as Plant & Machinery, apparatus, equipment, foundation, embankments, buildings, structures, super structures, constructions, additions, alterations or improvements etc. thereof, landscape structures, pavement and walkways, drainage facilities, sign boards, electrical, mechanical, civil, sanitation and other works, telephone, other communication equipment, laboratories with equipment, other equipment, technology at the Project Site/ relating to the Project; (c) financial assets of the Project such as receivables, cash and investments, security deposits for utilities, etc.; (d) rights of the Concessionaire under the Project Agreements and other agreements relating to the Project entered into by the Concessionaire, (e) proceeds from insurance policies taken by the Concessionaire in relation to the Project Facilities (f) all Applicable Permits, affiliations and authorizations relating to or in respect of the project (g) movable assets of the Project/ Project Facilities, movable

Term	Definition
	property, things and goods like equipment, machinery, fittings and fixtures etc.;
<b>Project Completion Schedule</b>	: means the progressive Project Milestones set forth in <b>Schedule H</b> for completion of the Project on or before the Scheduled Completion Date;
<b>Project Facilities</b>	: means all the amenities and facilities situated on the Site, as described in <b>Schedule C</b> and will also include any other facilities developed during the Concession Period at the Site;
<b>Project Milestones</b>	: means the project milestones as set forth in <b>Schedule H</b> ;
<b>Provisional Certificate</b>	: shall have the meaning as set forth in <b>Schedule J</b> ;
<b>Project Site or Site</b>	: shall have the meaning as set forth in <b>Schedule A</b> ;
<b>Re., Rs. or Rupees or Indian Rupees</b>	: means the lawful currency of the Republic of India;
<b>Reference Exchange Rate</b>	: means, in respect of any one currency that is to be converted into another currency in accordance with the provisions of this Agreement, the exchange rate as of 12.00 (twelve) noon on the relevant date quoted by the State Bank of India, and in the absence of such rate, the average of similar rates quoted by the Bank of India and the Bank of Baroda;
<b>Safety Requirements</b>	: shall have the meaning as set forth in Clause 17.1;
<b>Schedule</b>	: means any of the schedules appended to this Agreement;
<b>Scheduled Project Completion Date or Scheduled Completion Date</b>	: shall have the meaning as set forth Clause 14.6;
<b>Scope of the Project</b>	: shall have the meaning set forth in Clause 2.1;
<b>Security Interest</b>	: means any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, assignment, security interest or other encumbrances of any kind securing or conferring any priority of payment in respect of any obligation of any Person and includes without limitation any right granted by a transaction which, in legal terms, is not the granting of security but which has an economic or financial effect similar to the granting of security in each case under any Applicable Law;

Term	Definition
<b>Selected Bidder</b>	: means the Consortium/ single entity that has been successful in the Bidding Process for the Project and that has been incorporated as the Concessionaire;
<b>Semi Refined Morphine (SRM)</b>	: means which is a form of opioid active pharmaceutical (purity ranges from 72-77%) ingredients that is derived from opium poppy plant. It is an intermediate product in the process of refining crude opium into pharmaceutical grade morphine. SRM contains varying amounts of Active ingredients as well as other alkaloids and impurities which are removed after further processing. It is typically used as raw material for production of pharmaceutical drugs such as painkillers and cough suppressants.
<b>Senior Lenders</b>	: means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold paripassu charge on the assets, rights, title and interests of the Concessionaire;
<b>Special Purpose Vehicle or SPV</b>	: shall mean the Concessionaire;
<b>Specifications and Standards</b>	: means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Project, as set forth in Schedule-D, and any modifications thereof, or additions thereto, as included in the design and engineering for the Project submitted by the Concessionaire to, and expressly approved by, the Authority;
<b>Statutory Auditors</b>	: means a reputable firm of chartered accountants acting as the statutory auditors of the Concessionaire under the provisions of the Companies Act, 1956, including any statutory re-enactment or modification thereof, for the time being in force, and appointed in accordance with Clause 24.2.1;
<b>Sub-contractor</b>	: means the construction contractor(s) and/ or operation and maintenance contractor(s) and/or any other contractors and sub-contractors, manufacturers or suppliers of Works and/or building/ services or part thereof, as the context may require, to whom the Concessionaire contracts or subcontracts the Works in full or part;
<b>Substitute Entity</b>	: means the entity defined in the Substitution Agreement;
<b>Subordinated Debt</b>	: means the aggregate of the following sums expressed in Indian Rupees or in the currency of debt, as the case may be, outstanding as on the Transfer Date:  (a) the principal amount of debt provided by Lenders or the Concessionaire's shareholders for meeting the Total Project Cost and subordinated to the financial assistance provided by the Senior Lenders; and

Term	Definition
	<p>(b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Rate in case of loans expressed in Indian Rupees, but does not include any interest that had fallen due one year prior to the Transfer Date;</p> <p>provided that if all or any part of the Subordinated Debt is convertible into Equity at the option of the lenders and/or the Concessionaire's shareholders, it shall for the purposes of this Agreement be deemed to be Subordinated Debt even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;</p>
<b>Substitution Agreement</b>	: shall have the meaning as set forth in Clause 31.3;
<b>Suspension</b>	: shall have the meaning as set forth in Clause 27.1;
<b>Taxes</b>	: means any Indian taxes including excise duties, customs duties, value added tax, sales tax, local taxes, cess and any impost or surcharge of like nature (whether Central, State or local) on the goods, materials, equipment and services incorporated in and forming part of the Project charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;
<b>Terminal Date</b>	: means the last day of the Operation Period or the date on which this Agreement expires by efflux of time;
<b>Termination</b>	: means the expiry or termination of this Agreement and the Concession hereunder;
<b>Termination Date</b>	: means the date on which this Agreement and the Concession hereunder is terminated by a Termination Notice;
<b>Termination Notice</b>	: means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;
<b>Termination Payment</b>	: means the amount payable by the Authority to the Concessionaire upon Termination and may consist of payments on account of and restricted to the Debt Due and Adjusted Equity, as the case may be, which form part of the Total Project Cost in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, it is agreed that within a period of 60 (sixty) days from COD, the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment, and it is further agreed that in the event such disaggregation is not notified to

Term	Definition
	the Authority, the Equity and Debt Due shall be arrived at by adopting the proportion between Debt and Equity as specified in the Financing Agreements;
<b>Tests</b>	: means the tests to be carried out in accordance with the Construction Requirements and if not expressly specified in the said requirements, as instructed by the Authority /Independent Engineer, in accordance with this Agreement, tests set forth in Schedule J to determine the completion of the Project;
<b>Third Party</b>	: means any Person, real or legal, or entity other than the Parties to this Agreement;
<b>Total Project Cost</b>	: means the lowest of:  (a) a sum of Rs. 165 crore (Rupees One Hundred Sixty Five Crore); or  (b) actual capital cost of the Project upon completion of the Project as certified by the Statutory Auditors; or  (c) the total project cost as set forth in the Financing Agreements;  provided that in the event WPI increases, on an average, by more than 3% (three per cent) per annum for the period between the date hereof and COD, the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount hereinbefore specified such that the effect of increase in WPI, in excess of such 3% (three per cent), is reflected in the Total Project Cost;  provided further that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement;  provided also that the Total Project Cost shall not exceed the actual capital cost of the Project upon completion of the Project;
<b>Transfer Date</b>	: means the date on which this Agreement stands terminated and the Project assets are handedover to the Authority;
<b>Vesting Certificate</b>	: shall have the meaning as set forth in Clause 29.4;
<b>Works</b>	: mean the works under and in accordance with the provisions of this Agreement relating to design, construction, completion, testing and commissioning of the Project, as well as the O&M of the Project, collectively or singularly as the context may admit or require, including the technology, services and things to be designed, engineered, constructed, installed, equipped, supplied, executed, manufactured, completed, tested, commissioned, rectified, replaced, made good, carried out and

Term	Definition
	undertaken in respect of the Project and any other permanent, temporary or urgent works required hereunder;
<b>WPI</b>	: means the Wholesale Price Index for all commodities as published by the Ministry of Industry, GOI and shall include any index which substitutes the WPI, and any reference to WPI shall, unless the context otherwise requires, be construed as a reference to the latest monthly WPI published no later than 30 (thirty) days prior to the date of consideration hereunder.

## 1.2 Interpretation

### 1.2.1 In this Agreement, unless the context otherwise requires:

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

- (i) any reference to any period of time shall mean a reference to that according to Indian Standard Time;
- (j) any reference to a day shall mean a reference to a calendar day;
- (k) any reference to “**year**” shall mean reference to a 12 calendar months as per the Gregorian Calendar;
- (l) references to a “**Business Day**” shall be construed as reference to a day (other than a Sunday) on which banks in Bhopal are generally open for business;
- (m) any reference to “**month**” shall mean a reference to a calendar month as per the Gregorian calendar;
- (n) references to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- (o) any reference to any period commencing “**from**” a specified day or date and “**till**” or “**until**” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a Business Day, then the period shall run until the end of the next Business Day;
- (p) words importing singular shall include plural and vice versa;
- (q) references to any gender shall include the other and the neutral gender;
- (r) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- (s) “**indebtedness**” shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- (t) references to the “**winding-up**”, “**dissolution**”, “**insolvency**”, or “**reorganization**” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, re-organization, dissolution, arrangement, protection or relief of debtors;
- (u) save and except as otherwise provided in this Agreement, any reference, at any time, to any Agreement, deed, instrument, licence or document of any description shall be construed as reference to that Agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause (s) shall not operate so as to increase liabilities or obligations of the Authority hereunder or pursuant hereto in any manner whatsoever;
- (v) any Agreement, consent, approval, authorization, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effective only if it is in writing under the hand of a duly authorized representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;

- (w) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
  - (x) references to Recitals, Articles, Clauses, Sub-clauses, Provisos or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses, Provisos and Schedules of or to this Agreement, references to an Annex shall, subject to anything to the contrary specified therein, be construed as a reference to an Annex to the Schedule in which such reference occurs, and references to a Paragraph shall, subject to anything to the contrary specified therein, be construed as a reference to a Paragraph of this Schedule or Annex, as the case may be, in which such reference appears;
  - (y) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “**Damages**”);
  - (z) time shall be of the essence in the performance of the Parties’ respective obligations. If any time period specified herein is extended, such extended time shall also be of the essence; and
  - (aa) wherever in this Agreement provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate, Agreement, authorization, communication, information or report or determination by any Party, unless otherwise specified, such notice, endorsement, consent, approval, certificate, Agreement, authorization, communication, information or report or determination shall be in writing under the hand of duly authorized representative of such Party and/or the Independent Engineer in this behalf.
- 1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Concessionaire to the Authority and/or the Independent Engineer shall be provided free of cost and in three copies, and if the Authority and/or the Independent Engineer is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.
- 1.2.3 The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply.
- 1.2.4 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning and, for these purposes, the General Clauses Act, 1897 shall not apply.

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

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

### **1.4 Priority of Agreements, clauses and Schedules**

- 1.4.1 This Agreement, and all other agreements and documents forming part of or referred to in this Agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this Agreement, the priority of this Agreement and other

documents and agreements forming part hereof or referred to herein shall, in the event of any conflict between them, be in the following order:

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

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

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

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

## **Part II – The Concession**

## Article 2 – Scope of Project

### 2.1 Scope of the Project

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

- (a) Details of the Project Site are set forth in the **Schedule A** , whereas the detailed terms and conditions with respect to Concessionaire’s obligation towards plan, design, build, finance, own, operate and maintain along with procurement of necessary goods/ services/ materials for implementation of the Project are set forth in **Schedule B** ; whereas provisions related to Project Facilities are as specified in **Schedule C** , and conformity with the Specifications and Standards set forth in **Schedule D** ;
- (b) Undertake operation and maintenance of the Project and Project Facilities in accordance with the provisions of this Agreement as set forth in **Schedule L** ; and
- (c) 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 the performance of any or all of the obligations of the Concessionaire under this Agreement.

## Article 3 – Grant of Concession

### 3.1 The Concession

3.1.1 Subject to and in accordance with the terms and conditions set forth in this Agreement, the Authority hereby grants to the Concessionaire and the Concessionaire hereby accepts the Concession for a period of 20 years (the “**Term**”), commencing from the Appointed Date, including the exclusive right, license and authority during the subsistence of this Agreement to implement the Project (the “**Concession**”).

Provided further that, in the event the Concessionaire has been in material default of the provisions of this Agreement, then, the Authority shall not be under any obligation to provide extension to the Concessionaire in accordance with this Clause 3.1.1.

In any event, at all times, any decision concerning the extension of the Concession Period shall vest with the Authority.

3.1.2 Subject to and in accordance with the terms and conditions set forth in this Agreement, the Concession hereby granted shall entitle the Concessionaire to enjoy, and oblige the Concessionaire to undertake the following in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits:

- (a) Procure land, as per specifications laid down in the RFP and the Concession Agreement, on registered ownership or under registered lease of not less than 25 years (twenty-five) years from the Effective Date, with adequate right of way, access and license specifying use of the Project Site for the purpose of and to the extent conferred by the provisions of this Agreement;
- (b) to plan, design, develop, finance, construct, manage, operate and maintain the project along with owning of the Project Facilities during the Concession Period;
- (c) upon completion of the Project and during the Operations Period to manage, operate and maintain the Project in accordance with the provisions set forth in set forth in **Schedule B** , **Schedule C** , and **Schedule D** ;
- (d) perform and fulfil all of the Concessionaire's obligations under this Agreement;
- (e) receive assured quantity of Poppy Husk during a Accounting Year, during the entire Operation Period, as procured by and directed through the Authority or its assignees or its nominees;
- (f) Storage, handle Poppy Husk at Project, and process the Poppy Husk to extract SRM/ Alkaloids/Crude form of Alkaloids;
- (g) hand over the extracted SRM/ Alkaloids/Crude form of Alkaloids to the Authority;
- (h) bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Concessionaire under this Agreement;
- (i) to apply for and obtain all requisite approvals and consents including from all Governmental Authorities concerned, for the development of Project site, including plans for construction of building/s and other structure/s thereon for such uses and purposes as described herein; and

- (j) on the Transfer Date pursuant to Termination under **Article 28**, transfer and hand over the Site along with the Project Facilities and Project Assets to the Authority or its nominated agency in accordance with the provisions hereof.
- (k) Process the Minimum Business Guarantee, as provided by the Authority in the Accounting Year in which such Poppy Husk is received.

The Concessionaire acknowledges, accepts and confirms that the covenant contained herein is an essence of this Agreement.

### **3.1.2 Concession Period**

The Concession Period shall commence from the Appointed Date for an initial term of 20 years or the earlier Termination of this Agreement in terms hereof and during which the Concessionaire is authorized to implement the Project and to operate the Project Facilities in accordance with the provisions hereof. For the avoidance of doubt, the Concession Period shall include the Construction Period.

- (a) In the event of Termination, the Concession Period shall mean and be limited to the period commencing from the Appointed Date and ending with the Termination and all rights given under this Concession Agreement shall cease to have effect and the Project Site, Project Facilities and the Project Assets shall revert to the Authority;
- (b) At the end of the Concession Period, all rights given under this Concession Agreement shall cease to have effect.
- (c) The end of the Concession Period shall be the last day of the operations on which this Agreement will expire by efflux of time (the "**Terminal Date**").

## Article 4 – Conditions Precedent

### 4.1 Conditions Precedent

- 4.1.1 Save and except as expressly provided in Article 4, Article 5, Article 6, Article 7, Article 8, Article 20, Article 25, Article 35 and Article 39, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “**Conditions Precedent**”) save and except to the extent of waiver, if any, that a Party may grant in accordance with the provisions of Clauses 4.34.1.2, as the case may be.
- 4.1.2 The Conditions Precedent required to be satisfied by the Authority within a period of 120 (one hundred twenty) days from the Effective Date shall be deemed to have been fulfilled when the Authority shall have:
- (a) Appointed Independent Engineer as per the provisions of this Agreement; and
  - (b) Appointed an agency to operate the Independent Testing Laboratory.
- 4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire prior to the Appointed Date within 180 (one hundred eighty) days from the Effective Date shall be deemed to have been fulfilled when:
- (a) furnished Construction Performance Security, as per terms of Article 9 of this Agreement, to the Authority;
  - (b) the Concessionaire shall have to procure \_\_\_ acre of Land for the Project in its own name, or Transfer the Land procured by the Selected Bidder in its name at its own cost; which should be within 75 km radius from existing Government Opium and Alkaloids Factory at Neemuch, Madhya Pradesh; and to provide documentary evidence along with current land price certified by government approved/ Registered Valuer and copy of a Sale Deed;
  - (c) achieved Financial Close as per Clause 20.1 and provide a copy of Financing Documents to the Authority;
  - (d) the Concessionaire shall have obtained all such Applicable Permits as listed in **Schedule E** unconditionally or if subject to conditions, then all such conditions have been satisfied in full and such Applicable Permits are and shall be kept in full force and effect for the relevant period during the subsistence of this Agreement;
  - (e) provide an undertaking that all of the Representations and Warranties of the Concessionaire set forth in **Article 7** are true and correct as on date of this Concession Agreement and as on the Appointed Date and thereafter;
  - (f) certified true copies of all Project Agreements, in particular, the Financing Documents, the EPC Contract, O&M Contract (with an entity having the requisite O&M experience specified in the RFP document, as applicable) [as well as the shareholders funding agreement among the consortium partners have been delivered by the Concessionaire to the Authority];
  - (g) to furnish copies (certified as true copies by an authorized officer of the Concessionaire) of the constitutional documents of the Concessionaire;

- (h) to furnish copies (certified as true copies by a Director of the Concessionaire) of all resolutions adopted by the Board of Directors of the Concessionaire authorizing the execution, delivery and performance by the Concessionaire of this Agreement and each of the Project Agreements;
  - (i) to furnish copies from the Indian legal counsel of the Concessionaire a legal opinion with respect to the Authority of the Concessionaire to enter into this Agreement and the Project Agreements and the Financing Documents and the enforceability of the provisions thereof;
  - (j) in accordance with the **Article 16**, furnish copy of detailed project report constituting proposed project plan, project capacity, site plan, detailed design, cost estimates, machinery details as per applicable laws to the Authority for information;
  - (k) executed and procured execution of the Escrow Agreement;
  - (l) executed and procured execution of the Substitution Agreement; and
  - (m) to furnish 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders;
  - (n) any of the conditions precedent set forth in Clause 4.1.3, save and except condition of Sub-Clause (e) thereof, may be waived fully or partially by the Authority at any time in its sole discretion; and
- 4.1.4 Provided that upon a written request by the Concessionaire at least 30 days prior to expiry of the aforesaid 180 days, the Authority may, in its discretion and subject to such conditions as it may deem fit, extend the timeline for the Concessionaire to satisfy any of the Conditions Precedent, for a maximum period of 30 (thirty) days without payment of any Damages.

## **4.2 Obligations to satisfy Conditions Precedent**

- 4.2.1 Both the Parties shall make all reasonable endeavors to procure the satisfaction in full of the Conditions Precedent set out in Clause 4.1.2 and Clause 4.1.3 above. The Concessionaire and the Authority shall make all reasonable endeavors to procure fulfillment of the conditions set forth in Sub-Clause (e) of Clause 4.1.3. Each Party shall bear its respective cost and expense of satisfying such Conditions Precedent.
- 4.2.2 Upon satisfaction in full of all Conditions Precedent for a Party, the other Party shall forthwith issue to such Party a certificate of compliance with Conditions Precedent (the "**Certificate of Compliance**").
- 4.2.3 The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

## **4.3 Deemed Termination upon Delay**

- 4.3.1 In the event that - (i) the Concessionaire does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.1.3 within a period of 180 (one hundred and eighty) days from the Effective Date plus any extension provided by the Authority under

Clause 4.1.4, and (ii) the delay has not occurred as a result of failure to fulfil the obligations under Clause 4.1.3 or other breach of this Agreement by the Authority, or due to Force Majeure, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Construction Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum amount equal to 20% (twenty per cent) of the Construction Performance Security, and upon reaching such maximum, the Authority may, in its sole discretion, terminate this Agreement.

- 4.3.2 In the event that (i) the Authority does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the Authority shall pay to the Concessionaire Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Constructoin Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 10% (ten per cent) of the Construction Performance Security.
- 4.3.3 Without prejudice to the provisions of Clause 4.3.1 and Clause 4.3.2, the Parties expressly agree that in the event the Appointed Date does not occur, for any reason whatsoever, within 270 days from the Effective Date or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties. Provided, however, that in the event the delay in occurrence of the Appointed Date is for reasons attributable to the Concessionaire, the Construction Performance Security of the Concessionaire shall be encashed and appropriated by the Authority as Damages thereof.

Without prejudice to and notwithstanding anything to the contrary set out in the foregoing, the Parties may by mutual agreement in writing, instead decide to extend the time for fulfilling the Conditions Precedent.

## **Article 5 – Obligations of the Concessionaire**

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

5.1.1 It is expressly agreed that the Concessionaire shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the Project Agreements or any other agreement, and no default under any Project Agreement or agreement shall excuse the Concessionaire from its obligations or liability hereunder.

The Concessionaire shall at its own cost and expense observe, undertake, comply with and perform, in addition to and not in derogation of its obligations elsewhere set out in this Agreement, the following:

- (a) Procure, in its own name and at its own cost, land for the Project which should be well connected with national highway/ state highway/ major district road/ through all weather road;
- (b) make, or cause to be made, necessary designs, plans and applications to the relevant Authority instrumentalities with such particulars and details, as may be required for obtaining Applicable Permits and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
- (c) perform its obligations under this Agreement and notify to Authority forthwith the occurrence of Financial Close in accordance with terms of Article 20 of this Agreement;
- (d) submit to the Authority certified true copies of each of the Finance Agreements within 7 (seven) days of their execution;
- (e) The Concessionaire shall not make any addition, replacement or amendments to any of the Project Agreements without the prior written consent of the Authority if such addition, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation or adverse impact on the Authority, and in the event that any replacement or amendment is made without such consent, the Concessionaire shall not enforce such replacement or amendment nor permit enforcement thereof against the Authority. For the avoidance of doubt, the Authority acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the debt of the Concessionaire;
- (f) remove promptly from the Project Site, all waste materials (including, without limitation, hazardous materials and wastewater), rubbish and other debris (including without limitation accident debris) and shall keep the Project Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable Permits;
- (g) procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project;
- (h) appoint, supervise and control the activities of Contractors under their respective Project Agreements as may be necessary, also provide all assistance to the Independent Engineer and Independent Testing Agency as it may require for the performance of their duties and services;

- (i) support, cooperate with and facilitate the Authority in execution of the Project Agreement, implementation and operation of the Project in accordance with the provisions of this Agreement;
- (j) provide reports to the Authority on regular basis during the Construction Period and Operation Period in the form and manner set forth in this Agreement and **Schedule U** ;
- (k) obtain and maintain in force on and from the Appointed Date all insurance in accordance with the provisions of this Agreement and good industry practice;
- (l) undertake debt service payments in accordance with the financing documents and agreements;
- (m) ensure and procure that each Project Agreement contains provisions that entitle the Authority to step into such agreement in its discretion in place and substitution of the Concessionaire in the event of Termination or Suspension of this Agreement on account of default or breach by the Concessionaire;
- (n) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire's obligations under this Agreement;
- (o) comply with all Applicable Permits and Applicable Laws in the performance of the Concessionaire's obligations under this Agreement including those being performed by any of the Contractors appointed by the Concessionaire during the Concession Period in conformity with provisions of this Agreement;
- (p) develop, implement and administer a safety program for the Project and the Contractors personnel engaged in the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with **Schedule M** , Applicable Laws and Good Industry Practice;
- (q) take all reasonable precautions and install necessary provisions in the Project related to fire and for the prevention of accidents on or about the Project and provide all reasonable assistance and emergency medical aid to accident victims;
- (r) indemnify the Authority against all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be suffered by them on account of anything done or omitted to be done by the Concessionaire in connection with the performance of its obligations under this Agreement;
- (s) comply with the Divestment Requirements and hand over the Project (along with land) to Authority only in case of Termination of the Agreement;
- (t) not do or omit to do any act, deed or thing which may in any manner violate any of the provisions of this Agreement;
- (u) construct the place in the premises for setting up an Independent Testing Laboratory to test the alkaloid content of Poppy Husk, as per batches at a place designated upon mutual agreement of the Parties, the cost for the same to be borne as per Clause 37.3;

- (v) create adequate storage facility by the first anniversary of Concession for storage of Poppy Husk supplied by the Authority as well as finished products within the Project Site;
- (w) notwithstanding anything to the contrary contained in this Agreement, the Concessionaire shall neither assign, transfer or sublet of the Concession in whole or part hereby granted, or lease or part possession of the Project thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement;
- (x) Provide office space for designated officials of the Authority at all times during the Concession Period, within the Project Site, as may be approved by the Authority at the time of review of the Designs and Drawings;
- (y) Ensure that the SRM/ Alkaloids/ Crude form of Alkaloids produced/ extracted meet established/ prescribed international quality standards/ certification;
- (z) Ensure compliance to internationally established and accepted good manufacturing practices through approvals from United States Food and Drug Administration (USFDA) / United Kingdom's Medicines and Healthcare products Regulatory Agency (UK MHRA) / European Directorate for the Quality of Medicines & HealthCare (EDQM) / Australian Therapeutic Goods Administration (TGA) / Brazilian Health Regulatory Agency (ANVISA), etc.;
- (aa) the Concessionaire shall, from time to time, undertake upgradation of the Project Facilities in accordance with the provisions of this Agreement and good industry practice;
- (bb) ensure that the equipment used for the Project are and remain in good working condition through out the Concession Period and conform to the international specifications and efficiency standards;
- (cc) not store any hazardous or explosive substance on the Project Site unless specific license is obtained from the regulatory body after taking prior consent from the Authority. The Concessionaire shall provide and maintain necessary fire-fighting and fire protection system on the Project Site as per the Applicable Law;
- (dd) Project should be developed as a standalone unit and should not be developed within any existing premises of the ongoing business/ commercial unit of the Selected Bidder;
- (ee) Land, building and other assets required for establishment of the Project should be clearly identifiable and delineated and as-is drawings should be prepared;
- (ff) ensure provision/ access to necessary ancillary infrastructure for the Project Site viz. road that shall allow the smooth movement of a 40 ft container, water and electricity connection from the Utilities Service Provider; and to maintain internal road, water supply system, sewerage and other similar facilities on regular basis;
- (gg) reimburse the Authority one half of the cost towards professional fee and related charges of hiring the services of the Independent Engineer and Independent Testing Agency as per terms of the Agreement;
- (hh) comply, at its own cost, with all statutory requirements always related to personnel, contractors or sub-contractors during the Concession Period, and ensure that any

- such sub-contracting or additional manpower is disclosed in adequate detail, with a copy of the documentation to be available for inspection at all times in the Project premises;
- (ii) employ such qualified and experienced personnel to fulfil its obligations as specified under this Agreement, and as required to carry out the services and take care of Operation and Maintenance of the Project;
  - (jj) maintain MIS of stock and movements of Poppy Husk as well as Finished Products and of the books of accounts relating to expenditure towards the construction, operation and maintenance of the asset, inventory received, stored, processed, released and provide copies of the same record to the Authority for information on periodic basis; and
  - (kk) to receive Poppy Husk as procured by and directed through the Authority or its assignees or its nominees; and process the Poppy Husk to extract SRM/Alkaloids/Crude form of Alkaloids and hand over to the Authority. In case of shortage of storage or warehousing space due to the presence of arrear Poppy Husk, the concessionaire shall, at it's own cost and expense, ensure the storage of the supplied Poppy Husk in the same or similar facility constructed for storage.
  - (ll) Ensure that at the time of expiry/termination of the Agreement, the project assets used are scientifically dismantled and approvals from the pollution control board are obtained to certify the same.
  - (mm) Raise an yearly statement compiling the invoices raised every quarter, clearly highlighting the Poppy Husk received and processed, along with the extraction efficiency of the same.

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

- (a) Procure adequate land and undertake the planning, design, financing, engineering, procurement, construction, administration, management, operation and maintenance of all the components of the Project in accordance with this Agreement.
- (b) Design the plant capacity such that it caters to the processing of upto 10,000 MT per annum of Poppy Husk, which is taking into consideration any additional quantity of Poppy Husk over and above the Minimum Business Guaranteed, that the Authority may supply taking into consideration the increase in future demand for Alkaloids.

5.1.3 The Concessionaire shall, before commencement of construction of the Project:

- (a) submit to the Authority with due regard to Project Completion Schedule as set forth in Schedule H , its detailed design, engineering and construction time schedule in MSP/PRIMAVERA format and shall formulate and provide CPM/PERT/GANTT charts for the completion of the said activities;
- (b) finalize the Detailed Project Report (DPR) and detailed engineering basis and submit to the Authority during Condition Precedent period;
- (c) have requisite organization and designate and appoint a Project manager and such other managers, officers and representatives as it may deem appropriate to supervise

the Project and to deal with the Authority Representative and be responsible for all necessary exchanges of information required pursuant to this Agreement; and

- (d) undertake, do and perform such acts, deeds and things as may be necessary or required for construction and Project completion under and in accordance with this Agreement.

5.1.4 In respect of the Concessionaire's obligations with respect to the Designs and Drawings of the Project as set forth in **Schedule I** , the following shall apply:

- (a) the Concessionaire shall prepare and submit with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of all Designs and Drawings to Authority and the Independent Engineer for review and comments.
- (b) by forwarding the Designs and Drawings for review and comment to Authority, the Concessionaire represents that it has determined and verified that the design and engineering including field construction criteria related thereto is in conformity with the Specifications and Standards and quality set forth in this Agreement for and in respect of the Project.
- (c) if the comments/ observations of Authority indicate that the Designs and Drawings are not in conformity with the Specifications and Standards set forth in this Agreement or as per Applicable Laws, such Designs and Drawings shall be revised by the Concessionaire to the extent necessary and resubmitted to Authority for review, observations and comments.
- (d) the Concessionaire shall be responsible for delays in Project Completion Schedule caused by reasons of any of Designs and Drawings not being in conformity with the Specifications and Standards, and the Concession Period shall not be extended in any manner whatsoever on account of submission or revision of any Drawings.
- (e) within 90 (ninety) days of the COD, the Concessionaire shall furnish the Authority with "as built" Drawings 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 Facilities.

5.1.5 The Concessionaire shall submit to the Authority the drafts of all Project Agreements, or any amendments or replacements thereto, for its review and comments, and the Authority shall have the right but not the obligation to undertake such review and provide its comments, if any, to the Concessionaire within 30 (thirty) days of the receipt of such drafts. Within 7 (seven) days of execution of any Project Agreement or amendment thereto, the Concessionaire shall submit to the Authority a true copy thereof, duly attested by a Director of the Concessionaire, for its record. For the avoidance of doubt, it is agreed that the review and comments hereunder shall be limited to ensuring compliance with the terms of this Agreement. It is further agreed that no review and/or observation of the Authority and/or its failure to review and/or convey its observations on any document shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Authority be liable for the same in any manner whatsoever.

- (a) During the Construction Period, the Concessionaire shall be responsible for maintaining the Project Site, at its own cost and expense.

- (b) Provide or arrange at its cost during the Concession Period all on-site infrastructure including power, electricity, water, sanitation, sewage treatment and disposal, drainage, solid and hazardous waste disposal, effluent treatment and disposal and other utilities and facilities required from time to time in respect of the construction, operation and maintenance of the Project/ Project Facilities and be in compliance to the requirements relating thereto under the Applicable Laws, terms of Applicable Permits and Good Industry Practice. The treatment and disposal of such solid and hazardous waste needs to be kept in a log and should be updated from time to time.
- (c) It shall at its cost install meters to measure the consumption of power and water. The Concessionaire shall, at its cost, make alternate and back up arrangement for power, including but not limited to installation of generators and for water, subject to the Concessionaire obtaining Applicable Permits if any.

5.1.6 The Concessionaire shall, at all times, afford access to the Site to the authorized representatives of Authority, Senior Lenders, Independent Testing Agency, and the Independent Engineer and to the persons duly authorized by any Governmental 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 with minimum disruption to the construction, operation and maintenance of the Project consistent with the purpose for which such persons have gained such access to the Project Site.

## 5.2 Employment of foreign nationals

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

## 5.3 Employment of trained personnel

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

## 5.4 Sole purpose of the Concessionaire

The Concessionaire having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, i.e., to plan, design, build, finance, own, operate and maintain the Project, the Concessionaire hereby agrees not to have any shareholding interest/ control in any form or otherwise in any entity, or direct/ indirect interest/ concern/ engage in any form of arrangement with any person/ business other than as envisaged under this Agreement.

The Concessionaire hereby agrees not to form any subsidiary/ Joint Venture or to invest in securities of any other body corporate or to have any shareholding interest/control in any form, whether direct or indirect or through voting rights, or be or become directly or indirectly engaged, concerned or interested in any business, for undertaking its obligations in relation to plan, design, build, finance, own, operate and maintain the Project.

## 5.5 Branding of the Project

The Project or any part thereof shall not be branded in any manner to advertise, display or reflect the name or identity of the Concessionaire or its shareholders. The Concessionaire undertakes that it shall not, in any manner, use the name or entity of the Project to advertise or display its own identity, brand equity or business interests, including those of its shareholders, save and except as may be necessary in the normal course of business.

## 5.6 Concessionaire's Representative

- (a) The Concessionaire's Representative shall be the person so designated by the Concessionaire. If at some point of time the Concessionaire is unable to provide the services of the person named as the Concessionaire's Representative, then it shall notify the Authority and its reasons for this, and thereafter, provide a substitute person who can be the Concessionaire's Representative.
- (b) The person named as the Concessionaire's Representative under this Concession Agreement shall be a qualified and competent person having previous experience in a similar capacity in works comparable to the Project. Prior to appointment of the Concessionaire's Representative, the Concessionaire shall also submit the curriculum vitae of the person it proposes to appoint, detailing in particular the relevant project experience, and then obtain the written consent of the Authority to the appointment of the Concessionaire's Representative.
- (c) The Concessionaire's Representative shall be exclusively employed or engaged by the Concessionaire to give his whole time to directing the preparation of the Construction Documents, the execution of the Works, and operation and maintenance of the Project. Except as otherwise stated in the Concession Agreement, the Concessionaire's Representative shall receive on behalf of the Concessionaire all notices, instructions, consents, approvals, certificates, determinations and other communications under the Concession Agreement. Whenever the Concessionaire's Representative is to remain absent from the Project Site for a continuous period in excess of 14 (fourteen) days, a suitable replacement Person shall be appointed with the Authority's consent.
- (d) The Concessionaire's Representative may delegate, while retaining his prime responsibilities, any of his powers, functions and authorities to any competent Person, and may at any time revoke any such delegation. Any such delegation or revocation shall be in writing and shall not take effect until the Authority has received prior written notice signed by the Concessionaire's Representative, specifying the powers, functions and authorities being delegated or revoked. Concessionaire's Representative shall notify in writing to the Authority the names, duties and scope of authority of such Persons. Any instructions given to any of them shall be deemed to have been given to the Concessionaire's Representative. Any such delegation shall not relieve the Concessionaire's Representative of its obligation and duties under this Agreement.

## 5.7 Shareholding Lock-in

- 5.7.1 The Concessionaire confirms that the Lead Member and each of the other members together with their Associates whose technical experience has been evaluated for the purposes of the RFP, has subscribe at least 51% (fifty per cent) or more and 26% (twenty-six percent) or more respectively, of the paid up and subscribed Equity of the Concessionaire and further commits that each such member shall, till fifty Anniversary post COD of the Project, hold Equity share capital not less than:
  - (i) 51% (fifty one percent) of the subscribed and paid-up Equity share capital of the Concessionaire for Lead member;

- (ii) 26% (twenty-six percent) of the subscribed and paid-up Equity share capital of the Concessionaire for the technical member and,
- (iii) 5% (five percent) of the Total Project Cost specified in the Concession Agreement;

5.7.2 Any transfer of such share capital after such Lock-in Period shall require the prior written approval of the Authority, which shall not be unreasonably denied. Provided, nothing contained in this sub-section shall preclude or prevent pledge of the Selected Bidder's/Consortium's shares in the Concessionaire in favor of Lenders as security for the Financial Assistance and enforcement thereof in accordance with this Agreement and/or the Financing Documents;

5.7.3 At no stage, including as specified under Clause 5.7.1 and 5.7.2 above, shall any change in the shareholding pattern of the Concessionaire be made without obtaining prior approval from the Authority. On an application made for the purpose, the Authority may permit the change of Equity Components/ shareholding patterns, and such permission shall not be unreasonably rejected or withheld, provided the Authority is satisfied that the proposed changes shall be in the interest of the implementation of the Project in future and would not be detrimental to any of the rights or interests of the Authority and any of the Confirming Authorities. However, no such change in the shareholding pattern shall be permitted by the Authority, which would make the Consortium Members or Associates or the Concessionaire non-compliant with sub-clauses above.

## **5.8 Obligations relating to Change in Ownership**

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

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

- (a) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of 25% (twenty-five per cent) or more of the total Equity of the Concessionaire; or
- (b) acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him shall constitute a Change in Ownership requiring prior approval of the Authority from national security and public interest perspective, the decision of the Authority in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Concessionaire without such prior approval of the Authority. For the avoidance of doubt, it is expressly agreed that approval of the Authority hereunder shall be limited to national security and public interest perspective, and the Authority shall endeavor to convey its decision thereon expeditiously. It is also agreed that the Authority shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire from any liability or obligation under this Agreement.

For the purposes of this Clause 5.8.2:

- (iv) the expression “acquirer”, “control” and “person acting in concert” shall have the meaning ascribed thereto in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011 or any statutory re-enactment thereof as in force as on the date of acquisition of Equity, or the control of the Board of Directors, as the case may be, of the Concessionaire;
- (v) the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control of any company or companies whether in India or abroad which results in the acquirer acquiring control over the shares or voting rights of shares of the Concessionaire; and
- (vi) power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situate in India or abroad) the Equity of the Concessionaire, not less than half of the directors on the Board of Directors of the Concessionaire or of any company, directly or indirectly whether situate in India or abroad, having ultimate control of 25% (twenty five per cent) or more of the Equity of the Concessionaire shall constitute acquisition of control, directly or indirectly, of the Board of Directors of the Concessionaire.

## **Article 6 – Obligations of the Authority**

### **6.1 Obligations of the Authority**

- 6.1.1 The Authority shall, at its own cost and expense, undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 6.1.2 The Authority agrees to provide support to the Concessionaire and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:
- (a) 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 favorable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
  - (b) procure that no barriers are erected or placed on or about the Project by any Government Instrumentality or persons claiming through or under it, except for reasons of Emergency, national security, law and order;
  - (c) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
  - (d) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide reasonable support and assistance to the Concessionaire in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project;
  - (e) upon written request from the Concessionaire and subject to the provisions of Clause 5.9, provide reasonable assistance to the Concessionaire and any expatriate personnel of the Concessionaire or its Contractors to obtain applicable visas and work permits for discharging their respective obligations under this Agreement and the Project Agreements;
  - (f) observe and comply with its obligations set forth in this Agreement.
  - (g) make available a minimum of 6,000 MT of poppy husk in the last quarter of the preceding Accounting Year, as raw material to the Concessionaire, and share with the Concessionaire, the supply plan for the next Accounting Year by 31<sup>st</sup> July of the preceding Accounting Year;
  - (h) bear 50% cost of the testing laboratory to be constructed by the Concessionaire and appoint an independent third party to set-up, manage and operate the testing laboratory and bear 50% of the cost of its management & operation;
  - (i) approve Total Project Cost for any additional or increase in plant capacity upon submission of DPR and other supporting documents by the Concessionaire, as and when requested by the Concessionaire as per the provisions of this Agreement;
  - (j) ensure taking-off of the finished products within 15 (fifteen) days from the date of intimation by the Concessionaire;

- (k) timely pay Processing Charges to the Concessionaire on performance of the obligation as provided herein;
- (l) arrange, at its cost and expense, for delivery of Poppy Husk to the Project Site;
- (m) arrange, at its cost and expense, for dispatch of the finished product from the Project Site;
- (n) provide at least [XX hours] notice, in writing, for dispatch/acceptance of material at the Project Site; and
- (o) designate authorised representatives to issue instruction to the Concessionaire relating to operations including acceptance and dispatch of Poppy Husk/finished good from the Project Site.

## 6.2 Review of Designs and Drawings

In respect of the Authority's obligations with respect to the Designs and Drawings of the Project as set forth in **Schedule I**, the following shall apply:

6.3.1 Within 30 (thirty) days of the receipt of the Designs and Drawings, the Authority shall review the same and convey its comments/observations to the Concessionaire with particular reference to the conformity or otherwise with the Specifications and Standards set forth in this Agreement. It is expressly agreed that notwithstanding any review and comment/observations of Authority on any Drawings or failure of Authority to provide comments/ observations thereon, Authority shall not be liable for the same in any manner whatsoever and the Concessionaire shall remain solely responsible for and shall not be relieved or absolved in any manner whatsoever of its obligations, duties and liabilities as set forth in this Agreement. The Concessionaire shall not be obliged to await the comments/observations of Authority on the Drawings submitted pursuant hereto beyond the period set forth hereinabove.

6.3.2 On resubmission to Authority for review, observations and comments, Authority 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 Authority or failure of Authority 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.

## 6.3 Obligations relating to Re-financing

6.3.1 Upon request made by the Concessionaire to this effect, the Authority shall, in conformity with any regulations or guidelines that may be notified by the Government or the Reserve Bank of India, as the case may be, permit and enable the Concessionaire to secure refinancing, in whole or in part, of the Debt Due on such terms as may be agreed upon between the Concessionaire and the entity providing such refinancing; provided, however, that the refinancing hereunder shall always be subject to the prior consent of the Authority, which consent shall not be unreasonably withheld. For the avoidance of doubt, the tenure of debt refinanced hereunder may be determined mutually between the Senior Lenders and the Concessionaire, but the repayment thereof shall be completed no later than 1 (one) year prior to expiry of the Concession Period.

## 6.4 Supply of Raw Material

6.4.1 The Authority undertakes to supply to the Concessionaire, a minimum of 6,000 MT of Poppy Husk each Accounting Year post COD as assured quantity (the "**Minimum Business Guarantee**" or "**MBG**"). However, it is clarified that the Concessionaire shall be paid the Fixed Component of the Processing Fee for 6,000 MT of Poppy Husk in

case if the Authority is not able to supply the MBG quantity each Accounting Year post COD. The payment for the deficient quantity supplied shall be made in accordance with Clause 21.2.

- 6.4.2 While the Authority will ensure to supply MBG quantity each Accounting Year, the Authority endeavours to increase the supply of Poppy Husk incrementally within initial Accounting Years itself to maximise utilisation of the Project's output as per installed production capacity of the Project. For additional quantity of the Poppy Husk supplied over and above the MBG quantity, upon Concessionaire processing it the payment shall be made in accordance with the provision of the Clause 21.2.

## **6.5 Procedure in case of non-fulfillment of Authority's obligations**

- 6.5.1 In case the Authority not being able to fulfill its role under Article 6.1.2 (g), due to reason not attributed to Force Majeure, the Concessionaire may serve preliminary notice to the Authority which shall specify in reasonable detail the circumstances giving rise to such non-fulfillment. Following the Concessionaire's preliminary notice, a consultation period shall apply.

The consultation period shall be for the parties to discuss as to what steps shall be taken with a view to mitigate the consequences of the relevant non-fulfillment of role by the Authority including a time extension to the Concessionaire, having regard to all circumstances.

In case the Authority is still not able to fulfill the obligation in consideration post the time mutually agreed upon, the Concessionaire shall be liable to receive INR 50,000 for every day that such obligation is not fulfilled up to a maximum of 0.1% of the Total Project Cost. If the penalty value exceeds the threshold limit, the same may be considered as an Authority event of Default and shall give the Concessionaire the right but not obligation to terminate the Agreement.

## **Article 7 – Representations and Warranties**

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

The Concessionaire represents and warrants to the Authority that:

- (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;
- (b) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (c) it has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (d) along with its Associates, it has the financial standing and capacity to undertake the Project;
- (e) the obligations of the Concessionaire under this Agreement will be legally valid, binding and enforceable against it in accordance with the terms hereof;
- (f) it is subject to laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
- (g) all the information furnished in the Bid is, and shall be, true and correct as on the Appointed Date and true, correct and accurate in all respects;
- (h) 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 Memorandum and Articles of Association of the Concessionaire or any member of the Consortium or any Applicable Laws or any covenant, Agreement, understanding, decree or order to which, it is a Party or by which it or any of its properties or assets is bound or affected;
- (i) there are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect on its business, properties or assets or its condition, financial or otherwise, or in any impairment of its ability to perform its obligations and duties under this Agreement;
- (j) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Governmental Agency which may result in any Material Adverse Effect or impairment of the Concessionaire's ability to perform its obligations and duties under this Agreement;
- (k) it has complied with all Applicable Laws and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have Material Adverse Effect on its financial condition or its ability to perform its obligations and duties under this Agreement;
- (l) it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.14 and that the {Selected Bidder/ Consortium Members}, whose technical and financial capacity was evaluated for the purposes of qualification and short-listing

in response to the Request for Proposal, shall hold at least, as specified below, during the Construction Period and five years thereafter together with {its/their} Associates:

- (i) 51% (fifty one percent) of the subscribed and paid up Equity share capital of the Concessionaire as Lead member;
  - (ii) 26% (twenty six percent) of the subscribed and paid up Equity share capital of the Concessionaire for the technical member and,
  - (iii) 5% (five percent) of the Total Project Cost specified in the Concession Agreement;
  - (iv) Provided further that any such request made under Sub-Clause I of Clause 7.1, at the option of the Authority, may be required to be accompanied by a suitable no objection letter from Lenders;
- (m) the {Selected Bidder/ Consortium Members and its/their Associates} have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with this Agreement;
- (n) each Consortium Member was and is duly organized 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 Authority to enter into this Agreement with the Concessionaire pursuant to the LOA and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (o) all rights and interests of the Concessionaire in and to the Project (including land) shall pass to and vest in Authority on the Transfer/ Termination Date free and clear of all liens, claims, and Encumbrances without any further act or deed on the part of the Authority and that none of Project Assets including materials, supplies or equipment forming part thereof shall be acquired by the Concessionaire subject to any Agreement under which a security interest or other lien or Encumbrance is retained by any person save and except as expressly provided in this Agreement; provided that the Concessionaire shall take all steps and execute all necessary documents for transfer of land of the Project in the name of the Authority;
- (p) no representation or warranty by the Concessionaire contained herein or in any other document furnished by it to Authority, or to any Governmental Agency in relation to Applicable Permits contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- (q) it warrants that no sums, in cash or kind, have been paid or will be paid by or on behalf of the Concessionaire, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of Authority in connection therewith;
- (r) all information provided by the {Selected Bidder/ Consortium Members} in response to the Request for Proposals or otherwise, is to the best of its knowledge and belief, true and accurate in all material respects; and
- (s) all undertakings and obligations of the Concessionaire arising from the Request for Proposals or otherwise shall be binding on the Concessionaire as if they form part of this Agreement.

## **7.2 Representations and warranties of the Authority**

The Authority represents and warrants to the Concessionaire that:

- (a) Authority is duly organized and validly existing under the laws of India;
- (b) Authority has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (c) Authority has taken all necessary action to authorize the execution, delivery and performance of this Agreement;
- (d) This Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof; and
- (e) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any Material Adverse Effect on the Authority's ability to perform its obligations under this Agreement;
- (f) to the best of the Authority's knowledge and belief, there are no actions, suits, proceedings or investigations pending against it, at law or in equity, before any court or Governmental Authority, the outcome of which may result in the breach of or constitute a default of the authority under this Agreement, or constitute a default of the Authority under this Agreement or result in impairment of the Authority's ability to perform its obligations and duties under this Agreement;
- (g) it has complied with Applicable Laws in all material respects;
- (h) it has the right, power and authority to grant a license in respect of the Project to the Concessionaire.

### **7.3 Disclosure**

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

## **Article 8 – Disclaimer**

### **8.1 Acceptance of Project**

8.1.1 The Concessionaire acknowledges that it has either itself or through its shareholders undertaken a due diligence over all aspects of the Project. For the purposes of this Agreement, Concessionaire shall be deemed to have:

- (a) satisfied itself as to the proposed form and nature of the Project, and the nature of the design, work and materials necessary for the performance of its obligations under this Agreement.
- (b) satisfied itself as to the means of communication with, access to and accommodation at Project Site, it may require or as may be otherwise necessary for the performance of its obligations under this Agreement;
- (c) obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect its rights and obligations hereunder and its other rights and obligations under or pursuant to this Agreement; and
- (d) has determined the nature and extent of the difficulties, inputs, costs, time, resources, risks and hazards that are likely to arise or may be faced by it in the course of the performance of its obligations under this Agreement and for undertaking the Project.

8.1.2 Concessionaire further acknowledges that it, or any entity claiming under it, shall have no recourse against Authority in the event of any mistake made or misapprehension harbored by the Concessionaire in relation to any of the foregoing provisions of Article 8. If a deficiency is found, Concessionaire acknowledges and agrees that it shall, at its own cost, take all appropriate measures to remedy the same in order to undertake the Project.

8.1.3 Concessionaire acknowledges and hereby accepts the difficulties, inputs, costs, time, resources, risks and hazards associated with the performance of its obligations hereunder and hereby agrees that Authority shall not be liable for the same in any manner whatsoever to Concessionaire, other than as expressly provided in this Agreement.

8.1.4 It is clarified that all fossils, antiquities, structures and/or other remains or things either of archaeological or of particular geological interest discovered at Project Site or in the course of carrying out any work shall not be the property of Concessionaire and Concessionaire shall have no right or interest in such fossils, antiquities and structures.

### **8.2 Deemed Knowledge and Disclaimer**

8.2.1 Subject to the provisions of this Agreement, the Concessionaire shall be fully and exclusively responsible for, and shall bear the financial, technical, commercial, legal and other risks in relation to the design, financing, construction, completion, commissioning, operation, maintenance, and management of the Project and all its other rights and obligations under or pursuant to this Agreement regardless of whatever risks, contingencies, circumstances and/or hazards may be encountered (foreseen or not foreseen) and notwithstanding any change(s) in any of such risks, contingencies, circumstances and/or hazards on exceptional grounds or otherwise and whether foreseen or not foreseen and the Concessionaire shall have no right whether express or implied to bring any claim against, or to recover any compensation or other amount from,

the Authority and/ or any of their agencies other than in respect of those matters in respect of which express provision is made in this Agreement.

## **Part III – Development and Operations**

## Article 9 – Performance Security

### 9.1 Performance Security

9.1.1 The Performance Security for this Concession Agreement include:

- (a) “**Construction Performance Security**” in the form of Bank Guarantee, for “Construction Period”; and
- (b) “**Operation Performance Security**” in the form of Bank Guarantee, for “Operation Period”.

9.1.2 The Concessionaire has, for the performance of its obligations, provided to the Authority an irrevocable and unconditional guarantee of Construction Performance Security in accordance with Clause 4.1.3, valid from the Effective Date for a period of 36 (thirty-six) months from a Bank for an amount of INR ..... (Rupees ..... only)<sup>4</sup>, in the form set forth in Schedule F (the “**Construction Performance Security**”).

The Concessionaire shall keep the Construction Performance Security, valid at all times during the stipulated period of 36 (thirty-six) months from the Effective Date and any other extended period beyond 36 (thirty-six) months, as required by the Authority. The Concessionaire shall renew it 30 (thirty) days prior to the expiry of its validity, as applicable.

9.1.3 The Concessionaire shall provide an Operation Performance Security in the form of Bank Guarantee (the “**Operation Performance Security**”), no later than 15 days from the Commercial Operation Date, for an amount of INR ..... (Rupees ..... Only)<sup>5</sup> valid for a period of 3 consecutive years. A renewed Operation Performance Security is to be submitted every third year as specified in Clause 9.1.3 (b), during the Operational Phase of the Concession Period.

(a) The Concessionaire’s failure to provide and/ or maintain the Operation Performance Security, in accordance with the provisions of this Article 9.1 shall (i) entitle the Authority to call in and invoke the Construction Performance Security / subsisting Operation Performance Security, as the case may be and retain and appropriate the same; and (ii) constitute the same as a Concessionaire Default entitling the Authority to Terminate this Agreement under the provision hereof.

(b) The Concessionaire shall keep the Operation Performance Security, valid at all times during the stipulated period and renew it 30 (thirty) days prior to the expiry of its validity, as applicable.

### 9.2 Appropriation of Performance Security

9.2.1 In the event of the Concessionaire being in default in the due and faithful performance of its obligations under this Agreement and failing to remedy such default within the Cure Period, the Authority shall without prejudice to its other rights and remedies hereunder be entitled to encash and appropriate the respective Performance Security (for

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<sup>4</sup> The amount will be computed at the rate of 05% (five) per cent of the Total Project Cost quoted by the Selected Bidder and mentioned in the Financial Package

<sup>5</sup> The amount will be computed at the rate of 10% (ten) per cent of the Total Processing Fee payable to the Concessionaire during the first operational year, which will be computed assuming Minimum Business Guarantee quantity supplied and processed by the Concessionaire.

Construction Period or Operation period, as the case may be) as Damages for such default. Upon such encashment and appropriation of the respective Performance Security, Authority shall grant a period of 15 (fifteen) days to the Concessionaire to provide fresh Performance Security and the Concessionaire shall within the time so granted furnish to Authority such Performance Security failing which Authority shall be entitled to terminate this Agreement under Clause 28.1.

9.2.2 Notwithstanding anything to the contrary contained in Clause 9.2.1, upon furnishing of fresh Performance Security in accordance with Clause 9.2.1, the Concessionaire shall be granted an additional period of 60 (Sixty) days as Cure Period for remedying the defaults and complying with his obligations under this Agreement. In the event of the Concessionaire continuing to be in breach of the provisions of this Agreement after such Cure Period, Authority shall be entitled to terminate this Agreement under the provisions of Clause 28.1.

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

- (a) Upon provision of the Operation Performance Security pursuant hereto, the Authority shall release the Construction Performance Security to the Concessionaire in terms hereof.
- (b) The Authority shall release the Operation Performance Security forthwith, upon expiry of 150 (one hundred and fifty) days from the End Date of this Agreement or the Transfer Date, as applicable, subject however to deductions towards any outstanding amount payable to Authority by Concessionaire in terms hereof.
- (c) The respective Performance Security shall remain in force and effect by the Concessionaire, throughout the Concession Period. Upon request made by the Concessionaire for release of the respective Performance Security along with the particulars which establish satisfaction of the requirements, the Authority shall release the Performance Security forthwith.

## Article 10 – Project Asset Development

### 10.1 Covenants in respect of the Concession

- 10.1.1 In consideration of the development of the Project by the Concessionaire and subject to Concession granted in accordance with the terms hereof and adherence to the terms and conditions as contained in this Agreement and/ or the Project Documents, the Authority permits the Concessionaire unhindered, exclusive and unobstructed right to implement the Project on the Project Site for the Concession Period.
- 10.1.2 The Concessionaire shall be solely responsible to seek connection of, to procure and ensure at its own cost and expense, water, electricity and all other utilities required for the construction, operation and maintenance of Project Assets at the Project Site and the Authority shall not be responsible to provide any infrastructure in relation to any such services and/ or utilities. The Authority shall provide reasonable assistance to the Concessionaire in applying for and procuring any such connections for the supply of electricity, water, fuel and other utilities. Provided, however, the Concessionaire shall not be permitted to dig bore wells or extract ground water at any point of time, without the prior permission/ approval from the concerned local/ State Government authorities under Applicable Laws.
- 10.1.3 It is agreed that the Concessionaire shall pay all present and future outgoings, cesses, taxes (including municipal taxes), rates and other charges whatsoever and all increases thereto, in respect of the Project on the due dates thereof and the Authority shall not be liable to pay the same. The Concessionaire shall also pay all taxes (including GST), levies, import duties, fees (including any Concession Fees) and other charges, dues, assessments or outgoings payable in respect of the Concession Fee (including GST) or in respect of Project or in respect of the materials stored therein which may be levied by any Governmental Authority(s). If the Concessionaire fails to pay any of the above charges, the Authority shall be entitled, but not obliged to pay the same and recover the same from the Concessionaire along with interest at a rate per annum of 5% above prime lending rate of State Bank of India (or in the absence of State Bank of India's prime lending rate, the highest lending rate applicable to term lending).
- 10.1.4 The Authority shall, at all times during the construction of Project Assets be entitled to inspect the Project Site through its duly authorized representative. Provided however, the duly authorized representative of the Authority shall not interfere with or prevent the Concessionaire's officials from discharging their functions.
- 10.1.5 The Concessionaire shall at all times be responsible for the Project in accordance with this Agreement and in compliance with the local building byelaws/ regulations and development requirements prescribed in **Schedule B** , **Schedule C** , and **Schedule D** hereto.
- 10.1.6 The Concessionaire shall undertake the Project using due care and diligence in a professional manner, using sound engineering and design principles and project management and supervisory procedures and in accordance with Good Industry Practice.
- 10.1.7 The Concessionaire shall at all times, obtain and maintain all Applicable Permits which are required by Applicable Law to undertake the Project and all certifications in accordance with **Schedule E** . The Authority shall provide all reasonable assistance to the Concessionaire to obtain and maintain all such Applicable Permits. The Concessionaire shall apply for and obtain all Applicable Permits required to be

obtained in the name of the Authority, for which purposes the Authority shall extend assistance to the Concessionaire on a best efforts basis, including through executing all documents required to apply for such approvals. The Parties agree that the Concessionaire shall indemnify the Authority in respect of any loss caused to, or suffered by the Authority, arising out of a breach of the terms of any Applicable Permit taken in the name of the Authority.

- 10.1.8 The Concessionaire shall be obliged to achieve all Project Milestones as per Project Completion Schedule set forth in **Schedule H** , and commence the commercial operations for the Project on the Project site, within a period of 1095 (one thousand ninety-five) days from the Appointed Date. Provided that, upon occurrence of an Authority default which substantially prevents the Concessionaire from achieving commercial operations for the Project within a period of 1095 (one thousand ninety-five) days from the Appointed Date, the Concessionaire shall be entitled to a day for day extension beyond the aforesaid period, equivalent to the time taken by the Authority to complete its obligations hereunder. Further, subject to the Concessionaire having made timely applications for all Applicable Permits, in the event of a delay [as reasonably determined by the Authority] in the receipt of Applicable Permits, the Authority may permit a day for day extension beyond the aforesaid 1095 (one thousand ninety-five) days equivalent to the delay in receipt of such Applicable Permits.
- 10.1.9 The Concessionaire will undertake the Project during the Term with due regard to safety precautions, fire protection, security, transportation, delivery of goods, materials, control of pollution, maintenance of competent personnel and labour and industrial relations as per the codal provision, amended up to date and the mandatory compliances as per the **Schedule E** .
- 10.1.10 The Concessionaire will ensure that all materials, equipment, machinery, etc. installed and/ or used at Project site will be of sound and merchantable quality, that all workmanship shall be in accordance with globally Good Industry Practice applicable at the time of installation, construction or repair and that each part of the construction will be fit for the purpose for which it is required.
- 10.1.11 The Concessionaire shall be responsible for safety, soundness and durability of the Project Assets constructed upon Project site and shall ensure their compliance with the specifications and standards set out in **Schedule D** .
- 10.1.12 The Concessionaire shall be responsible for the operation and maintenance of the Project and shall at all times ensure that the Project Assets upon the Project site are operated, maintained and managed in accordance with the Good Industry Practice and guidelines as laid down in **Schedule L** . The Concessionaire shall have the right to undertake such operation and maintenance itself, or through a sub-contractor, provided however, that it shall always be the liability of the Concessionaire to ensure compliance with the operation and management standards prescribed in this Agreement.
- 10.1.13 The Concessionaire shall obtain and maintain in force on and from the Appointed Date all insurance in accordance with the provisions of this Agreement and Good Industry Practice.

- 10.1.14 The Concessionaire shall procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project Assets located upon the Project site.
- 10.1.15 The Concessionaire shall ensure that the Project Site remains free from all encroachments during the Term, provided however, upon request of the Authority, the Concessionaire shall provide to the Authority or to the relevant Governmental Authority as requested by the Authority, such temporary access to the Project site as is required for the provision of services or utilities to Project site.
- 10.1.16 The Concessionaire shall indemnify the Authority against all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be suffered by them on account of anything done or omitted to be done by the Concessionaire in connection with the performance of its obligations under this Agreement, provided however that the Concessionaire's obligation to indemnify the Authority shall only extend to all actions, suits, claims, demands and proceedings and any loss or damage or cost or expense that may be claimed during the Term or for a period of two years after the expiry of the Term, in relation to any claim for an event occurring during the Term.
- 10.1.17 The Concessionaire shall, from time to time, promptly pay all the charges/ bills for the usage of infrastructure facilities provided to them by the relevant Governmental Authority or by the Authority, as case may be.
- 10.1.18 The Authority covenants that it shall not seek or agree to an amendment of the terms of this Agreement so as to adversely affect the grant to the Concessionaire hereunder, without the consent of the Concessionaire.

## **10.2 Sub-Contracts**

- 10.2.1 The Concessionaire shall have the right to grant a sub-contract with regard to any activity relating to the Project, including but not limited to the design, construction, operation, maintenance or any part thereof, provided always that notwithstanding the sub-contract, Concessionaire shall retain overall responsibility, obligation and liability in relation to the Project. It is clarified that Concessionaire shall remain liable and responsible for any acts, omissions or defaults of any Sub-contractor and shall indemnify the Authority in respect thereof. Provided further that Concessionaire shall ensure that all such sub-contracts are in compliance with the terms of this Agreement.
- 10.2.2 The Concessionaire shall ensure all rights of the Authority under Clause 38.1 (b) are incorporated in all Agreements/ contracts between Concessionaire and third parties with a specific obligation on the parties to such contracts to enter into novation agreement with the Authority upon exercise of its option by the Authority under said Clause 38.1 (b).

## Article 11 – Development Requirements

### 11.1 Development Requirements

- 11.1.1 Without prejudice to the generality of anything contained in this Agreement and compliance with the Development Requirements set out in Schedule B, the Concessionaire shall inter alia comply with the following in order to achieve the above-mentioned objective:
- 11.1.2 Concessionaire shall, in addition to compliance with Applicable Law, at all times during the Term hereof, undertake the development, operation and maintenance of the Project Assets in accordance with the requirements set forth in **Schedule A** , **Schedule B** , **Schedule C** , **Schedule D** , and **Schedule L** hereof. The Concessionaire shall also use best endeavors to comply with the requirements of Schedules specified in this Clause. Prior to making any application to the State/Central Government Authority in relation to sanction of any plans for construction of Project Assets, the Concessionaire shall be required to get a no-objection in respect of development/layout plans from the Authority. Any subsequent changes to said development/layout plans would also require a no objection certificate from the Authority, which certificate shall not be unreasonably withheld by the Authority. All constructions shall be in accordance with the development plans in respect of which the Authority has issued a no-objection certificate. In the event, the Authority is of the reasonable opinion that the Project Assets developed by Concessionaire do not comply with the requirements specified in **Schedule L** , the Authority shall have a right to issue a written notice to the Concessionaire requiring the Concessionaire to cure the defect and develop the Project Assets as per the requirements specified in **Schedule B** , within the period specified in such notice. Notwithstanding anything set forth herein, the Concessionaire agrees and recognizes that the Concessionaire shall not be entitled to commercially operate an Project asset on Project Site if the same does not conform to the requirements of **Schedule B** . The Parties agree that a no-objection certificate granted by the Authority shall in no event amount to certifying the conformity of the Concessionaire's development layout plans with Applicable Law or discharge the Concessionaire from the requirement of obtaining Applicable Permits. The Authority shall be required to communicate its no-objection or reject the development layout plans within a period of 15 Business Days from the receipt of the development lay-out plans, failing which the Authority shall be deemed to have granted its no-objection with respect to the development / lay-out plans.
- 11.1.3 Any development and/ or construction of any Project Asset on Project Site shall at all times comply with the requirements of **Schedule E** and the Concessionaire shall not make any Project Asset on Project site other than those stipulated in Schedule B. The Concessionaire agrees and recognizes that the Concessionaire shall not be entitled to commercially operate a Project Asset on Project Site if the same does not conform to the requirements of **Schedule B** , and **Schedule C** .

## **Article 12 – Construction of the Project Facilities**

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

Prior to commencement of Construction Works, the Concessionaire shall:

- (a) submit to the Authority and the Independent Engineer its Detailed Project Report, detailed design, drawings, construction methodology, quality assurance procedures, cost estimates and the procurement, engineering and construction time schedule for completion of the project in accordance with the Project Completion Schedule as set forth in **Schedule H** ;
- (b) appoint its representative duly authorized to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, Applicable Laws and Applicable Permits;
- (d) undertake all the statutory approvals or permits required to be taken before the commencement of the Construction works from State/ Central Government Authorities; and
- (e) make its own arrangements for construction and procurement of materials needed for the Project under and in accordance with Applicable Laws and Applicable Permits.

### **12.2 Detailed Project Report**

In respect of the Concessionaire's obligations relating to the Detailed Project Report of the Project as set forth in Schedule-I, the following shall apply:

- (a) The Concessionaire shall, at its cost, charges and expenses, prepare or cause preparation and submit within 60 (sixty) days of the Effective Date, with reasonable promptness the Detailed Project Report, Designs and Drawings for the Project Facilities in such sequence as is consistent with the Project Completion Schedule, 3 (three) copies each of all the documents to the Authority/Independent Engineer for review.
- (b) The DPR shall, inter alia, set out the full details of the developmental activities proposed to be carried out by the Concessionaire for implementation of the Project, proposed order, sequence and method of working, the steps, procedures and processes undertaken and to be undertaken by the Concessionaire, the Project Completion Schedule with the Project Milestones, detailed schedule bar charts / PERT networks with milestone dates, master plan and building plan of the Project, including the site development, proposed construction activities, names of likely Sub-contractors/vendors etc., plans for mobilization of finances, proposed arrangements for operating and managing the Project, the organization chart of the Concessionaire and such other similar details which define and clarify the method and direction of the Concessionaire's plans for the implementation of the Project;
- (c) By submitting the Detailed Project Report, Designs and Drawings for review to the Authority/ Independent Engineer, the Concessionaire shall be deemed to have represented that it has determined and verified that the Detailed Project Report, Designs and Drawings are in conformity with the Scope of the Project, Specifications and Standards, Applicable Laws and Good Industry Practice.
- (d) Within 15 (fifteen) days of the receipt of the Detailed Project Report, Designs and Drawings, the Independent Engineer shall review the same and convey its observations to the

Concessionaire with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards.

- (e) If the aforesaid observations of the Authority/ Independent Engineer indicate that the Detailed Project Report, Designs and Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such documents shall be revised by the Concessionaire and resubmitted to the Authority/ Independent Engineer for review. The Authority/ Independent Engineer shall give its observations, if any, within 21 (twenty-one) days of receipt of the revised documents.
- (f) No review and/or observation of the Authority/ Independent Engineer and/or its failure to review and/or convey its observations on any Drawings shall not relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the Authority be liable for the same in any manner.
- (g) The project development guidelines which may be considered by the Authority with respect to the ecosystem of the project surrounding area shall be incorporated by the Concessionaire.
- (h) Without prejudice to the foregoing provisions of this Clause 12.2, the Concessionaire shall submit to the Authority for its information, its Detailed Project Report, Designs and Drawings. The Authority shall respond within 30 (thirty) days of the receipt of such documents. The Concessionaire will be obliged to make changes, if any, as suggested by the Authority. The provisions of this Clause 12.2 shall apply mutatis mutandis to the review and comments hereunder.
- (i) Within 90 (ninety) days of COD, the Concessionaire shall furnish to the Authority and the Independent Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in CD/ DVD or in such other medium as may be acceptable to the Authority, reflecting the Project/ Project Facilities as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Project Facilities and setback lines, if any, of the buildings and structures forming part of the Project Facilities.
- (j) The Concessionaire shall not be entitled to any extension of time for completing construction or any other relief on account of delay caused due to providing any clarification or in resubmitting the DPR, Designs and Drawings. Provided however the Authority may suitably extend the Construction Period or provide other relief to compensate for any such delay not attributable to the Concessionaire and which has a Material Adverse Effect.
- (k) The Concessionaire shall not change any DPR, Designs and Drawings, specifications and calculations approved by the Independent Engineer and the Authority under this Agreement, without the prior written consent of the Authority.
- (l) The Concessionaire shall obtain sanction to the building plans for the Project Facilities, with necessary designs, plans and specifications, as necessary to commence and undertake construction, from the proper municipal/ local bodies/ State or Central Government departments or Authority, at its own expense.
- (m) At any time during the Concession Period, the Concessionaire shall not revise the DPR, Designs and Drawings, including expansion of existing Project Facilities/ develop additional Project Facilities as permitted under the provisions of this Agreement, without the prior approval of the Authority.

### **12.3 Construction standards and maintenance of the Project**

- 12.3.1 The Concessionaire shall ensure that all contract(s) and arrangement(s) entered into related to the Construction Works shall (to the extent such provisions can be reasonably obtained in the market concerned) include provisions whereby the relevant Contractor warrants that each part of such Works carried out there under shall be fit for its purpose and free from all defects in design, workmanship and materials.
- 12.3.2 In the execution of the Construction Works, the Concessionaire shall ensure coordination amongst and avoidance of conflicts in the working of the Contractors, including all types of suppliers, sub-contractors, agents, advisors and consultants. The Concessionaire shall monitor and supervise the activities of the Contractors, retained by it to fulfill its obligations hereunder, under the terms of their respective contracts.
- 12.3.3 The Concessionaire shall, by itself or through its Contractors, at its cost and risk undertake the development of the Project Site, including land filling, levelling, clearing, landscaping and demarcation and division of the Site etc. for establishment of the Project Facilities, in accordance with the provisions of this Agreement, including the Specifications and Standards and Good Industry Practice. Each of the Project Facilities shall have adequate facilities with respect to water supply, power, entry & exit arrangement, fire safety provisions, etc.
- 12.3.4 The Concessionaire shall at its responsibility arrange for materials such as bricks, cement, steel, aggregates, soil, bituminous and asphalt materials, and any other materials used in undertaking the Construction Works, as well as equipment, machinery, tools and ancillary materials such as shuttering and scaffolding, bearings, joint fillers and similar materials. The Concessionaire shall make arrangements for transport, loading and unloading, stacking and proper storage (including making sheds) for all materials and equipment. The Independent Engineer/Authority shall have the right to inspect and check the quality and quantity of the materials and equipment and their storage in compliance with the terms of this Agreement.
- 12.3.5 The Concessionaire shall organize the Project Site during the period of construction with regard to safety precautions, fire protection, security, transportation, delivery of goods, materials, plant and equipment, control of pollution, maintenance of competent personnel and labor and industrial relations and general site services including, without limitation, access to and on the Site.
- 12.3.6 The Concessionaire shall ensure that the Construction Works shall comprise only materials and goods which shall be of sound quality and which shall have been manufactured and prepared and all workmanship shall be in accordance with the Specifications and Standards and Good Industry Practice and that each part of the Works shall be fit for the purpose for which it is required as stated in or as may be reasonably inferred from such plans.
- 12.3.7 The Concessionaire shall carry out or cause to be carried out the Construction Works with the skill, care and diligence to be expected of appropriately qualified and experienced professional designers, engineers and contractors with experience of work similar in scope and nature to that required under this Agreement. The Concessionaire shall design, engineer and execute the construction and implementation of the Construction Works using the best design and engineering principles and practices.

12.3.8 The Concessionaire shall ensure that in fulfilling its obligations hereunder, it shall procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for the designs, software, materials, methods, processes and systems used or incorporated into the Works undertaken by it and indemnify and keep indemnified the Authority and its advisors and consultants against all costs, damages, liabilities or consequences arising out of any breach by the Concessionaire in this behalf.

#### **12.4 Construction Commencement & Construction Works**

12.4.1 On or after the Appointed Date, the Concessionaire shall undertake construction of the Project as specified in **Schedule B** and **Schedule C** , and in conformity with the specifications and standards set forth in **Schedule D** .

12.4.2 The Concessionaire shall construct the Project in accordance with the Project Completion Schedule set forth in **Schedule H** . In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Project Milestone in **Schedule H** , unless such failure has occurred due to Force Majeure or for reasons attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Construction Performance Security for delay of each day until such Project Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Date are extended in accordance with the provisions of this Agreement, the dates set forth in **Schedule H** shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if **Schedule H** has been amended as above; provided further that in the event COD is achieved on or before the Scheduled Date, the Damages paid under this Clause 12.4.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.4.2 shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.

## **Article 13 – Monitoring and Supervision of Construction Works**

### **13.1 Monthly progress reports**

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

### **13.2 Inspection**

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

### **13.3 Delays during construction**

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

### **13.4 Tests**

13.4.1 For determining that the Construction Works conform to the Standards and Specifications and capacities as per Schedule B, the Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at such time and frequency and in such manner as may be specified by the Independent Engineer from time to time, in accordance with Good Industry Practice for quality assurance. The Concessionaire shall, with due diligence, carry out or cause to be carried out all the tests in accordance with the instructions of the Independent Engineer and furnish the results thereof to the Independent Engineer.

13.4.2 In the event that results of any tests conducted under this Clause 13.4.2 establish any defects or deficiencies in the Construction Works, the Concessionaire shall carry out remedial measures and furnish a report to the Independent Engineer in this behalf. The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests to determine that such remedial measures have brought the Construction Works into compliance with the Standards and Specifications and capacities as per **Schedule B**, and the procedure set forth in this Clause 13.4.2 shall be repeated until such Construction Works conform to stipulated requirements. For the avoidance of doubt, it is agreed that tests pursuant to this Clause 13.4.2 shall be undertaken in addition to and independent of the tests that shall be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice. It is also agreed that a copy of the results of such tests shall be sent by the Concessionaire to the Independent Engineer forthwith.

### 13.5 Suspension of unsafe Construction Works

- 13.5.1 Upon recommendation of the Independent Engineer to this effect, the Authority may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the Authority, such work threatens the safety of the users or people.
- 13.5.2 The Concessionaire shall, pursuant to the notice under Clause 13.5.1, suspend the Construction Works or any part thereof for such time and in such manner as may be specified by the Authority and thereupon carry out remedial measures to secure the safety of suspended works and the users. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures forthwith and make a report to the Authority recommending whether or not the Suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Engineer, the Authority shall either revoke such Suspension or instruct the Concessionaire to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 13.4 shall be repeated until the Suspension hereunder is revoked.
- 13.5.3 Subject to the provisions of Clause 25.7, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the period of Suspension (the "**Preservation Costs**") shall be borne by the Concessionaire; If the Suspension pursuant to Sub-Clause 13.5.2 above, is caused by:
- (a) any reason other than default or breach of this Agreement by the Concessionaire including breach of any of the obligations of the Concessionaire under this Agreement, the Preservation Costs shall be borne by the Concessionaire; and
  - (b) reason of any Force Majeure Event, the Preservation Costs shall be borne by the Concessionaire save and except to the extent otherwise expressly provided in **Article 25**.
- 13.5.4 If Suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates set forth in the Project Completion Schedule to which the Concessionaire is reasonably entitled, and shall notify the Authority accordingly whereupon the Authority shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Engineer.

## Article 14 – Completion

- 14.1 Upon the completion of the design, development, construction and other activities, but prior to seeking completion certificate from Authority, in relation to the Project, in accordance with the terms of this Agreement, as may be required to bring the Project into commercial operation, the Concessionaire shall intimate Independent Engineer in writing, together with all Applicable Permits required for the purposes of commencement of commercial operations (the "**Completion Notice**"). Independent Engineer shall, within 15 (fifteen) Business Days of the receipt of the Completion Notice, inspect the Project to ascertain its compliance with Applicable Laws and the terms of this Agreement including but not limited to **Schedule B** , **Schedule C** , and **Schedule D** .
- 14.2 In the event that the Project complies with this Agreement including but not limited to **Schedule B** , **Schedule C** , and **Schedule D** , the Independent Engineer shall submit a compliance report to the Authority for information. The Authority may, if required, conduct a joint inspection of the Project Asset with the Independent Engineer. On finding the aforesaid report satisfactory, the Authority shall direct the Independent Engineer to issue a notice to the Concessionaire (the "**Commencement Notice**").
- If the Project does not comply with the Applicable Laws and/or this Agreement including but not limited to **Schedule B** , **Schedule C** , and **Schedule D** , the Independent Engineer shall share a copy of a non-compliance report to the Authority and Concessionaire for information, indicating the deviations and requiring the Concessionaire to make such alterations to the Project as would be required to ensure its conformity. Upon receipt of report, the Authority may, if required, conduct a joint inspection with Independent Engineer. The Authority on finding the aforesaid report correct, shall direct the Independent Engineer to issue a notice to the Concessionaire, to make such alterations to the Project to ensure its conformity with the Applicable Laws and/or this Agreement including but not limited to **Schedule B** , **Schedule C** , and **Schedule D** (the "**Cure Notice**").
- 14.3 In the event that Independent Engineer issues a Cure Notice in accordance with the Clause 14.2, the Concessionaire shall undertake the alterations, that are required in terms of the Cure Notice, provided that such alterations are permissible as per Applicable Laws, where after the Concessionaire may issue another Completion Notice in accordance with Clause 14.1.
- 14.4 Upon receipt of a Commencement Notice from Independent Engineer and any other Applicable Permits, the Concessionaire may commence commercial operation of the Project (the "**COD**" or "**Commercial Operation Date**").
- 14.5 The Independent Engineer shall issue either the Commencement Notice or the Cure Notice within fifteen (15) days of the inspection of the Project, pursuant to the receipt of the Completion Notice. If Independent Engineer fails to issue either a Commencement Notice or a Cure Notice within the aforesaid period, Independent Engineer shall be deemed to have granted a Commencement Notice in respect of the Project.
- 14.6 The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the Project Completion Schedule set forth in **Schedule H** and other provisions of this Agreement on a date not later than 1095 (one thousand ninety-five) days from the Appointed Date (the "**Scheduled Project Completion Date**").
- 14.7 If the COD is not achieved prior to the 61st day of the Scheduled Completion Date for any reason other than conditions constituting Force Majeure or for reasons attributable to Authority or any Governmental Agency, the Concessionaire shall pay to Authority as Damages for delay in the achievement of the COD, an amount calculated at the rate of 0.1% (point one per cent) of the Total Project Cost per week or part thereof.

- 14.8 In the event that the COD is not achieved within 180 (one hundred and eighty days) days of the Scheduled Completion Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, the Authority shall be entitled to terminate this Agreement.
- 14.9 Authority shall not be responsible for any loss of business, profit, goodwill or any other loss caused to the Concessionaire due to a delay in the commencement of commercial operations of the Project Asset on account of issue of a Cure Notice by Independent Engineer.

## Article 15 – Change of Scope

### 15.1 Change of Scope

15.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the Scope of the Project as contemplated by this Agreement or arise due to the change in development controls as defined in **Schedule B** (the “**Change of Scope**”). Any such Change of Scope shall be made in accordance with the provisions of this **Article 15** and the costs thereof shall be borne by the Concessionaire.

15.1.2 If the Concessionaire proposes at any time that a Change of Scope is required for providing safer and improved services or due to the change in development controls, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings therefore in accordance with this **Article 15** or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope. In case of acceptance of the proposal, all the cost and expenses shall be borne by the Concessionaire for the Change of Scope.

### 15.2 Procedure for Change of Scope initiated by Authority or Concessionaire

15.2.1 In the event of the Authority determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the “**Change of Scope Notice**”).

15.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Authority such information as is necessary, together with preliminary Documentation in support of:

- (a) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period; and
- (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof.

15.2.3 In the event of the Concessionaire proposes that a Change of Scope is required, it shall submit to the Authority a proposal with preliminary Drawings and other Documentation including information like implementation time and cost for consideration.

15.2.4 Upon receipt of information set forth in Clause 15.2.1 and 15.2.3, if the Authority decides to proceed with the Change of Scope, it shall convey its preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time for implementation thereof. Upon reaching an agreement, the Authority shall issue an order (the “**Change of Scope Order**”) requiring the Concessionaire to proceed with the performance thereof.

## Article 16 – Operation and Maintenance

### 16.1 O&M obligations of the Concessionaire

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

- (a) permitting safe, smooth and uninterrupted use of Project Facilities during normal operating conditions;
- (b) collecting and appropriating the revenues;
- (c) minimizing disruption in the event of accidents or other incidents-affecting the safety and use of the Project Facilities by providing a rapid and effective response and maintaining liaison with emergency services of the State;
- (d) carrying out periodic preventive maintenance of the Project;
- (e) undertaking routine maintenance including prompt repairs of cracks, joints, drains, markings, lighting, signs and other control devices;
- (f) undertaking major maintenance such as repairs to structures, and refurbishment of parking system and other equipment;
- (g) preventing, with the assistance of concerned law enforcement agencies, any unauthorized use of the Project;
- (h) preventing, with the assistance of the concerned law enforcement agencies, any encroachments on the Project Site;
- (i) protection of the environment and provision of equipment and materials therefor;
- (j) operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project;
- (k) complying with Safety Requirements in accordance with **Article 17**;
- (l) make all necessary payments in time bound manner to the Authority such as Concession Fee or any other payment to comply with the provisions of this Agreement;
- (m) make all necessary/ applicable and time bound utilities payments and taxes to all Central and State Government utilities;

16.1.2 The Concessionaire shall remove promptly from the Project Site all surplus construction machinery and materials, waste materials (including hazardous materials and wastewater), rubbish, debris (including, without limitation, accident debris) and keep the Project in a clean, tidy and orderly condition, and in conformity with Applicable Laws, Applicable Permits and Good Industry Practice.

## 16.2 Maintenance requirements

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

## 16.3 Maintenance Manual

16.3.1 The Concessionaire shall in consultation with the Independent engineer prepare not later than 180 (one hundred and eighty) days before the Scheduled Project Completion Date, the repair and maintenance manual (the “**Maintenance Manual**”) for the regular, periodic and preventive maintenance, 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 and the minimum Maintenance Requirements set forth in **Schedule L**. The Concessionaire shall supply, at least two months before the COD, 2 (two) copies of the Maintenance Manual to Authority and Independent Engineer.

The Maintenance Manual shall be revised and updated once every 3 (three) years and the provisions of this Clause 16.3.1 shall apply, mutatis mutandis, to such revision.

16.3.2 Without prejudice to the provision of Clause 16.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Assets and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Assets, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

## 16.4 Maintenance Programme

16.4.1 On or before COD and not later than forty-five (45) days before the beginning of each Accounting Year, the Concessionaire, shall provide to Authority, its proposed Programme of preventive and other scheduled maintenance of the Project subject to the minimum Maintenance Requirements set forth in Maintenance Manual and in **Schedule L** 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:

- (a) intervals and procedures for the carrying out of inspection of all elements of the Project;
- (b) criteria to be adopted for deciding maintenance needs;
- (c) preventive maintenance schedule;
- (d) intervals at which the Concessionaire shall carry out periodic maintenance;
- (e) intervals for major maintenance and the scope thereof; and
- (f) arrangements and procedures for carrying out periodic maintenance.

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

16.4.3 The Concessionaire may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 16.4.1 and 16.4.2 shall apply mutatis mutandis to such modifications.

## **16.5 De-commissioning due to Emergency**

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

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

## **16.6 Project/ Project facilities closure**

16.6.1 Save and except as provided in Clause 16.5, the Concessionaire shall not close any part of the Project/Project facilities for undertaking maintenance or repair works, not forming part of the Maintenance Programme, except with the prior written approval of the Authority. Such approval shall be sought by the Concessionaire through a written request to be made to the Authority, at least 7 (seven) days before the proposed closure and shall be accompanied by particulars thereof. Within 3 (three) days of receiving such request, the Authority shall grant permission with such modifications as it may deem reasonable and necessary in conformity with the Maintenance Manual and Maintenance Programme.

16.6.2 Upon receiving the permission pursuant to Clause 16.6.1, the Concessionaire shall be entitled to close the designated facility for the period specified therein.

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

16.7.1 In the event the Concessionaire does not maintain and/ or repair the Project or a part thereof up to and in accordance with the Specifications and Standards and/ or in accordance with the Maintenance Programme or the Maintenance Manual, and shall have failed to commence remedial works within 15 (fifteen) days of receipt of notice in this behalf from Authority, or the O&M Inspection Report, as the case may be, Authority shall, without prejudice to its rights under this Agreement, including Termination thereof, be entitled to undertake the repair and maintenance of the Project at the risk and cost of the Concessionaire and to recover the same from the Concessionaire. In addition to recovery of the aforesaid cost of repair and maintenance by the Authority, a sum equal to 25% (twenty-five per cent) of such cost shall also be recovered by the Authority from the Concessionaire as Damages. The Authority shall have the right and the Concessionaire hereby expressly grants to the Authority the right to recover the same directly from the Escrow Account and for that purpose the Concessionaire hereby expressly authorizes Authority and hereby gives irrevocable instructions to the Escrow

Bank to make payment from the Escrow Account in accordance with the instructions of Authority under this Clause.

16.7.2 In the event the Authority does not exercise its option to undertake the required repair and maintenance after expiry of the 15 (fifteen) days period set forth in 16.7.1, it shall recover Damages from the Concessionaire for default in operating and maintaining the Project Site in conformity with this Agreement. Such Damages shall be payable after the aforesaid period of 15 (fifteen) days and until the default is cured. The amount of Damages shall be calculated for each day of default at the higher of the following, namely (a) INR 10,000 (Indian Rupees Ten thousand only), and (b) 0.1% (zero point one per cent) of the cost of such repair as estimated by the Authority. Recovery of such Damages shall be without prejudice to the rights of the Authority under this Agreement, including Termination thereof.

16.7.3 Damages set forth in Clause 16.7 may be assessed and specified forthwith by the Authority; provided that the Authority may, in its discretion, demand a smaller sum as Damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder. The Concessionaire shall pay such Damages forthwith and in the event that it contests such Damages, the Dispute Resolution Procedure shall apply.

16.7.4 If in the reasonable opinion of the Authority, the Concessionaire is in Material Breach of its obligations under this Agreement and, in particular, the Maintenance Requirements, and such breach is causing or likely to cause material hardship or danger to the people, the Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Concessionaire to take reasonable measures immediately for rectifying or removing such hardship or danger, as the case may be.

## **16.8 Restoration of loss or damage**

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

## **16.9 Modifications to the Project**

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

## **16.10 Excuse from performance of obligations**

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

- (a) an event of Force Majeure; or
- (b) compliance with a request from the Authority or the directions of any Government Instrumentality, the effect of which is to close all or any part of the Project;

provided, that any such non-availability and particulars thereof shall be notified by the Concessionaire to the Authority without any delay.

## **Article 17 – Safety Requirements**

### **17.1 Safety Requirements**

17.1.1 The Concessionaire shall comply with the provisions of this Agreement, Applicable Laws and Applicable Permits and conform to Good Industry Practice for securing the safety of the persons present at the Project site. In particular, the Concessionaire shall develop, implement and administer a surveillance and safety Programme for providing a safe environment on or about the Project and shall comply with the safety requirements set forth in **Schedule M** (the “**Safety Requirements**”).

17.1.2 The Authority shall carry out the safety audit of the Project in accordance with the Safety Requirements, and shall take all other actions necessary for securing compliance with the Safety Requirements.

### **17.2 Expenditure on Safety Requirements**

17.2.1 All costs and expenses arising out of or relating to Safety Requirements shall be borne by the Concessionaire.

## **Article 18 – Monitoring of Operation and Maintenance**

### **18.1 Monthly status reports**

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

18.1.2 During Operation Period, the Concessionaire shall, no later than 10 (ten) days after the close of each month, furnish to the Authority a monthly management report which shall be a summary of:

- (a) key performance indicators such as poppy husk processed and SRM/ Alkaloids/ Crude form of Alkaloids produced along with an analysis of reasons for failures, if any, and proposals to remedy the same;
- (b) key operational hurdles and deliverables expected in the succeeding month along with strategies for addressing the same and for otherwise improving the Project's operational performance; and
- (c) key financial parameters for the month, as benchmarked against the monthly budget, the reasons for shortfall, if any, and proposals to remedy the same.

### **18.2 Inspection**

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

### **18.3 Tests**

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

### **18.4 Remedial measures**

18.4.1 The Concessionaire shall repair or rectify the defects or deficiencies, if any, set forth in the O&M Inspection Report or in the test results referred to in Clause 18.3 and furnish a report in respect thereof to the Authority within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Concessionaire shall submit progress reports of the repair works once every week until such works are completed in conformity with this Agreement.

18.4.2 The Authority shall require the Concessionaire to carry out or cause to be carried out Tests, at its own cost, to determine that such remedial measures have brought the Project into compliance with the Maintenance Requirements and the procedure set forth in this Clause 18.4 shall be repeated until the Project conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the Authority shall be entitled to recover Damages from the Concessionaire under and in accordance with the provisions of Clause 16.7.

### **18.5 Reports of unusual occurrence**

The Concessionaire shall send to the Authority, by facsimile or e-mail, a report stating accidents and unusual occurrences on the Project relating to the safety and security of the persons at Site, within 3 (three) days of the closing of each month. For the purposes of this Clause 18.5, accidents and unusual occurrences on the Project shall include:

- (a) death or injury to any person;
- (b) damaged or dislodged fixed equipment;
- (c) any damage or obstruction on the Project, which results in slow down of the services being provided by the Concessionaire;
- (d) disablement of any equipment during operation;
- (e) smoke or fire or flooding of the Project Site; and
- (f) such other relevant information as may be required by the Authority.

### **18.6 ISO certification**

18.6.1 The Concessionaire shall, within 6 (six) months from COD, achieve and thereafter maintain throughout the Concession Period, the applicable ISO certifications, or a substitute thereof for all the facilities at the Project Facility, and shall provide a certified copy thereof to the Authority forthwith.

18.6.2 In the event of default in obtaining the certifications specified in Clause 18.6.1, the Concessionaire shall, within 15 (fifteen) days thereof, submit to the Authority an action plan that sets out the actions proposed to be taken by the Concessionaire for rectifying its deficiencies and obtaining such certifications for all facilities of the Project Facility.

18.6.3 If the period of default in obtaining the ISO certifications under this Clause 18.6 shall exceed a continuous period of 3 (three) months, the Concessionaire shall thereafter pay Damages to the Authority in an amount equal to 0.5% (zero point five per cent) of the Annual Procession Fee for respective year, for every 1 (one) month of default beyond the aforesaid period of 3 (three) months.

## **Article 19 – Independent Engineer**

### **19.1 Appointment of Independent Engineer**

- 19.1.1 The Authority shall appoint a consulting engineering firm or body corporate selected by the Authority in accordance with the selection process set forth in **Schedule N** .
- 19.1.2 The appointment of the Independent engineer pursuant to Clause 19.1.1 shall be for a period of 3 (three) years from the date of its appointment. The date of such appointment shall be no later than 120 (one hundred twenty) days from the date of this Agreement.

### **19.2 Duties and functions**

- 19.2.1 The Independent Engineer shall discharge its duties and functions substantially in accordance with the terms of reference set forth in **Schedule O** .
- 19.2.2 The Independent Engineer shall submit regular periodic reports (at least once every month) to the Authority in respect of its duties and functions set forth in **Schedule O** .
- 19.2.3 A true copy of all communications sent by the Authority to the Independent Engineer and by the Independent Engineer to the Authority shall be sent forthwith by the Independent Engineer to the Concessionaire.
- 19.2.4 A true copy of all communications sent by the Independent Engineer to the Concessionaire and by the Concessionaire to the Independent Engineer shall be sent forthwith by the Independent Engineer to the Authority.

### **19.3 Remuneration**

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

### **19.4 Termination of Appointment**

- 19.4.1 The Authority may, in its discretion, terminate the appointment of the Independent Engineer at any time, but only after appointment of another Independent Engineer in accordance with Clause 19.1.
- 19.4.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Authority and seek termination of the appointment of the Independent Engineer. Upon receipt of such representation, the Authority shall hold a tripartite meeting with the Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the Authority and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the appointment of the Independent Engineer is terminated hereunder, the Authority shall appoint forthwith another Independent Engineer in accordance with Clause 19.1.
- 19.4.3 If either party disputes any advice, instruction or award of the Independent Engineer, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure.

## **19.5 Authorized signatories**

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

## **19.6 Dispute resolution**

19.6.1 Subject to the Dispute resolution mechanism contained herein where a technical issue arises in which the two parties have a different view, then either party can nominate suitable technical experts to review the process and the other party selects one of these experts. Each party would brief the expert in writing on the issue to be addressed and would provide a copy of the briefing to the other party. The two Parties would agree with the expert on the time frame to review and report on the matter. The cost of the review will be borne equally by the two Parties.

## **Part IV – Financial Covenants**

## **Article 20 – Financial Close**

### **20.1 Financial Close**

20.1.1 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire covenants with Authority that it shall achieve Financial Close within 180 (one hundred eighty) days from the Effective Date. If the Concessionaire shall fail to achieve Financial Close within the said 180 (one hundred eighty) days period, the Concessionaire shall be entitled to a further period of 90 (ninety) days subject to an advance weekly payment by the Concessionaire to Authority of a sum equal to 0.05% of Construction Performance Security per day for any delay beyond the said 180 (one hundred eighty) day period, as Damages on account of such delay in achieving Financial Close within the said 180 (one hundred eighty) day period by the Concessionaire.

Provided that the Damages specified herein shall be payable every day in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. For the avoidance of doubt, the Damages payable hereunder by the Concessionaire shall be in addition to the Damages, if any, due and payable under the provisions of Clause 4.2.

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

### **20.2 Termination due to failure to achieve Financial Close**

20.2.1 Notwithstanding anything to the contrary contained in this Agreement, Authority shall be entitled to terminate this Agreement forthwith, without being liable in any manner whatsoever to the Concessionaire, by a communication in writing to the Concessionaire pursuant to Clause 28.1 if the Concessionaire shall have failed to pay in advance the Damages to Authority under and in accordance with Clause 19.1.1 above.

20.2.2 Notwithstanding anything to the contrary contained in this Agreement, if the Financial Close shall not occur within 270 (two hundred seventy) days from Effective Date as set forth in Clause 19.1.1 above, all rights, privileges, claims and entitlements, if any, of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual Agreement of the Parties.

20.2.3 Upon Termination of this Agreement under Clauses 19.1.1 and 19.2.1, Authority shall be entitled to encash the Bid Security or the Performance Security, as the case may be, and appropriate the proceeds thereof as Damages.

20.2.4 If Financial Close has not occurred solely as a result of the Authority being in default of any of its obligations hereunder, specifically Clause 4.1.2, the Authority shall, upon Termination, forthwith return the Performance Security to the Concessionaire.

## Article 21 – Processing Fee

### 21.1 Processing Fee

21.1.1 Subject to the provisions of this Agreement, the Concessionaire upon achieving COD for the Project and Completion Certificate having been issued, and in consideration of the Concessionaire performing and discharging its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, the Authority shall pay to the Concessionaire the Processing Fee (the “Processing Fee”) as per provisions of this Agreement from the COD till the Terminal Date or the Transfer Date whichever is earlier.

21.1.2 The Processing Fee payable to the Concessionaire for processing of the Poppy Husk and extraction of SRM/ Alkaloids/Crude form of Alkaloids that shall be supplied to the Concessionaire every year during the Operation Period.

21.1.3 In the event, COD is earlier than the Scheduled COD, the Authority may, at its sole discretion, start supplying the Poppy Husk to the Concessionaire to process and produce SRM/ Alkaloids/Crude form of Alkaloids against payment of the Processing Fee.

21.1.4 The Processing Fee as mentioned in **Schedule G**, shall be payable by the Authority to the Concessionaire shall have the following components to be calculated:

- a) Fixed Charge,
- b) Variable Charge, and
- c) Supplementary Charge.

21.1.5 Goods and Services Tax (GST) shall be payable on the Processing Fee computed by the Authority, as applicable under prevalent GST Act and Rules; provided the Concessionaire is having a valid GST registration.

### 21.2 Payment of the Processing Fee

The payment mechanism that shall be followed by the Authority is as follows:

21.2.1 The Processing Fee payable every Accounting Year by the Authority shall be computed after giving due consideration to the following aspects:

- Quantity of Poppy Husk supplied;
- Quantity of supplied Poppy Husk processed; and
- Extraction Efficiency Achieved, when compared to the Potential Extraction Efficiency ascertained by the Independent Testing Laboratory.

21.2.2 For any quantity processed in the same year in which it is supplied, the Authority shall pay the Processing Fee through Fixed Component and Variable Component taking into consideration the aspects as stipulated in Sub-clause above. For any arrear quantity, the payment shall be made according to relevant provisions in the Agreement relating to Supplementary Charges.

21.2.3 The payment towards the Fixed Charge to be made to the Concessionaire by the Authority shall be computed at the rate of 60% of the Processing Fee as mentioned in

**Schedule G** . The Fixed Component shall be payable towards the recovering of the all the fixed costs deployed by the Concessionaire in both asset development and project operation. The fixed component of the processing fee shall be payable to the Concessionaire for the quantity processed during the Accounting Year as a part of the Minimum Business Guarantee. Any additional quantity supplied in excess of the Minimum Business Guarantee shall not be liable for payment of the Fixed Charge.

21.2.4 The payment towards the Variable Charge to be made to the Concessionaire by the Authority shall be computed at the rate of 40% of the Processing Fee as mentioned in **Schedule G** . The Variable Component shall be payable towards the recovering of the operational costs incurred towards processing of the Poppy Husk and produce SRM/ Alkaloids/ Crude form of Alkaloids by the Concessionaire, including any other charges/ applicable taxes/ levies, etc. applicable towards operations, maintenance and management of the Project. For computation of amount payable proportionate to Variable Component during the Concession Period, quantity of Poppy Husk processed during the respective Accounting Year shall be considered.

21.2.5 The payment towards the Supplementary Charge shall be made to the Concessionaire by the Authority for the quantity supplied and not processed in the preceding Accounting Year. The same shall be computed at the rate of 40% of the Processing Fee.

21.2.6 The Authority shall take into consideration payment of taxation only limited to applicable GST on the Processing Fee as per prevailing rates at time of raising demand/ invoice by the Concessionaire.

21.2.7 The Authority shall make the quarterly payment towards Processing Fee upon the Concessionaire submitting the demand invoices within 45 (forty five) working days after completion of a quarter period, along with all the necessary supporting documentation.

### **21.3 Computation of Processing Fee**

21.3.1 For computation of Processing Fee payable in each Accounting Year on quarterly basis, the aspects as mentioned under Clause 21.2.

21.3.2 The Key Performance Indicators (KPIs) for evaluating the performance of the Concessionaire, are linked to the Concessionaire's ability to extract the quantity of alkaloids present in the Poppy Husk supplied. (the "**Extraction Efficiency**").

21.3.3 For computing the Extraction Efficiency, following shall be considered:

- After receipt of the Poppy Husk to the Concessionaire, batch-wise sampling, based on the district of supply of the lot, shall be undertaken to ascertain the quality of alkaloids that are present in the raw material. (the "**Potential Extraction Efficiency**").
- Similarly, the SRM/ Alkaloids/ Crude form of Alkaloids produced by the Concessionaire shall be tested before handed over to the Authority to evaluate actual quantity of alkaloids that can be extracted from the SRM/ Alkaloids/ Crude form of Alkaloids (the "**Extraction Efficiency Achieved**").
- A baseline extraction efficiency figure of 70% has been established by the Authority. A neutral band of 70% - 75% has been established. For every 1% extraction efficiency achieved in excess of 75%, 0.5% of the processing fee shall be increased while calculating the payout to the Concessionaire, up to 10% of the Processing Fee. Similarly, in case the actual extraction efficiency achieved is lesser than 70%, for each 1% that the quantity deviates from the baseline, 0.5% of the processing fee shall be

decreased while calculating the payout to the Concessionaire, up to 10% of the Processing Fee. If the extraction efficiency achieved is lower than 50%, then 50% of the Processing Fee shall be decreased while calculating the payout to the Concessionaire.

#### **21.4 Escalation of Processing Fee**

21.4.1 The Processing Fee quoted shall be considered for making payment for the first Accounting Year post COD, and no escalation shall be applicable for first Accounting Year (Base Fee). For every year post-the first Accounting Year, the Processing Fee shall be escalated by the WPI as on the first day of the respective Accounting Year.

#### **21.5 Penalty Levy and Event of Concessionaire Default**

21.5.1 In any Accounting Year, if the Concessionaire processes quantity of Poppy Husk less than the quantity of the Poppy Husk supplied during the respective Accounting Year; in that case, penalty equivalent to 05% (five per cent) of Fixed Component of the Processing Fee proportionate to quantity not processed (the “**Deficient Quantity**” shall be levied by the Authority and recovered from invoice of immediately succeeding quarter. Such Deficient Quantity shall be liable for immediate processing in the next Accounting Year failure to process such quantity by the Concessionaire shall attract additional levy of Penalty as deemed appropriate by the Authority. Such quantity when processed subsequently shall only be liable to attract the Variable Charge.

21.5.2 Following shall be deemed to be event of Concessionaire default and termination of this Agreement:

- If the Extraction Efficiency Achieved by the Concessionaire is less than 50%, in any 02 (two) quarters in an Accounting Year, and/ or
- If for two consecutive Accounting Years, if the Concessionaire processed less quantity of the Poppy Husk than the supplied quantity, where such deviation is greater than 20% of the Minimum Business Guarantee.

#### **21.6 Mode of Payment**

21.6.1 The Concessionaire hereby expressly authorises Authority to pay the Processing Fee, including any reduction or adjustments, Termination Payment and any other payment which becomes payable by the Authority to the Concessionaire under this Agreement directly by the credit to the Designated Bank Account through its Account Bank as per mechanism stipulated in Clause 21.12. The Authority shall to the extent of the payment so made be relieved and discharged of all its obligations in respect of such payments under this Agreement.

21.6.2 Unless otherwise provided in this Agreement, the Invoices shall be payable within 30 (thirty) working days from the date of submission of the invoice to the Authority under an acknowledgement (the “**Payment Due Date**”).

#### **21.7 Disputed Amounts**

21.7.1 If, within 21 (twenty one) days of the submission of an invoice ,the Authority does not raise any dispute, in writing, on the submitted invoice, the invoice shall be considered as being accurate, final and binding. In the event, the Authority raises any dispute on an invoice, it shall specify the specific parts where it has objections (the “**Disputed**

**Amounts**). The portion payable as per the Invoice other than the Disputed Amount shall be the undisputed amounts (the "**Undisputed Amounts**"). The Authority shall advise the Account Bank of the Disputed Amounts.

21.7.2 The Authority through the Account Bank shall pay the Undisputed Amounts of invoice on or before the Payment Due Date.

21.7.3 If the parties do not, within 30 (thirty) working days, of the communication of dispute in writing, resolve any dispute arising under this Clause 21.8, either Party may refer the matter for Dispute Resolution as set out in Article 35.

21.7.4 In the event the Dispute Amounts are settled in favour of the Concessionaire, the Authority shall additionally pay interest to the Concessionaire at the rate of interest equal to rate of interest applicable on fixed deposit of 90 (ninety) days offered by the State Bank of India (the "**Reference Rate**"). The interest payable under this clause shall be calculated from the Payment Due Date to actual payment date.

## 21.8 Delay in Payment

21.8.1 If payment of Undisputed Amounts of an invoice is not made by the Authority and/or Account Bank into the Designated Bank Account of the Concessionaire on or before the close of business on the Payment Due Date, a delayed payment charge on the unpaid payable amount due, for each day from the Payment Due Date of the Invoice till date of actual payment thereof, shall be payable at the rate of interest equal to rate of interest applicable on fixed deposit of 90 (ninety) days offered by the State Bank of India (the "**Reference Rate**"). Subject to Clause 21.7, Authority's failure to pay full payable amount (other than disputed amounts) of an invoice within 30 (thirty) working days of the Payment Due Date, shall constitute, a Material Breach of this Agreement by the Authority.

21.8.2 The non-payment of the disputed amount, as per Clause 21.7, shall not amount to a breach by the Authority under this Agreement.

## 21.9 Right to set-off

21.9.1 The Authority retains the right to set-off any amount owed to it by the Concessionaire under this Agreement which has fallen due and payable against any amount due to the Concessionaire under this Agreement.

## 21.10 Payment Security Mechanism

21.10.1 In order to assure payment of the Authority's obligation to the Concessionaire under this Agreement, the Authority shall, prior to the COD, establish with .....<sup>6</sup> ("Account Bank") a no lien bank account with revolving cash-credit limit of a sum equivalent to one quarter of estimated annual Processing Fee as applicable for the relevant Accounting Year and authorise the Account Bank to issue payment to the Concessionaire for unpaid Undisputed Amounts of invoices raised by the Concessionaire in respect of the Project built under this Agreement.

21.10.2 Upon the presentation of an unpaid invoice, the Account Bank shall release to the Concessionaire on the Payment Due Date Undisputed Amounts. The amounts under

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<sup>6</sup> A scheduled Bank which is agreeable to extend such facility to the Authority

this Clause 21.10.2 shall be released directly into the Designated Bank Account of the Concessionaire with an advice by the Account Bank to both the Parties for such activity.

21.10.3 The Authority undertakes not to create any charge or encumbrance on the in effect Performance Security Deposit and to clear the dues of the Account Bank for the Performance Security Deposit such that the Performance Security Deposit is adequately maintained.

21.10.4 The administrative charge by the Account Bank shall be borne equally between the Parties and shall be duly deducted from amounts released by the Account Bank.

#### **21.11 Security Creation by Concessionaire**

21.11.1 The Authority hereby acknowledges that the Concessionaire shall, without increasing the financial liabilities as contemplated by the Authority under this Agreement, have the right to undertake and implement such financial engineering, structuring and creation of security in relation to the flow of receivables due from the Authority under this Agreement, as it may consider necessary in order to effectively finance the Project and the provision of Services. The Authority hereby undertake to take, on a best efforts basis, such actions as may be necessary in order for the Concessionaire to create a valid and enforceable obligations, arrangements and security and not to impose or create any restrictions in relation thereto.

#### **21.12 Escrow mechanism**

21.12.1 The Concessionaire shall, prior to COD, give an irrevocable standing instruction to the Bank, where the Designated Bank Account is established (should be with Scheduled Bank), to make payments towards due and payable amounts first in respect of statutory dues and then in respect of dues to the Lenders in priority to all other payments. The Authority or its Account Bank shall make the payment of all due and payable amounts to the Concessionaire into the Designated Bank Account in accordance with clause 21.5. The Concessionaire shall, in advance, advise the Bank on the amounts payable along with other supporting documents as required.

## Article 22 – Escrow Account

### 22.1 Escrow Account

22.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank, acceptable to the Authority (the “**Escrow Bank**”) and all funds constituting the Financing Package for meeting the Total Project Cost shall be credited to such Escrow Account.

22.1.2 The nature and scope of the Escrow Account are fully described in the Agreement (the “**Escrow Agreement**”) to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Senior Lenders through the Lenders’ Representative, which shall be substantially in the form set forth in **Schedule Q** .

### 22.2 Deposits into Escrow Account

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

- (a) all funds constituting the Financial Package;
- (b) all revenue from or in respect of the Project, including the proceeds of any rentals, deposits, capital receipts or insurance claims; and
- (c) all payments by the Authority, after deduction of any outstanding payments due to the Authority;

provided that the Senior Lenders may make direct disbursements to the EPC Contractor(s) in accordance with the express provisions contained in this behalf in the Financing Agreements.

### 22.3 Withdrawals during Concession Period

22.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) all Concession Fee and other payment due and payable to the Authority;
- (c) all payments relating to construction of the Project, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (d) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (e) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;

- (g) all payments, interests and Damages certified by the Authority as due and payable to it by the Concessionaire;
- (h) monthly proportionate provision of Debt Service payments due in an Accounting Year in respect of Subordinated Debt;
- (i) any reserve requirements set forth in the Financing Agreements; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire.

22.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 22.3.1, except with the prior written approval of the Authority.

#### **22.4 Withdrawals upon Termination**

22.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Escrow Account shall, upon Termination, be appropriated in the following order:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) all Concession Fee and other payment due and payable to Authority;
- (c) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire;
- (e) retention and payments relating to the liability for defects and deficiencies set forth in **Article 30**;
- (f) outstanding Subordinated Debt;
- (g) incurred or accrued O&M Expenses;
- (h) any other payments required to be made under this Agreement; and
- (i) balance, if any, in accordance with the instructions of the Concessionaire;

provided that no appropriations shall be made under Sub-clause (i) of this Clause 22.4.1 until a Vesting Certificate has been issued by the Authority under the provisions of **Article 29**.

22.4.2 The provisions of this **Article 22** and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 22.4.1 have been discharged.

## **Article 23 – Insurance**

### **23.1 Insurance during Concession Period**

#### **23.1.1 Insurance during Construction Period**

- (a) The Concessionaire shall effect and maintain at its own cost, during the Construction Period and the Operation Period, such insurances for such maximum sums as may be required under the Financing Agreements, and Applicable Laws, and such insurances as may be necessary or prudent in accordance with Good Industry Practice. The Concessionaire shall also effect and maintain such insurances as may be necessary for mitigating the risks that may devolve on the Authority as a consequence of any act or omission of the Concessionaire during the Construction Period. The Concessionaire shall procure that in each insurance policy, the Authority shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Escrow Account. For the avoidance of doubt, the level of insurance to be maintained by the Concessionaire after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.
- (b) No later than 45 (forty-five) days prior to commencement of the Construction Period, the Concessionaire shall by notice furnish to the Authority, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this **Article 23**. Within 30 (thirty) days of receipt of such notice, the Authority may require the Concessionaire to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

#### **23.1.2 Insurance during Operation Period**

Not later than 60 days prior to the anticipated Completion of the Project, the Concessionaire shall obtain and maintain at no cost to Authority during the Operations Period in respect of the Project and its operations, such insurance as may be required under any of the Financing Documents, Applicable Laws and such insurance as the Concessionaire may reasonably consider necessary or desirable in accordance with Good Industry Practice. Provided, however, the level of insurance to be maintained after satisfaction of Senior Lenders' dues in full, shall be determined on the same principles as applicable for determining the level of Insurance prior to such date. This level shall be agreed with the Authority within 120 days of date of this Agreement. The Concessionaire shall procure that in each insurance policy, the Authority shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Escrow Account. For the avoidance of doubt, the level of insurance to be maintained by the Concessionaire after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.

For the sake of brevity, the aggregate of the maximum sums insured under the insurance taken out by the Concessionaire pursuant to this **Article 23** are herein referred to as the "Insurance Cover".

### **23.2 Insurance Cover**

Without prejudice to the provisions contained in Clause 23.1, the Concessionaire shall, during the Operations Period, procure and maintain Insurance Cover including but not limited to the following:

- (a) Loss, damage or destruction of the Project Assets, including assets handed over by the Authority to the Concessionaire, at replacement value;
- (b) Loss, damage or destruction of the Poppy Husk supplied by the Authority or the finished products, at replacement value;

- (c) comprehensive third-party liability insurance including injury to or death of personnel of the Authority or others caused by the Project;
- (d) the Concessionaire's general liability arising out of the Concession;
- (e) liability to third parties for goods or property damage;
- (f) workmen's compensation insurance; and
- (g) any other insurance that may be necessary to protect the Concessionaire and its employees, including all Force Majeure Events that are insurable at commercially reasonable premiums and not otherwise covered in items (a) to (f) above.

### **23.3 Evidence of Insurance Cover**

All insurances obtained by the Concessionaire in accordance with this **Article 23** 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 Authority, 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 Authority.

### **23.4 Remedy for failure to insure**

If the Concessionaire shall fail to effect and keep in force all insurances for which it is responsible pursuant hereto, the Authority shall have the option to either keep in force any such insurances, and pay such premia and recover the costs thereof from the Concessionaire, or in the event of computation of a Termination Payment, treat an amount equal to the Insurance Cover as deemed to have been received by the Concessionaire.

### **23.5 Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Concessionaire pursuant to this **Article 23** shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, inter alia, the Authority, and its assigns, successors, undertakings and their subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

### **23.6 Concessionaire's waiver**

The Concessionaire hereby further releases, assigns and waives any and all rights of subrogation or recovery against, inter alia, the Authority and its assigns, undertakings and their subsidiaries, affiliates, employees, successors, insurers and underwriters, which the Concessionaire may otherwise have or acquire in or from or in any way connected with any loss, liability or obligation covered by policies of insurance maintained or required to be maintained by the Concessionaire pursuant to this Agreement (other than third party liability insurance policies) or because of deductible clauses in or inadequacy of limits of any such policies of insurance.

### **23.7 Application of insurance proceeds**

The proceeds from all insurance claims, except life and injury, shall be paid to the Concessionaire by credit to the Escrow Account and it shall, notwithstanding anything to the contrary contained in Clause 22.3, apply such proceeds for any necessary repair, reconstruction, reinstatement, replacement, replenishment, improvement or delivery of the Project, and the balance remaining, if

any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

## **Article 24 – Accounts and Audit**

### **24.1 Audited accounts**

24.1.1 The Concessionaire shall maintain separate books of accounts with respect to the Project in compliance with generally applicable accounting principles in India, which books of accounts shall be duly audited by a statutory auditor in accordance with the requirements of Applicable Law. Copies of such books of accounts shall be provided to Authority upon written request from Authority and shall also be available for audit in accordance with the requirements of this Agreement.

### **24.2 Appointment of Auditors**

24.2.1 The Concessionaire shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it from the mutually agreed list of 5 (five) reputable firms of chartered accountants (the “**Panel of Chartered Accountants**”), such list to be prepared substantially in accordance with the criteria set forth in **Schedule R**. All fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.

24.2.2 The Concessionaire shall appoint and have during the subsistence of this Agreement as its Statutory Auditors a firm of Chartered Accountants duly licensed to practice in India out of the mutually agreed list of 5 (five) independent and reputable firms of Chartered Accountants in India (the “**List of Chartered Accountants**”). The criteria for preparing the List of Chartered Accountants are set forth in **Schedule R**. Subject to a 30 days’ notice to Authority and the replacement Statutory Auditors being appointed from the List of Chartered Accountants, the Concessionaire may terminate the appointment of any Statutory Auditor appointed in accordance with this **Article 24**. The fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.

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

24.3.1 Any claim or document provided by the Concessionaire to the Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors.

### **24.4 Set-off**

24.4.1 In the event any amount is due and payable by the Authority to the Concessionaire, it may set-off any sums payable to it by the Concessionaire and pay the balance remaining. Any exercise by the Authority of its rights under this Clause shall be without prejudice to any other rights or remedies available to it under this Agreement or otherwise.

## **Part V – Force Majeure and Termination**

## Article 25 – Force Majeure

### 25.1 Force Majeure

25.1.1 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 Clauses 25.2, 25.3, and 25.4 respectively hereinafter which prevent the Party claiming Force Majeure (the “**Affected Party**”) from performing its obligations under this Agreement and which act or event is (i) beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money and (iii) has a Material Adverse Effect on the Project.

### 25.2 Non-Political Force Majeure Events

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

- (a) acts of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionizing radiation, health pandemic, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Project Site);
- (b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/ representatives or attributable to any act or omission of any of them) interrupting supplies and services to the Project for a period exceeding a continuous period of 30 (thirty) days in an Accounting Year, and not being an Indirect Indian Political Event set forth in Clause 25.3 hereof;
- (c) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (d) any judgement or order of any court of competent jurisdiction or statutory authority 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 the Authority;
- (e) the discovery of geological conditions, toxic contamination or archaeological remains on the Site that could not reasonably have been expected to be discovered through a site inspection; and
- (f) Any event or circumstance of a nature analogous to any of the foregoing.

### 25.3 Indirect Political Force Majeure Events

An Indirect Political Event shall mean one or more of the following acts or events:

- (a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage which prevents operations of the Project/revenue generation for a continuous period exceeding 7 (seven) days in an Accounting Year;

- (b) industry wide or state-wide or India wide strikes or industrial action for a period exceeding a continuous period of 30 (thirty) days in an Accounting Year;
- (c) any civil commotion, boycott or political agitation which prevents operations of the Project/revenue generation by the Concessionaire for a continuous period exceeding 7 (seven) days in an Accounting Year;
- (d) any failure or delay of a Contractor to the extent caused by any Indirect Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; and
- (e) any event or circumstance of a nature analogous to any of the foregoing.

#### **25.4 Political Force Majeure Events**

A Political Event shall mean one or more of the following acts or events by or on account of Government of India or any other Governmental Agency:

- (a) expropriation or compulsory acquisition by any Governmental Agency of any Project Assets or rights of the Concessionaire or of the Contractors;
- (b) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorization, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorization, no objection certificate, exemption, consent, approval or permit;
- (c) any decision or order of a court or tribunal which has the effect of restraining all or any part of the activities concerning the construction, operation or maintenance of the Project including the determination, levy, demand, collection, retention and appropriation of Financials;
- (d) any failure or delay of a Contractor but only to the extent caused by another Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (e) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of **Article 32**; and
- (f) any event or circumstance of a nature analogous to any of the foregoing.

#### **25.5 Effect of Force Majeure before Appointed Date**

Upon the occurrence of any Force Majeure Event prior to Appointed Date as set forth in **Article 20**, the following shall apply:

- (a) there shall be no Termination except as provided in Clause 25.8;
- (b) the period set forth in Clause 4.1 for fulfilment of Conditions Precedent and in Clause 20.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event;

- (c) the Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs arising out of such Force Majeure Event.

## **25.6 Effect of Force Majeure Event after Appointed Date**

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

- (a) there shall be no Termination of this Agreement except as provided in Clause 25.8;
- (b) where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;
- (c) where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to operations of the Project/revenue generation, but if he is unable to operations of the Project/revenue generation during the subsistence of such Force Majeure Event, the Concession Period shall be extended by the period for which operations of the Project/revenue generation remains suspended on account thereof;
- (d) costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of Clause 25.7;
- (e) the Parties expressly agree that payment of Concession Fee shall not be suspended during the pendency of Force Majeure event and/or its effect.

## **25.7 Allocation of costs during subsistence of Force Majeure**

Upon occurrence of any Force Majeure Event prior to the Appointed Date, the Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs thereof;

Subject to the provisions of clause 25.6, upon occurrence of a Force Majeure Event after Appointed Date, the costs arising out of such event shall be allocated as follows:

- (a) When the Force Majeure Event is a Non-Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any costs arising out of any such Force Majeure Event;
- (b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the "**Force Majeure Costs**") shall be borne by the Concessionaire to the extent of the Insurance Claims, and to the extent such Force Majeure Costs exceed the Insurance Claims, one half of the same to the extent actually incurred and duly certified by the statutory Auditors of Concessionaire shall be reimbursed by the Authority to the Concessionaire;
- (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 the Authority to the Concessionaire, provided that no Force Majeure Costs shall be payable by the Authority if the Concession Period is increased under Clause 25.6.

For avoidance of doubt, Force Majeure Costs shall not include loss of 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.

## 25.8 Termination Notice

If a Force Majeure Event subsists for a period of 365 days (three hundred and sixty five) days, either Party may in its sole discretion terminate this Agreement by giving 30 (thirty) days Termination Notice in writing to the other Party without being liable in any manner whatsoever, save as provided in Clause 28.9 and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

## 25.9 Termination Payment for Force Majeure Events

25.9.1 Upon Termination of this Agreement pursuant to Clause 25.8, Termination Payment to the Concessionaire shall be made in accordance with the following:

- (a) If the Termination is on account of a Non-Political Event, the Concessionaire shall be entitled to receive from Authority by way of Termination Payment an amount equal to 90% of the Debt Due less Insurance Cover plus Actual cost of the land as informed by the Concessionaire (duly supported by evidence) to the Authority before the Appointed Date.
- (b) If the Termination is on account of an Indirect Political Event, the Concessionaire shall be entitled to receive from the Authority by way of Termination Payment an amount equal to:
  - the total Debt Due, less due insurance claims, if any. Provided, however, that if all or any of the insurance claims are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due, plus
  - 110% (one hundred ten per cent) of the Adjusted Equity
- (c) If the Termination of this Agreement is on account of a Political Event, the Concessionaire shall be entitled to receive from Authority by way of Termination Payment an amount equal to:
  - the total Debt Due, plus
  - 150% (one hundred fifty per cent) of the Adjusted Equity

## 25.10 Dispute Resolution

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

## 25.11 Liability for other losses, damages, etc.

Save and except as expressly provided in this **Article 25**, 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 25**.

### **25.12 Duty to Report**

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

- (a) The Affected Party shall not claim any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party in writing of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event within 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence and the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.
- (b) Any notice pursuant to this Clause 25.12 shall include full particulars of:
  - (i) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this **Article 25** with evidence in support thereof;
  - (ii) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;
  - (iii) the measures which the Affected Party is taking or proposes to take, to alleviate the impact of such Force Majeure Event; and
  - (iv) any other information relevant to the Affected Party's claim.
- (c) For so long as the Affected Party continues to claim to be affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) written reports containing information as required by this Clause 25.12, and such other information as the other Party may reasonably request the Affected Party to provide.

### **25.13 Excuse from performance of obligations:**

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

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

### **25.14 Obligation relating to stock**

The Concessionaire shall ensure safe keeping and proper documentation of all Poppy Husk, in processing plant - WIP and finished goods during the period of subsistence of Force Majeure Event. The Concessionaire shall promptly return all Poppy Husk, in processing plant - WIP and finished goods to the Authority as per Authority's direction in case of termination of this Agreement pursuant to Clause 25.8 hereof.



## **Article 26 – Compensation for Breach of Agreement**

### **26.1 Compensation for default by Concessionaire**

In the event of Concessionaire being in material default of this Agreement and such default is cured before Termination, the Concessionaire shall pay to Authority as compensation, all direct additional costs suffered or incurred by Authority arising out of such material default by the Concessionaire, in one lumpsum within 30 (thirty) days of receiving the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 29.1 for any material breach or default in respect of which damages are expressly specified and payable under this Agreement or for any consequential losses incurred by the Authority.

### **26.2 Compensation for default by the Authority**

In the event of Authority being in material default of this Agreement and such Material Breach is cured before Termination, Authority shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by Authority, in one lumpsum within 30 (thirty) days of receiving the demand supported by necessary particulars thereof; provided that no compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in the Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other directly attributable to such material breach or default but shall not include loss of revenues, debt repayments obligations or other consequential losses.

### **26.3 Extension of Concession Period**

Subject to the provisions of Clause 26.5, in the event that a Material Breach or default of this Agreement set forth in Clause 26.2 causes delay in achieving COD or leads to suspension of or reduction in the realization of revenues, as the case may be, the Authority shall, in addition to payment of compensation under Clause 26.2, extend the Concession Period, such extension being equal in duration to the period by which COD was delayed.

### **26.4 Compensation to be in addition**

Compensation payable under this **Article 26** shall be in addition to, and not in substitution for, or derogation of, Termination Payment, if any.

### **26.5 Mitigation of costs and damage**

The Affected Party shall make all reasonable efforts to mitigate or limit the costs and damage arising out of or as a result of breach of Agreement by the other Party.

## **Article 27 – Suspension of Concessionaire’s Rights**

### **27.1 Suspension upon Concessionaire Default**

27.1.1 Upon occurrence of a Concessionaire Event of Default, the Authority shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (a) suspend all rights of the Concessionaire under this Agreement including the Concessionaire’s right to collect Processing Fee, and other revenues pursuant hereto, and (b) exercise such rights itself and perform the obligations hereunder or authorize any other person to exercise or perform the same on its behalf during such suspension (the “**Suspension**”). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 120 (one hundred and twenty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders’ Representative, the Authority shall extend the aforesaid period of 120 (one hundred and twenty) days by a further period not exceeding 60 (sixty) days.

### **27.2 Authority to act on behalf of Concessionaire**

27.2.1 Subject to clause 30, Authority shall have the right to utilize the proceeds of Processing Fees and other revenues for meeting the costs incurred by Authority to remedy and rectify the cause of such Suspension and for defraying the O&M Expenses during such Suspension period. Provided, however, that if the Concessionaire is making diligent efforts to remedy and rectify such cause, then Authority shall allow the Concessionaire reasonable time and opportunity for such remedy or rectification.

27.2.2 During the period of Suspension hereunder, all rights and liabilities vested in the Concessionaire in accordance with the provisions of this Agreement shall continue to vest therein and all things done or actions taken, including expenditure incurred by the Authority for discharging the obligations of the Concessionaire under and in accordance with this Agreement and the Project Agreements, shall be deemed to have been done or taken for and on behalf of the Concessionaire and the Concessionaire undertakes to indemnify the Authority for all costs incurred during such period. The Concessionaire hereby licenses and sub-licenses respectively, the Authority or any other person authorized by it under Clause 27.1 to use during Suspension, all Intellectual Property belonging to or licensed to the Concessionaire with respect to the Project and its design, engineering, construction, operation and maintenance, and which is used or created by the Concessionaire in performing its obligations under the Agreement.

### **27.3 Revocation of Suspension**

27.3.1 The Suspension of the rights of the Concessionaire by Authority pursuant to Clause 27.1 above shall be revoked by Authority forthwith upon the Concessionaire having remedied or removed the cause of Suspension within a period not exceeding 90 days from date of Suspension to the satisfaction of Authority unless in the meantime this Agreement has been terminated by Authority in accordance with **Article 27**.

### **27.4 30.4 Substitution of the Concessionaire**

27.4.1 At any time during the period of Suspension, the Lenders’ Representative, on behalf of Senior Lenders, shall be entitled to substitute the Concessionaire under and in accordance with the Substitution Agreement, and upon receipt of notice thereunder from the Lenders’ Representative, the Authority shall withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of Suspension, and any

extension thereof under Clause 27.1, for enabling the Lenders' Representative to exercise its rights of substitution on behalf of Senior Lenders.

## **27.5 Termination**

27.5.1 At any time during the period of Suspension under this **Article 27**, the Concessionaire may by notice require the Authority to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 27.4, the Authority shall, within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with **Article 27**.

27.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 27.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual Agreement of the Parties and all the provisions of this Agreement shall apply, *mutatis mutandis*, to such Termination as if a Termination Notice had been issued by the Authority upon occurrence of a Concessionaire Event of Default.

## Article 28 – Termination

### 28.1 Termination for Concessionaire Default

28.1.1 Each of the following events or circumstances, to the extent not caused by a default of Authority or Force Majeure shall be considered for the purposes of this Agreement as events of default of the Concessionaire (the "**Concessionaire Event of Default**") which, if not remedied within the Cure Period set forth below, or where no Cure Period is specified, within 60 (sixty) days, upon receipt of written notice from Authority, shall provide Authority the right to terminate this Agreement in accordance with Clause 28.1.4:

- (a) the Concessionaire fails to achieve Financial Close in accordance with the provisions of Article 22;
- (b) the Concessionaire fails to achieve any Project milestone other than Scheduled Project Completion Date within the period set forth in **Schedule H** and fails to cure such default within a period of 120 (one hundred and twenty) days from the date of its occurrence.
- (c) the Concessionaire abandons the operations of the Project for more than 15 (fifteen) consecutive days without the prior consent of Authority, provided that the Concessionaire shall be deemed not to have abandoned such operation if such abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations by Authority.
- (d) COD does not occur within the period of 180 days from Schedule Project Completion Date specified in Clause 14.7;
- (e) the Concessionaire creates any Encumbrance, charges or lien in favor of any person save and except as otherwise expressly permitted under Clause 31.2;
- (f) the shareholding of the Consortium Members falls below the minimum prescribed under Clause 7.1 (i) and the Concessionaire does not Suo moto cure such default within 90 (ninety) days of its occurrence;
- (g) the Concessionaire is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its Project Assets that has a material bearing on the Project;
- (h) a resolution for winding up of the Concessionaire is passed, or any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, Project Assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements; and provided that:
  - (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;

- (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
- (iii) each of the Project Agreements remains in full force and effect;
- (i) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all or part of the Project Assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
- (j) a resolution is passed by the shareholders of the Concessionaire for the voluntary winding up of the Concessionaire;
- (k) the Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement;
- (l) the Concessionaire suffers an execution being levied on any of its Project Assets/ equipment causing a Material Adverse Effect on the Project and allows it to be continued for a period of 15 (fifteen) days;
- (m) the Concessionaire has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days;
- (n) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;
- (o) upon occurrence of a Financial Default, the Lenders' Representative has by notice required the Authority to undertake Suspension or Termination, as the case may be, in accordance with the Substitution Agreement and the Concessionaire fails to cure the default within the Cure Period specified hereinabove;
- (p) the Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a Cure Period of 15 (fifteen) days;
- (q) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to meet any Condition Precedent or cure the Concessionaire Default, as the case may be, for which whole or part of the Performance Security was appropriated, within a Cure Period of 120 (one hundred and twenty) days;
- (r) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;
- (s) the Concessionaire achieves less than 50% efficiency in SRM/ Alkaloids/ Crude form of Alkaloids extraction, in any 2 (two) quarters in a year;
- (t) the Concessionaire or its employees, contractors, agents, etc. are found to be involved in theft, misappropriation, etc. of the Poppy Husk, semi processed or finished products; and

- (u) the Concessionaire does not allow access to the project facilities to Independent Engineer, authorised government agencies, Authority, or any other person authorized by Authority.

28.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Event of Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of Clause 28.1.3.

28.1.3 The Authority shall, if there be Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 28.1.2 to inform the Lenders' Representative and grant 15 (fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement.

Provided that the Lenders' Representative may, instead of exercising the Senior Lenders' right of substitution, procure that the default specified in the notice is cured within the aforesaid period of 180 (one hundred and eighty) days, and upon such curing thereof, the Authority shall withdraw its notice referred to above and restore all the rights of the Concessionaire.

28.1.4 Save and except as otherwise provided in Clause 28.1.2, and without prejudice to any other right or remedy which Authority may have in respect thereof under this Agreement, upon the occurrence of any breach or default by the Concessionaire under this Agreement including any Concessionaire Event of Default, Authority shall be entitled to terminate this Agreement by a communication in writing (the "Termination Notice") to the Concessionaire if the Concessionaire has failed to cure such breach or default within the period provided for the same in this Agreement or Cure Period of 60 (sixty) days.

28.1.5 Transfer of knowledge assets, physical assets, detailed SOPs, right to use of the technology so deployed shall be ensured by the Concessionaire to the Authority at the Concessionaire's own cost and expense.

Subject to Clause 28.1.2, the following shall apply in respect of cure of any of the defaults and/or breaches of this Agreement:

- (a) the Cure Period shall commence from the date on which a notice in writing is delivered by Authority to the Concessionaire asking the latter to cure the breach or default specified in such notice.
- (b) the Cure Period provided in this Agreement shall not relieve the Concessionaire from liability for Damages caused by its breach or default;
- (c) the Cure Period shall not in any way be extended by any period of Suspension under this Agreement; and

- (d) if the cure of any breach by the Concessionaire requires any reasonable action by Concessionaire that must be approved by Authority or the Independent engineer hereunder, the applicable Cure Period (and any liability of the Concessionaire for Damages incurred) shall be extended by the period taken by Authority or the Independent Engineer to accord their required approval.

## 28.2 Termination for Authority Default

28.2.1 The Concessionaire may after giving 90 (ninety) days' notice in writing to Authority terminate this Agreement upon the occurrence and continuation of any of the following events (each a "**Authority Event of Default**"), unless any such Authority Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event:

- (a) the Authority is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and Authority has failed to cure such breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;
- (b) the Authority repudiates this Agreement or otherwise evidences an irrevocable intention not to be bound by this Agreement;
- (c) the Authority has delayed any payment that has fallen due under this Agreement if such delay exceeds 90 (ninety) days; or
- (d) the Authority is in breach of any representation or warranty made under this Agreement, or it repudiates this Agreement.

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

28.2.3 Transfer of knowledge assets, physical assets, detailed SOPs, right to use of the technology such deployed shall be ensured by the Concessionaire at its own cost and expense.

## 28.3 Termination Payment

28.3.1 Upon Termination of the Agreement pursuant to a Concessionaire Event of Default occurring.

Prior to COD: Upon Termination on account of Concessionaire Event of Default during the Construction Period, no Termination Payment shall be due and payable for and in respect of expenditure comprising the first 40% (forty per cent) of the Total Project Cost and in the event of expenditure exceeding such 40% (forty per cent) and forming part of Debt Due, the provisions of Clause 28.3.1 shall, to the extent applicable to Debt Due, apply for and in respect of the expenditure exceeding such 40% (forty per cent). For the avoidance of doubt and by way of illustration, the Parties agree that if the total expenditure incurred prior to Termination is 90% (ninety per cent) of the Total Project

Cost, the expenditure eligible for computation of Termination Payment hereunder shall be 50% (fifty per cent) of the Total Project Cost and the Termination Payment due and payable in such event shall not exceed 45% (forty-five per cent) of the Total Project Cost. The Parties also agree that for determining the Termination Payment under this Clause 28.3.1, only the expenditure comprising and up to the latest Project Milestone shall be reckoned.

Post COD: Upon Termination by Authority on account of occurrence of Concessionaire Event of Default during the Operations Period, the Authority shall pay to the Concessionaire by way of Termination Payment lower of, an amount equal to 90% (ninety per cent) of the Debt Due less insurance claims, if any, provided, however, that if all or any of the insurance claims are not admitted and paid, then 70% (seventy per cent) of such unpaid claims shall qualify for being included in the computation of Debt Due.

28.3.2 Upon Termination of this Agreement pursuant to an Authority Event of Default occurring prior to COD and post COD, the Authority shall make a payment of, lower of :

- the total Debt Due, plus
- 150% (one hundred fifty per cent) of the Adjusted Equity

28.3.3 The Termination Payment pursuant to this Agreement shall become due and payable to the Concessionaire by Authority within 30 days of a demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If Authority fails to disburse the full Termination Payment within 90 (ninety) days, the amount remaining unpaid shall be disbursed along with interest rate equal to 3% (three per cent) above the Bank rate for the period of delay on such amount. For the avoidance of doubt, it is expressly agreed that the Termination payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

28.3.4 Mode of Payment: Payment of compensation of costs by Authority pursuant to this Article 31 shall be made by way of credit to the Escrow Account and such payment shall constitute valid discharge of Authority's obligations for Termination Payment hereunder.

28.3.5 The Concessionaire expressly agrees that Termination Payment under this **Article 28** shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

#### **28.4 Certain limitations on Termination Payment**

28.4.1 Termination payment due and payable under this Agreement shall be computed with reference to the Debt Due and Adjusted Equity, as the case may be, in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, the Parties agree that within a period of 60 (sixty) days from COD, the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment. The Parties further agree that in the event such disaggregation is not notified to the Authority, the Equity and Debt Due shall be arrived at by adopting the proportion between debt and Equity as

specified in the Financing Agreements. It is further agreed that for the purposes of computing Termination Payment, the Debt Due shall at no time exceed 85% (eighty-five per cent) of the Total Project Cost.

## **28.5 Other rights and obligations of the Authority**

Upon Termination for any reason whatsoever, the Authority shall:

- (a) take possession and control of the Project/Project Facilities forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- (c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;
- (d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 29.1; and
- (e) succeed upon election by the Authority, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.

## **28.6 Survival of rights**

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

## **Article 29 – Divestment of Rights and Interest**

### **29.1 Divestment Requirements**

29.1.1 Upon Termination under **Article 28**, the Concessionaire shall comply with and conform to the following Divestment Requirements:

- (a) notify to the Authority forthwith the location and particulars of all Project Assets;
- (b) deliver forthwith the actual or constructive possession of the Project along with land, free and clear of all Encumbrances, save and except to the extent set forth in the Substitution Agreement;
- (c) cure all Project Assets, of all defects and deficiencies so that the Project is compliant with the Maintenance Requirements; provided that in the event of Termination during the Construction Period, all Project Assets shall be handed over on 'as is where is' basis after bringing them to a safe condition;
- (d) deliver and transfer relevant records, reports, Intellectual Property and other licenses pertaining to the Project and its design, engineering, construction, operation and maintenance, including all programmes and manuals pertaining thereto, and complete 'as built' Drawings as on the Transfer Date. For the avoidance of doubt, the Concessionaire represents and warrants that the Intellectual Property delivered hereunder shall be adequate and complete for the design, engineering, construction, operation and maintenance of the Project and shall be assigned to the Authority free of any Encumbrance;
- (e) transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws;
- (f) execute such deeds of conveyance, documents and other writings as the Authority may reasonably require for conveying, divesting and assigning all the rights, title and interest of the Concessionaire in the Project land and Project Assets, including manufacturers' warranties in respect of any plant or equipment and the right to receive outstanding insurance claims to the extent due and payable to the Authority, absolutely unto the Authority or its nominee; and
- (g) comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights, title and interest of the Concessionaire in the Project, free from all Encumbrances, absolutely unto the Authority or to its nominee.

29.1.2 Subject to the exercise by the Authority of its rights under this Agreement or under any of the Project Agreements to perform or procure the performance by a third party of any of the obligations of the Concessionaire, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the issuance of any Termination Notice, until the Termination of this Agreement becomes effective in accordance with its terms.

### **29.2 Inspection and cure**

29.2.1 Not earlier than 90 (ninety) days prior to Termination but not later than 30 (thirty) days prior to the effective date of such Termination, the Independent Engineer shall verify, after giving due notice to the Concessionaire of the time, date and place of such

verification, compliance by the Concessionaire with the Maintenance Requirements, and if required, cause appropriate tests to be carried out at the Concessionaire's cost for this purpose. Defaults, if any, in the Maintenance Requirements shall be cured by the Concessionaire at its cost and the provisions of **Article 30** shall apply, mutatis mutandis, in relation to curing of defects or deficiencies under this **Article 29**.

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

29.3.1 The Parties shall cooperate on a best effort basis and take all necessary measures, in good faith, to achieve a smooth transfer of the Project in accordance with the provisions of this Agreement.

29.3.2 The Parties shall provide to each other immediately as much information and advice as is reasonably practicable regarding the proposed arrangements for operation of the Project following the Transfer Date. The Concessionaire shall further provide such reasonable advice and assistance as the Authority, its Concessionaire or agent may reasonably require for operation of the Project until the expiry of 6 (six) months after the Transfer Date.

29.3.3 The Authority shall have the option to purchase or hire from the Concessionaire at a fair market value and free from any encumbrances all or any part of the plant and machinery used in connection with the Project but which does not form part of the Project Assets specified in Clause 32.1.1 and is reasonably required in connection with operation of the Project. For the avoidance of doubt, in the event of dispute or difference relating to fair market value, the Dispute Resolution Procedure shall apply.

### **29.4 Vesting Certificate**

29.4.1 The divestment of all rights, title and interest in the Project shall be deemed to be complete on the date when all of the Divestment Requirements have been fulfilled, and the Authority shall, without unreasonable delay, thereupon issue a certificate substantially in the form set forth in **Schedule T** (the "**Vesting Certificate**"), which will have the effect of constituting evidence of divestment by the Concessionaire of all of its rights, title and interest in the Project, and their vesting in the Authority pursuant hereto. It is expressly agreed that any defect or deficiency in the Divestment Requirements shall not in any manner be construed or interpreted as restricting the exercise of any rights by the Authority or its nominee on, or in respect of, the Project on the footing that all Divestment Requirements have been complied with by the Concessionaire.

### **29.5 Divestment costs etc.**

29.5.1 The Concessionaire shall bear and pay all costs incidental to divestment of all of the rights, title and interest of the Concessionaire in the Project Assets in favor of the Authority upon Termination under **Article 28**, save and except that all stamp duties payable on any deeds or Documents executed by the Concessionaire in connection with such divestment shall be borne by the Authority.

29.5.2 In the event of any Dispute relating to matters covered by and under this **Article 29**, the Dispute Resolution Procedure shall apply.

## **Article 30 – Defects Liability**

### **30.1 Liability for defects after Termination**

30.1.1 The Concessionaire shall be responsible for all defects and deficiencies in the Project for a period of 120 (one hundred and twenty) days after Termination under **Article 28**, and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Authority in the Project during the aforesaid period. In the event that the Concessionaire fails to repair or rectify such defect or deficiency within a period of 15 (fifteen) days from the date of notice issued by the Authority in this behalf, the Authority shall be entitled to get the same repaired or rectified at the Concessionaire's risk and cost so as to make the Project conform to the Maintenance Requirements. All costs incurred by the Authority hereunder shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receipt of demand thereof, and in the event of default in reimbursing such costs, the Authority shall be entitled to recover the same from the funds retained in the Escrow Account under the provisions of Clause 30.2 or from the Performance Guarantee provided thereunder. For the avoidance of doubt, the provisions of this **Article 30** shall not apply if Termination occurs prior to COD.

### **30.2 Retention in Escrow Account in case of Termination**

30.2.1 Notwithstanding anything to the contrary contained in this Agreement, a sum equal to the Performance Security shall be retained in the Escrow Account for a period of 120 (ninety) days after Termination under **Article 28** for meeting the liabilities, if any, arising out of or in connection with the provisions of this Clause.

30.2.2 Without prejudice to the provisions of Clause 30.2.1, the Authority shall carry out an inspection of the Project at any time between 30 (thirty) and 60 (sixty) days prior to the Termination and if it recommends that the status of the Project is such that a sum larger than the amount stipulated in Clause 30.2.1 should be retained in the Escrow Account and for a period longer than the aforesaid 120 (one hundred and twenty) days, the amount recommended by the Authority shall be retained in the Escrow Account for the period specified by it.

30.2.3 Within 14 days after the issue of the Vesting Certificate issued in accordance with **Article 29**, the sums retained in accordance with Clause 30.2.2 shall be released from the Escrow Account to the Concessionaire.

## **Part VI – Other Provisions**

## **Article 31 – Assignment and Charges**

### **31.1 Restrictions on assignment and charges**

31.1.1 Subject to Clauses 31.2 and 31.3, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

31.1.2 Subject to the provisions of Clause 31.2, the Concessionaire shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which the Concessionaire is a party except with prior consent in writing of the Authority, which consent the Authority shall be entitled to decline without assigning any reason.

### **31.2 Permitted assignment and charges**

The restraints set forth in Clause 31.1 shall not apply to, subject to the prior consent in writing of the Authority:

- (a) liens arising by operation of law (or by an Agreement evidencing the same) in the ordinary course of business of the Project;
- (b) mortgages/ pledges/ hypothecation of goods/assets other than Project Assets and land, and their related documents of title, arising or created in the ordinary course of business of the Project, and as security only for indebtedness to the Senior Lenders under the Financing Agreements and/or for working capital arrangements for the Project. For the avoidance of doubt, the Senior Lenders would be entitled to create a lien on the Escrow Account, subject to and without prejudice to the rights of the Authority under this Agreement;
- (c) assignment of rights, interest and obligations of the Concessionaire to or in favor of the Lenders' Representative as nominee and for the benefit of the Senior Lenders, to the extent covered by and in accordance with the Substitution Agreement as security for Financing provided by Senior Lenders under the Financing Agreements; and
- (d) liens or encumbrances required by any Applicable Law.

### **31.3 Substitution Agreement**

31.3.1 The Senior Lenders/Lender's Representative may exercise the rights of step-in or substitution as provided in the Substitution Agreement to be entered into among the Concessionaire, the Authority and the Senior Lenders in the form set forth in Schedule 'S' provided that the person substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations under this Agreement as if it were the Concessionaire. Provided, however, that in the event of such step-in or substitution, an additional Cure Period of 90 (ninety) days shall be provided by the Authority to enable the Concessionaire to cure any breach or default subsisting on the day of such step-in or substitution. Provided further that if the Senior Lenders step in to operate and manage the Concession for a period not exceeding 90 (ninety) days, their liabilities shall be restricted to the obligations relating to and arising during such 90 (ninety) days period.

### **31.4 Assignment by the Authority**

- 31.4.1 Notwithstanding anything to the contrary contained in this Agreement, the Authority may, after giving 60 (sixty) days notice to the Concessionaire, assign and/or transfer any of its rights and benefits and/or obligations under this Agreement to an assignee who is, in the reasonable opinion of the Authority, capable of fulfilling all of the Authority's then outstanding obligations of the Agreement.

## **Article 32 – Change in Law**

### **32.1 Increase in costs**

32.1.1 If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden for and in respect of the Concession, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.1% (zero point one per cent) of the Processing Fee in any Accounting Year, the Concessionaire may so notify the Authority and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in increased costs, reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:

32.1.2 Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the Authority to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Authority shall pay the amount specified therein; provided that if the Authority shall dispute such claim of the Concessionaire, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

### **32.2 Decrease in costs**

32.2.1 If as a result of Change in Law, the Concessionaire benefits from a decrease in costs or increase in net after-tax return or other financial burden for and in respect of the Concession, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.1% (zero point one per cent) of the Processing Fee in any Accounting Year, the Concessionaire may so notify the Authority and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in increased costs, reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:

32.2.2 Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the Authority to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Authority shall pay the amount specified therein; provided that if the Authority shall dispute such claim of the Concessionaire, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

32.2.3 For the avoidance of doubt, a change in the rate of any Tax or the imposition of a new Tax shall not constitute a Change in Law and the Parties shall be liable to bear the impact and incidence thereof at their cost and risk.

## **Article 33 – Liabilities and Indemnity**

### **33.1 Liability in respect of the Project**

33.1.1 The Concessionaire shall be solely responsible for the construction, operation and management of the Project, and shall have the overall responsibility and liability with respect to the Project and all Projects Assets located upon the Project Site. In no event shall the Authority have any liability or be subject to any claim for damages arising out of the design, development, financing, construction, operation, maintenance or management of the Project and the Project Assets located upon the Project Site.

### **33.2 General indemnity**

33.2.1 The Concessionaire will indemnify, defend, save and hold harmless the Authority and its officers, servants, agents, Government Instrumentalities and Government owned and/or controlled entities/ enterprises, (the “**Authority Indemnified Persons**”) against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Concessionaire of any of its obligations under this Agreement or any related agreement or on account of any defect or deficiency in the provision of services by the Concessionaire to the Authority or to any user or from any negligence of the Concessionaire under contract or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act or omission, or breach or default of this Agreement on the part of the Authority Indemnified Persons.

33.2.2 The Authority will indemnify, defend, save and hold harmless the Concessionaire and its officers, servants and agents against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature arising out of breach by the Authority of any of its obligations under this Agreement or any related agreement, which materially and adversely affect the performance by the Concessionaire of its obligations under this Agreement, save and except that where any such claim, suit, proceeding, action, and/or demand has arisen due to a negligent act or omission, or breach of any of its obligations under any provision of this Agreement or any related agreement and/or breach of its statutory duty on the part of the Concessionaire, its subsidiaries, affiliates, contractors, servants or agents, the same shall be the liability of the Concessionaire.

### **33.3 Indemnity by the Concessionaire**

33.3.1 Without limiting the generality of Clause 33.2.1, the Concessionaire shall fully indemnify, hold harmless and defend the Authority and the Authority Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) defect in title and/or the rights of the Concessionaire in the land comprised in the Site;
- (b) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits;
- (c) payment of taxes required to be made by the Concessionaire in respect of the income or other taxes of the Concessionaire’s contractors, suppliers and representatives; or
- (d) 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.

33.3.2 Without limiting the generality of the provisions of this **Article 33**, the Concessionaire shall fully indemnify, hold harmless and defend the Authority Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the Authority Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or Suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Project, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for the Authority a license, at no cost to the Authority, authorizing 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 part or process, or modify the same so that it becomes non-infringing.

#### **33.4 Notice and contest of claims**

33.4.1 In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this **Article 33** (the "**Indemnified Party**") it shall notify the other Party (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the Indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

#### **33.5 Defense of claims**

33.5.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 36, the Indemnifying Party shall be entitled, at its option, to assume and control the defense of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defense. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

33.5.2 If the Indemnifying Party has exercised its rights under Clause 36.4, the Indemnified Party shall not be entitled to settle or compromise any claim, action, suit or proceeding without the prior written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

33.5.3 If the Indemnifying Party exercises its rights under Clause 36.4, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

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

Provided that if Sub-clauses (b) or (c) or (d) of the Clause 33.5.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defense of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

### **33.6 No consequential claims**

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

### **33.7 Survival on Termination/ Expiry**

It is expressly understood by the Parties that this Article shall survive the termination or expiry hereof.

### **33.8 Authority's Limitation of Liability**

33.8.1 Notwithstanding anything contained in the Agreement, the maximum liability of Authority towards the Concessionaire in respect of the Project resulting out of any default of Authority as provided in Article 36.2.2 of this Agreement or any Dispute and subsequent claim by the Concessionaire in terms of the Agreement shall not exceed the Termination Payment & the Processing Fee due and payable to the Concessionaire in terms of Agreement or aggregate amount already paid by the Concessionaire to the Authority towards the consideration, whichever is higher.

## **Article 34 – Rights and Title over the Site**

### **34.1 Ownership rights**

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

### **34.2 Access rights of the Authority and others**

34.2.1 The Concessionaire shall allow free access to the Project Site at all times for the authorized representatives and vehicles of the Authority, Senior Lenders, and the Independent Engineer, and for the persons and vehicles duly authorized by any Government Instrumentality to inspect the Project or to investigate any matter within their authority, and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.

### **34.3 Taxes and charges**

The Concessionaire shall:

- (a) Pay all property taxes or any such taxes as per Applicable Laws related to the Project Site including or rental/ lease charges, if applicable, shall be payable by the Concessionaire, which shall not be reimbursed or payable by the Authority. Any pending payment, pertaining to property tax or any such taxes as per Applicable Laws for the Project Site or rental/ lease charges, prior to Handover of the Project Site shall be payable by the Concessionaire, which will be the case, if the Project Site including Project Facilities are transferred to the Authority upon Termination of this Agreement; and
- (b) Pay all charges, taxes, fines, late fees and other outgoings in relation to the use of utilities and services by the Authority or its contractors and agents during the implementation and operation of the Project such as water supply, sewage disposal, fuel, garbage collection and disposal, electric power, gas, telephone and other utilities and ensure avoidance of any disruption thereof due to disconnection or withdrawal of the facility.

### **34.4 Restriction on sub-letting**

34.4.1 The Concessionaire shall not sub-license or sub-let the whole or any part of the Site, save and except as may be expressly set forth in this Agreement; provided that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint Contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project.

## Article 35 – Dispute Resolution

### 35.1 Dispute Resolution

35.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “**Dispute**”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 35.2.

35.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

### 35.2 Conciliation

35.2.1 In the event of any Dispute between the Parties, either Party may require such Dispute to be referred to the Additional Secretary (Revenue), Department of Revenue, Ministry of Finance – Government of India and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 35.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 35.3.

### 35.3 Arbitration

35.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 35.2, shall be finally decided by reference to arbitration by an arbitral tribunal constituted in accordance with Clause 35.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The place of such arbitration shall be Bhopal, and the language of arbitration proceedings shall be English.

35.3.2 There shall be an arbitral tribunal comprising three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

35.3.3 The arbitral tribunal shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this **Article 35** shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

35.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective Project Assets wherever situated.

35.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

#### **35.4 Continued performance**

35.4.1 While any Dispute under this Agreement is pending, including the commencement and pendency of any Dispute referred to arbitration, the Parties shall continue to perform all of their respective obligations under this Agreement without prejudice to the final determination in accordance with the provisions under this **Article 35**.

## **Article 36 – Disclosure and Confidentiality**

### **36.1 Confidentiality**

- 36.1.1 Each Party hereby agree and undertake to keep all information received by the other Party (and/or its employees, directors, officers or authorized representatives), confidential.
- 36.1.2 Further, each Party hereby agrees that this Agreement and/or all Project Agreements or the contents thereof shall not be disclosed by either Party to any third party without the prior written consent of the other Party.

### **36.2 Disclosure**

- 36.2.1 Provided however that nothing contained hereinabove, shall apply to any disclosure by either Party of any information received from the other Party if
- (a) Such disclosure is required by Applicable Law or requested by Governmental Authority or required to be made under the Agreement; or
  - (b) Such information being available in the public domain, other than by a breach of the Agreement by the party seeking to make such disclosure; or
  - (c) Such information being made available to the consultants and professional advisers of either Party; or
  - (d) Such information is disclosed by a Party with the prior written consent of the other Party, provided the disclosure is made strictly in accordance with such written consent.

## **Article 37 – Independent Testing Laboratory**

### **37.1 Appointment of Independent Testing Agency**

- 37.1.1 The Authority shall appoint an independent testing agency selected by the Authority in accordance with the selection process set forth in **Schedule P**.
- 37.1.2 The appointment of the independent testing agency under Clause 37.1.1 shall be for entire Concession period from the Commercial Operations Date.
- 37.1.3 The independent testing agency laboratory shall be accredited by National Accreditation Board for Testing and Calibration Laboratories (NABL).
- 37.1.4 The independent testing laboratory shall be setup as a separate and distinct entity from the factory. It is clarified that the laboratory may be in the factory premises but must be distinct from the factory.

### **37.2 Duties and functions**

- 37.2.1 The independent testing agency shall discharge its duties and functions substantially in accordance with the terms of reference set forth in **Schedule P1a**.
- 37.2.2 The independent testing agency shall submit regular periodic reports (at least once every month) to the Authority in respect of its duties and functions set forth in **Schedule P1a**.
- 37.2.3 A true copy of all communications sent by the Authority to the independent testing agency and by the independent testing agency to the Authority shall be sent forthwith by the independent testing agency to the Concessionaire.
- 37.2.4 A true copy of all communications sent by the independent testing agency to the Concessionaire and by the Concessionaire to the independent testing agency shall be sent forthwith by the independent testing agency to the Authority.

### **37.3 Remuneration**

- 37.3.1 The remuneration, cost and expenses of the Independent Testing Laboratory shall be paid by the Authority and subject to the limits set forth in **Schedule P1a**, one-half of such remuneration, cost and expenses shall be reimbursed by the Concessionaire to the Authority within 15 (fifteen) days of receiving a statement of expenditure from the Authority.

## Article 38 – Transfer Provisions

- 38.1 Upon Termination of this Agreement under **Article 28** and consequent obligation/right of Authority to acquire the Project Assets (including land), the Concessionaire shall ensure that on the Transfer Date, the interest of Concessionaire in:
- (a) Land, all immovable property, assets, structures, buildings, plant and machinery, ways, walls, compounds relating to the Project Assets shall be transferred to Authority or its nominee, clear of any Encumbrances and with good title (other than any encroachments existing on the date hereof), except to the extent such encroachments have been removed after Effective Date;
  - (b) the rights and obligations under or pursuant to all contracts relating to the Project Assets and other arrangements entered into in accordance with the provisions of this Agreement between Concessionaire and any third party shall (in consideration of Authority's assumption of the obligations under or pursuant to the contracts and other arrangements), at the option of Authority, be vested in Authority or its nominee, clear of any Encumbrance and with good title. The Concessionaire shall ensure such rights of Authority are incorporated in all contracts between Concessionaire and third party(ies) with a specific obligation on the parties to such contracts to enter into novation agreement with Authority upon exercise of its option by Authority;

Notwithstanding anything contained in Sub-Clause (a) and (b) of the Clause 38.1, prior to any transfer of the Project Assets, Authority shall have the right to conduct a due diligence of the contracts and agreements, the rights and obligations of which it is assuming and shall not be bound to assume the rights and obligations of contracts that, in the sole opinion of Authority are unreasonably onerous, and would be considered onerous at the time that the contracts were entered into. In relation to all such contracts that are not transferred to Authority, no third entity, including the counter-party of such contract shall have any right, license title, interest, benefit, claim or demand against or over any Project Assets and such Project Assets shall be transferred to Authority or its nominee, clear of any Encumbrance and with good title.

- 38.2 Furthermore, notwithstanding anything contained in the Clause 38.1, no liability (accrued or contingent) of Concessionaire or relating to the Project Assets arising on account of actions or inactions prior to the Transfer Date shall be assumed or transferred to Authority or its nominees. Authority or its nominees shall only be liable for liabilities in relation to the Project Assets arising pursuant to the Transfer Date. In the event of any such liability being assumed or transferred to Authority or its nominee or any Encumbrance existing on any of the Project Assets, the quantum of such liability and/or amount corresponding to such Encumbrance, shall be deducted from the Performance Security.
- 38.3 Without prejudice to the foregoing, Concessionaire agrees to indemnify and keep indemnified Authority from and against all actions, proceedings, losses, damages, liabilities, claims, costs and expenses whatsoever which may be sustained or suffered by Authority as a result of any actions or omissions of Concessionaire prior to the transfer of the Project Assets. It is expressly understood by the Parties that this Article shall survive the Termination of this Agreement.

- 38.4 Concessionaire shall in accordance with Good Industry Practice ensure that all property, assets, rights and other items (constituting Assets) which are vested in or transferred to Authority shall be in good working order and in a good state of repair. For this purpose, the Parties shall appoint an independent engineer to conduct an audit of the Project Assets being transferred. In the event any of Project Assets which are vested in or transferred to Authority are not fit for purpose/ in a good state of repair/ as would be expected of an international world class assets, as certified by such independent engineer, then the cost or capital expenditure required to be incurred to bring it to good state of repair of all such Project Assets shall be payable by the Concessionaire to Authority, and the same may be deducted from the Performance Security.
- 38.5 Termination of this Agreement shall be without prejudice to all rights and obligations then having accrued to Authority and/or Concessionaire (or which may thereafter accrue in respect of any act or omission prior to such Termination) and without prejudice to those provisions which expressly provide for continuing obligations or which are required to give effect to such Termination or the consequences of such Termination.
- 38.6 The Parties' rights to terminate this Agreement shall be limited to those expressly set out in this Agreement.

## **Article 39 – Miscellaneous**

### **39.1 Governing Law and jurisdiction**

39.1.1 This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts at Jabalpur shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

### **39.2 Waiver of immunity**

Each Party unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Party with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

### **39.3 Delayed payments**

39.3.1 The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. Unless otherwise specified in this Agreement, in the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to SBI PLR plus 2% (two per cent) and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

39.3.2 Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.

### **39.4 Waiver**

39.4.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement: -

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorized representative of the Party; and

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

39.4.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

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

Except to the extent expressly provided in this Agreement:

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

### **39.6 Exclusion of implied warranties etc.**

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

### **39.7 Survival**

39.7.1 Termination shall:

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

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

### **39.8 Entire Agreement**

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the Agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn. For the avoidance of doubt, the Parties hereto agree that any obligations of the Concessionaire arising from the Request for Proposal shall be deemed to form part of this Agreement and treated as such.

### **39.9 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 to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure set forth under this Agreement or otherwise.

### **39.10 No partnership**

This Agreement shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party, and neither Party shall have any right, power or authority to enter into any Agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

### **39.11 Third parties**

This Agreement is intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and nothing in this Agreement shall be construed to create any duty to, standard of care with reference to, or any liability to, any person not a Party to this Agreement.

### **39.12 Successors and assigns**

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

### **39.13 Notices**

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

- (a) in the case of the Concessionaire, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Concessionaire may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside Bhopal may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number as the Concessionaire may from time to time designate by notice to the Authority.

Attention:

{Designation:

Address:

Fax No:

Email:}

- (b) in the case of the Authority, be given by facsimile or e-mail and by letter delivered by hand at the address given below and be addressed to the Chairman of the Authority with a copy delivered to the Authority Representative or such other person as the Authority may from time to time designate by notice to the Concessionaire; provided that if the Concessionaire does not have an office in ..... it may send such notice by facsimile or e-mail and by registered acknowledgement due, air mail or by courier.

{Address:

Fax No:

Email:}; and

- (c) any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date and time of delivery; provided that in the case of facsimile or e-mail, it shall be deemed to have been delivered on the working day following the date of its delivery.

### **39.14 Language**

All notices required to be given by one Party to the other Party and all other communications, Documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

### **39.15 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 DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

SIGNED, SEALED AND  
DELIVERED

For and on behalf of

THE AUTHORITY by:

**Government Opium and Alkaloids Factory,  
Department of Revenue (DOR),  
Ministry of Finance, Government of India**

THE COMMON SEAL OF  
CONCESSIONAIRE has been affixed pursuant  
to the resolution passed by the Board of  
Directors of the Concessionaire at its meeting  
held on the ..... day of 20..... hereunto  
affixed in the presence of .....,  
Director, who has signed these presents in  
token thereof and ....., Company  
Secretary / Authorized Officer who has  
countersigned the same in token thereof \$:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

((e-mail address)

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

((e-mail address)

**Witnesses**

1. (Signature)

(Name)

2. (Signature)

(Name)

## **Part VII – Schedules**

## **Schedule A – Details of the Site**

*(See Clause 4.1.3 (b))*

Indicative map of the Site (~25 acres area would be provided by the Concessionaire within a radius of 75 km of existing Government Opium Factory at Neemuch).

Drawing of the Project Site acquired/ procured by the Concessionaire to be attached to this Schedule as Annexure, with clear demarcation of existing land/ building on all four directions of the Land parcel, along with showcasing of Project Site's access to be nearest all weather road/ national highway/ state highway/ major district road.

## **Schedule B – Scope of the Project**

(See Clause 2.1)

### **1.1 Scope of the Project**

The Scope of the Project include planning, designing, financing, constructing, owning, operating, and maintaining the Project as specified in Schedule B and Schedule C on the Site set forth in Schedule A, and in conformity with the Specifications and Standards set forth in Schedule D. These broad scope activities shall include the following and all other provisions of this Agreement, but not be limited to:

- The Concessionaire shall procure, in its own name and at its own cost, land for the Project within 75 km radius from existing Government Opium and Alkaloids Factory at Neemuch, Madhya Pradesh which should be well connected with national highway/ state highway/ major district road/ through all weather road;
- Land shall be free from all encumbrances and shall have no litigation on it. The title shall be clear;
- the Concessionaire shall set up a new plant with minimum capacity to process 10,000 MT of Poppy Husk per annum;
- to plan, design, develop, finance, construct, manage, operate and maintain the project along with owning of the Project Facilities during the Concession Period;
- to apply for and obtain all requisite approvals and consents including from all Governmental Authorities concerned, for the development of Project site, including plans for construction of building/s and other structure/s, consent to establish and consent to operate, thereon for such uses and purposes as described herein;
- the Concessionaire shall create production block, adequate storage space for Poppy Husk and finished products as part of its design for storage of Poppy Husk;
- create facilities using CPS technology to process husk and further extraction of SRM/ alkaloids/ crude form of alkaloids as instructed by Authority;
- construct separate facility in the premises (spread over an area of at least 3000 sq. ft. of carpet area) for setting up an Independent Testing Laboratory to test the SRM/alkaloids/ crude form of alkaloids content;
- provide office space for two designated officials of the Authority at all times during the concession period, within the project area;
- ensure that the machinery, equipment etc used in the Project are in good condition and conform to the international industrial specifications and standards;
- the Concessionaire shall, from time to time, undertake upgradation of the Project Assets and facilities in accordance with the provisions of this Agreement and Good Industry Practices;
- the Concessionaire must process the minimum guaranteed quantity of Poppy Husk provided in an operational year by the Authority;
- minimise variations in the quantity of SRM/ Alkaloids/ crude alkaloids produced during each month of the year;
- ensure scientific storage to ensure safety from rodents, etc. and security of the Poppy Husk, semi-processed and finished products stocked in its warehouse and of the entire Project and project facilities;
- ensure that the Poppy Husk, semi-processed and finished products stocked in its warehouse are not misused, diverted, pilfered, adulterated etc.;

- the Concessionaire shall abide by all laws and regulations such as building bye laws, industrial norms, environmental laws, and labour laws, etc. while creating the design and operating the Project;
- ensure that the SRM/ alkaloids/ crude alkaloids extracted meet the international quality norms/standards/certification as followed in United States of America, United Kingdom, Europe, Australia, etc.;
- ensure compliance to internationally established and accepted good manufacturing practices through approvals from United States Food and Drug Administration (USFDA) / United Kingdom's Medicines and Healthcare products Regulatory Agency (UK MHRA) / European Directorate for the Quality of Medicines & HealthCare (EDQM) / Australian Therapeutic Goods Administration (TGA) / Brazilian Health Regulatory Agency (ANVISA), etc.; and
- ensure that the project premises are used only for lawful and permitted activities.

## **Schedule C – Project Facilities<sup>7</sup>**

(See Clause 2.1)

[To be defined based on the Concessionaire's Project Implementation Plan subject to compliance of the Terms and Conditions as mentioned in the Concession Agreement and guidance from the Authority and/ or Independent Engineer. Details of the CPS technology as proposed by the Selected Bidder that the Concessionaire shall install at the Project Site, details of the same to be included in this Schedule as Annexure.]

The Concessionaire shall develop the Project including installation of Poppy Husk processing facility and construction of requisite facilities /amenities as support infrastructure for the Project, to ensure optimal functioning thereof.

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<sup>7</sup> This Section of the Schedule should be prepared by the Procuring Entity in accordance with the identified Facilities in the Proposed Project based on the Detailed Project Report prepared.

## ***Schedule D – Specifications and Standards***

*(See Clause 2.1)*

## **Schedule E – Applicable Permits**

(See Clause 4.1.3 (d))

### **1 Applicable Permits**

1.1.1 The Concessionaire shall obtain, as required under the Applicable Laws, the following Applicable Permits on or before the Appointed Date, save and except to the extent of a waiver granted by the Authority in accordance with Clause 4.1.3 (d) of this Agreement. An indicative list of approvals is detailed below, however the Concessionaire needs to ensure all other approvals not mentioned in the list but applicable under the law are also procured:

<b>Sr. No.</b>	<b>Indicative list of approvals required</b>
1	Excise Registration
2	Conversion of Land for Factory use
3	Pollution Consent to establish
4	Consent to Operate
5	Professional Tax Registration
6	GST Registration
7	Water Connectivity
8	Environmental Clearance
9	Permission for connection of Power
10	Building Plan Approval from Panchayat
11	Final NOC from Fire Department
12	Registration of unit with the District Industries Centre
13	Site and building plan approval
14	Registration of manufacturing capacity
15	Certificate of registration for employment of contract labour
16	License to work a factory
17	Boiler inspection and certification
18	Petroleum & Explosive Safety License
19	Approvals from USFDA / UK MHRA / EDQM / Australian TGA / Brazilian ANVISA, etc. for good manufacturing practices

1.1.2 Nothing in this Concession Agreement shall relieve the Concessionaire from also securing relevant approval(s), permit(s), licenses and clearances of any and all Governmental Authorities or entities having jurisdiction over the development activities and the use of Project Site.

[The aforementioned list will be finalized based on the Concessionaire's Project Implementation Plan, subject to compliance of the Terms and Conditions as mentioned in the Concession Agreement and guidance from the Authority and/ or Independent Engineer].

## **Schedule F – Performance Security Deposit**

*[Proforma to furnish Construction/ Operation Performance Security in form of Bank Guarantee, to be issued by any Nationalized Bank in India]*

*(See Clause 9.1)*

From: .....

[Name and Address of Bank/ Financial Institution]

To,

**The .....**

**Government Opium and Alkaloids Factory,**

Department of Revenue (DOR),

Ministry of Finance, Government of India

WHEREAS:

- (a) ..... (the “**Concessionaire**”) and the Government Opium and Alkaloids Factory, Department of Revenue (DOR), Ministry of Finance, Government of India (the “**Authority**”) have entered into a Concession Agreement dated ..... (the “**Agreement**”) whereby the Authority has agreed to the Concessionaire undertaking to “**Setup of Production Unit for production of Concentrated Poppy Straw (CPS) from Opium Poppy Crop and Extraction of Semi Refined Morphine on PPP basis**” (the “**Project**”) on design, build, finance, own and operate (the “**DBFOO**”) basis, subject to and in accordance with the provisions of the Agreement.
- (b) The Agreement requires the Concessionaire to furnish a [Construction/ Operation] Performance Security (the “**Performance Security**”) to the Authority in a sum of INR ..... (Indian Rupees ..... crore) (the “**Guarantee Amount**”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the Concession Period (as defined in the Agreement).
- (c) We, ..... through our Branch at ..... (the “**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance Security.

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably guarantees and undertakes to pay to the Authority upon occurrence of any failure or default in due and faithful performance of all or any of the Concessionaire’s obligations, under and in accordance with the provisions of the Agreement, on its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Concessionaire, such sum or sums up to an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of an Officer not below the rank of ..... in the Authority, that the Concessionaire has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall

be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Concession Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any Dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Concessionaire for any reason whatsoever.

3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfilment and/ or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.
6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for ..... days during the Concession Period and unless a demand or claim in writing is made by the Authority on the Bank under this Guarantee, no later than 6 (six) months from the date of expiry of this Guarantee, all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.
8. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
9. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorized to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the

envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.

10. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of .... Days as mentioned in the Concession Agreement or until it is released earlier by the Authority pursuant to the provisions of the Agreement.

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

SIGNED, SEALED AND DELIVERED

Seal of [Bank/Financial Institution] .....

Name of [Bank/Financial Institution] .....

Signature .....

Name .....

Title .....

Date .....

**Notes:**

*The bank guarantee should contain the name, designation and code number of the officer(s) signing the guarantee.*

*The address, telephone number and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.*

## **Schedule G – Processing Fee**

(i) The Financial Offer of the Selected Bidder agreed upon by the Authority:

<b>Particulars</b>	<b>Amount of Processing Fee per MT (in INR)</b>
<b>Processing Fee</b> per Metric Tonne (MT) of Poppy Husk processed during first year post COD	_____ /-
In words – Rupees _____ _____ only + Applicable GST	

(ii) Fixed and Variable Component, base unit for first Accounting Year post COD shall be considered as follows:

<b>Component of Processing Fee</b>	<b>Percentage Share of Processing Fee</b>	<b>Amount of each Component (in INR per MT)</b>
<b>Fixed Component</b>	60%	_____ /-
<b>Variable Component</b>	40%	_____ /-

## **Schedule H – Project Completion Schedule**

(See Clause 12.1)

### **1.1 Project Completion Schedule**

During Construction Period, the Concessionaire shall comply with the requirements set forth in this Schedule-I for each of the Project Milestones and the Scheduled Project Completion Date. Within 15 (fifteen) days of the date of each Project Milestone, the Concessionaire shall notify the Authority of such compliance along with necessary particulars thereof.

#### **1.1.1 Project Milestone-I**

1.1.1.1 Project Milestone-I shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-I**”).

1.1.1.2 Prior to the occurrence of Project Milestone-I, the Concessionaire shall have completed all the excavation works and expended not less than 10% (ten per cent) of the total capital cost set forth in the Agreement

#### **1.1.2 Project Milestone-II**

1.1.2.1 Project Milestone-II shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-II**”).

1.1.2.2 Prior to the occurrence of Project Milestone-II, the Concessionaire shall have completed all the foundation works, built at least 15% of the building structure (built up area) and expended not less than 25% (twenty-five per cent) of the total capital cost set forth in the Agreement

#### **1.1.3 Project Milestone-III**

1.1.3.1 Project Milestone-III shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-III**”).

1.1.3.2 Prior to the occurrence of Project Milestone-III, the Concessionaire shall have built at least 30% of the building structure (built up area) and expended not less than 40% (forty-five per cent) of the total capital cost set forth in the Agreement

#### **1.1.4 Project Milestone-IV**

1.1.4.1 Project Milestone-IV shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-IV**”).

1.1.4.2 Prior to the occurrence of Project Milestone-IV, the Concessionaire shall have built at least 45% of the building structure (built up area) and have initiated the process of procurement of machineries and expended not less than 55% (Fifty-five per cent) of the total capital cost set forth in the Agreement

#### **1.1.5 Project Milestone-V**

1.1.5.1 Project Milestone-V shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-V**”).

1.1.5.2 Prior to the occurrence of Project Milestone-V, the Concessionaire shall have built at least 70% of the building structure (built up area) and expended not less than 75% (seventy-five per cent) of the total capital cost set forth in the Agreement

#### **1.1.6 Project Milestone-VI**

1.1.6.1 Project Milestone-VI shall occur on the date falling on the ..... (.....) day from the Appointed Date (the “**Project Milestone-VI**”).

1.1.6.2 Prior to the occurrence of Project Milestone-VI, the Concessionaire shall have built at least 100% of the building structure (built up area) and have installed all machineries and expended not less than 100% (hundred per cent) of the total capital cost set forth in the Agreement

#### **1.1.7 Scheduled Project Completion Date**

1.1.7.1 The Scheduled Project Completion Date shall occur on the 1095th (one thousand and ninety-five) day from the Appointed Date.

1.1.7.2 On or before the Scheduled Project Completion Date, the Concessionaire shall have completed the project construction and installed necessary machinery as proposed in Schedule-I in accordance with this Agreement.

[The aforementioned clauses may be finalized based on the Concessionaire’s Project Implementation Plan, subject to compliance of the Terms and Conditions as mentioned in the Concession Agreement and guidance from the Authority and/or Independent Engineer.]

## ***Schedule I – Detailed Project Report***

(See Clause 12.3)

### **1.1 Detailed Project Report**

1.1.1 In compliance of the obligations set forth in Clause 12.3 of this Agreement, the Concessionaire shall furnish to the Authority and Independent Engineer, free of cost, Detailed Project Report constituted of Site Plan, Cost details, plant capacity, equipment details, drawings.

1.1.2 The Authority would not provide any comments/ suggestions/ approval to the Detailed Project Report. The Concessionaire would be responsible for ensuring that all design and specifications are as per Applicable Laws.

### **1.2 Additional Drawings/ Report**

If the Independent Engineer determines that for discharging its duties and functions under this Agreement, it requires any drawings or reports other than those listed in Annex-I, it may by notice require the Concessionaire to prepare and furnish such drawings forthwith. Upon receiving a requisition to this effect, the Concessionaire shall promptly prepare and furnish such drawings or reports to the Independent Engineer, as if such drawings or reports formed part of Annexure of this Schedule I .

## ***Annex-I***

[Note: The Authority shall describe in this Annexure, all the Drawings or reports that the Concessionaire is required to furnish as per provisions stipulated hereunder in this Agreement.]

## **Schedule J – Tests**

### **1 Schedule for Tests**

**1.1.1** The Concessionaire shall, no later than 30 (thirty) days prior to the likely completion of the Project, notify the Independent Engineer and the Authority of its intent to subject the Project to Tests, and no later than 7 (seven) days prior to the actual date of Tests, furnish to the Independent Engineer and the Authority detailed inventory and particulars of all works and equipment forming part of the Project.

**1.1.2** The Concessionaire shall notify the Independent Engineer of its readiness to subject the Project to Tests at any time after 7 (seven) days from the date of such notice, and upon receipt of such notice, the Independent Engineer shall, in consultation with the Concessionaire, determine the date and time for each Test and notify the same to the Authority who may designate its representative to witness the Tests. The Independent Engineer shall thereupon conduct the Tests itself or cause any of the Tests to be conducted in accordance with Article 12 and this Schedule J .

### **1.2 Tests**

[Note: The Authority, in consultation with the Independent Engineer shall hereunder describe all the Tests that are required to be performed].

### **1.3 Agency for conducting Tests**

All Tests set forth in this Schedule J shall be conducted by the Independent Engineer or such other agency or person as it may specify in consultation with the Authority.

### **1.4 Completion**

Upon successful completion of Tests, the Independent Engineer shall issue the Completion Certificate or the Provisional Certificate, as the case may be.

### **1.5 Tests during construction**

Without prejudice to the provisions of this Schedule J , tests during construction shall be conducted.

## **Schedule K – Completion Certificate**

(See Clause 14.2 & 14.3)

1. I/We, ..... (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated ..... (the “**Agreement**”), to “**Setup of Production Unit for production of Concentrated Poppy Straw (CPS) from Opium Poppy Crop and Extraction of Semi Refined Morphine on PPP basis**” ( the “**Project**”), design, build, finance, own and operate (the “**DBFOO**”) basis, through ..... (Name of Concessionaire) (the “**Concessionaire**”), hereby certify that the Tests specified in **Article 13** and **Schedule J** of the Agreement have been successfully undertaken to determine compliance of the Project with the provisions of the Agreement, and I/ We am/ are satisfied that the Project can be safely and reliably placed in commercial service thereof.
2. It is certified that, in terms of the aforesaid Agreement, all works forming part of the Project have been completed, and the Project is hereby declared fit for entry into commercial operation on this the ..... day of ..... 20.....

SIGNED, SEALED AND DELIVERED

For and on behalf of

the INDEPENDENT ENGINEER by:

(Signature)

(Name)

(Designation)

(Address)

### **Provisional Certificate**

- 1 I/We, ..... (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated ..... (the “**Agreement**”), to “**Setup of Production Unit for production of Concentrated Poppy Straw (CPS) from Opium Poppy Crop and Extraction of Semi Refined Morphine on PPP basis**” ( the “**Project**”) through ..... (Name of Concessionaire), hereby certify that the Tests specified in Schedule J of the Agreement have been undertaken for the Project Component .....to determine compliance thereof with the provisions of the Agreement.
- 2 Construction Works forming part of the Project Components ..... of the Project that were found to be incomplete and/or deficient have been specified in the Punch List appended hereto, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. (Some of the incomplete works have been delayed as a result of reasons attributable to the Authority or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire) I/We am/are satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Project Component ..... of the Project, pending completion thereof.
- 3 In view of the foregoing, I/ We am/ are satisfied that the Project Components ..... of the Project can be safely and reliably placed in commercial service thereof, and in terms of the Agreement, the Project Component ..... of the Project is hereby provisionally declared fit for entry into commercial operation on this the ..... day of ..... 20.....

ACCEPTED, SIGNED, SEALED  
AND DELIVERED  
For and on behalf of  
CONCESSIONAIRE by:

SIGNED, SEALED AND  
DELIVERED  
For and on behalf of  
INDEPENDENT ENGINEER by:

(Signature)  
(Name and Designation)  
(Address)

(Signature)  
(Name and Designation)  
(Address)

## **Schedule L – Maintenance Requirements**

*(See Clause 16.2)*

*Few suggested points to be addressed in this Schedule:*

- (a) Capacity to store & process
- (b) Process flow for receipt of Poppy Husks
- (c) Process flow for Processing
- (d) Process flow for Testing of finished products
- (e) Storage Manual
- (f) Process flow for Dispatch of finished goods
- (g) Appointment of Contractors to operate the project site

## **Schedule M – Safety Requirements**

(See Clause 17.1.1)

### **1.1 Guiding principles**

1.1.1 Safety Requirement aim at reduction in injuries, loss of life and damage to property resulting from accidents on or about the Project, irrespective of the person(s) at fault.

1.1.2 Safety Requirements apply to all phases of operation, management and development with emphasis on identification of factors associated with accidents, consideration of the same, and implementation of appropriate remedial measures.

1.1.3 Safety Requirement include measures associated with safe movement, safety management, safely equipment, fire safety, enforcement and Emergency response.

### **1.2 Obligations of the Concessionaire**

1.2.1 The Concessionaire shall abide by the following in so far as they related to safety of the Users:

- (h) Applicable Laws and Applicable Permits;
- (i) Manual for Safety, issued by the Authority;
- (j) Provision of this Agreement;
- (k) Good Industry Practice

### **1.3 Appointment of Safety Consultant**

1.3.1 For carrying out safety audit of the Project, Authority shall appoint from time to time, one or more qualified firms or organization as its consultant (the "Safety Consultant").

1.3.2 Once in every Accounting Year, a safety audit shall be carried out by the Safety Consultant. It shall review, compile and analyze the annual report and accident data of the preceding year, and undertake an inspection of the Project. The Safety Consultant shall complete the audit within a period of 1(one) month and submit a Safety Report (the "Safety Report") recommending specific improvements, if any, required to be made in the Project. The Safety Report shall be submitted to Authority, in 5 (five) copies. One copy each of the Safety Report shall be forwarded by the Authority to the Concessionaire and the Independent Engineer forthwith.

### **1.4 Safety measures during Concession Period**

1.4.1 The Concessionaire shall develop, implement and administer a surveillance and safety Programme for the Project.

- 1.4.2 The Concessionaire shall keep a copy of every first information report (the "FIR") recorded by Police with respect to any accident occurring in the Project. In addition, the Concessionaire shall also collect data for all cases of accidents not recorded by the Police. The information so collected shall be summarized in the form prescribed by the Authority for this purpose. The Concessionaire shall also record the exact location of each accident on the Layout plans and aforesaid data shall be submitted to Authority at the conclusion of every quarter.
- 1.4.3 The Concessionaire shall submit to the Authority before 31<sup>st</sup> (thirty first) May of each year, an annual report (in ten copies) containing, without limitation, a detailed listing and analysis of all accidents of the preceding Accounting Year and the measures taken by the Concessionaire pursuant to the provisions of Paragraph 1.4.1 of this Schedule for averting or minimizing such accidents in future.
- 1.4.4 Once in every Accounting Year, a safety audit shall be carried out by the Safety Consultant to be appointed by the Authority. It shall review and analyze annual report and accident data of the preceding year, and undertake an inspection of the Terminal. The Safety Consultant shall complete the safety audit within a period of 1 (one) month and submit a Safety Report recommending specific improvements, if any, required to be made in the Project. Such recommendations shall be processed, mutatis mutandis, and acted upon in the manner set forth in Paragraphs 1.4.2, 1.4.3, and 1.4.4 of this Schedule.

## **1.5 Costs and expenses**

- 1.5.1 Costs and expenses incurred in connection with the Safety Requirements set forth herein, including the provisions of this Schedule, shall be met in accordance with Article 19.

## ***Schedule N – Selection of Independent Engineer***

(See Clause 19.1)

### **1.1 Selection of Independent Engineer**

1.1.1 The Authority shall follow the selection process specified in the Model RFP Document for Selection of Technical Consultants as published by the Ministry of Finance/Planning Commission or any substitute thereof for selection of an experienced firm to discharge the functions and duties of an Independent Engineer.

1.1.2 In the event of Termination of an Independent Engineer appointed in accordance with the provisions of paragraph 1.1, the Authority shall appoint another firm of Technical Consultants forthwith or may engage a Government-owned entity in accordance with the provisions of paragraph 5 of this Schedule N .

1.1.3 The Concessionaire may, in its discretion, nominate a representative to participate in the process of selection to be undertaken by the Authority under this Schedule N .

### **1.2 Terms of Reference**

1.2.1 The Terms of Reference for the Independent Engineer shall substantially conform with Schedule O .

### **1.3 Fee and expenses**

1.3.1 In determining the nature and quantum of duties and services to be performed by the Independent Engineer during the Construction Period and Operation Period, the Authority shall endeavor that payments to the Independent Engineer on account of fee and expenses do not exceed 2% (two per cent) of the Total Project Cost. Payments not exceeding such 2% (two per cent) shall be borne equally by the Authority and the Concessionaire in accordance with the provisions of this Agreement.

### **1.4 Appointment of Government entity as Independent Engineer**

1.4.1 Notwithstanding anything to the contrary contained in this Schedule, the Authority may in its discretion appoint a Government-owned entity as the Independent Engineer; provided that such entity shall be a body corporate having as one of its primary function the provision of consulting, advisory and supervisory services for engineering projects; provided further that a Government-owned entity which is owned or controlled by the Authority shall not be eligible for appointment as Independent Engineer.

## **Schedule O – Terms of Reference for Selection of Independent Engineer**

(See Clause 19.2.1)

### **1.1 Scope**

1.1.1 These Terms of Reference for the Independent Engineer (the “**TOR**”) are being specified pursuant to the Concession Agreement dated ..... (the “**Agreement**”), which has been entered into between the Authority and ..... (the “**Concessionaire**”) for the Project on design, build, finance, own and operate (the “**DBFOO**”) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this TOR.

1.1.2 This TOR shall apply to construction of the Project.

### **1.2 Definitions and interpretation**

1.2.1 The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.

1.2.2 References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.

1.2.3 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Agreement shall apply, mutatis mutandis, to this TOR.

### **1.3 Role and functions of the Independent Engineer**

1.3.1 The role and functions of the Independent Engineer shall include the following:

- (a) review of the Drawings and Documents as set forth in Schedule O 1.4;
- (b) review, inspection and monitoring of Construction Works as set forth in Schedule O 1.5;
- (c) conducting Tests on completion of construction and issuing Completion/Provisional Certificate as set forth in Schedule O 1.5;
- (d) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
- (e) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (f) assisting the Parties in resolution of Disputes as set forth in Schedule O 1.7; and
- (g) undertaking all other duties and functions in accordance with the Agreement.

1.3.2 The Independent Engineer shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

## 1.4 Construction Period

- 1.4.1 During the Construction Period, the Independent Engineer shall undertake a detailed review of the Drawings and Detailed Project Report to be furnished by the Concessionaire along with supporting data, including the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites and topographical surveys. The Independent Engineer shall complete such review and send its comments/observations to the Authority and the Concessionaire within 15 (fifteen) days of receipt of such Drawings. In particular, such comments shall specify the conformity or otherwise of such Drawings and Detailed Project Report with the Scope of the Project and Specifications and Standards.
- 1.4.2 The Independent Engineer shall review any modified Drawings or supporting Documents sent to it by the Concessionaire and furnish its comments within 7 (seven) days of receiving such Drawings or Documents.
- 1.4.3 The Independent Engineer shall review the Drawings sent to it by the Safety Consultant in accordance with Schedule M and furnish its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receiving such Drawings. The Independent Engineer shall also review the Safety Report and furnish its comments thereon to the Authority within 15 (fifteen) days of receiving such report.
- 1.4.4 The Independent Engineer shall review the detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments within 15 (fifteen) days of receipt thereof.
- 1.4.5 Upon reference by the Authority, the Independent Engineer shall review and comment on the EPC Contract or any other contract for construction, operation and maintenance of the Project, and furnish its comments within 7 (seven) days from receipt of such reference from the Authority.

## 1.5 Construction Period

- 1.5.1 In respect of the Drawings, Detailed Project Report, Documents and Safety Report received by the Independent Engineer for its review and comments during the Construction Period, the provisions of Paragraph 4 shall apply, *mutatis mutandis*.
- 1.5.2 The Independent Engineer shall review the monthly progress report furnished by the Concessionaire and send its comments thereon to the Authority and the Concessionaire within 7 (seven) days of receipt of such report.

- 1.5.3 The Independent Engineer shall inspect the Construction Works and the Project once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20<sup>th</sup> (twentieth) day of each month in any case, and make out a report of such inspection (the “**Inspection Report**”) setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works with the Scope of the Project and the Specifications and Standards. In a separate section of the Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in the construction of the Project. The Independent Engineer shall send a copy of its Inspection Report to the Authority and the Concessionaire within 7 (seven) days of the inspection.
- 1.5.4 The Independent Engineer may inspect the Project Site more than once in a month if any lapses, defects or deficiencies require such inspections.
- 1.5.5 For determining that the Construction Works conform to Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, Tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the Tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- 1.5.6 The sample size of the Tests, to be specified by the Independent Engineer under Paragraph 5.5, shall comprise 10% (ten per cent) of the quantity or number of Tests prescribed for each category or type of Tests in the Quality Control Manuals; provided that the Independent Engineer may, for reasons to be recorded in writing, increase the aforesaid sample size by up to 10% (ten per cent) for certain categories or types of Tests.
- 1.5.7 The timing of Tests referred to in Paragraph 5.5, and the criteria for acceptance/ rejection of their results shall be determined by the Independent Engineer in accordance with the Quality Control Manuals. The Tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the Tests that may be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice.
- 1.5.8 In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, Tests to determine that such remedial works have brought the Construction Works into conformity with the Specifications and Standards, and the provisions of this Paragraph 5 shall apply to such Tests.

- 1.5.9 In the event that the Concessionaire fails to achieve any of the Project Milestones, the Independent Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Independent Engineer shall determine that completion of the Project is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within 15 (fifteen) days the steps proposed to be taken to expedite progress, and the period within which Scheduled Project Completion Date shall be achieved. Upon receipt of a report from the Concessionaire, the Independent Engineer shall review the same and send its comments to the Authority and the Concessionaire forthwith.
- 1.5.10 If at any time during the Construction Period, the Independent Engineer determines that the Concessionaire has not made adequate arrangements for the safety of workers and Users in the zone of construction or that any work is being carried out in a manner that threatens the safety of the workers and the Users, it shall make a recommendation to the Authority forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- 1.5.11 In the event that the Concessionaire carries out any remedial measures to secure the safety of suspended works and Users, it may, by notice in writing, require the Independent Engineer to inspect such works, and within 3 (three) days of receiving such notice, the Independent Engineer shall inspect the suspended works and make a report to the Authority forthwith, recommending whether or not such Suspension may be revoked by the Authority.
- 1.5.12 If Suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of dates set forth in the Project Completion Schedule, to which the Concessionaire is reasonably entitled, and shall notify the Authority and the Concessionaire of the same.
- 1.5.13 The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in Schedule J and issue a Completion Certificate or Provisional Certificate, as the case may be. For carrying out its functions under this Paragraph and all matters incidental thereto, the Independent Engineer shall act under and in accordance with the provisions of Article 16 and Schedule J .
- 1.5.14 Upon reference from the Authority, the Independent Engineer shall make a fair and reasonable assessment of the costs of providing information, works and services as set forth in Article 17 and certify the reasonableness of such costs for payment by the Authority to the Concessionaire.
- 1.5.15 The Independent Engineer shall aid and advise the Concessionaire in preparing the Maintenance Manual.

## **1.6 Determination of costs and time**

- 1.6.1 The Independent Engineer shall determine the costs, and/or their reasonableness, that are required to be determined by it under the Agreement.

1.6.2 The Independent Engineer shall determine the period, or any extension thereof, that is required to be determined by it under the Agreement.

### **1.7 Assistance in Dispute resolution**

1.7.1 When called upon by either Party in the event of any Dispute, the Independent Engineer shall mediate and assist the Parties in arriving at an amicable settlement.

1.7.2 In the event of any disagreement between the Parties regarding the meaning, scope and nature of Good Industry Practice, as set forth in any provision of the Agreement, the Independent Engineer shall specify such meaning, scope and nature by issuing a reasoned written statement relying on Good Industry Practice and authentic literature.

### **1.8 Other duties and functions**

1.8.1 The Independent Engineer shall perform all other duties and functions specified in the Agreement.

### **1.9 Miscellaneous**

1.9.1 The Independent Engineer shall notify its Programme of inspection to the Authority and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection.

1.9.2 A copy of all communications, comments, instructions, Drawings or Documents sent by the Independent Engineer to the Concessionaire pursuant to this TOR, and a copy of all the test results with comments of the Independent Engineer thereon shall be furnished by the Independent Engineer to the Authority forthwith.

1.9.3 The Independent Engineer shall obtain, and the Concessionaire shall furnish in 2 (two) copies thereof, all communications and reports required to be submitted, under this Agreement, by the Concessionaire to the Independent Engineer, whereupon the Independent Engineer shall send 1 (one) of the copies to the Authority along with its comments thereon.

1.9.4 The Independent Engineer shall retain at least one copy each of all Drawings, Detailed Project Report and Documents received by it, including 'as-built' Drawings, and keep them in its safe custody.

1.9.5 Upon completion of its assignment hereunder, the Independent Engineer shall duly classify and list all Drawings, Detailed Project Report, Documents, results of Tests and other relevant records, and hand them over to the Authority or such other person as the Authority may specify, and obtain written receipt thereof. 2 (two) copies of the said documents shall also be furnished in editable digital format or in such other medium as may be acceptable to the Authority.

1.9.6 Wherever no period has been specified for delivery of services by the Independent Engineer, the Independent Engineer shall act with the efficiency and urgency necessary for discharging its functions in accordance with Good Industry Practice.

## ***Schedule P – Selection of Independent Testing Laboratory***

### **1.1 Selection of independent testing agency**

1.1.1 The Authority shall follow an open competitive bidding process, as mutually agreeable to both the parties, for selection of an experienced firm to set up and discharge the functions and duties of an Independent Testing Laboratory ('ITL').

1.1.2 In the event of Termination of an independent testing agency appointed in accordance with the provisions of paragraph 1.1, the Authority shall appoint another entity as independent testing agency.

### **1.2 Fee and expenses**

1.2.1 The cost quoted by the preferred bidder to set up the Independent Testing Laboratory and discharge the functions and duties of an independent testing agency, shall be borne equally by the Authority and the Concessionaire.

1.2.2 If any party requests for any additional testing/retesting to be done beyond the prescribed sampling and testing process (as mutually agreed at the time of appointment of ITL), the cost for such additional testing/retesting would be borne by the requesting party.

### ***a. - Terms of Reference – Independent Testing Agency***

While the detailed terms of reference would be mutually agreeable between the Authority and the Concessionaire, indicative terms of reference for Independent Testing Agency are mentioned below:

- (a) Finalise the methodology in consultation with the Authority for drawing the samples from each batch of Poppy Husk received by the Concessionaire, within 2 months of appointment.
- (b) Supervision of weighment of the Poppy Husk received by the Concessionaire under each batch and ensure its correct recording and communicate the same to Concessionaire as well as Authority.
- (c) Direct and guide the Concessionaire to separately store the Poppy Husk provided by the Authority under each batch, till ITL draws samples from such Poppy Husk for testing of the SRM/ Alkaloids/Crude form of Alkaloids Content.
- (d) Draw samples (as per defined methodology) of Poppy Husk from the batch (of Poppy Husk) for testing SRM / Alkaloids / Crude form of Alkaloids contents, within 5 working days from receipt of such Poppy Husk.
- (e) Carry the sample collected to the Independent Testing Laboratory facility, within 2 hours from the time sample collected.
- (f) Test the samples collected using High-Performance Liquid Chromatography (HPLC) or any other method as mutually agreeable between the Authority and Concessionaire, within 5 working days from sample collection.
- (g) Communicate the results of tests undertaken to the Concessionaire and Authority within 5 working days from the date of testing.

## **Schedule Q – Escrow Agreement**

(See Clause 22.1.2)

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

- (a) ..... LIMITED, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at ..... (hereinafter referred to as the **“Concessionaire”** which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
- (b) .....name and particulars of Lenders’ Representative and having its registered office at .....acting for and on behalf of the Senior Lenders as their duly authorized agent with regard to matters arising out of or in relation to this Agreement (herein after referred to as the **“Lenders’ Representative”** which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
- (c) .....name and particulars of the Escrow Bank and having its registered office at .....(hereinafter referred to as the **“Escrow Bank”** which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);  
and
- (d) The ..... represented by ..... and having its principal offices at ..... (hereinafter referred to as the **“Authority”** which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).

WHEREAS:

- (e) The Authority has entered into a Concession Agreement dated ..... with the Concessionaire (the **“Concession Agreement”**) to **“Setup of Production Unit for production of Concentrated Poppy Straw (CPS) from Opium Poppy Crop and Extraction of Semi Refined Morphine on PPP basis”** ( the **“Project”**) on PPP (the **“DBFOO”**) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement
- (f) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (g) The Concession Agreement requires the Concessionaire to establish an Escrow Account, inter alia, on the terms and conditions stated therein.

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

### **1.1 Definitions and Interpretation**

#### **1.1.1 Definitions**

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

- **“Agreement”** means this Escrow Agreement and any amendment thereto made in accordance with the provisions contained herein;

- **“Concession Agreement”** means the Concession Agreement referred to in Recital (A) above and annexed hereto as Annex-A, and shall include all of its Recitals and Schedules and any amendments made thereto in accordance with the provisions contained in this behalf therein;
- **“Cure Period”** means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Concessionaire, and shall commence from the date on which a notice is delivered by the Authority or the Lenders’ Representative, as the case may be, to the Concessionaire asking the latter to cure the breach or default specified in such notice;
- **“Escrow Account”** means an escrow account established in terms of and under this Agreement, and shall include the Sub-Accounts;
- **“Escrow Default”** shall have the meaning ascribed thereto in Clause 6.1;
- **“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;
- **“Parties”** means the parties to this Agreement collectively and **“Party”** shall mean any of the Parties to this Agreement individually;
- **“Payment Date”** means, in relation to any payment specified in Clause 4.1, the date(s) specified for such payment; and
- **“Sub-Accounts”** means the respective Sub-Accounts of the Escrow Account, into which the monies specified in Clause 4.1 would be credited every month and paid out if due, and if not due in a month then appropriated proportionately in such month and retained in the respective Sub Accounts and paid out therefrom on the Payment Date(s).

#### 1.1.2 Interpretation

References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Senior Lenders.

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

References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.

The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

### 1.2 Escrow Account

#### 1.2.1 Escrow Bank to act as trustee

The Concessionaire hereby appoints the Escrow Bank to act as trustee for the Authority, the Lenders’ Representative and the Concessionaire in connection herewith and authorizes the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the Authority, the Lenders’ Representative and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Authority, the Lenders’ Representative and the Concessionaire shall have any rights hereunder as the beneficiaries of, or as Third-Party beneficiaries under this Agreement.

### 1.2.2 Acceptance of Escrow Bank

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Concessionaire, Senior Lenders or the Authority with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank shall act in trust for the benefit of, and as agent for, the Authority, the Lenders' Representative and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

### 1.2.3 Establishment and operation of Escrow Account

Within 30 (thirty) days from the date of this Agreement, and in any case prior to the Appointed Date, the Concessionaire shall open and establish the Escrow Account with the ..... (name of Branch) Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.

The Escrow Bank shall maintain the Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.

The Escrow Bank and the Concessionaire shall, after consultation with the Lenders' Representative, agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

### 1.2.4 Escrow Bank's fee

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Concessionaire. For the avoidance of doubt, such fee and expenses shall form part of the O&M Expenses and shall be appropriated from the Escrow Account in accordance with Clause 4.1.

### 1.2.5 Rights of the Parties

Save and except as otherwise provided in the Concession Agreement, The rights of the Authority, the Lenders' Representative and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Authority, the Lenders' Representative and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

### 1.2.6 Substitution of the Concessionaire

The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Nominated Company, pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the Nominated Company is a Party hereto and the Nominated Company shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Nominated Company.

## **1.3 Deposits into Escrow Account**

### 1.3.1 Deposits by the Concessionaire

The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

- (a) all money received in relation to the Project from any source, including the Senior Lenders, Lenders of Subordinated Debt and the Authority;
- (b) all funds received by the Concessionaire from its share-holders, in any manner or form;
- (c) all Processing Fee levied/ revenue received and collected by the Concessionaire;
- (d) any other revenues, rentals, deposits or capital receipts, as the case may be, from or in respect of the Project; and
- (e) all proceeds received pursuant to any insurance claims.

The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

#### 1.3.2 Deposits by the Authority

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

- (a) all Processing Fee collected by the Authority in exercise of its rights under the Concession Agreement; and
- (b) Termination Payments

Provided that, notwithstanding the provisions of Clause 4.1.1, the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire, and the balance remaining shall be deposited into the Escrow Account.

#### 1.3.3 Deposits by Senior Lenders

The Lenders' Representative agrees, confirms and undertakes that the Senior Lenders shall deposit into and/or credit the Escrow Account with all disbursements made by them in relation to or in respect of the Project; provided that notwithstanding anything to the contrary contained in this Agreement, the Senior Lenders shall be entitled to make direct payments to the EPC Contractor under and in accordance with the express provisions contained in this behalf in the Financing Agreements.

#### 1.3.4 Interest on deposits

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account; provided that the Escrow Bank shall be entitled to appropriate therefrom the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

### **1.4 Withdrawals from Escrow Account**

#### 1.4.1 Withdrawals during Concession Period

At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date(s):

- (a) all Taxes due and payable by the Concessionaire for and in respect of the Project;

- (b) all Concession Fee payable to Authority;
- (c) all payments relating to construction of the Project, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (d) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (e) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) all payments, interests and Damages certified by the Authority as due and payable to it by the Concessionaire;
- (h) monthly proportionate provision of Debt Service payments due in an Accounting Year in respect of Subordinated Debt;
- (i) any reserve requirements set forth in the Financing Agreements; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire.

No later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

#### 1.4.2 Withdrawals upon Termination

Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:

- (a) all Taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) all Concession Fee payable to Authority;
- (c) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire;
- (e) retention and payments relating to the liability for defects and deficiencies set forth in Article 32;
- (f) outstanding Subordinated Debt;
- (g) incurred or accrued O&M Expenses;
- (h) any other payments required to be made under this Agreement; and
- (i) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that the disbursements specified in Sub-clause (i) of this Clause 4.2 shall be undertaken only after the Vesting Certificate has been issued by the Authority.

#### 1.4.3 Application of insufficient funds

Funds in the Escrow Account shall be applied in the serial order of priority set forth in Clauses 4.1 and 4.2, as the case may be. If the funds available are not sufficient to meet all the requirements, the Escrow Bank shall apply such funds in the serial order of priority until exhaustion thereof.

#### 1.4.4 Application of insurance proceeds

Notwithstanding anything in this Agreement, the proceeds from all insurance claims, except life and injury, shall be deposited into and/or credited to the Escrow Account and utilized for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project, and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

#### 1.4.5 Withdrawals during Suspension

Notwithstanding anything to the contrary contained in this Agreement, the Authority may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 29 of the Concession Agreement. Any instructions given by the Authority to the Escrow Bank during such period shall be complied with as if such instructions were given by the Concessionaire under this Agreement and all actions of the Authority hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

### **1.5 OBLIGATIONS OF THE ESCROW BANK**

#### 1.5.1 Segregation of funds

Monies and other property received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received, and shall be segregated from other funds and property of the Escrow Bank.

#### 1.5.2 Notification of balances

7 (seven) business days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the Concessionaire and/or the Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Lenders' Representative of the balances in the Escrow Account and Sub-Accounts as at the close of business on the immediately preceding business day.

#### 1.5.3 Communications and notices

In discharge of its duties and obligations hereunder, the Escrow Bank:

- (a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;
- (b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;

- (c) shall, within 5 (five) business days after receipt, deliver a copy to the Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and
- (d) shall, within 5 (five) business days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Lenders' Representative in connection herewith.

#### 1.5.4 No set off

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies and properties held by the Escrow Bank in the Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

#### 1.5.5 Regulatory approvals

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

### 1.6 ESCROW DEFAULT

#### 1.6.1 Escrow Default

Following events shall constitute an event of default by the Concessionaire (an "**Escrow Default**") unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority or the Lenders' Representative:

- (a) the Concessionaire commits breach of this Agreement by failing to deposit any receipts into the Escrow Account as provided herein and fails to cure such breach by depositing the same into the Escrow Account within a Cure Period of 5 (five) business days;
- (b) the Concessionaire causes the Escrow Bank to transfer funds to any account of the Concessionaire in breach of the terms of this Agreement and fails to cure such breach by depositing the relevant funds into the Escrow Account or any Sub-Account in which such transfer should have been made, within a Cure Period of 5 (five) business days; or
- (c) the Concessionaire commits or causes any other breach of the provisions of this Agreement and fails to cure the same within a Cure Period of 5 (five) business days.

Upon occurrence of an Escrow Default, the consequences thereof shall be dealt with under and in accordance with the provisions of the Concession Agreement.

### 1.7 TERMINATION OF ESCROW AGREEMENT

#### 1.7.1 Duration of the Escrow Agreement

This Agreement shall remain in full force and effect so long as any sum remains to be advanced or is outstanding from the Concessionaire in respect of the debt, guarantee or Financial Assistance received by it from the Senior Lenders, or any of its obligations to the Authority remain to be discharged, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement.

### 1.7.2 Substitution of Escrow Bank

The Concessionaire may, by not less than 45 (forty five) days prior notice to the Escrow Bank, the Authority and the Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders' Representative and arrangements are made satisfactory to the Lenders' Representative for transfer of amounts deposited in the Escrow Account to a new Escrow Account established with the successor Escrow Bank. The Termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

### 1.7.3 Closure of Escrow Account

The Escrow Bank shall, at the request of the Concessionaire and the Lenders' Representative made on or after the payment by the Concessionaire of all outstanding amounts under the Concession Agreement and the Financing Agreements including the payments specified in Clause 4.2, and upon confirmation of receipt of such payments, close the Escrow Account and Sub-Accounts and pay any amount standing to the credit thereof to the Concessionaire. Upon closure of the Escrow Account hereunder, the Escrow Agreement shall be deemed to be terminated.

## 1.8 SUPPLEMENTARY ESCROW AGREEMENT

### 1.8.1 Supplementary Escrow Agreement

The Lenders' Representative and the Concessionaire shall be entitled to enter into a supplementary escrow Agreement with the Escrow Bank providing, inter alia, for detailed procedures and documentation for withdrawals from Sub-Accounts pursuant to Clause 4.1.1 and for matters not covered under this Agreement such as the rights and obligations of Senior Lenders and Lenders of Subordinated Debt, investment of surplus funds, restrictions on withdrawals by the Concessionaire in the event of breach of this Agreement or upon occurrence of an Escrow Default, procedures relating to operation of the Escrow Account and withdrawal therefrom, reporting requirements and any matters incidental thereto; provided that such supplementary escrow Agreement shall not contain any provision which is inconsistent with this Agreement and in the event of any conflict or inconsistency between provisions of this Agreement and such supplementary escrow Agreement, the provisions of this Agreement shall prevail.

## 1.9 INDEMNITY

### 1.9.1 General indemnity

The Concessionaire will indemnify, defend and hold the Authority, Escrow Bank and the Senior Lenders, acting through the Lenders' Representative, harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.

The Escrow Bank will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfil its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement

other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Escrow Bank, its officers, servants and agents.

#### 1.9.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a Third Party in respect of which it is entitled to the benefit of an indemnity under Clause 5.1.1 or in respect of which it is entitled to reimbursement (the “**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “**Indemnifying Party**”) within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or Dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

### 1.10 DISPUTE RESOLUTION

#### 1.10.1 Dispute resolution

Any Dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be decided finally by reference to arbitration to a Board of Arbitrators comprising one nominee of each Party to the Dispute, and where the number of such nominees is an even number, the nominees shall elect another person to such Board. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “**Rules**”) or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.

The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The place of arbitration shall be Bhopal and the language of arbitration shall be English.

### 1.11 MISCELLANEOUS PROVISIONS

#### 1.11.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Bhopal shall have jurisdiction over all matters arising out of or relating to this Agreement.

#### 1.11.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and
- (d) consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it

or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

#### 1.11.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

#### 1.11.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorized representatives of the Parties.

#### 1.11.5 Waiver

Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorized representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

Neither the failure by any Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by any Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

#### 1.11.6 No Third Party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

#### 1.11.7 Survival

Termination of this Agreement:

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

All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such Termination or expiry of this Agreement.

#### 1.11.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to

be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to Dispute resolution under the Clause 1.10 of this Agreement or otherwise.

#### 1.11.9 Successors and assigns

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

#### 1.11.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number or e-mail are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5:30 (five thirty) p.m. on a business day, or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

#### 1.11.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

#### 1.11.12 Authorized representatives

Each of the Parties shall, by notice in writing, designate their respective authorized representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorized representative by similar notice.

#### 1.11.13 Original Document

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

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

THE COMMON SEAL OF CONCESSIONAIRE has been affixed pursuant to the resolution passed by the Board of Directors of the Concessionaire at its meeting held on the ..... day of 20..... hereunto affixed in the presence of ....., Director, who has signed these presents in token thereof and ....., Company Secretary / Authorized Officer who has countersigned the same in token thereof:

SIGNED, SEALED AND DELIVERED

For and on behalf of  
SENIOR LENDERS by the  
Lenders' Representative:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(E-mail address)

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(E-mail address)

SIGNED, SEALED AND DELIVERED

SIGNED, SEALED AND DELIVERED

For and on behalf of ESCROW BANK by:

For and on behalf Department of ..... by:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(E-mail address)

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(E-mail address)

In the presence of:

1.

In the presence of:

2.

## **Schedule R – Panel of Chartered Accountants**

(See Clause 24.2.1)

### **1 Panel of Chartered Accountants**

Pursuant to the provisions of the Agreement, the Authority and the Concessionaire shall prepare a mutually agreed panel of 05 (five) reputable firms of Chartered Accountants having their registered offices in India (the “**Panel of Chartered Accountants**”). The criteria for preparing such Panel and the procedure to be adopted in this behalf shall be as set forth in this Schedule R .

#### **1.1 Invitation for empanelment**

**1.1.1** The Authority shall invite offers from all reputed firms of Chartered Accountants who fulfil the following eligibility criteria, namely:

- (a) the firm should have conducted statutory audit of the annual accounts of at least one hundred companies registered under the Companies Act, 1956, including any re-enactment or amendment thereof, of which at least ten should have been public sector undertakings;
- (b) The firm should have at least 05 (five) practicing Chartered Accountants on its rolls, each with a minimum experience of ten years in the profession;
- (c) The firm or any of its partners should not have been disqualified or black-listed by the Comptroller and Auditor General of India or the Authority; and
- (d) The firm should have an office in the State or in an adjacent State with at least 02 (two) practicing Chartered Accountants on its rolls in such State.

**1.1.2** Interested firms meeting the eligibility criteria shall be required to submit a statement of their capability including the bio-data of all the practicing Chartered Accountants on its rolls. In particular, each firm shall be required to furnish year-wise information relating to the names of all the companies with an annual turnover exceeding 25,00,00,000 INR (rupees twenty-five crore only) whose annual accounts were audited by such firm in any of the preceding 05 (five) Accounting Years

#### **1.2 Evaluation and selection**

**1.2.1** The information furnished by each firm shall be scrutinized and evaluated by the Authority and 01 (one) point shall be awarded for each annual audit of the companies specified in Paragraph 2.2 above. (For the avoidance of doubt and by way of illustration, a firm which has conducted audit of the annual accounts of any such company for 05 (five) years shall be awarded 05 (five) points).

**1.2.2** The Authority shall prepare a list of all the eligible firms along with the points scored by each such firm and 05 (five) firms scoring the highest points shall be identified and included in the draft Panel of Chartered Accountants.

#### **1.3 Consultation with the Concessionaire**

The Authority shall convey the aforesaid panel of firms to the Concessionaire for scrutiny and comments, if any. The Concessionaire shall be entitled to scrutinize the relevant records of the Authority to ascertain whether the selection of firms has been undertaken in accordance with the

prescribed procedure and it shall send its comments, if any, to the Authority within 15 (fifteen) days of receiving the aforesaid panel.

#### **1.4 Mutually agreed panel**

**1.4.1** The Authority shall, after considering all relevant factors including the comments, if any, of the Concessionaire, finalize and constitute a panel of 05 (five) firms which shall be deemed to be the mutually agreed Panel of Chartered Accountants.

## **Schedule S – Substitution Agreement**

(See Clause 31.3)

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

### **AMONGST**

- (a) The ....., represented by its ..... and having its principal offices at ..... (hereinafter referred to as the “**Authority**” which expression shall unless repugnant to the context or meaning thereof include its administrators, successors and assigns);
- (b) ..... LIMITED, a company incorporated under the provisions of the Companies Act, 2013 and having its registered office at ....., (hereinafter referred to as the “**Concessionaire**” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns and substitutes);
- (c) ..... name and particulars of Lenders’ Representative and having its registered office at ....., acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**”, which expression shall unless repugnant to the context or meaning thereof include its successors and substitutes);

### **WHEREAS:**

- (a) The Authority has entered into a Concession Agreement dated ..... with the Concessionaire (the “**Concession Agreement**”) to “**Setup of Production Unit for production of Concentrated Poppy Straw (CPS) from Opium Poppy Crop and Extraction of Semi Refined Morphine on PPP basis**” ( the “**Project**”) on PPP basis (the “**DBFOO**”), and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.
- (b) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (c) Senior Lenders have requested the Authority to enter into this Substitution Agreement for securing their interests through assignment, transfer and substitution of the Concession to a Nominated Company in accordance with the provisions of this Agreement and the Concession Agreement.
- (d) In order to enable implementation of the Project including its financing, construction, operation and maintenance, the Authority has agreed and undertaken to transfer and assign the Concession to a Nominated Company in accordance with the terms and conditions set forth in this Agreement and the Concession Agreement.

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

### **1.1 DEFINITIONS AND INTERPRETATION**

#### **1.1.1 Definitions**

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

- **“Agreement”** means this Substitution Agreement and any amendment thereto made in accordance with the provisions contained in this Agreement;
- **“Financial Default”** means occurrence of a Material Breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 3 (three) months;
- **“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;
- **“Nominated Company”** means a company, incorporated under the provisions of the Companies Act, 1956, including any re-enactment or modification thereof, selected by the Lenders’ Representative, on behalf of Senior Lenders, and proposed to the Authority for assignment/transfer of the Concession as provided in this Agreement;
- **“Notice of Financial Default”** shall have the meaning ascribed thereto in the Concession Agreement; and
- **“Parties”** means the parties to this Agreement collectively and “Party” shall mean any of the Parties to this Agreement individually.

### 1.1.2 Interpretation

References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Senior Lenders.

References to Clauses are, unless stated otherwise, references to Clauses 1.2, 1.3 and 1.4 of this Agreement.

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

The rules of interpretation stated in Clauses of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

## 1.2 ASSIGNMENT

### 1.2.1 Assignment of rights and title

The Concessionaire hereby agrees to assign the rights, title and interest in the Concession to, and in favour of, the Lenders’ Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of Financing by the Senior Lenders under the Financing Agreements.

## 1.3 SUBSTITUTION OF THE CONCESSIONAIRE

### 1.3.1 Rights of substitution

Pursuant to the rights, title and interest assigned under Clause 2.1, the Lenders’ Representative shall be entitled to substitute the Concessionaire by a Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.

The Authority hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Nominated Company selected by the Lenders’ Representative in accordance with this Agreement. For the avoidance of doubt, the Senior Lenders or the Lenders’ Representative shall not be entitled to operate and maintain the Project as Concessionaire either individually or collectively.

### 1.3.2 Substitution upon occurrence of Financial Default

Upon occurrence of a Financial Default, the Lenders' Representative may issue a notice to the Concessionaire (the "**Notice of Financial Default**") along with particulars thereof, and send a copy to the Authority for its information and record. A Notice of Financial Default under the Clauses of this Concession Agreement shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.

Upon issue of a Notice of Financial Default hereunder, the Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Agreements, substitute the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement.

At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project in accordance with the provisions of Article 29 of the Concession Agreement, and upon receipt of such notice, the Authority shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority may extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days. For the avoidance of doubt, the Authority expressly agrees and undertakes to terminate the Concession Agreement forthwith, upon receipt of a written request from the Lenders' Representative at any time after 240 (two hundred and forty) days from the date of Suspension hereunder.

### 1.3.3 Substitution upon occurrence of Concessionaire Default

Upon occurrence of a Concessionaire Default, the Authority shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days time to the Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.

In the event that the Lenders' Representative makes a representation to the Authority within the period of 15 (fifteen) days, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the Authority shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days; provided further that the Lenders' Representative may at any time withdraw its representation hereunder and upon such withdrawal, the Authority may terminate this Agreement in accordance with the provisions hereof.

### 1.3.4 Procedure for substitution

The Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Authority, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the take over and transfer of the Project including the Concession to the Nominated Company upon such Nominated Company's assumption of the liabilities and obligations of the Concessionaire

towards the Authority under the Concession Agreement and towards the Senior Lenders under the Financing Agreements.

To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfil the eligibility criteria that were laid down by the Authority for shortlisting the bidders for award of the Concession; provided that the Lenders' Representative may represent to the Authority that all or any of such criteria may be waived in the interest of the Project, and if the Authority determines that such waiver shall not have any Material Adverse Effect on the Project, it may waive all or any of such eligibility criteria.

Upon selection of a Nominated Company, the Lenders' Representative shall request the Authority to:

- (a) accede to transfer to the Nominated Company the right to construct, operate and maintain the Project in accordance with the provisions of the Concession Agreement;
- (b) endorse and transfer the Concession to the Nominated Company, on the same terms and conditions, for the residual Concession Period; and
- (c) enter into a Substitution Agreement with the Lenders' Representative and the Nominated Company on the same terms as are contained in this Agreement.

If the Authority has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 15 (fifteen) days from the date of proposal made by the Lenders' Representative, give a reasoned order after hearing the Lenders' Representative. If no such objection is raised by the Authority, the Nominated Company shall be deemed to have been accepted. The Authority shall thereupon transfer and endorse the Concession within 15 (fifteen) days of its acceptance/deemed acceptance of the Nominated Company; provided that in the event of such objection by the Authority, the Lenders' Representative may propose another Nominated Company for substitution of such Nominated Company in place of the Concessionaire.

The transfer of Concession hereunder to a Nominated Company may, notwithstanding anything to the contrary in this Agreement and the Concession Agreement, be undertaken by transfer of no less than 75% (seventy five per cent) of the Equity of the Concessionaire to the Nominated Company, and upon such transfer hereunder, the Concessionaire shall be deemed to be the Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.

### 1.3.5 Selection to be binding

The decision of the Lenders' Representative and the Authority in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Lenders' Representative or the Senior Lenders or the Authority taken pursuant to this Agreement including the transfer/assignment of the Concession in favour of the Nominated Company. The Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assets of the Project or the Concessionaire's shares. It is hereby acknowledged by the Parties that the rights of the Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or Authority and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the Authority or the Lenders' Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders' Representative.

## 1.4 PROJECT AGREEMENTS

### 1.4.1 Substitution of Nominated Company in Project Agreements

The Concessionaire shall ensure and procure that each Project Agreement contains provisions that entitle the Nominated Company to step into such Project Agreement, in its discretion, in place and substitution of the Concessionaire in the event of such Nominated Company's assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

## **1.5 TERMINATION OF CONCESSION AGREEMENT**

### **1.5.1 Termination upon occurrence of Financial Default**

At any time after issue of a Notice of Financial Default, the Lenders' Representative may by a notice in writing require the Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the Authority shall undertake Termination under and in accordance with the provisions of Article 29 of the Concession Agreement.

### **1.5.2 Termination when no Nominated Company is selected**

In the event that no Nominated Company acceptable to the Authority is selected and recommended by the Lenders' Representative within the period of 180 (one hundred and eighty) days or any extension thereof, the Authority may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

### **1.5.3 Realisation of Debt Due**

The Authority and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realisation of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Escrow Account in accordance with the provisions of the Concession Agreement and the Escrow Agreement.

## **1.6 DURATION OF THE AGREEMENT**

### **1.6.1 Duration of the Agreement**

This Agreement shall come into force from the date hereof and shall expire at the earliest to occur of the following events:

- (a) Termination of the Agreement; or
- (b) no sum remains to be advanced and no sum is outstanding to the Senior Lenders, under the Financing Agreements.

## **1.7 INDEMNITY**

### **1.7.1 General indemnity**

The Concessionaire will indemnify, defend and hold the Authority and the Lenders' Representative harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

The Authority will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Authority to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or

this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Authority, its officers, servants and agents.

The Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and Third Party claims for any loss, damage, cost and expense arising out of failure of the Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lenders' Representative, its officers, servants and agents.

#### 1.7.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a Third Party in respect of which it is entitled to the benefit of an indemnity under Clause 10.1 or in respect of which it is entitled to reimbursement (the "**Indemnified Party**"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or Dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

### 1.8 DISPUTE RESOLUTION

#### 1.8.1 Dispute resolution

Any Dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably shall be decided by reference to arbitration to a Board of Arbitrators comprising one nominee each of the Authority, Concessionaire and the Lenders' Representative. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") or such other rules as may be mutually agreed by the Parties, and shall be subject to provisions of the Arbitration and Conciliation Act, 1996.

The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The place of arbitration shall be Bhopal and the language of arbitration shall be English.

### 1.9 MISCELLANEOUS PROVISIONS

#### 1.9.1 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Bhopal shall have jurisdiction over all matters arising out of or relating to this Agreement.

#### 1.9.2 Waiver of sovereign immunity

The Authority unconditionally and irrevocably:

- agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Authority with respect to its assets;
- waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and

- consents generally in respect of the enforcement of any judgement or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgement that may be made or given in connection therewith).

#### 1.9.3 Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

#### 1.9.4 Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorised representatives of the Parties.

#### 1.9.5 Waiver

Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

- (a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
- (b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and
- (c) shall not affect the validity or enforceability of this Agreement in any manner.

Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

#### 1.9.6 No Third Party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

#### 1.9.7 Survival

Termination of this Agreement:

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

All obligations surviving the cancellation, expiration or Termination of this Agreement shall only survive for a period of 3 (three) years following the date of such Termination or expiry of this Agreement.

#### 1.9.8 Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to Dispute resolution under Article 11 of this Agreement or otherwise.

#### 1.9.9 Successors and assigns

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

#### 1.9.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and e-mail address are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on any day, or on a day that is a public holiday, the notice shall be deemed to be received on the first working day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

#### 1.9.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

#### 1.9.12 Authorised representatives

Each of the Parties shall by notice in writing designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

#### 1.9.13 Original Document

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

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

THE COMMON SEAL OF CONCESSIONAIRE has been affixed pursuant to the resolution passed by the Board of Directors of the Concessionaire at its meeting held on the ..... day of 20..... hereunto affixed in the presence of ....., Director, who has signed these presents in token thereof and ....., Company

SIGNED, SEALED AND DELIVERED

For and on behalf of

..... Authority:

Secretary / Authorized Officer who has  
countersigned the same in token thereof:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(E-mail address)

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(E-mail address)

SIGNED, SEALED AND DELIVERED

For and on behalf of SENIOR LENDORS by the  
Lenders' Representative:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(E-mail address)

In the presence of:

1.

2.

## **Schedule T – Vesting Certificate**

(See Clause 29.4)

1. The ..... (the “**Authority**”) refers to the **Concession Agreement** dated ..... (the “**Agreement**”) entered into between the Authority and ..... (the “**Concessionaire**”) for **Selection of the Concessionaire to “Setup of Production Unit for production of Concentrated Poppy Straw (CPS) from Opium Poppy Crop and Extraction of Semi Refined Morphine on PPP basis”** ( the “**Project**”) on design, build, finance, own and operate (the “**DBFOO**”) basis.
2. The Authority hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 31.1 of the Agreement on the basis that upon issue of this Vesting Certificate, the Authority shall be deemed to have acquired, and all title and interest of the Concessionaire in or about the Project shall be deemed to have vested unto the Authority, free from any Encumbrances, charges and liens whatsoever.
3. Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

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

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

AGREED, ACCEPTED AND SIGNED

SIGNED, SEALED AND DELIVERED

For and on behalf of

for and on behalf of

CONCESSIONAIRE by:

AUTHORITY by:

(Signature)

(Signature)

(Name)

(Name)

(Designation)

(Designation)

(Address)

(Address)

In the presence of:

1.

2.

## ***Schedule U – Reporting and Record Requirements***