

Request for Proposal  
for  
Operation and Maintenance  
of  
Joghigopa Terminal

Tender ID: IWAI/Cargo/456/2023-24

JUNE 2024

# INLAND WATERWAYS AUTHORITY OF INDIA

(Ministry of Ports, Shipping and Waterways, Government of India)

A-13, Sector-1, Gautam Buddha Nagar, NOIDA, U.P. - 201301

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## NOTICE INVITING E-TENDER

### 1. Introduction

Inland Waterways Authority of India (IWAI) invites online Tenders / Bids from reputed & eligible firms in two cover systems (Cover – I: Technical Bid and Cover – II: Financial Bid) for “**for Operation and Maintenance of Jogighopa Inland Terminal of IWAI**”.

### 2. Critical Data Sheet

- a. Interested parties may download the tender document online from the site <https://eprocure.gov.in/eprocure/app> and or IWAI's website “[www.iwai.nic.in](http://www.iwai.nic.in)” and pay INR 2,950/- (Rupees Two Thousand nine Hundred fifty only) including 18% GST as the cost of tender document / tender fee deposited to IWAI fund through RTGS / NEFT. However, Micro and Small Enterprises (MSEs) as defined in MSE Procurement Policy issued by Department of Micro, Small and Medium Enterprises (MSME) or Start-ups as recognized by Department for promotion of Industrial and Internal Trade (DPIIT) are exempt from submitting the Tender Fee / cost of Tender document, on submission of documents to the extent as per the Government of India notifications in this regard.
- b. Some important dates for this tender process are as follows:

i.	Document download start date	18.06.2024
ii.	Last date for submission of queries	27.06.2024
iii.	Pre bid Meeting date	28.06.2024
iv.	Bid Submission Start Date	09.07.2024
v.	Bid Submission Last Date	16.07.2024
vi.	Technical Bid Opening date	18.07.2024
vii.	Financial Bid Opening date	To be intimated later

### 3. Brief Scope of the Work

In brief, the scope of work for the appointed Charterer / Contractor shall be **Operation and Maintenance of Jogighopa inland Terminal of IWAI** for an initial contract duration of 10 years. The detailed Terms of Reference are given in the tender document.

#### 4. Method of Selection

The successful Bidder will be selected from among that who quotes the highest royalty rate INR /MT and complies with the procedures described in this Tender Document.

#### 5. Clarifications

Clarification / Query, if any, on the Tender Document can be obtained from the following address:

**Director (Traffic & Logistics),**

**Inland Waterways Authority of India,**

**(Ministry of Ports, Shipping and Waterways, Govt. of India)**

**A-13, Sector – 1, Noida-201301, U. P.**

**Tel. Nos.** 0120 - 2543931

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6. IWAI reserves the right to accept or reject any or all Tenders without assigning any reason and no correspondence shall be entertained in this regard.

**Director (Traffic & Logistics)**

**IWAI, Noida**

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## **Disclaimer**

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

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

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

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

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

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

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

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

## **Glossary**

<b>Contracting Authority</b>	As defined in Clause 1.1.1
<b>Bid(s)</b>	As defined in Clause 1.2.1
<b>Bidders</b>	As defined in Clause 2.4.1
<b>Bidding Documents</b>	As defined in Clause 1.1.8
<b>Bid Due Date</b>	As defined in Clause 1.1.8
<b>Bidding Process</b>	As defined in Clause 1.2.1
<b>Bid Parameter</b>	As defined in Clause 1.2.6
<b>Bid Security</b>	As defined in Clause 1.2.4
<b>COD</b>	As defined in Clause 6.3 of the Contract
<b>Operator</b>	As defined in Clause 1.1.2
<b>DPR</b>	As defined in Clause 2.3.2
<b>Government</b>	Government of India
<b>Highest Bidder</b>	As defined in Clause 1.2.8
<b>LOA</b>	As defined in Clause 3.c.iv
<b>Member</b>	Member of a Consortium
<b>MT</b>	Metric Ton
<b>Contract</b>	As defined in Clause 1.1.4
<b>Re. or Rs. or INR</b>	Indian Rupee
<b>RFP or Request for Proposals</b>	As defined in the Disclaimer
<b>Royalty</b>	As defined in Clause 1.2.6
<b>Selected Bidder</b>	As defined in Clause 3.c.i
<b>Terminal</b>	As defined in Clause 1.1.1
<b>Tied Bidders</b>	As defined in Clause 3.c.ii

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

# 1. INTRODUCTION

## 1.1. Background

- 1.1.1. The Inland Waterways Authority of India (“**Contracting Authority**”) is inter alia engaged in the operations of Inland Waterway Terminal located at Jogighopa (“**Terminal**”) in the state of Assam.

### **Indo Bangladesh Protocol**

Government of the Republic of India and Government of the People’s Republic of Bangladesh entered into a trade agreement in June 2015 wherein the two governments agreed to make mutually beneficial arrangements for the use of their waterways for commerce between the two countries and for passage of goods between two places in one country and to third countries through the territory of the other under the terms mutually agreed upon. In such cases, fees and charges, if leviable as per international agreements, conventions or practices, may be applied and transit guarantee regime may be established through mutual consultations. It is further agreed as following:

1. Each country will maintain the river routes falling within its territory in a navigable condition and provide all the essential pilotage and conservancy services, including hydrographic surveys and supply of charts, if prepared and available for commercial navigational use to inland water transport operators, and aids to night navigation where facilities for such navigation, already exist.

2. Acknowledging that there may be routes or parts of routes in one country, primarily being used by the transit traffic of the other, the country maintaining such routes will provide aids to night navigation on such routes, provided the country using such routes pays, by mutual agreement, for the installation and maintenance of such aids. The amount to be paid and the manner of its payment shall be mutually agreed upon by the two countries.

3. Port dues may be levied by the Inland Waterway Authorities (BIWTA and IWAI) in either country on the vessels belonging to the other country and engaged in inter country trade.

4. Acknowledging that one country may be required to maintain routes or parts of routes primarily on account of the transit traffic of the other, the country utilizing such routes will provide to the other country an agreed sum of money for the maintenance of such routes including conservancy and pilotage. IN accordance to this, the routes between Sirajganj and Daikhawa in the Northern Delta Section of the River Jamuna-Brahamaputra and the route between Sherpur and Zakiganj in the North Eastern Delta Section of the Kushiara river are recognized by both sides as routes being maintained primarily for the use of Indian transit traffic.

Two stretches of Bangladesh inland waterways viz, Sirajganj-Daikhawa and Ashuganj-Zakiganj on the IBP route are being developed at a total cost of Rs 305.84 Cr. on 80:20 cost sharing basis (80% being borne by India & 20% by Bangladesh). The development of these two stretches is expected to provide seamless navigation to and from North East India through waterways via the IBP route. The contracts for dredging on the two stretches have been awarded for achieving and maintaining requisite depth.

- 1.1.2. The Contracting Authority has decided to engage an entity (“**Operator**”) to operate and maintain the Terminal on Operation and Maintenance (“**O&M**”) basis. These and other allied activities shall be referred to as (“**the Project**”) through O&M basis.

1.1.3. The Contracting Authority is carrying out a bidding process for selection of the Operator.

1.1.4. The Selected Bidder shall be responsible for the Project as per the provisions of all applicable laws including but not limited to the National Waterways Act, 2016 or any subsequent enactment on the subject and in accordance with the provisions of O&M Agreement (“**Contract**”) to be entered into between the Contracting Authority and the Operator in the form provided by the Contracting Authority as part of the Bidding Documents pursuant hereto.

1.1.5. The scope of work will broadly include

- (a) Operations and maintenance: The Operator shall be responsible for Operations and Maintenance (“**O&M**”) of the terminal for handling cargo (bulk, break-bulk, containers etc.).

Detailed scope of work is provided in Article 7, read with Annexure III, of the Contract.

1.1.6. The Contract sets forth the detailed terms and conditions for award of the concession to the Operator, including the scope of the Operator’s services and obligations.

1.1.7. The statements and explanations contained in this RFP are intended to provide a better understanding to the Bidders about the subject matter of this RFP and the Project. The RFP should not be construed or interpreted as limiting in any way or manner the scope of services and obligations of the Operator set forth in the Contract or the Contracting Authority’s rights to amend, alter, change, supplement or clarify the scope of work, the Concession to be awarded pursuant to this RFP or the terms thereof or herein contained. Consequently, any omissions, conflicts or contradictions in the Bidding Documents including this RFP are to be noted, interpreted and applied appropriately to give effect to this intent, and no claims on that account shall be entertained by the Contracting Authority.

1.1.8. The Contracting Authority shall receive Bids pursuant to this RFP in accordance with the terms set forth in this RFP (collectively the “**Bidding Documents**”). The Contracting Authority reserves the right to modify, alter, amend and/ or clarify any or all of the Bidding Documents from time to time by the Contracting Authority. All Bids shall be prepared and submitted in accordance with such terms on or before the date specified in Clause 1.3 for submission of Bids (the “**Bid Due Date**”).

## **1.2. Brief description of Bidding Process**

1.2.1. The Contracting Authority has adopted a single-stage two envelope bidding process (collectively referred to as the “**Bidding Process**”) for selection of the Bidder for award of the Project. Bidders are called upon to submit details of their Technical Capacity and Financial Capacity in Cover-1 (“**Technical Bid**”)

and financial proposals in the format specified on the CPPP (“**Financial Bid**”) (the Technical Bid and Financial Bid shall collectively referred as “**Bid**”) in accordance with the terms specified in these Bidding Documents. The Bid shall be valid for a period of not less than 120 (one hundred and twenty) days from the Bid Due Date.

1.2.2. Deleted

1.2.3. The Bidding Documents include the draft Contract agreement is enclosed. Subject to the provisions of Clause 2.3.2, the aforesaid documents and any addenda issued subsequent to this RFP Document, shall form part of the Bidding Documents.

1.2.4. A Bidder is required to deposit, along with its Bid, a bid security of **Rs 41,01,200/- for Jogighopa Terminal**

, refundable not later than 60 (sixty) days from the Bid Due Date, except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the Concession Agreement. The Bidders will have an option to provide Bid Security in the form of a demand draft, RTGS or bank guarantee acceptable to the Authority. In case a bank guarantee is provided, its validity period shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. The Bid shall be summarily rejected if it is not accompanied by the Bid Security.

1.2.4.1 The firms registered with Micro and Small Enterprises (MSEs) are exempted from submission of Bid Security.

1.2.4.2 Deleted

1.2.4.3 Bids not accompanied with the Bid-Security shall be rejected as non-responsive.

1.2.4.4 ‘Bid Security’ amount as specified in clause 1.2.4..

1.2.5 During the Bid Stage, Bidders are invited to examine the Project in greater detail, and to carry out, at their cost, such studies as may be required for submitting their respective Bids.

1.2.6 The bid parameter (“**Bid Parameter**”) shall be the Royalty (“**Royalty**”) payable by the Operator for riverine and non-riverine cargo to the Contracting Authority, as per the terms and conditions of this RFP and the provisions of the Contract.

1.2.7 The Royalty shall be quoted in terms of INR per metric ton (“**MT**”) of cargo handled at the terminal. The Bid Parameter shall be quoted upto 2 (two) decimals, for instance, INR [XX.XX] per MT.

- 1.2.8 In this RFP, the term “**Highest Bidder**” shall mean the Bidder who is offering the highest royalty. Generally, the Highest Bidder will be the Selected Bidder. In the event Highest Bidder withdraws or is not selected for any reason then the Contracting Authority may, in its discretion, invite fresh Bids
- 1.2.9 The Contract period shall be for a period of 10(Ten) years from the COD.
- 1.2.10 The Operator will be allowed to handle non-riverine cargo also. However, the Operator shall pay Royalty to the Contracting Authority for both riverine and non-riverine cargo handled at the Terminal. Royalty shall be paid as per the terms of Contract document.
- 1.2.11 The Operator shall, in consideration of its investment and services, be entitled to levy, charge and appropriate a user fee from the users of the Project. The upper limit of the user fee shall be stipulated by the Contracting Authority in advance as per Contract document.
- 1.2.12 Details of the process to be followed at the Bid Stage and the terms thereof are spelt out in this RFP.
- 1.2.13 Any queries or request for additional information concerning this RFP shall be submitted in writing by e-mail so as to reach the officer designated in Clause 2.15.4 by the specified date. The communication shall clearly bear the following identification/ title:

**“Queries/Request for Additional Information: RFP for Operation and Maintenance of Jogighopa Terminal, Assam”**

- 1.2.14 The pre-bid queries should be submitted in the format specified below. They should be submitted in Microsoft Excel format. Pre-bid queries not submitted in the prescribed format shall not be responded to.

S. No.	Page No.	Clause No.	Text provided in RFP	Clarification sought with justification (if any)
1.				
2.				

**1.3 Schedule of Bidding Process**

- 1.3.1 The proposed schedule of the bidding process is as below. While the Contracting Authority shall endeavor to adhere to the proposed schedule, it reserves the right to modify the schedule without providing any reasons thereof:

S No	Bid Stage	Proposed schedule
1.	Release of Bid Documents	.....
2.	Last date for receiving queries	.....



<b>S No</b>	<b>Bid Stage</b>	<b>Proposed schedule</b>
3.	Pre-Bid Conference	.....
4	Bid submission start date	.....
5.	Bid Due Date	.....
6.	Opening of Technical Bids	.....
7.	Validity of Bids	.....

#### **1.4 Pre-Bid Conference**

1.4.1 The Pre-Bid Conference shall be online. The link for on-line Pre-Bid Conference shall be shared with interested Applicants in due course.

Applicants willing to attend the Pre-Bid Conference should inform the Authority beforehand in writing and email. The maximum number of participants, who chose to attend the Pre-Bid Conference, shall not be more than two per Applicant.

#### **1.5 Contract timeline**

As per the provision of the RFP and Contract documents following timeline shall be applicable for the Project.

<b>Sl. No.</b>	<b>Description</b>	<b>Timeline</b>
1	Issuance of Letter of Award (LoA)	After declaration of the Selected Bidder and within 120 days of Bid Due Date
2	Signing of Contract	Within 30 days of issuance of LoA
3	Appointed Date	Within 3 months of signing of Contract  (After completion of Conditions Precedents for required before Appointed Date)
4	Commercial Operate Date (COD)	Within 3 months of Appointed Date  (After completion of mobilisation and commencement of operation at Jogighopa Terminal)
5	Contract Period	10(ten) years from COD

## **2. INSTRUCTIONS TO BIDDERS**

### **A. GENERAL**

#### **1.6 General terms of Bidding**

- 1.6.1 No Bidder shall submit more than one Bid, subject to Clause 1.6 of the RFP, for the Project. A Bidder bidding individually or as a member of a Consortium shall not be entitled to submit another bid either individually or as a member of any Consortium, as the case may be.
- 1.6.2 The Detailed Project Report (the “DPR”) of Jogighopa Terminal can be made available and the same shall be only a preliminary reference document for Bidders. Bidders are expected to carry out their own surveys, investigations and detailed examination of the Project before submitting their Bids. Nothing contained in the DPR shall be binding on the Contracting Authority nor confer any right on the Bidders, and the Contracting Authority shall have no liability whatsoever in relation to the contents of the DPR.
- 1.6.3 Notwithstanding anything to the contrary contained in this RFP, in the event there is any inconsistency in the Bidding Documents, the detailed terms specified in the draft Contract shall have overriding effect. It is however made clear, that all conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Contract.
- 1.6.4 The Technical Bid, including materials evidencing the Technical Capacity and Financial Capacity, should be furnished online in the formats prescribed at Annexure-VIII and Annexure-IX. Only the Qualified Bidders shall be considered for shortlisting and for further stages for evaluation.
- 1.6.5 The Financial Bid should be furnished in the format at Annexure–XII, clearly indicating the Royalty amount in both figures and words, in Indian Rupees, and signed by the Bidder’s authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be taken into account.
- 1.6.6 The Bid shall consist of Royalty to be quoted by the Bidder in terms of INR per MT. The Royalty shall be payable by the Operator to the Contracting Authority, as per the terms and conditions of this RFP and the provisions of the Contract.
- 1.6.7 The Bidder shall provide the Bid Security acceptable to the Contracting Authority as specified in the RFP
- 1.6.8 The Bidder should submit a Power of Attorney as per the format at Annexure–III, authorising the signatory of the Bid to commit the Bidder.
- 1.6.9 In case the Bidder is a Consortium, the Members thereof should also furnish a Power of Attorney in favour of the Lead Member in the format at Annexure–IV.

- 1.6.10 Any condition or qualification or any other stipulation contained in the Bid shall render the Bid liable to rejection as a non-responsive Bid. In any event, any condition and/ or qualification shall not be enforceable against the Contracting Authority and the Contracting Authority may in its sole discretion evaluate the Bids as if such condition and/or qualification are not there.
- 1.6.11 The Bid and all communications in relation to or concerning the Bidding Documents and the Bid shall be in English language.
- 1.6.12 The documents including this RFP and all attached documents, provided by the Contracting Authority are and shall remain the property of the Contracting Authority and are transmitted to the Bidders solely for the purpose of preparation and the submission of a Bid in accordance herewith. Bidders are to treat all information as strictly confidential and shall not use it for any purpose other than for preparation and submission of their Bid. The provisions of this Clause shall also apply mutatis mutandis to Bids and all other documents submitted by the Bidders, and the Contracting Authority will not return to the Bidders any Bid, document or any information provided along therewith.
- 1.6.13 This RFP is not transferable.
- 1.6.14 Any award of Concession pursuant to this RFP shall be subject to the terms of Bidding Documents.

## **B. ELIGIBILITY OF THE BIDDERS**

### **1.7 General conditions**

- 2.4.1 For determining the eligibility of bidders, interchangeably used as Applicant, (“**Bidders**”) for submission of Bids hereunder, the following shall apply:
- 1.7.1.1 A Bidder may be a natural person, private entity, government-owned entity or any combination of them with a formal intent to enter into an agreement or under an existing agreement to form a consortium (“**Consortium**”). However, no Bidder applying individually or as a Member of a Consortium, as the case may be, can be Member of another Bidder. The term Bidder used herein would apply to both a single entity and a Consortium. A Consortium shall be eligible for consideration subject to the conditions set out in Clause 2.4.1;
- 1.7.1.2 A Bidder shall not have a conflict of interest (the “**Conflict of Interest**”) that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. In the event of disqualification, the Contracting Authority shall be entitled to forfeit and appropriate the Performance Security, as the case may be, as mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Contracting Authority and not by way of penalty for, *inter alia*, the time, cost and effort of the Contracting Authority, including consideration of such Bidder’s proposal (the “**Damages**”), without prejudice to any other right or remedy that may be available to the Contracting Authority under the Bidding Documents and/ or the

Contract or otherwise. Without limiting the generality of the above, a Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:

1.7.1.2.1 The Bidder or its Member (or any constituent thereof) and any other Bidder or its Member (or any constituent thereof) have common controlling shareholders or other ownership interest;

Provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder or its Member (or any shareholder thereof having a shareholding of more than 5% (five per cent) of the paid up and subscribed share capital of such Bidder or its Member, as the case may be) in the other Bidder or its Member, is less than 5% (five per cent) of the subscribed and paid up equity share capital thereof;

Provided further that this disqualification shall not apply to any ownership by a bank, insurance company, pension fund or a public financial institution referred to in sub-section (72) of section 2 of the Companies Act, 2013.

For the purposes of this Clause 2.4.1, indirect shareholding held through one or more intermediate persons shall be computed as follows: (a) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the “**Subject Person**”) shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (b) subject always to sub-clause (a) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under sub-clause (b) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid up equity shareholding of such intermediary; or

1.7.1.2.2 a constituent of such Bidder is also a constituent of another Bidder; or

1.7.1.2.3 such Bidder or its Member thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder or its Member, has provided any such subsidy, grant, concessional loan or subordinated debt to any other Bidder or its Member; or

1.7.1.2.4 such Bidder has the same legal representative for purposes of this Bid as any other Bidder; or

1.7.1.2.5 such Bidder has a relationship with another Bidder, directly or through common third party/ parties, that puts either or both of them in a position to have access to each other’s information about, or to influence the Bid of either or each other; or

1.7.1.2.6 such Bidder has participated as a consultant to the Contracting Authority in the preparation of any documents, design or technical specifications of the Project.

*Explanation:*

In case a Bidder is a Consortium, then the term Bidder as used in this Clause 2.4.1, shall include each Member of such Consortium.

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

1.7.1.4 As per policy of Government of India to encourage 'Make in India' and promote manufacturing and production of goods and services in India, the provisions vide order no. **P-45021/2/2017-PP (B.E-II) dated 04.06.2020** on the subject "**Public Procurement (Preference to Make in India), Order 2017 – Revision**" shall be fully applicable for this tender.

1.7.1.5 The Office Memorandum No. 6/18/2019-PPD dated 23<sup>rd</sup> July 2020 of Public Procurement Division, Department of Expenditure, Ministry of Finance shall be fully applicable for this tender.

## **1.8 Qualification criteria**

1.8.1 To be eligible for shortlisting as a Qualified Bidder, a Bidder shall fulfill the following conditions:

(a) Technical Capacity

For demonstrating technical capacity and experience ("**Technical Capacity**"), the Bidder shall have an experience of:

- (i) Providing seaport terminal (containers, dry bulk, liquid bulk or general cargo)/ CFS/ ICD/ inland waterway terminal (containers, dry bulk, liquid bulk or general cargo) services/ Railway Rack handling ; OR

(ii) Vessel operator; OR

(iii) Cargo owner

and should have handled/generated at least **60,000 (sixty thousand) MT of cargo or 4,000 (four thousand) Twenty Foot Equivalent Units ("TEUs")** in at least 1 (one) year within last 3 (three) years from bid due date ("**Minimum Handling Capacity**"). For calculation purpose, the conversion rate of 1TEU=15 MT shall be used.

If the bidder is eligible as per (a) (ii) or (a) (iii) above and is the selected bidder for the project, Selected Bidder should provide the Contracting Authority with a detailed plan for operations and details of the terminal operator (meeting Minimum Handling Capacity) as part of its Bid. In case the bidder fails to do so, Contracting Authority reserves the right to reject the Bid.

(b) Financial Capacity

The bidder shall have an annual average turnover (Financial capacity) of Rs 5,12,65,000/- in last two year preceding bid due date for the following terminals for 10 years contract period

In case of a Consortium, the combined Technical Capacity and Financial Capacity of Consortium members shall be considered.

1.8.2 The Applicants shall enclose with its Application, to be submitted as per the formats set out in Annexures I - IX, the following:

(a) Certificates from its statutory auditors or respective clients specifying the volume requirements specified in Clause 1.9.1 above

(b) Certificates from its statutory auditors<sup>1</sup> specifying the turnover of the Applicant in last two years.

1.8.3 The Applicant should submit a Power of Attorney as per the format at Annexure III, authorizing the signatory of the Application to commit the Applicant. In the case of a Consortium, the Members should submit a Power of Attorney in favour of the Lead Member as per format at Annexure IV.

1.8.4 Deleted:

1.8.4.1 Number of members in a consortium shall not exceed 2 (two);

1.8.4.2 Subject to the provisions of sub-clause (a) above, the Application should contain the information required for each member of the Consortium;

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<sup>1</sup> In case duly certified audited annual financial statements containing explicitly the requisite details are provided, a separate certification by statutory auditors would not be necessary in respect of Clause 1.9.2 (a). In jurisdictions that do not have statutory auditors, the firm of auditors which audits the annual accounts of the Applicant may provide the certificates required under this RFP.

- 1.8.4.3 Members of the Consortium shall nominate one member as the lead member ("**Lead Member**"). The nominations shall be supported by a Power of Attorney, as per the format at Annexure IV, signed by all the other members of the Consortium;
- 1.8.4.4 The Application should include a brief description of the roles and responsibilities of individual members, particularly with reference to O&M obligations;
- 1.8.4.5 An individual Applicant cannot at the same time be member of a Consortium applying for qualification. Further, a member of a particular Applicant Consortium cannot be member of any other Applicant Consortium applying for qualification;
- 1.8.4.6 Members of the Consortium shall enter into a binding Joint Bidding Agreement, substantially in the form specified at Annexure VI ("**Joint Bidding Agreement**"), for the purpose of making the Application and submitting a Bid in the event of being short-listed. The Joint Bidding Agreement, to be submitted along with the Application, shall, inter alia:
- 1.8.4.6.1 Deleted;
  - 1.8.4.6.2 Clearly outline the proposed roles and responsibilities, if any, of each member;
  - 1.8.4.6.3 Commit the percentage stake of each member;
  - 1.8.4.6.4 Include a statement to the effect that all members of the Consortium shall be liable jointly and severally for all obligations of the Operator in relation to the Project until the commencement of operations of the Project is achieved in accordance with the O&M Agreement; and
- 1.8.4.7 Except as provided under this RFP and the Bidding Documents, there shall not be any amendment to the Joint Bidding Agreement without the prior written consent of the Authority.
- 1.8.5 Any entity which has been barred by the Central/ State Government, or any entity controlled by it, from participating in any project (O&M or otherwise), and the bar subsists as on the date of Application, would not be eligible to submit an Application, either individually or as member of a Consortium.
- 1.8.6 An Applicant including any Consortium Member or Associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Applicant, Consortium Member or Associate, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Applicant, Consortium Member or Associate. Provided, however, that where an Applicant claims that its disqualification arising on account of any cause or event specified in this Clause 1.9.6 is such that it does not reflect
- 1.8.6.1 Any malfeasance on its part in relation to such cause or event;

1.8.6.2 Any willful default or patent breach of the material terms of the relevant contract;

1.8.6.3 Any fraud, deceit or misrepresentation in relation to such contract; or

1.8.6.4 Any rescinding or abandoning of such contract;

it may make representation to this effect to the Contracting Authority for seeking a waiver from the disqualification hereunder and the Contracting Authority may, in its sole discretion and for reasons to be recorded in writing, grant such waiver if it is satisfied with the grounds of such representation and is further satisfied that such waiver is not in any manner likely to cause a material adverse impact on the Bidding Process or on the implementation of the Project. In the event an Applicant fails to disclose any disqualification and such disqualification becomes known at a later date (even after the execution of O&M Agreement) the Contracting Authority shall in its discretion take such steps including termination of the O&M Agreement as it may deem appropriate.

1.8.7 Deleted

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

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

1.8.8.1 The Applicants should attach clearly marked and referenced continuation sheets in the event that the space provided in the prescribed forms in the Annexes is insufficient.

1.8.8.2 Information supplied by an Applicant (or other constituent Member if the Applicant is a Consortium) must apply to the Applicant, Member or Associate named in the Application and not, unless specifically requested, to other associated companies or firms.

1.8.8.3 In responding to the qualification submissions, the Applicants should demonstrate their capabilities in accordance with Clause 1.9.1; and

1.8.8.4 In case the Applicant is a Consortium, each Member should substantially satisfy the qualification requirements to the extent specified herein.

1.8.9 Notwithstanding anything to the contrary contained herein, in the event that the Application Due Date falls within 6 (six) months of the closing of the latest financial year of an Applicant, it shall ignore such financial year for the purposes of its Application and furnish all its information and certification with reference to 5 (five) years or 1 (one) year, as the case may be, preceding its latest financial year. For the



avoidance of doubt, financial year shall, for the purposes of an Application hereunder, mean the accounting year followed by the Applicant in the course of its normal business.

## **1.9 Change in composition of the Consortium**

1.9.1 Deleted:

## **1.10 Change in Ownership**

1.10.1 Deleted;

1.10.2 The Bidder further acknowledges and agrees that the aforesaid obligation shall be the minimum and shall be in addition to such other obligations as may be contained in the Contract, and a breach hereof shall, notwithstanding anything to the contrary contained in the Contract, be deemed to be a breach of the Contract and dealt with as such thereunder. For the avoidance of doubt, the provisions of this Clause 2.7.1 shall apply only when the Bidder is a Consortium.

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

## **1.11 Number of Applicants and Cost of Bidding**

1.11.1 No Applicant shall submit more than one Application for the Project.

1.11.2 Each Bidder shall be responsible for all of the costs associated with the preparation of their respective Bid and their participation in the Bidding Process. The Contracting Authority will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.

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

1.12.1 Bidders are encouraged to submit their respective Bids after visiting the Project site and ascertaining for themselves the site conditions, traffic, location, surroundings, climate, availability of power, water and other utilities for construction, access to site, handling

and storage of materials, weather data, applicable laws and regulations, and any other matter considered relevant by them.

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

1.12.2.1 made a complete and careful examination of the Bidding Documents;

1.12.2.2 received all relevant information requested from the Contracting Authority;

1.12.2.3 accepted the risk of inadequacy and error in the information provided in the Bidding Documents or furnished by or on behalf of the Contracting Authority relating to any of the matters referred in the RFP;

1.12.2.4 satisfied itself about all matters, things and information including matters referred to in Clause 2.9 hereinabove necessary and required for submitting an informed Bid, execution of the Project in accordance with the Bidding Documents and performance of all of its obligations thereunder;

1.12.2.5 acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in the Bidding Documents or ignorance of any of the matters referred in the RFP hereinabove shall not be a basis for any claim for compensation, damages, revision of Royalty, extension of time for performance of its obligations, loss of profits etc. from the Contracting Authority, or a ground for termination of the Contract by the Operator;

1.12.2.6 acknowledged that it does not have a Conflict of Interest; and

1.12.2.7 agreed to be bound by the undertakings provided by it under the terms hereof.

1.12.3 The Contracting Authority shall not be liable for any omission, mistake or error in respect of any of the above or on account of any matter arising out of the RFP, the Bidding Documents or the Bidding Process, including any error therein or in any information given by the Contracting Authority.

### **1.13 Verification and Disqualification**

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

1.13.2 The Contracting Authority reserves the right to reject any Bid if:

1.13.2.1 at any time, a material misrepresentation is made or uncovered, or

- 1.13.2.2 the Bidder does not provide, within the time specified by the Contracting Authority, the supplemental information sought by the Contracting Authority for evaluation of the Bid.
- 1.13.3 Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium and each Member may be disqualified / rejected. If such disqualification / rejection occurs after the Bids have been opened and the Highest Bidder gets disqualified / rejected, then the Contracting Authority reserves the right to:
- (a) take any such measure as may be deemed fit in the sole discretion of the Contracting Authority, including annulment of the Bidding Process.
- 1.13.4 In case it is found during the evaluation or at any time before signing of the Contract or after its execution and during the period of subsistence thereof, including the Concession thereby granted by the Contracting Authority, that one or more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Operator either by issue of the LOA or entering into of the Contract, and if the Selected Bidder has already been issued the LOA or has entered into the Contract, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Contracting Authority to the Selected Bidder or the Operator, as the case may be, without the Contracting Authority being liable in any manner whatsoever to the Selected Bidder or Operator. In such an event, the Contracting Authority shall be entitled to encash the Performance Security, as the case may be, without prejudice to any other right or remedy that may be available to the Contracting Authority under the Bidding Documents and/ or the Contract, or otherwise.

## **C. DOCUMENTS**

### **1.14 Contents of the RFP**

- 1.14.1 This RFP comprises the Disclaimer set forth hereinabove, the contents as listed below, and will include any Addenda issued in accordance with Clause 1.2.3.
- 1.14.2 Invitation for Bids
- 1.14.3 Section 1. Introduction
- 1.14.4 Section 2. Instructions to Bidders
- 1.14.5 Section 3. Evaluation of Bids
- 1.14.6 Section 4. Fraud and Corrupt Practices
- 1.14.7 Section 5. Pre-Bid Conference
- 1.14.8 Section 6. Miscellaneous

#### 1.14.9 Annexures

- I. Letter comprising the Bid
- II. Deleted
- III. Power of Attorney for signing of Bid
- IV. Power of Attorney for Lead Member of Consortium
- V. Deleted
- VI. Joint Bidding Agreement
- VII. Particulars of the Applicant
- VIII. Technical Capacity of the Applicant
- IX. Financial Capacity
- X. Instructions for Online Bid Submission
- XA Checklist of Technical Bid
- XI. Guidelines of the Department of Disinvestment
- XII. Format for Financial Bid

1.14.10 The draft Contract and the DPR provided by the Contracting Authority as part of the Bidding Documents are deemed to be part of this RFP.

#### **1.15 Clarifications**

1.15.1 Bidders requiring any clarification on the RFP may notify the Contracting Authority in writing by e-mail in accordance with Clause 1.2.14. They should send in their queries on or before the date mentioned in the Schedule of Bidding Process specified in Clause 1.3. The Contracting Authority shall endeavor to respond to the queries within the period specified therein, but no later than 15 (fifteen) days prior to the Bid Due Date. The responses will be sent by e-mail. The Contracting Authority will forward all the queries and its responses thereto, to all Bidders without identifying the source of queries.

1.15.2 The Contracting Authority reserves the right not to respond to any question or provide any clarification, in its sole discretion, and nothing in this Clause shall be read as compelling the Contracting Authority to respond to any question or to provide any clarification.

1.15.3 The Contracting Authority may also on its own motion, if deemed necessary, issue interpretations and clarifications to all Bidders. All clarifications and interpretations issued by the Contracting Authority shall be deemed to be part of the Bidding Documents.

#### **1.16 Amendment of RFP**

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

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

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

## **D. PREPARATION AND SUBMISSION OF BIDS**

### **1.17 Format and Signing of Bid**

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

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

### **1.18 Sealing and Marking of Bids**

1.18.1 The Bidder shall upload the documents on Central Public Procurement Portal <https://eprocure.gov.in/eprocure/app> as per Annexure X.

#### **1.18.2 Submission of Bids**

- i) The original Power of Attorney (PoA) must be delivered to the office of Bid Inviting Authority (authorized representative) of IWAI as mentioned in Clause 2.15.4, on or before Bid Due Date & Time.
- ii) Online Bids submitted without original PoA shall automatically become ineligible and shall not be considered for opening of Bids.
- iii) In case of MSE registered firms, letter of claim of exemption for EMD with documentary evidence in support of the claim must be delivered to the office of the Bid Inviting Authority (authorized representative) of IWAI as mentioned in Clause 2.15.4. on or before Bid Due Date & Time.
- iv) The Bidders are further advised to number all the pages and prepare a table of contents in the beginning of each Part referring the page numbers of the indexed items.
- v) The scanned copy of the Technical Bids, complete in all respects, should be submitted as mentioned below.
  - i. Bid Security as specified in the RFP;
  - ii. Power of Attorney for signing of Bid in the format at Annexure–III;

- iii. If applicable, the Power of Attorney for Lead Member of Consortium in the format at Annexure–IV;
  - iv. A copy of the Contract with each page initialed by the person signing the Bid in pursuance of the Power of Attorney referred to in Clause (b) hereinabove;
  - v. Technical and Financial Capacity of the Applicant in the format at Annexure VIII and Annexure IX.
- 1.18.3 The pages of each document shall be numbered serially. Each page thereof shall be initialed in blue ink by the authorised signatory of the Bidder.

A check list of Technical Bid submission is provided in Annexure XA.

- 1.18.4 The Financial Bid should be submitted in accordance with on-line bid submitted instructions provided in Central Public Procurement Portal <https://eprocure.gov.in/eprocure/app>

## **1.19 Bid Due Date**

- 1.19.1 Bids should be submitted before the specified time on the Bid Due Date on the Central Public Procurement Portal <https://eprocure.gov.in/eprocure/app> A receipt thereof should be obtained from the person specified at Clause 2.15.4.
- 1.19.2 The Contracting Authority may, in its sole discretion, extend the Bid Due Date by issuing an Addendum in accordance with Clause 1.2.3 uniformly for all Bidders.

## **1.20 Late Bids**

- 1.20.1 Bids received by the Contracting Authority after the specified time on the Bid Due Date shall be summarily rejected.

## **1.21 Contents of the Bid**

- 1.21.1 The Bidder shall specify (in INR/MT) the Royalty, offered by him, to undertake the Project in accordance with this RFP and the provisions of the Contract.
- 1.21.2 The opening of Bids and acceptance thereof shall be in accordance with this RFP.

## **1.22 Modifications/ Substitution/ Withdrawal of Bids**

- 1.22.1 The Bidder may modify, substitute or withdraw its Bid after submission, provided that written notice of the modification, substitution or withdrawal is received by the Contracting Authority prior to the Bid Due Date, on the Central Public Procurement Portal <https://eprocure.gov.in/eprocure/app>. No Bid shall be modified, substituted or withdrawn by the Bidder on or after the Bid Due Date.

- 1.22.2 The modification, substitution or withdrawal notice shall be prepared, sealed, marked, and delivered in accordance with Clause 2.19, with the envelopes being additionally marked “MODIFICATION”, “SUBSTITUTION” or “WITHDRAWAL”, as appropriate.
- 1.22.3 Any alteration/ modification in the Bid or additional information supplied subsequent to the Bid Due Date, unless the same has been expressly sought for by the Contracting Authority, shall be summarily rejected.

### **1.23 Rejection of Bids**

- 1.23.1 Notwithstanding anything contained in this RFP, the Contracting Authority reserves the right to reject any Bid and to annul the Bidding Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Contracting Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.
- 1.23.2 The Contracting Authority reserves the right not to proceed with the Bidding Process at any time, without notice or liability and without assigning any reasons thereof.

### **1.24 Validity of Bids**

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

### **1.25 Confidentiality**

- 1.25.1 Information relating to the examination, clarification, evaluation and recommendation for the Bidders shall not be disclosed to any person who is not officially concerned with the process or is not a retained professional advisor advising the Contracting Authority in relation to, or matters arising out of, or concerning the Bidding Process. The Contracting Authority will treat all information, submitted as part of the Bid, in confidence and will require all those who have access to such material to treat the same in confidence. The Contracting Authority may not divulge any such information unless it is directed to do so by any statutory entity that has the power under law to require its disclosure or is to enforce or assert any right or privilege of the statutory entity and/ or the Contracting Authority or as may be required by law or in connection with any legal process.

### **1.26 Correspondence with the Bidder**

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

## **E. BID SECURITY**

### **1.27 Bid Security**

1.27.1 The Bidder shall furnish as part of its Bid, a Bid Security in INR as a Bank Guarantee for Rs 41,01,200/-. If Bid Security is provided through RTGS, proof of transaction shall be annexed with the Bid and the transfer shall be made to the following account.

- Name of Bank Account: IWAI FUND
- Bank Name and Address: Union Bank of India, Sector-15, Naya Bans, Noida
- Bank Account number: 513202050000007
- IFSC: UBIN0551325

If Bid Security is provided through demand draft it shall be issued by a scheduled bank in favour of 'IWAI FUND' payable at Noida, Uttar Pradesh, India and a copy of the same shall be annexed with the Bid. If Bid Security is provided in form of Bank Guarantee acceptable to the Authority, it shall be as per format at Annexure II.

The validity period of the demand draft or Bank Guarantee shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days and may be extended as may be mutually agreed between the Authority and the Bidder. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. The Bid Security shall be refundable no later than 60 (sixty) days from the Bid Due Date except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the Concession Agreement.

1.27.2 Deleted

1.27.3 Deleted.

1.27.4 Deleted.

1.27.5 The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Contracting Authority will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP.

1.27.6 The Contracting Authority shall take actions in accordance with Bid Security, if:

- (a) a Bidder submits a non-responsive Bid;
- (b) a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this RFP;
- (c) Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Contracting Authority;
- (d) the Selected Bidder fails within the specified time limit:
  - i) to sign and return the duplicate copy of LOA; or
  - ii) to sign the Contract; or



- iii) to furnish the Performance Security within the period prescribed in the Contract.
- iv) the Selected Bidder, having signed the Contract, commits any breach thereof prior to furnishing the Performance Security.

### **3. EVALUATION OF BIDS**

#### **a. Opening and Evaluation of Bids**

- i. The Contracting Authority shall open the Bids at the specified time and venue in the presence of the Bidders who choose to attend.
- ii. The Contracting Authority will subsequently examine and evaluate the Bids in accordance with the provisions set out in this Clause 3.
- iii. To facilitate evaluation of Bids, the Contracting Authority may, at its sole discretion, seek clarifications in writing from any Bidder regarding its Bid.

#### **b. Tests of responsiveness**

- i. Prior to evaluation of Bids, the Contracting Authority shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive if:
  1. it is received as per the format at Appendix-I;
  2. it is received by the Bid Due Date including any extension thereof;
  3. it is accompanied by the Bid Security as specified in Clause 2.24.1;
  4. it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.8 and 2.1.9, as the case may be;
  5. it contains all the information as requested in this RFP and/or Bidding Documents in the specified formats;
  6. it does not contain any condition or qualification; and
  7. it is not non-responsive in terms hereof.
- ii. The Contracting Authority reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Contracting Authority in respect of such Bid. Provided, however, that the Contracting Authority may, in its discretion, allow the Bidder to rectify any infirmities or omissions if the same do not constitute a material modification of the Bid.
- iii. Bids, where lead member is not incorporated in India, necessary approval from Ministry of Home Affairs will be required before evaluation of the financial bid.

#### **c. Selection of Bidder**

- i. Subject to the provisions of Clause 2.18.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.4 and who quotes the highest Royalty in terms of INR/MT, to the Contracting Authority, shall ordinarily be declared as the selected

Bidder (the “**Selected Bidder**”). In the event that the Contracting Authority rejects or annuls all the Bids, shall stand cancelled.

- ii. In the event that two or more Bidders quote the same amount of Royalty (the “**Tied Bidders**”), the Contracting Authority shall identify the Selected Bidder by conducting re-bidding among the Tied Bidders, which shall be conducted, with prior notice, in the presence of the Tied Bidders who choose to attend. For the avoidance of doubt, only the bids which quote a higher bid than the tie bid shall be considered.
- iii. In the event that the Highest Bidder withdraws or is not selected for any reason in the first instance, the Contracting Authority shall take appropriate actions. The tender shall also stand cancelled in such instance.
- iv. After selection, a Letter of Award (the “**LOA**”) shall be issued, in duplicate, by the Contracting Authority to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Contracting Authority may, unless it consents to extension of time for submission thereof, shall take appropriate actions.
- v. After acknowledgement of the LOA as aforesaid by the Selected Bidder execute the Contract within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation or modification in the Contract.
- vi. Selected Bidder shall sign the Agreement, provided as part of this RFP, within 30 (thirty) days from the date of issue of the LOA.

**d. Contacts during Bid Evaluation**

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

#### 4. FRAUD AND CORRUPT PRACTICES

The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LOA and during the subsistence of the Contract. Notwithstanding anything to the contrary contained herein, or in the LOA or the Contract, the Contracting Authority may reject a Bid, withdraw the LOA, or terminate the Contract, as the case may be, without being liable in any manner whatsoever to the Bidder or Operator, as the case may be, if it determines that the Bidder or Operator, as the case may be, has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process. In such an event, the Contracting Authority shall be entitled to forfeit and appropriate the Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Contracting Authority under the Bidding Documents and/ or the Contract, or otherwise.

Without prejudice to the rights of the Contracting Authority under Clause 4 hereinabove and the rights and remedies which the Contracting Authority may have under the LOA or the Contract, or otherwise if a Bidder or Operator, as the case may be, is found by the Contracting Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the Contract, such Bidder or Operator shall not be eligible to participate in any tender or RFP issued by the Contracting Authority during a period of 2 (two) years from the date such Bidder or Operator, as the case may be, is found by the Contracting Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be.

For the purposes of this Clause 4, the following terms shall have the meaning hereinafter respectively assigned to them:

- (a) **“corrupt practice”** means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bidding Process (for avoidance of doubt, offering of employment to or employing or engaging in any manner whatsoever, directly or indirectly, any official of the Contracting Authority who is or has been associated in any manner, directly or indirectly, with the Bidding Process or the LOA or has dealt with matters concerning the Contract or arising therefrom, before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the Contracting Authority, shall be deemed to constitute influencing the actions of a person connected with the Bidding Process); or (ii) save and except as permitted under the Clause 1.2.13 of this RFP, engaging in any manner whatsoever, whether during the Bidding Process or after the issue of the LOA or after the execution of the Contract, as the case may be, any person in respect of any matter relating to the Project or the LOA or the Contract, who

at any time has been or is a legal, financial or technical adviser of the Contracting Authority in relation to any matter concerning the Project;

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

## **5. PRE-BID CONFERENCE**

Pre-Bid Conference(s) of the Bidders shall be convened at the designated date, time and place. A maximum of three representatives of each Bidder shall be allowed to participate on production of authority letter from the Bidder.

During the course of Pre-Bid Conference(s), the Bidders will be free to seek clarifications and make suggestions for consideration of the Contracting Authority. The Contracting Authority shall endeavor to provide clarifications and such information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.

## **6. MISCELLANEOUS**

The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts in the State of Uttar Pradesh shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process. All disputes triable by a Civil Court shall be initiated only in Noida.

The Contracting Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to:

1. suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;
2. consult with any Bidder in order to receive clarification or further information;
3. retain any information and/ or evidence submitted to the Contracting Authority by, on behalf of, and/ or in relation to any Bidder; and/ or
4. independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Bidder.

It shall be deemed that by submitting the Bid, the Bidder agrees and releases the Contracting Authority, its employees, agents and advisers, irrevocably, unconditionally, fully and finally from any and all liability for claims, losses, damages, costs, expenses or liabilities in any way related to or arising from the exercise of any rights and/ or performance of any obligations hereunder, pursuant hereto and/ or in connection with the Bidding Process and waives, to the fullest extent permitted by applicable laws, any and all rights and/ or claims it may have in this respect, whether actual or contingent, whether present or in future.

## **ANNEXURES**



## Annexure I: Letter comprising the Bid

Dated:

To,

Person In Charge  
Inland Waterways Authority of India  
Head Office,  
A-13, Sector - 1,  
Noida-201301,  
Uttar Pradesh, India

Sub: Bid for the Operation and Maintenance of Jogighopa Inland Waterway Terminal

Dear Sir,

1. With reference to your RFP document dated ....., I/we, having examined the Bidding Documents and understood their contents, hereby submit my/our Bid for the aforesaid Project. The Bid is unconditional and unqualified.
2. I/ We acknowledge that the Contracting Authority will be relying on the information provided in the Bid and the documents accompanying the Bid for selection of the Operator for the aforesaid Project, and we certify that all information provided therein is true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying the Bid are true copies of their respective originals.
3. This statement is made for the express purpose of our selection as Operator for the Operation and Maintenance of the aforesaid Project.
4. I/ We shall make available to the Contracting Authority any additional information it may find necessary or require to supplement or authenticate the Bid.
5. I/ We acknowledge the right of the Contracting Authority to reject our Bid without assigning any reason or otherwise and hereby waive, to the fullest extent permitted by applicable law, our right to challenge the same on any account whatsoever.
6. I/ We certify that in the last three years, we/ any of the Consortium Members<sup>2</sup> or our/ their Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach on our part.

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<sup>2</sup> If the Bidder is not a Consortium, the provisions applicable to Consortium may be omitted.

7. I/ We declare that:
- (a) I/ We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Contracting Authority; and
  - (b) I/ We do not have any conflict of interest in accordance with Clauses 2.2.1 of the RFP document; and
  - (c) I/ We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as defined in Clause 4.3 of the RFP document, in respect of any tender or request for proposals issued by or any Agreement entered into with the Contracting Authority or any other public sector enterprise or any government, Central or State; and
  - (d) I/ We hereby certify that we have taken steps to ensure that in conformity with the provisions of Section 4 of the RFP, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice; and
8. I/ We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.18 of the RFP document.
9. I/ We declare that we/ any Member of the Consortium, or our/ its Associates are not a Member of a/ any other Consortium submitting a Bid for the Project.
10. I/ We certify that in regard to matters other than security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.
11. I/ We further certify that in regard to matters relating to security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been charge-sheeted by any agency of the Government or convicted by a Court of Law.
12. I/ We further certify that no investigation by a regulatory authority is pending either against us or against our Associates or against our CEO or any of our directors/ managers/ employees.
13. I/ We further certify that we are not disqualified in terms of the additional criteria specified by the Department of Disinvestment in their OM No. 6/4/2001-DD-II dated July 13, 2001, a copy of which forms part of the RFP at Annexure-XI thereof.
14. I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of the guidelines referred to above, we shall intimate the Contracting Authority of the same

immediately.

15. Deleted.

16. I/ We acknowledge and agree that in the event of a change in control of an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes technical qualification under and in accordance with the RFP, I/We shall inform the Contracting Authority forthwith along with all relevant particulars and the Contracting Authority may, in its sole discretion, disqualify our Consortium or withdraw the Letter of Award, as the case may be. I/We further acknowledge and agree that in the event such change in control occurs after signing of the Contract but prior to COD of the Project, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed a breach thereof, and the Contract shall be liable to be terminated without the Contracting Authority being liable to us in any manner whatsoever.

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

18. In the event of my/ our being declared as the Selected Bidder, I/we agree to enter into a Contract in accordance with the draft that has been provided to me/us prior to the Bid Due Date. We agree not to seek any changes in the aforesaid draft and agree to abide by the same.

19. I/ We have studied all the Bidding Documents carefully and also surveyed the Site. We understand that except to the extent as expressly set forth in the Contract, we shall have no claim, right or title arising out of any documents or information provided to us by the Contracting Authority or in respect of any matter arising out of or relating to the Bidding Process including the award of Concession.

20. I/ We submit a Bid Security to the Contracting Authority in accordance with the RFP Document.

21. Deleted.

22. The documents accompanying the Bid, as specified in Clause 2.13 of the RFP, have been submitted in a separate envelope and marked as “Enclosures of the Bid”.

23. I/ We agree and understand that the Bid is subject to the provisions of the Bidding Documents. In no case, I/we shall have any claim or right of whatsoever nature if the Project / Concession is not awarded to me/us or our Bid is not opened or rejected.

24. The Royalty has been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft Contract, our own estimates of costs [and traffic] and after a careful assessment of the site and all the conditions that may affect the project cost and implementation of the Project, as share of the Contracting Authority. The quoted Royalty shall be exclusive of applicable taxes which the Operator will pay over and above Royalty payments.

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

26. {We, the Consortium Members agree and undertake to be jointly and severally liable for all the obligations of the Operator under the Contract till COD in accordance with the Contract.}

27. I/ We shall keep this offer valid for 120 (one hundred and twenty) days from the Bid Due Date specified in the RFP.

28. I/ We hereby submit our Bid and offer Royalty as provided in Annexure XII for undertaking the aforesaid Project in accordance with the Bidding Documents and the Contract;

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

Yours faithfully,

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

Place: Name and seal of Bidder/Lead Member

**Annexure II: Bank guarantee for Bid Security**

*(Refer Articles 1.2.4 and 2.24 of the RFP)*

B.G. No. Dated:

1. In consideration of you, Inland Waterways Authority of India, having its office at Inland Waterways Authority of India Head Office, Project Management Unit – 2nd Floor, A-13, Sector - 1, Noida-201301, Uttar Pradesh, India (hereinafter referred to as the “Authority”, which expression shall unless it be repugnant to the subject or context thereof include its, successors and assigns) having agreed to receive the Bid of ..... (a company registered under the Companies Act, 1956/ 2013) and having its registered office at ..... (and acting on behalf of its Consortium) (hereinafter referred to as the “Bidder” which expression shall unless it be repugnant to the subject or context thereof include its/ their executors, administrators, successors and assigns), Operation and Maintenance of Jogighopa Inland Waterway Terminal (hereinafter referred to as “the Project”) pursuant to the RFP Document dated ..... issued in respect of the Project and other related documents including without limitation the draft Concession Agreement (hereinafter collectively referred to as “Bidding Documents”), we (Name of the Bank) having our registered office at ..... and one of its branches at ..... (hereinafter referred to as the “Bank”), at the request of the Bidder, do hereby in terms of Article 1.2.4 read with Article 2.24 of the RFP Document, irrevocably, unconditionally and without reservation guarantee the due and faithful fulfilment and compliance of the terms and conditions of the Bidding Documents (including the RFP Document) by the said Bidder and unconditionally and irrevocably undertake to pay forthwith to the Authority an amount of ..... (hereinafter referred to as the “Guarantee”) as our primary obligation without any demur, reservation, recourse, contest or protest and without reference to the Bidder if the Bidder shall fail to fulfil or comply with all or any of the terms and conditions contained in the said Bidding Documents.
2. Any such written demand made by the Authority stating that the Bidder is in default of the due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents shall be final, conclusive and binding on the Bank.
3. We, the Bank, do hereby unconditionally undertake to pay the amounts due and payable under this Guarantee without any demur, reservation, recourse, contest or protest and without any reference to the Bidder or any other person and irrespective of whether the claim of the Authority is disputed by the Bidder or not, merely on the first demand from the Authority stating that the amount claimed is due to the Authority by reason of failure of the Bidder to fulfil and comply with the terms and conditions contained in the Bidding Documents including failure of the said Bidder to keep its Bid open during the Bid validity period as set forth in the said Bidding Documents for any reason whatsoever. Any such demand made on the Bank shall be conclusive as regards amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding INR..... (INR ..... only).

4. This Guarantee shall be irrevocable and remain in full force for a period of 180 (one hundred and eighty) days from the Bid Due Date inclusive of a claim period of 60 (sixty) days or for such extended period as may be mutually agreed between the Authority and the Bidder, and agreed to by the Bank, and shall continue to be enforceable till all amounts under this Guarantee have been paid.
5. We, the Bank, further agree that the Authority shall be the sole judge to decide as to whether the Bidder is in default of due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents including, inter alia, the failure of the Bidder to keep its Bid open during the Bid validity period set forth in the said Bidding Documents, and the decision of the Authority that the Bidder is in default as aforesaid shall be final and binding on us, notwithstanding any differences between the Authority and the Bidder or any dispute pending before any Court, Tribunal, Arbitrator or any other authority.
6. The Guarantee shall not be affected by any change in the constitution or winding up of the Bidder or the Bank or any absorption, merger or amalgamation of the Bidder or the Bank with any other person.
7. In order to give full effect to this Guarantee, the Authority shall be entitled to treat the Bank as the principal debtor. The Authority shall have the fullest liberty without affecting in any way the liability of the Bank under this Guarantee from time to time to vary any of the terms and conditions contained in the said Bidding Documents or to extend time for submission of the Bids or the Bid validity period or the period for conveying acceptance of Letter of Award by the Bidder or the period for fulfilment and compliance with all or any of the terms and conditions contained in the said Bidding Documents by the said Bidder or to postpone for any time and from time to time any of the powers exercisable by it against the said Bidder and either to enforce or forbear from enforcing any of the terms and conditions contained in the said Bidding Documents or the securities available to the Authority, and the Bank shall not be released from its liability under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the said Bidder or any other forbearance, act or omission on the part of the Authority or any indulgence by the Authority to the said Bidder or by any change in the constitution of the Authority or its absorption, merger or amalgamation with any other person or any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of releasing the Bank from its such liability.
8. Any notice by way of request, demand or otherwise hereunder shall be sufficiently given or made if addressed to the Bank and sent by courier or by registered mail to the Bank at the address set forth herein.
9. We undertake to make the payment on receipt of your notice of claim on us addressed to [name of Bank along with branch address] and delivered at our above branch which shall be deemed to have been duly authorised to receive the said notice of claim.

10. It shall not be necessary for the Authority to proceed against the said Bidder before proceeding against the Bank and the guarantee herein contained shall be enforceable against the Bank, notwithstanding any other security which the Authority may have obtained from the said Bidder or any other person and which shall, at the time when proceedings are taken against the Bank hereunder, be outstanding or unrealized.
11. We, the Bank, further undertake not to revoke this Guarantee during its currency except with the previous express consent of the Authority in writing.
12. The Bank declares that it has power to issue this Guarantee and discharge the obligations contemplated herein, the undersigned is duly authorised and has full power to execute this Guarantee for and on behalf of the Bank.
13. For the avoidance of doubt, the Bank's liability under this Guarantee shall be restricted to INR. .... (INR ..... only). The Bank shall be liable to pay the said amount or any part thereof only if the Authority serves a written claim on the Bank in accordance with paragraph 9 hereof, on or before [..... (indicate date falling 180 days after the Bid Due Date)].

Signed and Delivered by ..... Bank

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

(Signature of the Authorised Signatory)

(Official Seal)

**Annexure III: Power of Attorney for signing of Bid<sup>3</sup>**

(Refer Clause 2.1.8)

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

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

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

For.....

(Signature, name, designation and address)

Witnesses:

1.

\_\_\_\_\_

<sup>3</sup> To be submitted in original



2.

Accepted

Notarised

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

Notes:

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

**Annexure IV: Power of Attorney for Lead Member of Consortium**

(Refer Clauses 2.1.9 and 2.2.1)

Whereas the ..... (the “Contracting Authority”) has invited bids from interested parties for the ..... Project (the “Project”).

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

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

**NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS**

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

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

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

For ..... (Signature, Name & Title)

For ..... (Signature, Name & Title)

For ..... (Signature, Name & Title)

(Executants)

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

Witnesses:

- 1.
- 2.

Notes:

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

**Annexure V: Deleted**

## **Annexure VI: Joint Bidding Agreement**

(Refer Clause 2.2.1)

*(To be executed on Stamp paper of appropriate value)*

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

### **AMONGST**

1. {..... Limited, a company incorporated under the Companies Act, 1956/2013} and having its registered office at ..... (hereinafter referred to as the “**First Part**” which expression shall, unless repugnant to the context include its successors and permitted assigns)

### **AND**

2. {..... Limited, a company incorporated under the Companies Act, 1956/2013} and having its registered office at ..... (hereinafter referred to as the “**Second Part**” which expression shall, unless repugnant to the context include its successors and permitted assigns)

### **AND**

3. {..... Limited, a company incorporated under the Companies Act, 1956/2013} and having its registered office at ..... (hereinafter referred to as the “**Third Part**” which expression shall, unless repugnant to the context include its successors and permitted assigns)}

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

### **WHEREAS,**

(a) The Inland Waterways Authority of India, Head Office, A-13, Sector – 1, Noida – 201301, Uttar Pradesh, India (hereinafter referred to as the “Contracting Authority” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) has invited Applications by its Request for Proposal No. xx dated xx.xx.20xx for qualification and selection of bidders for operation and maintenance of Jogighopa Inland Waterway Terminal through operation and maintenance mode.

(b) The Parties are interested in jointly bidding for the Project as members of

a Consortium and in accordance with the terms and conditions of the RFP document and other bid documents in respect of the Project, and

(c) It is a necessary condition under the RFP document that the members of the Consortium shall enter into a Joint Bidding Agreement and furnish a copy thereof with the Application.

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

**1. Definitions and Interpretations**

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

**2. Consortium**

2.1 The Parties do hereby irrevocably constitute a consortium (the “**Consortium**”) for the purposes of jointly participating in the Bidding Process for the Project.

2.2 The Parties hereby undertake to participate in the Bidding Process only through this Consortium and not individually and/ or through any other consortium constituted for this Project, either directly or indirectly or through any of their Associates.

**3. Covenants**

The Parties hereby undertake that in the event the Consortium is declared the selected Bidder and awarded the Project, it shall enter into a O & M Agreement with the Contracting Authority and for performing all its obligations as the Operator in terms of the O&M Agreement for the Project.

**4. Role of the Parties**

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

- (a) Party of the First Part shall be the Lead member of the Consortium and shall have the power of attorney from all Parties for conducting all business for and on behalf of the Consortium during the Bidding Process and until the Appointed Date under the O&M Agreement when all the obligations of the Operator shall become effective;
- (b) Party of the Second Part shall be {the Technical Member of the Consortium;}
- (c) Party of the Third Part shall be {the Financial Member of the Consortium.}

**5. Joint and Several Liability**

The Parties do hereby undertake to be jointly and severally responsible for all obligations and liabilities relating to the Project and in accordance with the terms of the RFP and the O&M Agreement, till commencement of operations for the Project is achieved under and in accordance with the O&M Agreement.

## **6. Representation of the Parties**

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

- (a) Such Party is duly organised, validly existing and in good standing under the laws of its incorporation and has all requisite power and authority to enter into this Agreement;
- (b) The execution, delivery and performance by such Party of this Agreement has been authorised by all necessary and appropriate corporate or governmental action and a copy of the extract of the charter documents and board resolution/ power of attorney in favour of the person executing this Agreement for the delegation of power and authority to execute this Agreement on behalf of the Consortium Member is annexed to this Agreement, and will not, to the best of its knowledge:
  - (i) Require any consent or approval not already obtained;
  - (ii) Violate any Applicable Law presently in effect and having applicability to it;
  - (iii) Violate the memorandum and articles of association, by-laws or other applicable organisational documents thereof;
  - (iv) Violate any clearance, permit, contract, grant, license or other governmental authorisation, approval, judgement, order or decree or any mortgage agreement, indenture or any other instrument to which such Party is a party or by which such Party or any of its properties or assets are bound or that is otherwise applicable to such Party; or
  - (v) Create or impose any liens, mortgages, pledges, claims, security interests, charges or Encumbrances or obligations to create a lien, charge, pledge, security interest, encumbrances or mortgage in or on the property of such Party, except for encumbrances that would not, individually or in the aggregate, have a material adverse effect on the financial condition or prospects or business of such Party so as to prevent such Party from fulfilling its obligations under this Agreement;
- (c) This Agreement is the legal and binding obligation of such Party, enforceable in accordance with its terms against it; and
- (d) There is no litigation pending or, to the best of such Party's knowledge, threatened to which it or any of its Affiliates is a party that presently affects or which would have a material adverse effect on the financial condition or prospects or business of such Party in the fulfillment of its obligations under this Agreement.

## **7. Termination**



This Agreement shall be effective from the date hereof and shall continue in full force and effect until commencement of operations of the Project is achieved under and in accordance with the O & M Agreement, in case the Project is awarded to the Consortium. However, in case the Consortium is either not qualified for the Project or does not get selected for award of the Project, the Agreement will stand terminated in case the Applicant is not pre-qualified, as the case may be.

**8. Miscellaneous**

8.1 This Joint Bidding Agreement shall be governed by laws of India.

8.2 The Parties acknowledge and accept that this Agreement shall not be amended by the Parties without the prior written consent of the Contracting Authority.

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

SIGNED, SEALED AND DELIVERED

SIGNED, SEALED AND DELIVERED

For and on behalf of

LEAD MEMBER by:

SECOND PART

(Signature)

(Signature)

(Name)

(Name)

(Designation)

(Designation)

(Address)

(Address)

SIGNED, SEALED AND DELIVERED

For and on behalf of

THIRD PART

(Signature)

(Name)

(Designation)

(Address)

***Notes:***

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

## **Annexure VII: Particulars of the Applicant**

1.
  - (a) Name:
  - (b) Country of incorporation:
  - (c) Address of the corporate headquarters and its branch offices, if any, in India:
  - (d) Date of incorporation and/ or commencement of business:
2. Brief description of the Company including details of its main lines of business and proposed role and responsibilities in this Project:
3. Details of individuals who will serve as the point of contact/ communication for the Contracting Authority:
  - (a) Name:
  - (b) Designation:
  - (c) Company:
  - (d) Address:
  - (e) Telephone Number:
  - (f) E-Mail Address:
  - (g) Fax Number:
4. Particulars of the Authorised Signatory of the Applicant:
  - (a) Name:
  - (b) Designation:
  - (c) Address:
  - (d) Phone number:
  - (e) Fax Number:
5. In case of a Consortium:
  - (a) The information above (1-4) should be provided for all the Members of the Consortium.
  - (b) A copy of the Joint Bidding Agreement, as envisaged in Clause 1.9 should be attached to the Application.

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

<b>S No</b>	<b>Name of Member</b>	<b>Role* {Refer Clause 1.9}</b>	<b>Percentage of equity in the Consortium {Refer Clauses 1.9}</b>
1.			
2.			
3.			
4.			

\* The role of each Member, as may be determined by the Applicant, should be indicated in accordance with notes provided at Annexure IV.

The following information shall also be provided for each Member of the Consortium

**Name of Applicant/ member of Consortium:**

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

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

**Annexure VIII: Technical Capacity of the Applicant**

*(Refer to Clauses 1.9.1 (a))*

**For Year\*\*\*\*:**

S.No	Applicant type#	Project Code**	Member Code*	Project Name	Type of Cargo handled***	Volume of Cargo handled (In MT or TEUs)	Supporting Document
1	Single entity Applicant	a					
		b					
		c					
		d					
2	Consortium Member 1	1a					
		1b					
		1c					
		1d					
3	Consortium Member 2	2a					
		2b					
		2c					
		2d					
4	Consortium Member 3	3a					
		3b					
		3c					
		3d					

*Note: Provide details of only those projects that have been undertaken by the Applicant under its own name.*

*For volume of cargo handled, the Applicant shall provide supporting documents in the form of certificate, etc. in order to make the volume eligible for consideration.*

*In absence of certificates from counterparty for cargo handled, certificates from statutory auditor or chartered accountant may be provided.*

*# An Applicant consisting of a single entity should fill in details as per the row titled Single entity Applicant and ignore the rows titled Consortium Member. In case of a Consortium, the row titled Single entity Applicant may be ignored.*

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

*\*\* For a single entity Applicant, the Project Codes would be a, b, c, d etc. In case the Applicant is a Consortium then for Member 1, the Project Codes would be 1a, 1b, 1c, 1d etc., for Member 2 the Project Codes shall be 2a, 2b, 2c, 2d etc., and so on.*

*\*\*\* Specify cargo type in terms of Bulk, Break bulk, Liquid, General or Container Cargo*

*\*\*\*\*Mention the year for which the eligibility of the project is claimed*

## Annexure IX: Financial Capacity

(Refer to Clauses 1.9.1(b))

(In INR crore)

S.No	Applicant type <sup>\$</sup> (1)	Member Code <sup>£</sup> (2)	Turnover in <sup>€</sup> Year 1 (3)	Turnover in <sup>€</sup> Year 2 (4)
1	Single entity			
2	Consortium Member 1			
3	Consortium Member 2			
4	Consortium Member 3			
5	TOTAL			

### Name & address of Applicant's Bankers:

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

<sup>£</sup>For Member Code, see notes at Annexure VIII.

<sup>€</sup>The Applicant should provide details of its own Financial Capacity.

### Certificate from the Statutory Auditor

Name of the audit firm:

Seal of the audit firm:

(Signature, name and designation of the authorised signatory)

Date: \_\_\_\_\_



**Instructions:**

1. The Applicant/ its constituent Consortium Members shall attach copies of the balance sheets, financial statements and Annual Reports for 3 (three) years preceding the Application Due Date. The financial statements shall:
  - (a) Reflect the financial situation of the Applicant or Consortium Members;
  - (b) Be audited by a statutory auditor;
  - (c) Be complete, including all notes to the financial statements; and
  - (d) Correspond to accounting periods already completed and audited (no statements for partial periods shall be requested or accepted).
2. Deleted
3. In the case of a Consortium, a copy of the Joint Bidding Agreement shall be submitted in accordance with Annexure VI of the RFP document.
4. The applicant shall provide the name and address of the Bankers to the Applicant.
5. The Applicant shall provide an Auditor's Certificate specifying the net worth of the Applicant and also specifying the methodology adopted for calculating such net worth in accordance with Clause 2.3.1 of the RFP document.

## **Annexure – X: Instructions for Online Bid Submission**

The Bidders are required to submit soft copies of their bids electronically on the CPP Portal, using valid Digital Signature Certificates. The instructions given below are meant to assist the bidders in registering on the CPP Portal, prepare their bids in accordance with the requirements and submitting their bids online on the CPP Portal.

More information useful for submitting online bids on the CPP Portal may be obtained at:

<https://eprocure.gov.in/eprocure/app>.

### **REGISTRATION**

- 1) Bidders are required to enroll on the e-Procurement module of the Central Public Procurement Portal (URL: <https://eprocure.gov.in/eprocure/app>) by clicking on the link “Online bidder Enrollment” on the CPP Portal which is free of charge.
- 2) As part of the enrolment process, the bidders will be required to choose a unique username and assign a password for their accounts.
- 3) Bidders are advised to register their valid email address and mobile numbers as part of the registration process. These would be used for any communication from the CPP Portal.
- 4) Upon enrolment, the bidders will be required to register their valid Digital Signature Certificate (Class III Certificates with signing key usage) issued by any Certifying Authority recognized by CCA India (e.g. Sify / nCode / eMudhra etc.), with their profile.
- 5) Only one valid DSC should be registered by a bidder. Please note that the bidders are responsible to ensure that they do not lend their DSC’s to others which may lead to misuse.
- 6) Bidder then logs in to the site through the secured log-in by entering their user ID / password and the password of the DSC / e-Token.

### **SEARCHING FOR TENDER DOCUMENTS**

- 1) There are various search options built in the CPP Portal, to facilitate bidders to search active tenders by several parameters. These parameters could include Tender ID, Organization Name, Location, Date, Value, etc. There is also an option of advanced search for tenders, wherein the bidders may combine a number of search parameters such as Organization Name, Form of Contract, Location, Date, Other keywords etc. to search for a tender published on the CPP Portal.
- 2) Once the bidders have selected the tenders they are interested in, they may download the required documents / tender schedules. These tenders can be moved to the respective ‘My Tenders’ folder. This would enable the CPP Portal to intimate the bidders through SMS / e-mail in case there is any corrigendum issued to the tender document.

- 3) The bidder should make a note of the unique Tender ID assigned to each tender, in case they want to obtain any clarification / help from the Helpdesk.

### **PREPARATION OF BIDS**

- 1) Bidder should take into account any corrigendum published on the tender document before submitting their bids.
- 2) Please go through the tender advertisement and the tender document carefully to understand the documents required to be submitted as part of the bid. Please note the number of covers in which the bid documents have to be submitted, the number of documents - including the names and content of each of the document that need to be submitted. Any deviations from these may lead to rejection of the bid.
- 3) Bidder, in advance, should get ready the bid documents to be submitted as indicated in the tender document / schedule and generally, they can be in PDF / XLS / RAR / DWF/JPG formats. Bid documents may be scanned with 100 dpi with black and white option which helps in reducing size of the scanned document.
- 4) To avoid the time and effort required in uploading the same set of standard documents which are required to be submitted as a part of every bid, a provision of uploading such standard documents (e.g. PAN card copy, annual reports, auditor certificates etc.) has been provided to the bidders. Bidders can use “My Space” or “Other Important Documents” area available to them to upload such documents. These documents may be directly submitted from the “My Space” area while submitting a bid, and need not be uploaded again and again. This will lead to a reduction in the time required for bid submission process.

**Note:** *My Documents space is only a repository given to the Bidders to ease the uploading process. If Bidder has uploaded his Documents in My Documents space, this does not automatically ensure these Documents being part of Technical Bid.*

### **SUBMISSION OF BIDS**

- 1) Bidder should log into the site well in advance for bid submission so that they can upload the bid in time i.e., on or before the bid submission time. Bidder will be responsible for any delay due to other issues.
- 2) The bidder has to digitally sign and upload the required bid documents one by one as indicated in the tender document.
- 3) Bidder has to select the payment option as “offline” to pay the tender fee / EMD as applicable and enter details of the instrument.
- 4) **Deleted**
- 5) Bidders are requested to note that they should necessarily submit their financial bids in the format provided and no other format is acceptable. If the price bid has been given as a standard BoQ format with the tender document, then the same is to be downloaded and to be filled by all the bidders. Bidders are required to download the BoQ file, open it and complete the white coloured (unprotected) cells with their respective financial quotes and other details (such as name of the bidder). No other cells should be changed.

Once the details have been completed, the bidder should save it and submit it online, without changing the filename. If the BoQ file is found to be modified by the bidder, the bid will be rejected.

- 6) The server time (which is displayed on the bidders' dashboard) will be considered as the standard time for referencing the deadlines for submission of the bids by the bidders, opening of bids etc. The bidders should follow this time during bid submission.
- 7) All the documents being submitted by the bidders would be encrypted using PKI encryption techniques to ensure the secrecy of the data. The data entered cannot be viewed by unauthorized persons until the time of bid opening. The confidentiality of the bids is maintained using the secured Socket Layer 128 bit encryption technology. Data storage encryption of sensitive fields is done. Any bid document that is uploaded to the server is subjected to symmetric encryption using a system generated symmetric key. Further this key is subjected to asymmetric encryption using buyers/bid opener's public keys. Overall, the uploaded tender documents become readable only after the tender opening by the authorized bid openers.
- 8) The uploaded tender documents become readable only after the tender opening by the authorized bid openers.
- 9) Upon the successful and timely submission of bids (i.e. after Clicking "Freeze Bid Submission" in the portal), the portal will give a successful bid submission message & a bid summary will be displayed with the bid no. and the date & time of submission of the bid with all other relevant details.
- 10) The bid summary has to be printed and kept as an acknowledgement of the submission of the bid. This acknowledgement may be used as an entry pass for any bid opening meetings.

#### **ASSISTANCE TO BIDDERS**

- 1) Any queries relating to the tender document and the terms and conditions contained therein should be addressed to the Tender Inviting Authority for a tender or the relevant contact person indicated in the tender.
- 2) Any queries relating to the process of online bid submission or queries relating to CPP Portal in general may be directed to the 24x7 CPP Portal Helpdesk.

**Annexure – XA: Check list Technical Bid**

<b>S. No.</b>	<b>Document</b>	<b>Format/ document</b>
1	Letter comprising Bid	Annexure I
2	Bid Security	Annexure II
3	Power of Attorney for signing of Bid	Annexure III
4	Power of Attorney for Lead Member of the Consortium, if applicable	Annexure IV
5	Joint Bidding Agreement, if applicable	Annexure VI
6	Particulars of the Applicant	Annexure VII
7	Technical Capacity of the applicant <i>(supporting documents such as certificate from the client need to be provided)</i>	Annexure VIII
8	Financial Capacity of the applicant <i>(Statutory Auditor's certificate needs to be provided)</i>	Annexure IX

Note: Above documents, wherever required and as provided in the RFP document, should be supported by documents such as certificates, undertakings, applicant's charter documents, etc.

## **Annexure XI: Guidelines of the Department of Disinvestment**

(Refer Clause 1.2.2)

No. 6/4/2001-DD-II  
Government of India  
Department of Disinvestment  
Block 14, CGO Complex  
New Delhi.  
Dated 13<sup>th</sup> July 2001.

### OFFICE MEMORANDUM

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

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

- (a) In regard to matters other than the security and integrity of the country, any conviction by a Court of Law or indictment/ adverse order by a regulatory authority that casts a doubt on the ability of the bidder to manage the public sector unit when it is disinvested, or which relates to a grave offence would constitute disqualification. Grave offence is defined to be of such a nature that it outrages the moral sense of the community. The decision in regard to the nature of the offence would be taken on case to case basis after considering the facts of the case and relevant legal principles, by the Government of India.
- (b) In regard to matters relating to the security and integrity of the country, any charge-sheet by an agency of the Government/ conviction by a Court of Law for an offence committed by the bidding party or by any sister concern of the bidding party would result in disqualification. The decision in regard to the relationship between the sister concerns would be taken, based on the relevant facts and after examining whether the two concerns are substantially controlled by the same person/ persons.
- (c) In both (a) and (b), disqualification shall continue for a period that Government deems appropriate.
- (d) Any entity, which is disqualified from participating in the disinvestment process, would not be allowed to remain associated with it or get associated merely because it has preferred an appeal against the order based on which it has been disqualified. The mere pendency of appeal will have no effect on the disqualification.
- (e) The disqualification criteria would come into effect immediately and would apply to all bidders for various disinvestment transactions, which have not been completed

as yet.

- (f) Before disqualifying a concern, a Show Cause Notice why it should not be disqualified would be issued to it and it would be given an opportunity to explain its position.
- (g) Henceforth, these criteria will be prescribed in the advertisements seeking Expression of Interest (EOI) from the interested parties. The interested parties would be required to provide the information on the above criteria, along with their Expressions of Interest (EOI). The bidders shall be required to provide with their EOI an undertaking to the effect that no investigation by a regulatory authority is pending against them. In case any investigation is pending against the concern or its sister concern or against its CEO or any of its Directors/ Managers/ employees, full details of such investigation including the name of the investigating agency, the charge/ offence for which the investigation has been launched, name and designation of persons against whom the investigation has been launched and other relevant information should be disclosed, to the satisfaction of the Government. For other criteria also, a similar undertaking shall be obtained along with EOI.

sd/- (A.K. Tewari)

Under Secretary to the Government of India

**Annexure – XII: Form FIN -1 Financial Bid Submission Form**

**Jogighopa Terminal**

(To be submitted only in financial bid not in technical bid. Submission of financial bid submission form and BoQ in Technical bid will be considered as non-responsive bid and further evaluation will not be considered)

Dated:

To,

.....  
Inland Waterways Authority of India  
Head Office,  
A-13, Sector - 1,  
Noida-201301,  
Uttar Pradesh, India

Sub: Bid for the Operation and Maintenance of IWT Terminal at Jogighopa

We, the undersigned, submit our Bid and offer Royalty in the form of .....  
INR / MT (in both numbers and words) for undertaking the aforesaid project in accordance with the RFP, Contract document and our Technical Bid.

This Royalty amount is inclusive of all types of taxes but excluding Goods & Service Tax (GST). We acknowledge that the award of Project shall be on basis Royalty quoted by us. We hereby confirm that the Financial Bid is unconditional, and we acknowledge that any condition attached to Financial Bid shall result in rejection of our Financial Bid / Bid as a whole.

Our Financial Bid shall be binding upon us up to expiration of the validity period of the Bid

We understand you are not bound to accept any Bid you receive.

**Yours sincerely,**

**Authorized Signature [In Full and initials]:**

**Name and Designation of Signatory** : .....

**Name of Firm** : .....



**Operation and Maintenance Agreement**

**Draft Contract Agreement**

**Between**

**INLAND WATERWAYS AUTHORITY OF INDIA**  
**(as “Contracting Authority”)**

**And**

[\_\_\_\_\_]

**(as “Operator”)**

**For**

**Operation and maintenance of Jogighopa Inland Waterway Terminal in  
Assam, India**

**Inland Waterways Authority of India**

**[Date]**

## CONTRACT AGREEMENT

**THIS CONTRACT AGREEMENT** is made and signed at Noida on this the .....day of \_\_\_\_\_ 2024.

BETWEEN:

Inland Waterways Authority of India, a body corporate constituted and incorporated under the provision of the Inland Waterways Authority of India Act, 1985 of the Government of India, and having its Administrative Office at A-13, Sector – 1, Noida – 201301, Uttar Pradesh, acting through Mr. \_\_\_\_\_ who is the duly authorized person to sign the present agreement \_\_\_\_\_, hereinafter referred to as **“the Contracting Authority”** (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns);

AND

....., a company incorporated under the Companies Act, 1956/ 2013, and having its registered office at..... hereinafter referred to as **“the Operator”** acting through Mr. \_\_\_\_\_ who has been duly authorized vide board resolution dated \_\_\_\_\_ to act on behalf of the Operator (which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns).

WHEREAS:

- A. The Contracting Authority is desirous of implementing a Project for terminal at Jogighopa through private sector participation;
- B. The Contracting Authority invited application from interested parties for operation and management
- C. of Inland Waterway Terminal at Jogighopa.
  - a)
- D. In response to the invitation referred to in recital ‘B’ above, the Contracting Authority received proposals from various parties including the proposal dated ..... submitted by the Applicant/Consortium in accordance with the Request for Proposal;

- E. The Contracting Authority, after evaluating all the proposals received by it, accepted the proposal referred to in recital “C” above submitted by the Applicant/ Consortium and communicated its acceptance to the Applicant/ Consortium vide Letter of Intent for Award of Contract dated .....
  
- F. Following the issue of the Letter of Intent for Award of Contract dated \_\_\_\_\_, the Contracting Authority has agreed to grant the Contract to the Operator to implement the Project on the terms, conditions and covenants hereinafter set forth in this Agreement.

**NOW, THIS AGREEMENT WITNESSETH AS FOLLOWS:**

## ARTICLE 1

### 1 Definitions and Interpretations

#### 1.1 Definitions

In this Agreement, unless the context otherwise requires the following terms shall have the following meanings assigned/ascribed thereto:

“**Additional Cost**” means the additional capital expenditure which the Operator has or would be required to incur and which has arisen as a result of Change in Law.

“**Additional Auditor**” means another firm of chartered accountants duly licensed to practice in India empanelled by CAG, to conduct special audit of the quantity MT of cargo/ TEUs handled and the financial statements, documents and supporting evidences thereto as may be mandated by the Contracting Authority.

“**Agreement**” means this agreement as of date hereof, including Annexures I through XIV as may be amended, supplemented or modified in accordance with the provisions hereof. The words ‘Agreement’, ‘Contract’ and ‘Contract Agreement’ have been used interchangeably in this document and they all refer to this agreement as of date hereof, including Annexures I through XIV as may be amended, supplemented or modified in accordance with the provisions hereof.

“**Annexure**” means the schedules, supplements or documents, annexed to this Agreement.

“**Applicable Laws**” means all laws, brought into force and effect by Government of India or any of the state governments, 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;

“**Applicable Permits**” means any and all permissions, clearances, licenses, authorizations, consents, no-objections, approvals and exemptions under or pursuant to any of the Applicable Laws or from any Government Authority required in connection with the Project and for undertaking, performing or discharging the obligations contemplated by this Agreement or any other Transaction Document.

“**Applicant**” means [●]<sup>4</sup>.

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<sup>4</sup> Name and address of the applicant to be added here

**“Appointed Date”** means three (3) months from the date of signing of this Agreement or the date of completion of all Conditions Precedent, whichever is earlier.

**“Associate”** means, with respect to any Party and/or with respect to the Applicant and/or with respect to any member of Consortium, any other Person directly or indirectly controlling, controlled by or under common control with such Party, Applicant and/or member of Consortium. For the purposes of this definition, the term “control” (including with correlative meaning, the terms “controlled by” and “under common control with”) as applied to any Party or Applicant or a member of Consortium, means the possession, directly or indirectly, of the power to direct or cause the direction of the management of that Party or Applicant or a member of Consortium whether through ownership of more than 50% (fifty percent) of the voting securities, by contract, or otherwise.

**“Contracting Authority Event of Default”** shall have the meaning as set out under Article 15.2.

**“Bid”** means the proposal and the entire set of documents submitted by the Applicant and/or the Consortium in response to the RFP.

**“Book value”** means the aggregate written down value as on the date of issue of the Termination Notice in the books of the Operator of (i) the tangible assets (including capital works in progress) forming part of, fixed or attached to the ground, created, installed or provided by the Operator and comprised in Project Facilities and Services, and (ii) the moveable assets including cargo handling equipment belonging to the Operator, in accordance with Indian Accounting Standards using depreciation rates as set forth in the (Indian) Companies Act, 1956, as applicable from time to time.

**“Cargo throughput”** means the volume of cargo (in metric ton) handled at the Terminal in the period of one year.

**“Change in Law”** shall have the meaning set out under Article 13.1 of this Agreement.

**“Change of Scope”** means requisition by the Contracting Authority for the provision of additional works and services which are not included in the scope of the Project as per this Agreement.

**“Change of Scope Notice”** means a notice issued by Contracting Authority specifying in reasonable detail the works and services contemplated thereunder, if the Contracting Authority determines that Change of Scope is necessary.

**“Chainage”** means the specific locations on National Waterways, denoted in Km, as notified/published by the Contracting Authority from time to time.

**“Contract Period”** means the period of the OM specified in Article 2.2 of this Agreement.

“**Conditions Precedent**” shall mean conditions prescribed in Article 3 of this Agreement.

“**Consortium**” (if applicable) means the consortium consisting of (i) ....., (ii) ....., and (iii)..... formed, to implement the Project.

“**Consultation Notice**” has the meaning ascribed to it in Article 15.3.

“**Contractor**” means a Person with whom the Operator has entered into/may enter into a contract relating to the execution of any works and /or operation and maintenance of the Project Facilities and Services, including the Management Contractor.

“**Commercial Operation Date (COD)**” has the meaning ascribed to it in in Clause 6.3..

“**Day**” means the 24 (twenty-four) hour period beginning and ending at 12:00 midnight Indian Standard Time.

“**Encumbrance**” means any encumbrance such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations and shall include without limitation any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances and encroachments on the Project Site/Terminal’s Assets/ Project Facilities and Services.

“**Environmental Law**” means any statute, rule, regulation, ordinance, code, guideline or policy having the force of law, in each case, applicable to the Project now or hereafter in effect and any applicable judicial or administrative interpretation, pronouncement, order, decree or judgment, relating to the environment, health and safety.

“**Escrow Account**” means the account used for withdrawals and appropriations during the Contract Period as mentioned under Article 9.3.

“**Escrow Agreement**” means the agreement to be executed inter alia between the Operator, the Contracting Authority and the Escrow Bank substantially in the format set out in Annexure VI hereto.

“**Event of Default**” shall have the meaning assigned under Article 15.1.

“**Expert**” means any person, body or organization of repute with recognized technical/ professional expertise in respect of any field, matter or subject relevant, including the relevant subject-matter expert(s), financial expert(s), industry expert(s) and technical expert(s),for the purpose of this Agreement.

**“Expert Committee”** means the committee set up for dispute resolution in accordance with Annexure VII hereto.

**“Fee Regulations”** means the Inland Waterways Authority of India (Levy and Collection of fee and charges) Regulations 2018 as amended and notified from time to time.

**“Financial Year”** means twelve-month period commencing from 1<sup>st</sup> April and ending 31<sup>st</sup> March

**“Force Majeure Event”** shall have the meaning ascribed to it in Article 14.1 of this Agreement.

**“GoI”** means the Government of India.

**“Good Industry Practice”** means the exercise of that degree of skill, diligence and prudence and those practices, methods, specifications and standards of equipment, safety and performance, as may change from time to time and which would reasonably and ordinarily be expected to be used by a skilled and experienced operator engaged in construction, operation and maintenance of facilities, equipment or systems of the type and size similar to the Project Facilities and Services.

**“Government Authority”** means GoI, any state government or any governmental department, commission, board, body, bureau, agency, authority, instrumentality, administrative body, at central, state, or local level, having jurisdiction over the Operator, the Terminal’s Assets, the Project Facilities and Services or any portion thereof, but shall not include the Contracting Authority.

**“Gross Revenue”** for and in respect of any Accounting Year shall mean the total amount of gross Revenues and receipts of every kind (from both cash and credit transactions computed prior to payment of any commission or service charge or fee thereon) derived by the Operator from the operation of the Project Facilities and Services and/or any other activity related to the Project, if any, as certified by the statutory auditors of the Operator, and shall include Revenues and receipts from and on account of cargo handling charges (including bulk, break bulk, container and liquid cargo), storage charges, vessel related charges (including but not limited to berthing, pilotage and towage), terminal charges, other miscellaneous charges (including but not limited to electricity supply to the vessel, bunkering facility, water supply, weighting scale, weighment, seal cutting, container entry, truck entry etc) any other services or facility provided by the Operator, but shall exclude the following:

- 1.1.1 All statutory applicable indirect Taxes such as GST, expenditure tax, and the like by whatever name called now or in future, which the Operator is bound to pay;
- 1.1.2 Any revenue earned by the Operator on sale of assets of a capital nature which are owned by the Operator;
- 1.1.3 Interest income from investment made; and
- 1.1.4 Statutory charges collected by the Operator on behalf of Contracting Authority

For the avoidance of doubt, Gross Revenue shall also include any amount received by the Affiliate to whom the Operator has contracted any Associated Services and/or any other activity related to the Project, and any amount received by the Operator from a third party to whom it has contracted any Associated Services and/or any other activity related to the Project;

**“Independent Expert”** means a person appointed in accordance with Article 5 for supervising and monitoring of compliance by the Operator as per Scope of Work, Performance Standards and Minimum Guaranteed Cargo more particularly to undertake, perform, carry out the duties, responsibilities, services and activities set forth in Annexure V.

**“Indian Accounting Standards”** means the Indian accounting standards issued by the Institute of Chartered Accountants of India.

**“Indo Bangladesh Protocol”** refers to the Protocol on Inland Waterways Transit and Trade signed between India and Bangladesh (PIWTT).

**“Insurance Cover”** shall have the meaning ascribed to it in Article 12.1.3 (b).

**“IWAI Act”** means The Inland Waterways Authority of India Act, 1985 as amended, supplemented, re- enacted or replaced from time to time.

**“LAD”** means Least Available Depth.

**“Management Control”** means the possession, directly or indirectly of the power to direct or cause the direction of the management and policies of the Operator, whether through the ownership of voting securities, by contract or otherwise or the power to elect or appoint more than 50% (fifty percent) of the directors, managers, partners or other individuals exercising similar authority with respect to the Operator.

**“Material Adverse Effect”** means material adverse effect of any act or event on the ability of either Party to exercise any of its rights or perform any of its duties 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.

**“Minimum Equipment”** shall have the meaning ascribed to it in Article 7.1.1 and Annexure III A

**“Minimum Guaranteed Cargo”** shall have the meaning ascribed to it in Article 7.1.13.

**“Mobilisation Phase”** shall have the meaning ascribed to it in Article 6.3

**“Month”** means the calendar Month as per the Gregorian calendar.



“**Non-riverine cargo**” means cargo other than Riverine Cargo. Quantity of such cargo will be ascertained as per Goods Receipt document.

“**Operations Phase**” means the period from the Commercial Operation Date to the expiry/termination of the Contract Period.

“**Operations and Maintenance Standards**” means the minimum standards of operations and maintenance set out in the Annexure VIII with regards the Project Facilities and Services.

“**Operator Event of Default**” shall have the meaning as set out under Article 15.1.1

“**Party**” means either the Contracting Authority or the Operator as the context may require or admit and “**Parties**” means both Contracting Authority and Operator.

“**Performance Standards**” means the minimum standards of performance set out in Annexure IV with regards the Project Facilities and Services.

“**Performance Guarantee**” shall mean the bank guarantees procured by the Operator for the benefit of the Contracting Authority guaranteeing the performance of the obligations of the Operator hereunder in the manner specified in Article 4.

“**Person**” means any individual, company, corporation, partnership, joint venture, trust, unincorporated organization, government or governmental authority or agency or any other legal entity.

“**Political Event**” means the Force Majeure Events set out in Article 14.3.

“**Project**” means the operation and maintenance and providing of the Project Facilities and Services at Inland Water Transport Terminal at Jogighopa, Assam, India; in accordance with the provisions of this Agreement.

“**Project Contracts**” means collectively this Agreement, O&M Contract and any other material contract (other than the Escrow Agreement or any commercial agreement with the users) entered into or may hereafter be entered into by the Operator in connection with the Project and Project Facilities and Services.

“**Project Facilities and Services**” means the facilities and services as set out under the Scope of Work (as provided in, *inter alia*, Article 7 and Annexure III), to be provided by the Operator during the Contract Period, in accordance with this Agreement.

“**Project Site**” means the area demarcated in Annexure I including the waterfront (which shall include adjacent channel stretch of 100 meters on river side of terminal, existing berth, land together with buildings, structures if any and easement rights thereto that may be given to the

Operator and all other assets comprised therein on which the Operator is authorized to operate the Project Facilities and Services as set forth in this Agreement.

“**Quarter**” means a period of 3 (three) months.

“**Remedial Period**” has the meaning ascribed to it in Article 15.4.

“**Request for Proposal**” or “**RFP**” means the Request for Proposal dated [●] issued by the Contracting Authority to the applicants and includes any addendum / clarification issued in respect thereof by the Contracting Authority.

“**Requisition**” has the meaning ascribed to it in Article 16.3.

“**Riverine cargo**” means cargo transported to and/or from the Terminal through waterways. For the avoidance of doubt, it is clarified that in the event cargo imported into the Terminal has been processed and exported, such cargo shall be treated as Riverine Cargo in the event either the import or export is through waterways.

“**Royalty**” means the share payable by the Operator to the Contracting Authority, pursuant to Article 9.1 hereof.

“**Safety Standards**” means the minimum standards of safety set out in the Annexure VIII with regards the Project/Project Facilities and Services.

“**Scope of Work**” means the minimum requirements as to the operation and maintenance of the Project and provision of Project Facilities and Services set out in, *inter alia*, Article 7 and Annexure III.

“**Special Audit**” means an audit of the quantity of cargo handled as MT and the financial statements, documents and supporting evidences thereto as may be mandated by the Contracting Authority and report to the Contracting Authority such information as may be desired by the Contracting Authority for any period.

“**Statutory Auditors**” means a firm of chartered accountants appointed in terms of Section 139 of the Companies Act, 2013 and acting as the statutory auditors of the Operator. Appointment of Statutory Auditors shall be as per Annexure XIV.

“**Statutory Charges**” means collectively the Waterway usage Charges, Vessel Related Charges and Composite charges as such identified in the Schedule-I of the Fee Regulations at Annexure XII

“**Tariff**” means collectively the applicable (i) Cargo Related Charges (ii) Miscellaneous Charges, as notified by competent authority and identified Fee Regulation at Annexure XII, that may be collected by the Operator from the users of the Project Facilities and Services

**“Ten Year G Sec”** means the 10 Year G Sec rate published by Reserve Bank of India prevailing as on the date of a payment due from which the computation of interest is required to be made under the Agreement.

**“Terminal’ Assets”** means the assets set out in Annexure II, belonging to the Contracting Authority.

**“Termination Notice”** means a notice for termination of this Agreement issued pursuant to Article 16 hereof.

**“Termination Period”** shall have the meaning as set out under Article 16.1 hereof.

**“Terminal”** means Inland Waterway Terminal at Jogighopa.

**“Transfer”** means to transfer, sell, assign, pledge, hypothecate, create a security interest in or other encumbrance on, place in trust (voting or otherwise), transfer by operation of law or in any other way dispose of, whether or not voluntarily, the legal or beneficial interest in the equity shares of the Operator.

**“Transfer Date”** means the date of expiry or termination as the case may be, of the Contract Period in accordance with the terms of this Agreement.

**“Transaction Documents”** means collectively the RFP and Project Contracts.

**a. Other References**

In this Agreement:

**“BIS”** means Bureau of Indian Standards.

**“BS”** means British Standard.

**“CISF”** means Central Industrial Security Force.

**“DIN”** means German Industrial Standard.

**“IWT”** means Inland Waterways Terminal

**“IBP”** means Indo Bangladesh Protocol

**“IS”** means Indian Standard.

**“ISO”** means International Standards Organization.

“**km**” means kilometre, the unit of length.

“**kWh**” means Kilowatt-hour, the unit of electrical energy.

“**KVA**” means Kilovolt- Ampere, the unit of power.

“**m**” means Metre, the unit of length.

“**mm**” means Millimetre, the unit of length.

“**mt**” means Metric Tonne, the unit of weight.

“**MVA**” means Mega Volt Ampere, the unit of power.

“**MSIHC**” means Manufacture Storage and Import of Hazardous Chemicals.

“**OISD**” means Oil Industry Safety Directorate.

“**PIWTT**” means Protocol on Inland Waterways Transit and Trade

“**WPI**” means annual Wholesale Price Index published by Reserve Bank of India

## **b. Interpretations**

This Agreement constitutes the entire understanding between the Parties regarding the Project and supersedes all previous written and/or oral representations and/or arrangements and /or understanding and /or commitments regarding the Project. If there is any aspect of the Project not covered by any of the provisions of this Agreement, then and only in that event, reference may be made by the Parties to the bid documents, inter alia including the RFP documents, issued by the Contracting Authority and also including addendums, clarifications given in writing in the pre-bid meetings and the submissions of the Operator and the bid submitted by the Operator but not otherwise. In case of any contradictions in the terms of this Agreement and any such other bid documents as referred to above, the terms of this Agreement shall prevail.

In this Agreement unless the context otherwise requires:

- i. any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;
- ii. the words importing singular shall include plural and vice versa, and words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures,

trusts, associations, organisations or other entities (whether or not having a separate legal entity);

- iii. the table of contents and any headings in this Agreement are for ease of reference only and shall not affect its construction or interpretation;
- iv. the words “include” and “including” are to be construed without limitation;
- v. any reference to any period of time shall mean a reference to Indian Standard Time;
- vi. any reference to Day shall mean a reference to a calendar Day; any reference to month shall mean a reference to a calendar month;
- vii. “Recital”, “Articles” and “Annexures” shall refer, except where the context otherwise requires, to Articles of and any Annexure to this Agreement. The Annexures to this Agreement shall form an integral part and parcel of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- viii. any reference at any time to any agreement, deed, instrument, license or document of any description shall be construed as reference to that agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or novated at the time of such reference;
- ix. 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 expert and/or a Statutory Auditor shall be valid and effectual only if it is in writing under the hands of duly authorized representative of such Party or the Independent expert and/or Statutory Auditor, as the case may be, in this behalf and not otherwise;
- x. unless otherwise stated, 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;
- xi. unless otherwise specified, any interest to be calculated and payable under this Agreement shall accrue on a monthly basis and from the respective due dates as provided for in this Agreement; and
- xii. any word or expression used in this Agreement, unless defined or construed in this Agreement, shall be construed as per the definition given in General Clauses Act, 1897 failing which it shall bear the ordinary English meaning.

**c. 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.

**d. Ambiguities and Discrepancies**

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

- i. between two Article of this Agreement, the provisions of specific Articles relevant to the issue under consideration shall prevail over those in other Articles;
- ii. between any value written in numerals and that in words, the latter shall prevail; and
- iii. between the provisions of this Agreement and any other documents forming part of it, the former shall prevail.

## ARTICLE 2

### **b) Contract Agreement and Terminal Assets**

#### **a. Contract Agreement**

- i. In consideration of the Operator agreeing to pay to the Contracting Authority Royalty along with performing its obligations as set out in this Agreement, the Contracting Authority hereby grants to the Operator, an exclusive license for operation and maintenance (“O&M”) of the Project Facilities and Services as per Scope of Work defined in Annexure III subject to the provisions of this Agreement.

#### **b. Contract Period**

- i. The Contract hereby granted is for a period of 10 ( ten) years commencing from the COD during which the Operator is authorized and obliged to implement the Project and to provide Project Facilities and Services as per Scope of work in accordance with the provisions hereof.

Provided that:

In the event of an early termination of this Agreement by either Party in accordance with the provisions hereof, the Contract Period shall mean and be limited to the period commencing from the COD and ending with the date of termination of this Agreement.

#### **c. Acceptance of the Contract**

- i. The Operator hereby accepts the Contract and agrees and undertakes to implement the Project and to provide Project Facilities and Services in accordance with the provisions of this Agreement. Subject to and in accordance with the provisions of this Agreement and Applicable Laws and Applicable Permits, the Operator shall at its costs, charges, expenses and risk including but not limited to foreign exchange variation risk if any, conceptualize, equip, operate and maintain the Project/ Project Facilities and Services.

#### **d. Terminal Assets**

- i. In consideration of the Operator agreeing to perform and discharge its obligations as set forth in this Agreement, the Contracting Authority hereby grants to the Operator, the exclusive right to enter upon, occupy and use the Project Site and Terminal Assets for the purpose of implementing the Project and provision of Project Facilities and Services pursuant thereto in accordance with this Agreement.

The Contracting Authority shall repair, restore, if required, Terminal Assets so that Terminal Assets are in good working condition, prior to granting right to Operator for use of Terminal Assets.

The Independent Expert, along with the Contracting Authority and the Operator shall undertake a joint inspection of Terminal Assets and maintain a record condition of

Terminal Assets, which shall include, but not limited to, make, capacity, specification, age of Terminal Assets.

- ii. The Operator shall at its costs, charges and expenses make such development and improvements in the Project Site and Terminal Assets as may be necessary or appropriate for implementing the Project and providing Project Facilities and Services in accordance with the Agreement, Applicable Laws and Applicable Permits.

**e. Use of Terminal Assets**

- i. The Operator shall not without the prior written consent or approval of the Contracting Authority use the Project Site and the Terminal Assets for any purpose other than those of the Project/ the Project Facilities and Services and those incidental thereto as permitted under this Agreement or as may otherwise be approved by the Contracting Authority.

**f. Information about Project Site and Terminal Assets**

- i. The information about the Project Site and Terminal Assets as set out in Annexures I and II respectively is provided by the Contracting Authority in good faith and with due regard to the matters for which such information is required by the Operator. The Contracting Authority agrees to provide to the Operator, upon a reasonable request, any further information relating to the Project Site and Terminal Assets, which the Contracting Authority may now possess or may hereafter come to possess, as may be relevant to the implementation of the Project. Subject to this, the Contracting Authority makes no representation and gives no warranty to the Operator in respect of the condition of the Project Site and Terminal Assets.

**g. Acceptance of the Project Site and Terminal Assets**

- i. The Operator accepts possession of the Project Site and Terminal Assets on 'as is where is' basis and confirms having:
  - a) inspected the Project Site and Terminal Assets, including the berths and all structures there and its surroundings;
  - b) satisfied itself as to the nature of the climatic, hydrological and general physical conditions of the Project Site and Terminal Assets, the nature of the ground and subsoil, the form and nature of the Project Site and Terminal Assets, and the nature of the design, work and materials necessary for the performance of its obligations under this Agreement; and
  - c) obtained for itself all necessary information as to the risks, contingencies and all other circumstances which may influence or affect the Operator and its rights and obligations under or pursuant to this Agreement.

**h. Peaceful Occupation**

- i. Handing over physical possession of the Project Site and Terminal Assets, free from all encumbrances, after receipt of performance guarantee from the Operator is a Condition



Precedent for Contracting Authority. The Contracting Authority warrants that the Operator shall, subject to complying with the terms and conditions of this Agreement, remain in occupation of the Project Site and Terminal Assets during the Contract Period. In the event the Operator is obstructed by any Person claiming any right, title or interest in or over the Project Site and Terminal Assets or any part thereof or in the event of any enforcement action including any attachment, distraint, appointment of receiver or liquidator being initiated by any Person claiming to have charge on the Project Site and Terminal Assets or any part thereof pursuant to the IWAI Act, the Contracting Authority shall, if called upon by the Operator, defend such claims and proceedings. The Contracting Authority represents that the Operator shall be kept indemnified and harmless against any adverse court order or direction.

## ARTICLE 3

### c) **Conditions Precedent**

#### a. **Conditions Precedent to be satisfied by the Operator before Appointed Date**

- i. The Contract shall be subject to satisfaction or waiver of the following conditions precedent (the “**Conditions Precedent**”)
  - a) Furnishing of the Performance Guarantee as stipulated in Article 4 hereof;
  - b) Furnishing of copies (certified as true copies by a Director of the Operator) of the constituent documents of the Operator;
  - c) Furnishing of all resolutions adopted by the Board of Directors of the Operator (certified as true copies by a Director of the Operator) authorizing the execution, delivery and performance by the Operator, of each of the Bidding Documents;
  - d) Opening the Escrow Account and executing the Escrow Agreement;
  - e) Furnishing a certificate from its principal officer/ Director on the shareholding pattern of the Operator;
  - f) Submission of Draft Operational Plan (as detailed in Article 6) within 30 (thirty) Days from the signing of the Contract and submission of final Operational Plan within 30 (thirty) Days from the receipt of the comments from the Contracting Authority (as per Article 3.2).
  - g) Procuring and furnishing the following confirmations, in original, (from the Applicant/all members in case of a Consortium) that the Operator:
    - (i) shall at all times comply with the provisions of Article 11.2 in respect of its shareholding;
    - (ii) has the financial standing and resources to fund /raise finances for undertaking and implementing the Project in accordance with this Agreement;
    - (iii) is duly organized and validly existing under the laws of jurisdiction of its incorporation, and has requested the Contracting Authority to enter into this Agreement with the Operator and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
  - h) Deleted.
  - i) Insurance requirement: The Operator shall, at its cost and expense, purchase and maintain insurances as are prudent, including but not limited to the following:
    - (i) Contractor’s all risk insurance;

- (ii) loss, damage or destruction of Project Facilities and Services, at replacement value;
- (iii) comprehensive third-party liability insurance including injury or death to personnel of the Contracting Authority and others who may enter the Project Site or the Terminal Assets;
- (iv) workmen's compensation insurance;
- (v) marine cum storage cum erection insurance; and
- (vi) any other insurance necessary to protect the Operator, its employees and its assets and the Contracting Authority, its employees and agents engaged in or connected to the Project and the Project Site and Terminal Assets, against loss, damage or destruction at replacement value, including all Force Majeure Events that are insurable and not otherwise covered in items (i) to (v).
- (vii) Compliance of statutory clearances and permits for installation and operation including environmental clearances

**b. Conditions Precedent to be satisfied by the Contracting Authority:**

- i. Deleted;
- ii. Handing over physical possession of the Project Site and Terminal Assets, as provided in Annexure II of this Contract, free from all encumbrances, after receipt of performance guarantee from the Operator with the provision that Royalty and applicable taxes shall be paid by operator from the date of taking the physical possession.

**c. Other Requirements**

- i. The aforesaid Conditions Precedent shall be complied within 3 (three) months from the date of the signing of this Contract and can be extended based on the mutual agreement between the Contracting Authority and the Operator.
- ii. Any of the Conditions Precedent set forth in Articles 3.1 may be waived fully or partially by the Contracting Authority at any time in its sole discretion or the Contracting Authority may grant additional time for compliance with these conditions. The Operator shall ensure compliance within such additional time as may be specified by the Contracting Authority. Any of the Conditions Precedent set forth in Articles 3.2 may be waived fully or partially by the Operator at any time in its sole discretion or the Operator may grant additional time for compliance with these conditions.
- iii. If the Operator has fulfilled all the Conditions Precedent under Article 3.1 including the furnishing of the Bank Guarantee and has not waived or extended the time under Article 3.3.2 above, and if the Contracting Authority has failed to fulfill the Conditions Precedent to be fulfilled by it under Article 3.2 (and which are within the power of the Contracting Authority), and the Operator has not waived or extended the time under Article 3.3.2 above, the Contracting

Authority shall be liable to pay liquidated damages in a sum calculated at the rate of 0.1% (zero point one percent) of the Performance Guarantee for each Day's delay until fulfilment of the Conditions Precedent subject to a maximum of 5% (five percent) of the figure mentioned in the Performance Guarantee furnished by the Operator. In such event, having regard to the quantum of damages, the time for the performance shall be deemed to have been extended by the number of days for which the liquidated damages is paid and if, after the extended period the Contracting Authority is still not in a position to comply with the Conditions Precedent, then the agreement shall be liable to be terminated as provided for in Article 3.3.5 below.

iv. Deleted.

v. In the event that the Conditions Precedents are not complied within the time (including the extended time, if any) in terms of the aforesaid Articles 3, this Agreement shall be liable to be terminated. If such termination is on account of failure of the Operator to comply with Conditions Precedent, the Bid Security shall stand forfeited. If such termination is on account of failure of the Contracting Authority, the Contracting Authority shall be obliged to return the Bid Security/Performance Guarantee. It is clarified that except for the payment as stipulated in the foregoing Article 3.3.3 and forfeiture in this Article 3.3.4, each party hereto shall have no claims against the other for costs, damages, compensation or otherwise.

## ARTICLE 4

### **d) Performance Guarantee**

4.1 The Operator shall for due performance of its obligations provide to Contracting Authority an unconditional and irrevocable bank guarantee, within 15 (fifteen) days of execution of this Agreement, in favour of the Contracting Authority, encashable and enforceable at Noida, Uttar Pradesh, substantially in the form set forth in Annexure X (the "Performance Guarantee"). The Performance Guarantee for Jogighopa terminal is Rs 2,05,06,000.

The same is effective from COD till six (6) months after completion of Contract Period i.e., 10 years.

4.2 Till such time the Operator provides to Contracting Authority the Performance Guarantee pursuant hereto, the Bid Security shall remain in full force and effect. The Performance Guarantee, if in the form of a bank guarantee shall be valid from COD till six (6) months after completion of Contract Period.

4.3 The Operator shall be liable to restore the Performance Guarantee to the full amount in case of part encashment of the same by the Contracting Authority. This shall be done within 30 (thirty) Days of any such part encashment.

4.4 Failure of the Operator to provide and maintain a valid Performance Guarantee and in accordance with this Article shall entitle the Contracting Authority to terminate this Agreement forthwith and also if relevant, to forfeit the Bid Security.

## ARTICLE 5

### e) Independent Expert

- 5.1 The performance of the Operator during the Contract period shall be monitored by an Independent Expert.
- 5.2 Cost of the Independent Expert shall be shared equally between Contracting Authority and Operator.
- 5.3 The Contracting Authority shall appoint, no later than 30 (thirty) Days from the Signing of the Contract, a third-party agency (the “**Independent Expert**”) for the Contract Period. Provided that the Contracting Authority shall have the right to appoint any of its agencies or departments or officers to monitor the Project until the Independent Expert is appointed in accordance with this Article 5.2. The provisions of this Agreement with respect to the Independent Expert shall apply mutatis mutandis to such agency or department until the Independent Expert is appointed in accordance with the provisions of this Article 5.2 and such provisions shall be repeated after expiry of each appointment.
- 5.4 Independent Expert shall review quarterly performance reports by the Operator and report to the Contracting Authority and Operator in case of any discrepancy in the report and assessment of the Independent Expert.
- 5.5 Independent Expert shall be responsible to organize and conduct quarterly joint inspections of the Terminal with the Contracting Authority and the Operator, at a pre – defined time. Report of the joint inspection shall be prepared and shared with the Contracting Authority and Operator by Independent Expert.
- 5.6 Independent Expert shall also be responsible for ensuring that the Operator meets Performance Standards.
- 5.7 Independent Expert can provide any Change in Scope, as and when necessary, to improve cargo handling capacity and efficiency of the Terminal, subject to approval of the Contracting Authority.
- 5.8 In the event that any damage is caused partly due to the negligence or default or omission on the part of the Contracting Authority and partly due to the negligence or default or omission on the part of the Operator, Independent Expert has to ascertain the proportion of respective damages. Each Party shall be liable to the other Party only in the proportion to its respective degree of negligence or default or omission, as the case may be.

## ARTICLE 6

### f) Project Implementation

#### a. Preparation of Operation Plan

- i. The Operator shall at its cost, charges and expenses, prepare the operation plan (the “**Operation Plan**”) in conformity with the Scope of Work.

#### b. Review of the Operation Plan

- i. The Operator shall submit the Operation Plan, within 30 (thirty) Days of the signing of the contract, for review of the Independent Expert. Simultaneously, the Operator shall also provide the Contracting Authority a list of equipment with specifications the Operator would install at Terminal for Operation and Maintenance.
- ii. The Independent Expert shall review the Operation Plan submitted by the Operator and provide its observations and suggestions on the same within 30 (thirty) Days from the date of the receipt of such Operation Plan.
- iii. In the event that the Independent Expert and/or Contracting Authority has observed that the Operation Plan is not in conformity with the Scope of Work, the Operator shall promptly and without any undue delay revise and resubmit the Operation Plan or satisfy the Independent Expert and/or Contracting Authority with regards its compliance within 30 (thirty) Days of receiving observations and suggestions from the Independent Expert.
- iv. The Contracting Authority shall provide a No-Objection Certificate (“NOC”) for operation of the Terminal on basis of Operation Plan submitted by the Operator. If the Independent Expert and/or Contracting Authority does not make any observations with respect to the Operation Plan submitted to it by the Operator within 60 (sixty) days of the submission, it shall be deemed that the Independent Expert/ Contracting Authority has no objections to the Operation Plan and the Operator is permitted to proceed with the Project according to the Operation Plan.
- v. The initial approved Operation Plan under this Agreement, shall be applicable for first two years from COD. Any subsequent changes in the Operation Plan shall be informed to the Independent Expert and Contracting Authority. Independent Expert and Contracting Authority reserve the right to provide comments on the plan.
- vi. Notwithstanding the review by the Independent Expert, the Operator shall be responsible for any defect and/or deficiency in the Operation Plan relating to the Project or any part thereof, and accordingly, the Operator shall at all times remain responsible for its obligations under this Agreement.

#### c. Mobilisation Phase

- i. Mobilisation Phase shall commence after successful completion of Conditions Precedent, as provide in Clause 3. This period shall be for 3 months from the Appointed Date,

unless mutually extended or shortened by the Contracting Authority and the Operator depending on completion of mobilization by the Operator. Accordingly, the Commercial Operation Date (the “COD”) of the Project shall be the date on which successful completion of Mobilisation Phase occurs.

- ii. The Operator shall promptly commence and complete the works, including mobilization, installation of equipment in accordance with the Operation Plan and shall also obtain from the Independent Expert a certificate as to completion of installation of Equipment and Services in accordance with provisions of this Agreement (“**Availability Certificate**”) before Commercial Operation Date.
- iii. The Contracting Authority shall notify proposed Fee Regulations by the Operator, for charges to be collected and retained by the Operator before Commercial Operation Date. In case of delay, both the parties can mutually agree on extension of the date for notification of proposed Fee Regulations. For the purpose of Fee Regulation, Schedule I, II and III of Inland Waterways Contracting Authority of India Amendment Regulations 2018 may be referred in Annexure XII.
- iv. The Operator shall procure all Applicable Permits before commencing operations, including but not limited to the list as provided in Annexure XI.
- v. COD of the Contract shall be applicable only after satisfaction of Clause 6.3.1, Clause 6.3.2 and Clause 6.3.3. It shall not be extended beyond 3 months from the Appointed Date, unless mutually agreed between both the parties.

**d. Obligations of the Operator**

Without prejudice to the generality of Article 6.3 and in addition to any of its other obligations under this Agreement the Operator shall:

- i. arrange for, in a timely manner all necessary financial and other resources required for installation of the Equipment, if any and Services.
- ii. engage professionally competent Persons for project management and installation and ensure that all works are carried out in compliance with the Operation Plan;
- iii. obtain Applicable Permits, comply with Applicable Laws and Applicable Permits and give priority to safety in its installation and planning activities in order to protect life, health, property and environment;
- iv. provide to the representatives of the Contracting Authority, at reasonable times and upon prior intimation, access to the Project Site to review progress in installation and to ascertain compliance with any of the requirements of this Agreement. Provided that non-inspection by the Contracting Authority of any works shall not, in relation to such works,
  - i. amount to any consent or approval by the Contracting Authority nor shall the same be deemed to be waiver of any of the rights of the Contracting Authority under this Agreement; and



- ii. release or discharge the Operator from its obligations or liabilities under this Agreement in respect of such work;
- v. Promptly carry out at its cost such further works as may be necessary to remove any defects or deficiencies observed by the Independent Expert and ensure timely completion of installation of Equipment and Services in all respects; and
- vi. To ensure safe and timely completion of installation of Equipment and Services, the Operator may, subject to approval of the Contracting Authority, at its cost, interrupt and divert the water or the road traffic or Terminal traffic, adjacent to the Project Site if such interruption and diversion is imperative for efficient progress of installation works and conforms to Good Industry Practice. Such interruption and diversion shall be undertaken by the Operator only with prior written approval of the Independent Expert which approval shall not be unreasonably withheld. For avoidance of doubt, it is agreed that the Operator shall, at all times, be responsible for ensuring safe operation of installation works and shall remove interruption or diversion within the period specified by the Independent Expert.
  - b)
- vii. Procure necessary insurance covers for Equipment as provided under Article 3.

**e. Obligations of the Contracting Authority**

In addition to any of its other obligations under this Agreement, the Contracting Authority shall:

- i. in matters falling within its authority, grant, Applicable Permits, approvals and consents as may be required by the Operator and, on a best effort's basis;
- ii. make available all records (such as bathymetric survey, etc.) carried out on its behalf in the Terminal Assets, if requested by the Operator. It is clarified that the Operator shall be solely responsible for determining the adequacy or otherwise of such records and will not in reliance of such records, be entitled to claim any relief under this Agreement.

**f. Suspension of Works**

- i. Upon recommendation of the Independent Expert to this effect, the Contracting Authority may by notice require the Operator to suspend forthwith whole or any part of installation works if, in the reasonable opinion of the Contracting Authority, such work is not in accordance with Installation Standards and/or Safety Standards.
- ii. The Operator shall, pursuant to the notice under foregoing provision suspend installation works or any part thereof for such time and in such manner as may be specified by the Contracting Authority and thereupon represent to the Contracting Authority / Independent Expert, measures to remedy defects notified. The Operator may by notice require the Independent Expert to inspect such remedial measures forthwith and make a report to the Contracting Authority recommending whether or not the suspension hereunder may be revoked. Any dispute as regards suspension of works or remedial measures proposed, if not resolved within 30 (thirty) Days of the suspension or proposal of the remedial measures respectively, shall be submitted for dispute resolution in accordance with Article 21 hereof.

**g. Deleted**

**h. Liquidated Damages**

i. Subject to any of the provisions of this Agreement providing for extension of time for performance or excuse from performance, as the case may be, of any of the obligations of the Operator under this Agreement, apart from damages as mentioned in Clause 3.3.3; and Performance Standards as specified in Annexure IV, the Operator shall pay to the Contracting Authority liquidated damages at the rate of 0.1% (zero point one percent) of the Performance Guarantee for every day of delay in fulfilling specified obligations. The Parties agree that liquidated damages as provided are a genuine pre-estimate of the damages the Contracting Authority is likely to suffer and are not by way of a penalty. In case the aggregate delay exceeds 120 (one hundred and twenty) days, the Contracting Authority shall be entitled to terminate this Agreement and consequences of termination as laid down in Article 15 shall follow. The Contracting Authority may, at its discretion recover any amounts with respect to liquidated damages from the Performance Guarantee.

## ARTICLE 7

### **g) Operations and Maintenance**

#### **a. Obligations of the Operator**

In addition to any of its other obligations under this Agreement, the Operator shall operate and maintain the Project Facilities and Services, entirely at its cost, charges, expenses and risk in accordance with the provisions of this Agreement. The Operator's obligations under this Article shall include, but not be limited to the following:

#### **i. Berth and Terminal Operations**

The Operator shall:

- a) Promptly commence Commercial operations after the COD;
- b) Install and operationalize Equipment as provided in Annexure III A within 6 (six) months of COD;
- c) Make efforts to maximize cargo handled so as to achieve optimal utilization of the Project Facilities and Services;
- d) Ensure compliance of the Scope of Work;
- e) Be free to deploy higher capacity equipment/facilities/ technology, etc. and induct new technology and carry out value engineering for improved productivity and/or improved utilization, subject to the capacity and structural condition of the jetties, during the Contract Period;
- f) Ensure that the Project Facilities and Services shall adhere to the Operations and Maintenance Standards and Safety Standards and there is safe, smooth and uninterrupted flow of traffic under normal operating conditions;
- g) Minimize disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Facilities and Services by providing a rapid and effective response and maintaining liaison with emergency services of the Contracting Authority or other agencies;
- h) Make available all necessary financial, technical, technological, managerial and other resources for operation, maintenance, repair and replacement of the Project Facilities and Services in a timely manner;
- i) Ensure maintenance of proper and accurate record/data/accounts relating to operations of the Project Facilities and Services and revenue earned therefrom;
- j) Obtain, maintain and comply with Applicable Permits and comply with the Applicable Laws including those relating but not limited to Terminal side safety, health,

environment and labour;

- k) Subject to the provisions of this Agreement, perform, undertake or provide, in connection with the Project, all services which the Contracting Authority is authorized to perform, undertake or provide under provisions of the IWAI Act; and
- l) Prevent, with assistance of concerned law enforcement agencies, any encroachment or unauthorized use of the Project Facilities and Services.

ii. River and Terminal Services

- c) Scheduling the entry, berthing and sailing of vessels on a non-discriminatory basis subject to priority berthing norms and the sailing schedule
- d) Provide for/put in place arrangements for provision of supporting Project Infrastructure other than those covered under the Contract Agreement

iii. Repairs and Maintenance

The Operator shall at its own cost:

- a) Repair as necessary and maintain Project Facilities and Services or any part thereof in accordance with Scope of Work and for this purpose carry out routine preventive measures and maintenance of Project Facilities and Services
- b) Maintain the Project Facilities and Services in accordance with the provisions of this Agreement and Good Industry Practice with the objective of providing adequate service standards and ensuring that Project Facilities and Services to be transferred to the Contracting Authority upon expiry of the Contract Period are in good condition, except for normal and reasonable wear and tear.
- c) Ensure that maintenance Performance Standards as specified in Annexure IV are met.

iv. Replacement of Equipment

The Operator shall at its cost, plan for replacement of equipment well ahead of time when the utility thereof is reasonably expected to expire and replace the equipment in accordance with Good Industry Practice so as to ensure that the quality of Project facilities and Services are commensurate with the Scope of Work, at all times during the Contract Period.

The Operator shall not be responsible for replacement of equipment/ effects deployed/ provided by the Contracting Authority as provided in the Annexure II.

However, if any equipment deployed/ provided by the Contracting Authority becomes obsolete, in such case the Operator, after taking prior approval from the Authority, shall replace the equipment at its own cost. The replaced equipment shall be safely returned to the Contracting Authority.

v. Repairs, Replacement or Restoration

The Operator shall at its own costs, promptly and diligently, repair, replace or restore any of Project Facilities and Services or part thereof which may be lost, damaged, or destroyed for any reason whatsoever and as recommended by the Independent Expert.

vi. Removal and/or Replacement of Assets

Except as provided/ authorized under this Agreement, the Operator shall not, without prior written notice to the Contracting Authority, remove or replace any assets forming part of Project Facilities and Services. Such notice shall contain the exact details of assets that the Operator intends to remove and/or replace, its reasons for doing so and the likely period for replacement.

vii. Payments to the Contracting Authority

The Operator shall ensure payments to the Contracting Authority as per Article 9.

viii. Access for Inspection

The Contracting Authority, authorized personnel of the Contracting Authority and their respective agents will at all times have access to the Terminal, technical documents, materials, records and accounts relating to such operations for the purpose of inspection and review, consistent with relevant safety procedures. The Operator shall be obliged to extend all co-operation to subject matter Experts appointed by the Contracting Authority for purposes of verifying that Project Facilities and Services are operated and maintained in compliance with Performance Standards and adhere to Operations and Maintenance Standards and Safety Standards. Such verification shall be made annually. Additionally, the Operator shall upon prior intimation by the Contracting Authority provide authorized representatives of the Contracting Authority access to Project Facilities and Services for inspection and review of assets and operations and also to ascertain compliance with the requirements under this Agreement. Without prejudice to generality of this provision, it is agreed that the Operator shall in particular extend all co-operation and information required by subject matter Experts appointed by the Contracting Authority for conducting a safety audit and verifying that Project Facilities and Services are in strict compliance with Safety Standards.

ix. Reports

The Operator shall provide to the Contracting Authority, Monthly reports on cargo traffic, unit gross output/ discharge rates at berth, Tariff billed and collected in respect of Project Facilities and Services. The Monthly Report shall be submitted within 15 (fifteen) days following the end of each month along with any other information relating to Project Facilities and Services which the Contracting Authority may require from time to time. The Operator shall provide reports in prescribed formats and in such electronic form so as to provide online access to the Contracting Authority and its representatives.

x. Computer System and Network

The Operator shall install, operate and maintain such computer system and network (such as Electronic Data Interchange and Terminal Community System) and follow such protocol as the Contracting Authority may specify from time to time. In addition, the Operator shall install, operate and maintain an automated Gate Management System to ensure transparent and accurate reporting of total cargo throughput at the entry and exit gate of the Terminal. The Operator shall ensure live access of Gate Management System to the Contracting Authority. The system shall report the entry time, exit time, type of cargo and quantity of cargo carried by the vehicle exiting the Terminal;

xi. Security Arrangements

The Operator may make his own arrangements for security of Project Site and Terminal Assets. The Operator shall abide by the security regulations and procedures prescribed by the Contracting Authority or a competent Government Contracting Authority from time to time.

xii. Employment of personnel and manpower training

- a) The Operator shall employ qualified and skilled personnel required to operate the Project Facilities and Services. The terms of employment may be as deemed fit by the Operator and the Operator shall comply with all Applicable Laws and bear all costs in this regard. Without prejudice to the generality of this provision, all requisite approvals for employment of personnel of foreign origin or nationality shall be obtained by the Operator prior to engaging such personnel. Failure to obtain approval will not amount to a Force Majeure Event. All employees shall always remain the Operator's responsibility.
- b) The Operator shall adhere to all labour law compliances. The Operator shall also ensure that adequate training is provided to the employees for skill development relevant to industry that would benefit the Terminal and enable knowledge transfer.

xiii. Minimum Guaranteed Cargo for Jogighopa Terminal (**It may be noted that Minimum Cumulative Cargo Volume shall include both riverine and non-riverine cargo**)

**Jogighopa Terminal:**

**The Operator hereby unconditionally guarantees a Minimum Cumulative Cargo Volume (hereinafter referred as "MCCV") as per below schedule starting from the 1st (first) anniversary of COD. In the event that MCCV is not met, the Contract Period shall be reduced and penalty shall be levied on the Operator as laid out in this Article 7.1.13. The Operator agrees that, except as provided in this Agreement, it shall not be entitled to any relaxation of this guarantee.**

<b>Year</b>	<b>MCCV (in MT)</b>	<b>MCCV required to be achieved by the Operator (MCCV is expressed in MT)</b>
<b>A</b>	<b>B</b>	<b>C</b>
Year 1	-	No MCCV guarantee
Year 2	2,20,000	The MCCV guarantee at the end of year 2 is 2,20,000MT for the first 2 years
Year 3	3,30,000	The MCCV guarantee at the end of year 3 is 3,30,000 MT for the first 3 years
Year 4	4,40,000	The MCCV guarantee at the end of year 4 is 4,40,000 MT for the first 4 years
Year 5	5,50,000	The MCCV guarantee at the end of year 5 is 5,50,000 MT for the first 5 years
Year 6	6,60,000	The MCCV guarantee at the end of year 6 is 6,60,000 MT for the first 6 years
Year 7	7,70,000	The MCCV guarantee at the end of year 7 is 7,70,000 MT for the first 7 years
Year 8	8,80,000	The MCCV guarantee at the end of year 8 is 8,80,000MT for the first 8 years
Year 9	9,90,000	The MCCV guarantee at the end of year 9 is 9,90,0000 MT for the first 9 years
Year 10	1,100,000	The MCCV guarantee at the end of year 10 is 1,100,000 MT for the first 10 years

In case the Operator fails to achieve the MCCV or/and MCRCV in a particular year as per above targets, the Operator shall be liable to pay liquidated damages, at the rate of 10% of the aggregate Royalty payable to Contracting Authority for last twelve months.

In case the Operator is unable to meet the MCCV or/and MCRCV for consecutive two years, Contracting Authority has the right to terminate the Contract on the part of Operator's default.

- xiv. Indemnity against claims for loss of goods
- a) Notwithstanding anything contained in the IWAI Act or any other law for the time being in force, the Operator shall be responsible for addressing any claim, action, suit or proceeding ("Action") by any third party alleging loss, destruction or deterioration of goods of which charge has been taken by the Operator and indemnify, save and hold harmless the Contracting Authority, its officers, employees, agents and representatives ("Indemnified Persons") against all claims, which may be asserted against or suffered and legal fees and costs incurred and which relate to any such goods, provided that notice of the action received by the Indemnified Persons shall be forwarded to the Operator expeditiously and in any case within 30 (thirty) Days of receipt thereof by any of the Indemnified Persons.

- b) Provided further that the Indemnities shall have the right but not the obligation, to contest, defend and litigate any Action by any third party alleged or asserted against any of such Indemnities in respect of, resulting from, related to or arising out of any matter for which it is to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Operator.
- c) If the Operator acknowledges in writing its obligation to indemnify the Indemnities in respect of loss to the full extent, the Operator shall be entitled, at its option, to assume and control the defence of such Action at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnities and reimburses to them for reasonable cost and expenses incurred by them prior to assumption of such defence by the Operator.
- d) In such case the Indemnities shall not be entitled to settle or compromise any Action without prior written consent of the Operator, which consent shall not be unreasonably withheld or delayed. This indemnity shall survive the termination of this Agreement.

xv. Maintenance of Complaint Portal

- a) The Operator shall maintain a “Complaint Portal” on its website which shall be available to all users of the Project Facilities and Services who shall be duly informed about availability of provision for lodging of complaints. The Complaint Portal will also be linked to the Contracting Authority website with an alert system for real time access to the complaints.
- b) Operator shall take action for just and fair redressal of the complaint and submit a reply to the complainant within 30 (thirty) days of the date of receipt of the complaint with a copy to Contracting Authority and maintain a proof of reply.
- c) If operator fails to address the complaint and the complainant makes a reference to the Contracting Authority, the Contracting Authority may issue directions that shall be binding on the Operator. The Contracting Authority shall be just and fair in issuing such directions.

xvi. Operation and maintenance of Utilities

The operation and maintenance of Project utilities and related services shall be the responsibility of the Operator.

xvii. Cargo visibility

The Operator shall provide end-to-end visibility of cargo to all users by use of adequate technologies.

xviii. Reporting of Performance Standards

The Operator shall report the Performance Standards to the Contracting Authority on a monthly basis.



xix. Joint Inspection of Operations

The Operator, Independent Expert and Contracting Authority will jointly conduct four (4) inspections in a year, at a pre-defined time. These inspections will be conducted to assess performance of Operator on performance standards and other requirements as part of this Contract. Apart from the joint inspections, Contracting Authority reserves the right to conduct surprise inspections.

xx. Operation and maintenance of Waste Reception & Treatment Services

The Operator shall arrange the Waste Reception & disposal services through third party for the terminal before COD and provide waste reception services to vessels as per Inland Vessels (Prevention and Containment of Pollution) Rules, 2022, Published vide Notification No. CG-DL-E-12082021-228941, dated 12<sup>th</sup> August 2021.

**b. Rights of Operator**

i. Preferential and priority berthing

The Operator shall not provide any preferential / priority treatment to any party.

ii. Maintenance of Least Available Depth (LAD)

7.2.2.1. The Terminal have the potential to cater to traffic for the North East Region as well as to inter regional trade between Bhutan & Bangladesh specifically through the IBP routes and hence in order to facilitate vessel movement on these routes, the targeted LAD in different stretches are as following:

. LAD of 2.5 meter for NW-2 up to Neamati.

**c. Obligations of the Contracting Authority**

In addition to any of its other obligations in this Agreement, the Contracting Authority shall arrange for, or provide the following:

i. Approvals

The Contracting Authority shall promptly grant approvals sought by the Operator as required under this Agreement subject to the Operator having complied with all Applicable Laws and requirements.

ii. Additional land, utilities and facilities

In the event that land, utilities and facilities are found to be insufficient by the Operator for providing services as per the scope of work, at any time during the Contract Period, the Operator may approach the Contracting Authority for providing additional land, utilities and facilities. The Contracting Authority on being approached by Operator shall consider the same,

subject to reasonableness and availability. The Contracting Authority may provide additional land, utilities and facilities if considered necessary. If the Contracting Authority is not in a position to provide the same, the Operator shall not be entitled to any relaxation on the grounds that its request for additional land, utilities and services was not accepted by the Contracting Authority.

**d. Rights of Contracting Authority**

- i. If in the reasonable opinion of the Contracting Authority, the Operator is in material breach of its obligations under this Agreement for handling of cargo at the Terminal, the Contracting Authority may, without prejudice to any of its rights under this Agreement including Termination thereof, by notice require the Operator to take reasonable measures for the handling of cargo.
- ii. In the event that the Operator, upon receipt of notice above, fails to handle cargo at the berth within a reasonable period, the Contracting Authority may take over performance of any or all obligations of the Operator to the extent deemed necessary by it for handling of cargo at the berth; provided that such taking over by the Contracting Authority shall be of no greater scope and of no longer duration than is reasonably required.

**e. Utilities and services**

- i. The Contracting Authority shall, during the Contract Period, provide access to the Operator for all infrastructure facilities and utilities including water, electricity and telecommunication facilities necessary for the implementation, operations and maintenance of the Project Facilities and Services in accordance with this Agreement, at rates and on terms no less favourable to the Operator than those generally available to commercial customers availing substantially equivalent facilities and utilities. Provided that, unless otherwise agreed to by the Contracting Authority:
  - a) power made available shall be as received by the Contracting Authority from Assam State Electricity Board. The take off point for electricity shall be from the substation;
  - b) The Operator shall, at its cost, and to satisfaction of the Contracting Authority, install meters to measure consumption of power and water. The Contracting Authority does not warranty reliability, quality and quantity of water and power and shall not be liable in any manner for shortage in or non-supply of these utilities;
  - c) The Operator may, at its cost, make alternate arrangements for power including but not limited to installation of generators, subject to obtaining Applicable Permits, if any.

**f. Liability for shortfall in performance**

- i. In the event the Contracting Authority, whether from the review of reports submitted by the Operator or otherwise, observes that Project Facilities and Services fall short of the Performance Standards, the Contracting Authority shall issue a demand notice to the Operator seeking liquidated damages. The liquidated damages shall be calculated in accordance with Annexure IV of this Agreement. The liquidated damages shall be payable within 30 (thirty) days of the date of issue of notice. On failure of the Operator to pay the same, Contracting

Authority shall recover the amount from the Performance Bank Guarantee provided by the Operator.

- ii. Provided that, within 15 (fifteen) days of receipt of demand notice, the Operator may make a written representation to the Contracting Authority which shall be considered by the Contracting Authority on merits. The Contracting Authority may waive the liquidated damages in part or full, if it is satisfied that the Operator has been carrying out its obligations diligently and efficiently and that the performance shortfall to be waived was on account of reasons beyond the control of the Operator.
- iii. It is clarified that this provision does not prejudice the rights of the Contracting Authority upon an Operator Event of Default as set out in Article 15 including the Contracting Authority's right to terminate this Agreement which shall remain unaffected.

## ARTICLE 8

### **h) Tariff**

#### **a. Levy and Collection of Tariff**

- i. The Operator is entitled to collect and recover appropriate Tariff from the users of the Project Facilities and Services as per the charges specified in the Fee Regulations provided at Annexure XII of this Agreement. The Tariff as per Annexure XII prescribes the maximum tariff that can be levied by the Operator (“Ceiling Tariff”). The Operator may offer discount on the Ceiling Tariff to the users at their discretion, subject to the provisions of this contract. However, the discount offered by the Operator on Tariff shall have no effect on the royalty payable to the Contracting Authority.
- ii. The Operator shall be entitled to propose a revised Ceiling Tariff (“**Proposed Tariff**”) after third anniversary of COD. The Operator shall provide the Proposed Tariff to the Contracting Authority for consent.
- iii. Contracting Authority shall make its best efforts to notify the agreed revised tariff in the Fee Regulations within a period of 180 days from the proposal received from the Operator.
- iv. It is clarified that till such time, as the notification of the Revised Tariff is issued by the Contracting Authority, the Tariff in the existing Fee Regulations shall apply.
- v. The Operator shall, subject to Article 8.2 hereunder, deposit all Tariff and other receipts in relation to the Project Facilities and Services in the Escrow Account and shall not make any such deposits to any other account either of the Operator or of any other person.

#### **b. Statutory Charges**

- i. The Statutory Charges shall belong to the Contracting Authority and the Contracting Authority hereby authorizes the Operator to collect the same on behalf of Contracting Authority with effect from the COD. The Operator shall remit the Statutory Charges collected by it, in full, to the Contracting Authority without any deductions or withholding in any manner whatsoever within 3 (three) Business Days from the close of each day.
- ii. The Operator shall not deposit any amounts in respect of Statutory Charges collected by it from the users on behalf of the Contracting Authority in the Escrow Account and shall deposit the same in a separate account as specified by the Contracting Authority.
- iii. The Parties further agree that failure by the Operator to collect or deposit the Statutory Charges would be a material breach of its obligations under the Contract and the Contracting Authority shall have the right to recover any such uncollected or non-deposited Statutory Charges from the Operator, without prejudice to its rights and remedies under clause 15.1.1.

## ARTICLE 9

### i) Payments to the Contracting Authority

#### a. Payments of Royalty

- i. The Operator shall pay to the Contracting Authority a Royalty, in INR per MT, (“**Royalty**”) equal to the financial bid quoted by Operator. It will be applicable on total cargo (riverine and non-riverine) handled during the previous month. Royalty amount shall be payable monthly. All such payments shall be exclusive of applicable taxes which the Operator will pay over and above Royalty payments.
- ii. Royalty payment to the Contracting Authority shall start from COD and will continue till Termination.
- iii. Royalty per MT of cargo will be indexed to as per the variations in the Wholesale Price Index (WPI) annually. Escalation in WPI shall be on the basis of the year preceding the year for which Royalty is being calculated.

The Royalty shall be further adjusted for each terminal as per below:

Year	Condition	Adjustment in Royalty
A	B	C
Year 1	-	-
Year 2	If CRCV is more than 2,20,000	50% reduction in Royalty for riverine cargo volume in addition to 2,20,000 MT
Year 3	If CRCV is more than 3,30,000 MT	50% reduction in Royalty for riverine cargo volume in addition to 3,30,000 MT
Year 4	If CRCV is more than 4,40,000 MT	50% reduction in Royalty for riverine cargo volume in addition to 4,40,000 MT
Year 5	If CRCV is more than 5,50,000	50% reduction in Royalty for riverine cargo volume in addition to 5,50,000 MT
Year 6	If CRCV is more than 6,60,000	50% reduction in Royalty for riverine cargo volume in addition to 6,60,000MT
Year 7	If CRCV is more than 7,70,000	50% reduction in Royalty for riverine cargo volume in addition to 7,70,000 MT
Year 8	If CRCV is more than 8,80,000	50% reduction in Royalty for riverine cargo volume in addition to 8,80,000 MT
Year 9	If CRCV is more than 9,90,000	50% reduction in Royalty for riverine cargo volume in addition to 9,90,000 MT
Year 10	If CRCV is more than 1,100,000	50% reduction in Royalty for riverine cargo volume in addition to 1,100,000 MT

## CRCV – Cumulative Riverine Cargo Volume

- iv. Royalty for each month shall be paid on or before the 20th (twentieth) day of the following month from the 1<sup>st</sup> anniversary of COD.
- v. Royalty amounts remaining unpaid on respective due dates would carry interest @ 10-year GSec bond yield plus 6% (Six percent) per annum from the due date till the date of payment.
- vi. The Operator shall submit a Monthly Report, approved by Independent Expert, to the Contracting Authority showing, among other things, calculation of total cargo throughput in metric tons, for all types of cargo including dry-bulk, break-bulk, liquid-bulk, containers, bagged etc., measured through bill of lading or cargo manifest. For the purpose of Royalty calculation, cargo measurement mechanism as given below may be used:

S No	Cargo type	Cargo measurement
1	Container	Gross weight in MT as per bill of lading/cargo manifest
2	Dry bulk	As per bill of lading/cargo manifest in MT
3	Liquid bulk	As per bill of lading/cargo manifest in MT
4	Break bulk	As per bill of lading/cargo manifest in MT
5	Bagged cargo	As per bill of lading/cargo manifest in MT
6	Any other cargo	As per bill of lading/cargo manifest in MT

In the event of any disagreement between Operator and Contracting Authority, the decision of the Additional Auditor shall be final in this matter as given in Article 9.3.3.

### b. Certified accounts

- i. During the subsistence of this Agreement, the Operator shall maintain all documents and supporting evidences for its financial statements including agreements and documents with respect to all capital expenditure and operational expenses towards the Project; user-wise, vessel-wise information; cargo throughput by category; tariffs charged and the amount of money received. The Operator shall submit to the Contracting Authority a financial statement including quantity (MT) of cargo handled for every 6 (six) monthly period ending 30<sup>th</sup> September and 31<sup>st</sup> March every year, duly certified by its Statutory Auditors. The certificate must be furnished within 30 (thirty) Days of the end of each such period.
- ii. The Contracting Authority may, at its own cost, appoint a firm of chartered accountants duly licensed to practice in India and empanelled by CAG (“**Additional Auditor**”) to conduct a special audit of the cargo throughput and the financial statements, documents and supporting evidences thereto as may be mandated by the Contracting Authority (“**Special Audit**”).
- iii. In the event that the cargo throughput reported by the Additional Auditor is higher than that reported by the Statutory Auditor, the auditors shall meet to resolve such differences and if they are unable to resolve the same, the Operator shall pay Royalty on

the cargo throughput reported by the Additional Auditor. The Operator shall also pay interest @ 10 year GSec plus 6% - (Six percent) on the difference in Royalty as per the cargo throughput reported by the Statutory Auditor and the Additional Auditor. Further, the Operator shall reimburse all costs, charges and expenses related to Special Audit. Without prejudice to the aforesaid, if difference between cargo throughput reported by the Additional Auditor and the Statutory Auditor is higher than 5% (five percent), the Contracting Authority shall have the right to require a Special Audit for the entire outstanding tenure of the Contract.

**c. Escrow account**

- i. The Operator shall maintain an escrow account with a scheduled bank (“**Escrow Account**”), during the subsistence of this Agreement and ensure all revenues and other receipts arising from the Project and under any agreements, including this Agreement received by the Operator are deposited into such Escrow Account. Withdrawals and appropriations during the Contract Period, at any relevant time, from the Escrow Account shall be in the following order of priority:
  - j) for all taxes, cess and fee payable to Government of India/ State Government/ Local Authority payable by the Operator for O&M services;
  - k) all expenses relating to operation and maintenance of Project Facilities and Services;
  - l) towards payment of Royalty and other sums payable to the Contracting Authority and liquidated damages, if any;
  - m) all development/equipment expenses relating to Project Facilities and Services;
  - n) the Operator shall be at liberty to withdraw any sums outstanding in Escrow Account after all the aforesaid payments due in any Quarter have been made and/or adequate reserves have been created in respect thereof for that Quarter. Provided, upon issuance of Termination Notice and/or suspension of the Operator in accordance with provisions of this Agreement, withdrawal from the Escrow Account shall be made only in accordance with written instructions of the Contracting Authority.
- i. All amounts standing to the credit of Escrow Account at the end of the Contract Period including amounts credited to the Escrow Account towards compensation payable in accordance with Article 16 shall be appropriated in following order of priority:
  - a) towards taxes and statutory dues payable by the Operator;
  - b) all amounts due to the Contracting Authority and amounts payable towards transfer of Project Facilities and Services by the Operator in accordance with this Agreement;

The Operator shall be at liberty to withdraw any sums outstanding in Escrow Account after all the aforesaid payments due have been made and/or adequate reserves have been created in respect thereof to the satisfaction of the Contracting Authority.

- ii. The Operator agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

- a) all monies received in relation to the Project from any source;
- b) all funds received by the Operator from its shareholders, in any manner or form;
- c) all Fee levied and collected by the Operator;
- d) any other revenues from or in respect of the Project/Project Facilities and Services accruing to the Operator including termination payments; and
- e) all proceeds received pursuant to any insurance claims.

For avoidance of doubt, all amounts received by the Operator in respect of the Project/ Project Facilities and Services excepting any amounts in respect of cesses and duties collected by it from the users on behalf of the Contracting Authority or such other Contracting Authority in accordance with the Contract Agreement or pursuant to any other instructions in respect thereof shall be deposited in the Escrow Account.



## **ARTICLE 10**

### **o) Assets: Ownership and Permitted Charge**

#### **a. Ownership of Assets**

##### **i. Land and Water Area**

The ownership of the Project Site and Terminal Assets shall always remain vested with the Contracting Authority. The rights of the Operator in the Project Site and Terminal Assets shall only be that of a bare licensee of such assets and the Operator shall neither assign, transfer, sublet, create any charge or Encumbrance, nor shall the Operator create or permit creation of any third party rights whatsoever, on whole or any part of the Terminal Assets or Project Site. Further, any such rights of the Operator shall always be subject to existing rights of way. It is expressly agreed that the Operator's rights in Project Site and/or Terminal Assets shall cease without the need for any action to be taken by the Contracting Authority upon termination of this Agreement for any reason whatsoever.

##### **ii. Assets created or provided by the Operator**

The ownership of all infrastructure assets, buildings, structures, berths, wharfs, equipment and other immovable and movable assets constructed, installed, located, created or provided by the Operator at Project Site and/or in Terminal Assets pursuant to this Agreement shall, until expiry of or termination of this Agreement, shall always remain vested with the Contracting Authority. Buildings etc. erected by the Operator at Project Site shall not be construed as and shall not confer any rights in Project Site or other Terminal Assets upon the Operator, save as that of a bare licensee.

## ARTICLE 11

### p) General Rights, Duties and Obligations

#### a. Of the Operator

##### i. Applicable Permits

The Operator shall at all times during the Contract Period maintain and comply with the Applicable Permits (Annexure XI).

##### ii. Taxes & duties

The Operator shall during the Contract Period pay in a timely manner all taxes, duties, levies and charges including but not limited to income tax and goods and services tax that may be levied, claimed or demanded from time to time by any Government Authority including any increase therein effected from time to time from any Government Authority, in respect of Project/ Project Facilities and Services.

##### iii. Insurance

a) Insurance Requirement: The Operator shall, at its cost and expense, purchase and maintain insurances as are prudent, including but not limited to the following:

- (i) Operator's all risk insurance;
- (ii) loss, damage or destruction of the Project Facilities and Services, at replacement value;
- (iii) comprehensive third party liability insurance including injury or death to personnel of the Contracting Authority and others who may enter Project Site or Terminal Assets;
- (iv) workmen's compensation insurance;
- (v) marine cum storage cum erection insurance; and
- (vi) any other insurance that may be necessary to protect the Operator, its employees and its assets and the Contracting Authority, its employees and agents engaged in or connected to the Project and Project Site and Terminal Assets (against loss, damage or destruction at replacement value including all Force Majeure Events that are insurable and not otherwise covered in items (i) to (v)).

b) Insurance Cover & Insurance Companies: The Operator shall insure all insurable Terminal Assets and Project Facilities and Services, and all insurable risks associated with Project to the extent advisable in accordance with Good Industry Practice

("Insurance Cover"). Insurance of Contracting Authority's assets to be maintained at least equivalent to the terms and conditions of the insurance of the Contracting Authority's assets before this Contract.

- c) Evidence of Insurance Cover: The Operator shall, from time to time, provide to the Contracting Authority copies of all insurance policies (or appropriate endorsements, certifications or other satisfactory evidence of insurance) obtained by the Operator in accordance with this Agreement.
- d) Application of Insurance Proceeds: All moneys received under insurance policies shall be promptly applied by the Operator towards repair or renovation or restoration or substitution of Terminal Assets and Project Facilities and Services or any part thereof which may have been damaged or destroyed and in respect of which the claim is lodged. The Operator shall carry out such repair or renovation or restoration or substitution to the extent possible in such manner that the Project Facilities and Services or any part thereof, shall, after such repair or renovation or restoration or substitution be as far as possible in equal or better condition as they were before such damage or destruction, normal wear and tear excepted.
- e) Validity of Insurance Cover: The Operator shall pay premium payable on such insurance policies so as to keep the policies in force and valid throughout the Contract Period and furnish copies of the same to the Contracting Authority. Each insurance policy shall provide that the same shall not be cancelled or terminated unless 10 (ten) Days' clear notice of cancellation is provided to Contracting Authority in writing. If at any time the Operator fails to purchase and maintain in full force and effect any and all insurances required under this Agreement, the Contracting Authority may at its option purchase and maintain such insurance and all sums incurred by the Contracting Authority therefor shall be reimbursed with interest @ 10 year GSec plus 6% - (six percent) per annum by the Operator forthwith on demand, failing which the same shall be recovered by the Contracting Authority by exercising right of set off or otherwise.
- f) Waiver of Subrogation: All insurance policies procured in terms of provisions hereof shall include a waiver of any right of subrogation of insurers thereunder against, inter alia, the Contracting Authority and its assigns and successors and their respective subsidiaries, Associates, employees and of any right of the insurers of 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.

iv. Indemnification

The Operator shall, during pendency of this Contract Agreement and thereafter, until all claims and demands in respect to acts and omissions during the Contract Period as described hereunder are duly settled, indemnify and keep indemnified and otherwise save harmless, the Contracting Authority, its agents and employees, from and against all claims, demands made against and/or loss caused and/or damages suffered and/or cost, charges/expenses incurred to and/or penalty levied and/or any claim due to injury to or death of any person and/or loss or damage caused or suffered to property owned or belonging to the Contracting Authority, its agents and employees or third party as a result of any acts, deeds or thing done or omitted to be done by

the Operator or as a result of failure on part of the Operator to perform any of its obligations under this Contract Agreement or on the Operator committing breach of any terms and conditions of this Contract Agreement or on the failure of the Operator to perform any of its duties and/or obligations including statutory duties or as a consequence of any notice, action, suit or proceedings, given, initiated, filed or commenced by consignee or owner of goods or vessel owner/agent or its employees or any third party or Government Authority or as a result of any failure or negligence or default of the Operator or its Contractor(s), sub-contractor(s), or employees, servants, agents of such Contractor(s) and/or sub-contractor(s) and/or invitees as the case may be, in connection with or arising out of this Agreement and/or arising out of or, in connection with the Operator's use and occupation of the Project Site or Terminal Assets and/or construction, operation and maintenance of Project Facilities and Services.

v. Assignability

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

vi. Engagement of Contractors

The Operator may engage any Person possessing requisite skill, expertise and capability of designing, engineering, procurement and construction of civil/ mechanical/electrical engineering structures/equipment, and/or operation and maintenance of Project Facilities and Services.

Provided that:

- a) the Operator shall at all times be solely responsible for all its obligations under this Agreement notwithstanding any such engagement and anything contained in any Project Contracts or any other agreement, and no default under any Project Contract or agreement shall excuse the Operator from its obligations or liability hereunder and the Operator shall at all times be solely responsible for non-performance or for any defect, deficiency or delay in construction and erection and/or installation of structures/equipment or any part thereof and for the operation and maintenance of Project/Project Facilities and Services in accordance with provisions of this Agreement;
- b) the Operator should have obtained, if required, security clearance for the Contractor the Operator intends to engage;
- c) the Operator shall ensure that Project Contracts contain provisions that entitle the Contracting Authority to step into such contract in its sole discretion in substitution of the Operator in the event of termination or suspension of this Agreement; and
- d) any contract that it enters with an Associate in respect of the Project shall be on arms-length basis and shall require a written approval from the Contracting Authority.

vii. Condition Survey

- a) The Operator agrees that at least 6 (six) Months prior to expiry by efflux of time of the Contract Period, it shall, cause to be conducted at its cost by an industry Expert appointed by Parties by mutual consent, a condition survey and an inventory of entire Project Facilities and Services. If, as a result of such survey, the industry Expert shall observe that the Terminal Assets and/or Project Facilities and Services or any part thereof have/has not been operated and maintained in accordance with requirements therefor under this Agreement (normal wear and tear excepted) the Operator shall, at its cost and expenses, take all necessary steps to put the same in good working condition well before the Transfer Date. In the event the Operator fails to comply with this provision, the Contracting Authority may itself cause the condition survey and inventory of the Terminal Assets and Project Facilities and Services to be conducted and remove any defect or deficiency. The Contracting Authority shall be promptly reimbursed by the Operator for costs incurred in conducting such survey and preparation of inventory as also in putting Project Facilities and Services in a good working condition.
- b) The Operator shall as security for performance of its obligation in preceding sub-Article (a), submit to the Contracting Authority a guarantee issued by a scheduled bank in India for a sum of contract period for 6 (six) months from the expiry of the Contract Period. In the event of Operator's failure to provide such guarantee, the same shall be deemed to be an Operator Event of Default and the Contracting Authority shall accordingly be entitled to terminate this Agreement in accordance with Article 15. This shall be over and above the Performance Guarantee submitted in accordance with Article 4.

viii. Cruise Operations

1. For cruise operation, Operator shall make appropriate provision by granting preference to the embarkation and disembarkation of tourist and their entry /exit. In case of an incoming cruise vessel, Contracting Authority will provide the information to the Operator at least 12 hours in advance.
2. Operator has to ensure that the tourist vehicles/ passengers gets hinderance free way to the passenger cruise terminal.
3. Operator shall ensure that the terminal is safe for passengers to disembark and undergo necessary documentation checks.
4. Contracting Authority shall construct a temporary jetty at suitable place between high level and low-level jetties or any other appropriate place inside the terminal for berthing of cruise vessel and embarkation/ disembarkation of passengers/ tourist to /from the cruise vessel. Till such temporary jetty is not constructed, cruise vessels shall berth at high level and low-level jetties depending on the requirement.

ix. Custom Operations

Jogighopa Terminal is a custom notified port. Operator shall facilitate smooth custom operations in consultation with the Contracting Authority and access to the Custom official for performing their duties at the Port/ terminal. IWAI will continue to be the custodian, however

an indemnity with insurance will be with the operator for any liability may arise on account of duties, penalties etc. in course of operation of the Exim cargo.

x. Hindrance free entry / exit to the officials of the Contracting Authority

The Contracting Authority's offices are situated inside the terminal at Jogighopa. Operator shall provide hinderance free entry / exit to the officials of the Contracting Authority at the Terminal.

xi. Negative List of Non-Operating Activities

The Operator shall strictly prohibit from performing any of the activities, as ascribed in Annexure XIII, on the Project Site.

xii. Dredging of Approach Channel

The dredging in approach channel will be in IWAI Purview.

**b. Of the Contracting Authority**

i. Assistance in obtaining approvals, permits and licenses

The Contracting Authority shall, at the written request of the Operator, but without guarantees and/or without assuming any responsibility in that behalf, issue recommendatory letters and make best efforts to assist the Operator in obtaining all the Applicable Permits including renewals thereof. Provided that, nothing contained in this Article shall relieve the Operator of its obligations under this Agreement to obtain the Applicable Permits and to keep them in force and effect throughout the Contract Period.

ii. General rights of inspection and verification

The Contracting Authority may during pendency of the Agreement itself or by appointment of subject matter Experts verify performance of obligations of the Operator as set out in this Agreement.

iii. Deleted

iv. Office space for Operator

Contracting Authority will provide appropriate office space within the Terminal. Contracting Authority may also provide further space inside Contracting Authority's Offices and terminal if found feasible within or outside the Terminal limits, and based on the needs of the Operator.

v. Competing Facilities

The Contracting Authority shall not operationalize any additional permanent terminal/ jetty to handle riverine cargo at riverfront within a Chainage distance of 50 km from the Terminal for the duration of the Contract Period. The Chainage of Jogighopa Terminal on National

Waterway-2 is 108 km .

**c. Of the Contracting Authority and the Operator**

i. Monitoring Arrangement

The parties shall furnish to each other periodical status reports relating to key milestones and obligations as per Annexure IX “Monitoring Arrangement”

ii. Compliance with Laws and Regulations

The Parties shall perform their respective obligations under this Agreement in accordance with Applicable Laws and Applicable Permits.

iii. Rights to Documents

- a) Contracting Authority’s Documents: Documents and computer programs or copies thereof, if any, provided by the Contracting Authority to the Operator, shall always remain property of the Contracting Authority. Such documents, computer programs and/or copies shall not be used by the Operator for purposes other than for the Project. Such documents, computer programs and/or copies thereof shall, unless otherwise agreed upon by the Contracting Authority, be returned by the Operator to the Contracting Authority on Transfer Date.
- b) Operator’s Documents: Documents and computer programs provided by the Operator, or which are developed (and owned by the Operator) for operation and/or maintenance of Project /Project Facilities and Services shall be handed over by the Operator to the Contracting Authority free of cost on the Transfer Date.
- c) Confidentiality: All confidential information and documents (whether financial, technical or otherwise provided by either Party to the other shall not, unless compelled by law or the process of a Government Authority, be disclosed to any Person without the consent of the other Party with the exception of providing such information to legal advisors/auditors of the concerned party on a need-to-know basis. This covenant shall survive the Contract Period.
- d) Obligation to Cooperate: The Parties shall mutually cooperate with each other in order to achieve the objectives of this Agreement.

**d. Assistance of Expert**

- i. The Parties, may, in circumstances mentioned in the instant Contract Agreement and other appropriate circumstances seek help of an Expert on case to case basis. The Parties shall ensure that the Expert proposed to be appointed is independent and has no conflict of interest and possesses the skill and experience to resolve the issue at hand. The cost of the service of the Expert shall be shared equally.
- ii. The Contracting Authority shall propose the name of three Experts proposed to be appointed and the Operator shall be required to choose one of them no later than 30 (thirty)

days from date of proposal by Contracting Authority to act as Expert for the issue at hand.

- iii. The Expert shall be expected to resolve the issues referred to him expeditiously and the Parties shall ensure that all necessary and reasonable assistance is provided to the Expert.



## ARTICLE 12

### q) Change in Law

#### a. Change in law

“Change in Law” means any of the following events which has a Material Adverse Effect:

- i. adoption, promulgation, modification, reinterpretation or repeal after the date of this Agreement by any Government Authority of any statute, rule, ordinance, regulation or order, treaty, convention, directive, guideline, policy having force of law; or
- ii. the imposition by any Government Authority of any material condition (other than a condition which has been imposed as a consequence of a violation by the Operator of any Applicable Permit) in connection with the issuance, renewal or modification of any Applicable Permits after the date of this Agreement which renders the performance by the Operator of any of the terms of this Agreement impossible or unviable; or
- iii. Any Applicable Permit previously granted, ceasing to remain in full force and effect for reasons other than breach/violation by or the negligence of the Operator or if granted for a limited period, being renewed on terms different from those previously stipulated.
- iv. Any imposition of new Taxes except a new Direct Tax (both State and Central), duties, cess and the like and/or the increase in Taxes except in Direct Taxes (both State and Central), duties, cess and the like effected from time to time by any Government Authority, and/or imposition of standards and conditions of operations, maintenance and safety arising out of a new or revised Environmental Law; and/or imposition of standards and terms of employment and working conditions of Labourers and Workmen; and/or any rules or regulations stipulated by IWAI Act or other regulatory authority having jurisdiction over the Project in respect of standards of service. A change in the interpretation or application of any Indian Law by the judgement of a court of record which has become final and binding in place of such interpretation or application of law by a court of record prior to the bid due date

#### b. The Operator’s Remedy

- i. In the event of Change in Law the Operator may propose to the Contracting Authority modifications to the relevant terms of this Agreement which are reasonable and intended to mitigate the effect of the Change in Law. Thereupon, the Parties shall, in good faith, negotiate and agree upon suitable changes in the terms of this Agreement including extension of the Contract Period, so as to place the Operator in substantially the same legal and financial position as it were prior to such Change in Law. Provided however, that if the resultant Material Adverse Effect is such that this Agreement is frustrated or is rendered illegal or impossible of performance, the Change in Law shall be deemed to be a Political Event, whereupon the provisions with respect thereto shall apply.
- ii. In the alternative to the aforesaid, subject to the Operator taking necessary measures to mitigate the impact or the likely impact of Change in Law on the Project, if as a direct consequence of a Change in Law, the Operator is obliged to incur Additional Cost in any accounting year, any such Additional Cost above a sum of Rs. 20 Lakh may at the option of

the Contracting Authority be borne by the Contracting Authority. It is clarified that Additional Cost up to Rs. 20 Lakh in any accounting year shall be borne by the Operator;

- iii. Upon occurrence of a Change in Law, the Operator shall notify the Contracting Authority, of the following:
  - a) the particulars, nature and the impact of Change in Law on the Project;
  - b) in sufficient detail, the estimate of the Additional Cost likely to be incurred by the Operator on account of the Change in Law; and
  - c) the measures, which the Operator has taken or proposes to take to mitigate the impact of Change in Law, including in particular, minimising the Additional Cost.
- iv. Upon receipt of the notice of Change in Law issued by the Operator pursuant to the preceding sub-article 13.2.3, the Contracting Authority and the Operator shall hold discussions and take all such steps as may be necessary including determination/certification by a financial Expert, appointed by the Parties by mutual consent, of the Additional Cost and to determine the quantum of the Additional Cost to be incurred.
- v. If it is determined that the only material impact of a Change in Law is Additional Cost and the Contracting Authority opts to compensate the same in accordance with the preceding sub-article (b), the Operator shall not be entitled to any other remedy nor shall seek any alterations to the Agreement and the Contracting Authority shall, within 30 (thirty) Days from the date of determination of quantum of Additional Cost to be borne by the Contracting Authority in accordance with sub-article (b) above, compensate the Operator in either of the following ways:
  - a) by lump-sum reimbursement of such Additional Cost to the Operator;
  - b) reimbursement of the such Additional Cost to the Operator, in not exceeding four half yearly installments, subject to payment of interest at 10 Year GSEC + 6% - (Six percent) on the amount the payment of which is deferred.
- vi. Notwithstanding the aforesaid, if in terms of Good Industry Practice, the event constituting a Change in Law could be insured, the Operator shall not be entitled to any remedy under this Article 13.2

## ARTICLE 13

### **r) Force Majeure**

#### **a. Force Majeure Event**

- i. As used in this Agreement, Force Majeure Event means the occurrence of any of the Non- Political Events, the Political Events or the Other Events in India, set out in Articles 14.2, 14.3 and 14.4 respectively including the impact/consequence thereof which:
  - a) is beyond the control of the Party claiming to be affected thereby (the “Affected Party”);
  - b) prevents the Affected Party from performing or discharging its obligations under this Agreement; and
  - c) the Affected Party has been unable to overcome or prevent despite exercise of due care and diligence.

#### **b. Non-Political Events**

- i. Any of the following events which prevent the Affected Party from performing any of its obligations for a continuous period of not less than 7 (seven) Days from the date of its occurrence, shall constitute a Non-Political Event:
  - a) act of God, pandemic, epidemic, extreme adverse weather conditions, lightning, earthquake, cyclone, volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Project Site and by reasons not attributable to the Operator or the Contractor or any of the employees or agents of the Operator or the Contractor);
  - b) strikes or boycotts (other than those involving the Operator, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them), and not being an Other Event set forth in Article 14.4, labour disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Operator or the Contractor;
  - c) any failure or delay of a Contractor caused by any of the Non-Political Events, for which no offsetting compensation is payable to the Operator or on behalf of the Contractor;
  - d) the discovery of geological conditions, toxic contamination or archeological remains on the Project Site that could not reasonably have been expected to be discovered through a site inspection; or
  - e) any event or circumstance of a nature analogous to any of the foregoing.

#### **c. Political Events**

- i. Any of the following events shall constitute Political Event:
  - a) Change in Law for which no relief is provided under the provisions of Article 13, resulting in Material Adverse Effect;
  - b) action of a Government Authority having Material Adverse Effect including but not limited to:
    - (i) acts of expropriation, compulsory acquisition or takeover by any Government Authority of the Project/Project Facilities and Services or any part thereof or of the Operator's or the Contractor's rights under any of the Project Contracts, and
    - (ii) any unlawful, unauthorized or without jurisdiction refusal to issue or to renew or the revocation of any Applicable Permits, in each case, for reasons other than the Operator's or the Contractor's breach or failure in complying with the Scope of Work , Applicable Laws, Applicable Permits, any judgment or order of a Governmental Agency of any contract by which the Operator or the Contractor as the case may be is bound;
    - (iii) early termination of this Agreement by the Contracting Authority for reasons of national emergency, national security or the public interest;
    - (iv) any failure or delay of the Contractor caused by any of the aforementioned Political Events, for which no offsetting compensation is payable to the Operator by or on behalf of the Contractor; or
    - (v) any event or circumstance of a nature analogous to any of the foregoing.

**d. Other Events**

- i. Any of the following events which prevents the Affected Party from performing any of its obligations under this Agreement for a continuous period of not less than 30 (thirty) Days from the date of its occurrence, shall constitute the Other Event:
  - a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
  - b) industry wide or Statewide strikes or industrial action;
  - c) any civil commotion, boycott or political agitation which prevents collection of Fee by the Operator;
  - d) any judgment or order of a court of competent jurisdiction or statutory authority in India made against the Operator or the Contractor in any proceedings which is non-collusive and duly prosecuted by the Operator; and any judgment or order of a court of competent jurisdiction or statutory authority in India made against the Operator or the Contractor in any proceedings which is non-collusive and duly prosecuted by the Operator other

than relating to proceedings

- (i) pursuant to failure of the Operator to comply with any Applicable Law or Applicable Permit, or
  - (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or
  - (iii) enforcement of this Agreement or
  - (iv) with respect to exercise of any of its rights under this Agreement by the Contracting Authority; or
- e) any event or circumstance of a nature analogous to any of the foregoing.

**e. Notice of Force Majeure Event**

- i. The Affected Party shall give written notice to the other Party in writing of the occurrence of any of the Force Majeure Event (the “**Notice**”) as soon as the same arises or as soon as reasonably practicable and in any event within 7 (seven) Days after the Affected Party knew, or ought reasonably to have known, of its occurrence and the adverse effect it has or is likely to have on the performance of its obligations under this Agreement.
- ii. The Notice shall inter-alia include full particulars of:
- a) the nature, time of occurrence and extent of the Force Majeure Event with evidence in respect thereof;
  - b) the duration or estimated duration and the effect or probable effect which such Force Majeure Event has or will have on the Affected Party’s ability to perform its obligations or any of them under this Agreement;
  - c) the measures which the Affected Party has taken or proposes to take, to alleviate the impact of the Force Majeure Event or to mitigate the damage; and
  - d) any other relevant information.
- iii. So long as the Affected Party continues to claim to be affected by a Force Majeure Event, it shall provide the other Party with periodic (fortnightly/monthly) written reports containing the information called for by Article 14.5(b) and such other information as the other Party may reasonably request.

**f. Period of Force Majeure**

- i. Period of Force Majeure shall mean the period from the time of occurrence specified in the Notice given by the Affected Party in respect of the Force Majeure Event until the earlier of:
- a) expiry of the period during which the Affected Party is excused from performance of its obligations in accordance with Article 14.7; or
  - b) termination of this Agreement pursuant to Article 14.10 hereof.

**g. Resumption of Performance**

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

**h. Performance Excused**

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

**i. Costs, Revised Timetable**

- i. Costs

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

- ii. Extension of time/period

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

**j. Termination due to Force Majeure Event**

- i. If the period of Force Majeure continues or is in the reasonable judgment of the Parties likely to continue beyond a period of 120 (one hundred and twenty) Days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms. If the Parties are unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 (one hundred and twenty) Days be entitled to terminate the Agreement in which event, the provisions of Articles 16 and 17 shall, to the extent expressly made applicable, apply.

## ARTICLE 14

### s) Events of Default

#### a. Events of Default

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

#### i. The Operator Event of Default

Operator Event of Default means any of the following events unless such an event has occurred as a consequence of the Contracting Authority Event of Default or a Force Majeure Event:

- a) Operator's failure to perform or discharge any of its obligations in accordance with the provisions of this Agreement;
- b) Date of Commercial Operations is delayed for more than 180 (one hundred and eighty) Days from the Scheduled Project Completion Date;
- c) Delay in payment of Royalty for more than 2 (two) months from the due date;
- d) Operator's failure to perform or discharge any of its obligations under any other Project Contract, which has or is likely to affect the Project/the Project Facilities and Services, materially;
- e) Any representation made or warranties given by the Operator under this Agreement is found to be false or misleading;
- f) The Operator passing a resolution for voluntary winding up;
- g) Appointment of a provisional liquidator, administrator, trustee or receiver of the whole or substantially whole of the undertaking of the Operator by a court of competent jurisdiction in proceedings for winding up or any other legal proceedings;
- h) Levy of an execution or restraint on the Operator's assets which has or is likely to have Material Adverse Effect and/or affect the Project/Project Facilities and Services, materially and such execution or restraint remaining in force for a period exceeding 90 (ninety) Days;
- i) The Performance Guarantee is not maintained in terms of the provisions hereof;
- j) The Operator abandons or expresses its intention to revoke/terminate this Agreement without being entitled to do so as is expressly provided in the Agreement;
- k) A change in shareholding such that the beneficial interest of the Applicant/Consortium in the Operator reduces below the limits set in Article 11.2 and/or Management Control of the Operator has occurred in contravention of the provisions of Article 11 hereof;

- l) Amalgamation of the Operator with any other company or reconstruction or transfer of the whole or part of the Operator's undertaking [other than transfer of assets in the ordinary course of business] in contravention with the provisions of Article 11 hereof; and
- m) The Operator engaging or knowingly allowing any of its employees, agents, Contractor or representative to engage in any activity prohibited under this Agreement and/or by law or which constitutes a breach of the Agreement or breach of or an offence under any law, in the course of any activity undertaken pursuant to this Agreement.
- n) Operator fails to maintain the required Insurance Cover as mentioned in the Article 12 of this Contract Agreement.
- o) The Operator undertakes any activity which is part of negative list for non-operational activities as provided in Annexure XIII.

ii. The Contracting Authority Event of Default

- a) The Contracting Authority's failure to perform or discharge its obligations in accordance with the provisions of this Agreement unless such failure has occurred as a consequence of any Operator Event of Default or a Force Majeure Event.
- b) Any representation made or warranties given by the Contracting Authority under this Agreement is found to be false or misleading.
- c) Levy of an execution or distraint on the Terminal Assets in any proceedings against the Contracting Authority (unless such proceedings are initiated as a consequence of any Operator Event of Default) which has or is likely to have Material Adverse Effect and such execution or distraint remaining in force for a period exceeding 90 (ninety) Days.

**b. Parties Rights**

- i. Upon the occurrence of an Operator Event of Default, the Contracting Authority shall without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Contract Agreement.
- ii. Upon the occurrence of a Contracting Authority Event of Default, the Operator shall without prejudice to any other rights and remedies available to it under this Agreement be entitled to terminate this Contract Agreement.

Provided that before proceeding to terminate this Contract Agreement, the Party entitled to do so shall give due consideration and shall have due regard to the nature of the underlying Event of Default, its implication on the performance of the respective obligations of Parties under this Agreement and the circumstances in which the same has occurred.

**c. Consultation Notice**

- i. Either Party exercising its right under Article 15.2, shall issue to the other Party a notice



in writing specifying in reasonable detail the underlying Event of Default(s) and proposing consultation amongst the Parties to consider possible measures of curing or otherwise dealing with the underlying Event of Default (“**Consultation Notice**”).

**d. Remedial Process**

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

- i. the change of management or control/ownership of the Operator;

**e. Obligations during Remedial Period**

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

**f. Revocation of Consultation Notice**

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

**g. Termination due to Events of Default**

- i. If before the expiry of the Remedial Period, the underlying Event of Default is neither cured nor waived nor the Parties have agreed upon any of the measures in accordance with Article 15.4, the Party who has issued the Consultation Notice shall have the right to terminate this Agreement, in which event, the provisions of Article 16 and 17 shall, to the extent expressly made applicable, apply.

**h. Contracting Authority’s Rights of Step-in**

- i. Upon a Termination Notice being issued due to an Operator Event of Default, the Contracting Authority may, at its discretion:
  - a) re-enter upon and take possession and control of Project Site/Project Facilities and Services forthwith;
  - b) prohibit the Operator and any Person claiming through or under the Operator from entering upon/dealing with the Project Facilities and Services;
  - c) step in and succeed upon election by Contracting Authority without the necessity of

any further action by the Operator, to the interests of the Operator under such of the Project Contracts as the Contracting Authority may in its discretion deem appropriate with effect from the date of communication of such election to the counter party to the relative Project Contracts.

- ii. The Operator acknowledges that any payments made by the Contracting Authority during the Remedial Period shall be adjusted against compensation payable by the Contracting Authority to the Operator in terms of the provisions of this Agreement.

## ARTICLE 15

### t) Termination of Contract Agreement

#### a. Termination Procedure

- i. The Party entitled to terminate this Contract Agreement either on account of a Force Majeure Event or on account of an Event of Default having Material Adverse Effect shall do so by issue of a notice in writing (“**Termination Notice**”) to the other Party. The Termination Notice shall be of not less than 90 (ninety) Days and not ordinarily be more than 180 (one hundred and eighty) Days, (“**Termination Period**”) and at the expiry of the Termination Period, this Agreement shall stand terminated without any further notice.

#### b. Obligations during Termination Period

- i. During Termination Period, the Parties shall, subject where applicable to the provisions of this Article 16, continue to perform such of their respective obligations under this Agreement which are capable of being performed with the object, as far as possible, of ensuring continued availability of the Project Facilities and Services to the users, failing which the Party in breach shall compensate the other Party for any loss or damage occasioned or suffered on account of the underlying failure/breach.

#### c. Requisition

- i. Upon issue or receipt as the case may be of Termination Notice, either as a consequence of a Force Majeure Event or as a consequence of an Event of Default, or otherwise 6 (six) months prior to the expiry of the Contract Period, the Contracting Authority shall by a notice in writing (“**Requisition**”) call upon the Operator to furnish the following information to enable the Contracting Authority to estimate the likely compensation payable by the Contracting Authority to the Operator and/or to finalise the items of Operator’s assets comprised in the Project Facilities and Services to be handed over to/taken over by the Contracting Authority:
  - a) data or records including test certificates, survey reports, inspection reports, records of maintenance, statutory certificates issued for operation and establishment of the project facilities and services and regarding the operation and maintenance of the Project Facilities and Services;
  - b) specifications regarding the Operator’s assets comprised in the Project Facilities and Services; and
  - c) any other information or records [to be specified by Contracting Authority at its discretion] regarding Operator, its business, the Project/Project Facilities and Services, assets and liabilities.
- ii. The Operator shall within a period of 30 (thirty) Days of receipt of Requisition furnish the particulars called for by the Contracting Authority.

#### d. Condition Survey

- i. The Operator agrees that on the service of a Termination Notice or at least 6 (six) months prior to the expiry of the Contract Period, as the case may be, it shall conduct or cause to be conducted under the Contracting Authority's supervision, a condition survey of the Project Facilities and Services including the Project Site and/or the Terminal Assets to ascertain the condition thereof, verifying compliance with the Operator's obligations under this Contract Agreement and to prepare an inventory of the assets comprised in the Project Facilities and Services. During this period, the designated key personnel of the Contracting Authority shall be associated with the operations of the Project Facilities and Services (except when the same is impossible due to a Force Majeure Event) in order to facilitate smooth takeover of the same by the Contracting Authority on the Transfer Date.
- ii. If, as a result of the condition survey, the Contracting Authority shall observe/notice that the Project Site and/or the Terminal Assets and/or the Project Facilities and Services or any part thereof have/has not been operated and maintained in accordance with the requirements therefor under this Contract Agreement (normal wear and tear excepted) the Operator shall, at its cost and expenses, take all necessary steps to put the same in good working conditions well before the Transfer Date.
- iii. In the event the Operator fails to comply with the provisions of this Contract Agreement, the Contracting Authority may itself cause the condition survey and inventory of Terminal Assets and the Project Facilities and Services to be conducted. The Contracting Authority shall be compensated by the Operator for any costs incurred in conducting such survey and preparation of inventory as also in putting the Project Facilities and Services in good working condition.

**e. Consequences of Termination**

- i. Without prejudice to any other consequences or requirements under this Contract Agreement or under any law:
  - a) the Contracting Authority reserves the right to accept or reject transfer of any/all the assets and rights upon expiry of the Contract Period by efflux of time or termination of the Agreement due to a Force Majeure Event or on account of an Event of Default in accordance with Article 18;
  - b) the Contracting Authority shall be entitled to encash any subsisting bank guarantee(s) provided by the Operator against any amounts owing to the Contracting Authority by the Operator.
- ii. Notwithstanding anything contained in this Contract Agreement, except for ensuring the deposit of the compensation payable to the Operator in accordance with Article 17 in the Escrow Account, the Contracting Authority shall not, as a consequence of termination or otherwise, have any obligation whatsoever to any third party including but not limited to obligations as to compensation for loss of employment, continuance or regularization of employment, absorption or re-employment on any ground, in relation to any person in the employment of or engaged by the Operator in connection with the Project, and the handback of the Project Site/Terminal Assets/Project Facilities & Services by the Operator to the Contracting Authority shall be free from any such obligation.

## ARTICLE 16

### u) Compensation

#### a. Compensation

- i. Termination due to Force Majeure Event
  - a) If the termination is due to a Non-Political Event, no party will be obligated for any payment
  - b) If the termination is due to an Other Event compensation payable to the Operator by Contracting Authority should be equal to 10% of Gross Revenue for last 6 months.
  - c) If termination is due to a Political Event, compensation payable to the Operator shall be the same as that stipulated for termination due to a Contracting Authority Event of Default under Article 15 and payable as Article 17.1.3.

Provided, no compensation shall be payable to the Operator if the Operator fails to maintain Insurance Cover as contemplated under Article 12 of this Contract Agreement.

#### ii. Termination due to Operator Event of Default

If the termination is after the Date of Commercial Operation, due to an Operator Event of Default, no compensation shall be payable to the Operator. Operator shall pay the compensation to the Contracting Authority as follows:

- a) From COD till the date of the operator default : Performance Bank Guarantee will be revoked;
- b) In case Contracting Authority decides to purchase the handling equipment installed the Operator, an Independent Valuator will be appointed at the joint cost of the Operator and Contracting Authority to evaluate current Market Value of the equipment.

In case the handling equipment is on lease, the lease agreement between Operator and Equipment Owner may be transferred to the Contracting Authority at the same or better terms.

The decision to purchase and/or transfer of lease shall be at the sole discretion of the Contracting Authority.

In case the Contracting Authority decides not to purchase and/or transfer lease on its name, the Operator shall safely remove the handling equipment, at its own cost, without causing any damage to the Terminal Assets.

#### iii. Termination due to Contracting Authority Event of Default

If the termination is due to a Contracting Authority Event of Default, the compensation payable by the Contracting Authority shall be as follows:

- a) From COD till end of the second year of operations from COD: INR 20 Lakh
- b) From Beginning of 2 years and 1 day till end of Contract Period: Higher of INR 25 Lakh or 10% of Gross revenue of the Operator in the last 12 months from the date of issue of Termination Notice
- c) In case Contracting Authority decides to purchase the handling equipment of the Operator, an Independent Valuator will be appointed at the joint cost of the Operator and Contracting Authority to evaluate current Market Value of the equipment.

In case the handling equipment is on lease, the lease agreement between Operator and Equipment Owner will be transferred to the Contracting Authority at the same or better terms.

The decision to purchase and/or transfer of lease shall be at the sole discretion of the Contracting Authority.

In case the Contracting Authority decides not to purchase and/or transfer lease on its name, the Operator shall safely remove the handling equipment, at its own cost, without causing any damage to the Terminal Assets.

- d) The compensation payable by the Contracting Authority will also include Book Value of any fixed asset created by the Operator for the Project.

Provided, no compensation shall be payable to the Operator if the Operator fails to maintain Insurance Cover as contemplated under Article 12 of this Contract Agreement.

**b. No Compensation on Expiry of Contract Period**

- i. In the event of expiry of Contract Agreement by efflux of time (the Contract Agreement having run its full course), the Operator shall hand over/ transfer peaceful possession of the Project Site including land, Terminal Assets (as per Annexure II) and the Project Facilities and Services free of cost and Encumbrance.

**c. Transfer Fee and Charges**

- i. Transfer costs, stamp duties, notary fees and taxes, if applicable, for the transfer of the Project Facilities and Services consequent to the expiry or termination of this Contract Agreement shall be borne by:
  - a) the Operator in the event of expiry of Contract Period or termination due to an Operator Event of Default;
  - b) the Contracting Authority in the event of termination due to a Contracting Authority Event of Default or Political Event; and
  - c) by both parties equally in case of termination due to Change in Law or Non Political

Event or Other Event.

**d. Delayed Transfer of Assets**

- i. If for any reasons other than those attributable to the Contracting Authority the Operator fails to transfer assets, rights and contracts on the Transfer Date in accordance with Article 16.5 read with Article 18, there shall be no suspension of the operation and maintenance of the Project Facilities and Services and the Operator shall, as a trustee of the Contracting Authority,
- a) continue to operate and maintain the Project Facilities and Services or such of them, as directed by Contracting Authority until completion of the relative transfer formalities and
  - b) account for and pay to the Contracting Authority the Project Revenue minus operating costs and statutory dues, from such operations. In the event of failure to do so, the Operator shall be liable to pay to the Contracting Authority, for every Day of delay, liquidated damages computed at the rate of the average daily profits earned during the 3 (three) years immediately preceding the Transfer Date. Parties confirm that this is a true and correct estimate of damages and not in the nature of a penalty. Provided nothing contained in this Article 17.6 shall be deemed or construed to authorise delay in completion of formalities of transfer of assets, rights and contracts by the Operator to the Contracting Authority in accordance with the requirements thereof under this Contract Agreement.
- ii. In case the transfer of assets by the Operator to the Contracting Authority is delayed for reasons attributable to the Contracting Authority, the Operator shall nonetheless continue to operate the Project Facilities and Services but as agent of the Contracting Authority. Provided however, the Operator shall be liable to pay Royalty in accordance with Article 9.21.

**e. Remedies Cumulative**

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

## ARTICLE 17

### v) Transfer on expiry of Contract Period

#### a. General Scope of Transfer/Payment

- i. The Parties shall perform/discharge their respective obligations to be performed or discharged under the provisions of this Contract Agreement on the Transfer Date in entirety. Without prejudice to the generality of this provision and the provisions of Article 16, the transactions to be consummated and the formalities to be completed by the Parties on the Transfer Date shall be as set out in Articles 18.2 and 18.3.

#### b. Operator's Obligations

The Operator shall;

- i. hand over peaceful possession of the Project Site, Terminal Assets (as per Annexure II), the Project and the Project Facilities and Services free of Encumbrance;
- ii. transfer all its rights, titles and interests in the assets (apart from Annexure II) comprised in the Project Facilities and Services which are mutually agreed, by Contracting Authority and Operator, to be transferred to the Contracting Authority in accordance with this Contract Agreement and execute such deeds and documents as may be necessary for the purpose and complete all legal or other formalities required in this regard;
- iii. hand over to the Contracting Authority all documents including as built drawings, manuals and records relating to operation and maintenance of the Project Facilities and Services;
- iv. transfer technology and up-to-date know-how relating to operation and maintenance of the Terminal Assets and/or the Project Facilities and Services;
- v. transfer or cause to be transferred to the Contracting Authority any Project Contracts which are:
  - a) valid and subsisting;
  - b) capable of being transferred to the Contracting Authority; and
  - c) those the Contracting Authority has chosen to take over and cancel or cause to be cancelled such Project Contracts not transferred to the Contracting Authority. For this purpose, the Operator shall ensure that all Project Contracts are assignable in favor of the Contracting Authority without any further action on part of the respective counterparties. The Operator shall entirely at its cost, terminate all such Project Contracts which are not transferred/assigned and/or are not required to be transferred/assigned to the Contracting Authority;
- vi. at its cost, transfer to the Contracting Authority all such Applicable Permits which the Contracting Authority may require and which can be legally transferred. Provided if the



termination is on account of Contracting Authority Event of Default the cost of such transfer shall be borne/ reimbursed by the Contracting Authority;

- vii. at its cost, remove within 90 (ninety) days from expiry of the Contract Period, from the Project Site/Terminal Assets, any moveable assets that are not taken over by or not to be transferred to the Contracting Authority in terms of the provisions of this Contract Agreement.
- viii. In case, Operator fails to comply with Clause 18.2.7, Contracting Authority shall take over the site and shall forfeit the Performance Bank Guarantee submitted by the Operator.

**c. Contracting Authority's Obligations**

- i. Except in the event of expiry of the Contract Agreement by efflux of time, the Contracting Authority shall pay compensation payable to the Operator in accordance with Article 17.1 of this Contract Agreement or deposit the same in the Escrow Account, as the case may be. The Operator confirms that upon such payment being made, the Contracting Authority shall stand duly discharged of its obligations regarding payment of compensation under this Contract Agreement and all such assets shall on and from the Transfer Date be free from such charge.
- ii. The Operator further confirms that payment of compensation by Contracting Authority in accordance with this Article 18.3 shall be a valid discharge to the Contracting Authority in respect of Contracting Authority's obligation regarding payment of compensation to the Operator under this Contract Agreement.

**d. Risk**

- i. Until transfer in accordance with this Article 18, the Terminal Assets and the Project Facilities and Services shall remain at the sole risk of the Operator except for any loss or damage caused to or suffered by the Operator due to any act or omission or negligence on the part of the Contracting Authority under this Contract Agreement.

## ARTICLE 18

### w) Dispute resolution

#### a. Amicable settlement

- i. If any dispute or difference or claims of any kind arises between the Contracting Authority and the Operator in connection with interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement, whether before or after the termination of this Agreement, then the Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion/mediation between them.

#### b. Assistance of Expert

- i. The parties, may, in appropriate cases agree to refer the matter to a legal Expert appointed by them with mutual consent. The cost of obtaining the service of the legal Expert shall be shared equally.

#### c. Arbitration

- i. Arbitration

Failing amicable settlement and/or settlement with the assistance of legal expert appointed by the parties by mutual consent, the dispute or differences or claims as the case may be, shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be presided over by a Sole Arbitrator. Upon invocation of Arbitration by either party, the Contracting Authority shall within 7 days, propose three names to the Contractor. The Contractor shall have the right to choose one name as the Arbitrator. Failing any agreement on the name of the Arbitrator, the arbitrator shall be appointed by the Court in terms of Section 11 of the Act.

- ii. Seat of Arbitration

The seat of Arbitration shall be New Delhi, India.

- iii. English language

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

- iv. Procedure

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

v. Enforcement of award

Any decision or award resulting from arbitration shall be final and binding upon the parties. The parties hereto agree that the arbitral award may be enforced against the parties to the arbitration proceeding or their assets wherever they may be found and that a judgment upon the arbitral award may be entered in any court having jurisdiction thereof.

vi. Fees and expenses

The fees and expenses of the arbitrators and all other expenses of the arbitration shall be equally borne by respective parties. The fee of arbitration shall be determined according to the Arbitration and Conciliation Act, 1996 or by the Ld. Arbitrator in terms of the schedule thereof.

vii. Performance during arbitration

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

## ARTICLE 19

### x) Representations and warranties

#### a. Representations and warranties of the Operator

The Operator represents and warrants to the Contracting Authority that:

- i. it is duly organised, validly existing and in good standing under the laws of India and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- ii. it has full power and authority to execute, deliver and perform its obligations under this Agreement;
- iii. it has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- iv. this Agreement constitutes the legal, valid and binding obligation of the Operator, enforceable against it in accordance with the terms hereof;
- v. there are no actions, suits or proceedings pending or to its best knowledge, threatened against or affecting it before any court, administrative body or arbitral tribunal which might materially and adversely affect its ability to meet or perform any of its obligations under this Agreement;
- vi. it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- vii. the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its memorandum of association and articles of association or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- viii. it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Authority which may result in any Material Adverse Effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- ix. it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a Material Adverse Effect on its ability to perform its obligations under this Agreement;
- x. all its rights and interests in the Project/Project Facilities and Services shall pass to and vest in the Contracting Authority on the Transfer Date free and clear of all liens, claims and

Encumbrances, without any further act or deed on its part or that of the Contracting Authority, and that none of the Project Terminal Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;

- xi. no representation or warranty by it contained herein or in any other document furnished by it to the Contracting Authority including the Bid or to any Government Authority in relation to Applicable Permits contains or will contain any untrue or misleading statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading;
- xii. no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Contract or entering into this Agreement or for influencing or attempting to influence any officer or employee of the Contracting Authority in connection therewith;
- xiii. agrees that the execution, delivery and performance by it of this Agreement and all other agreements, contracts, documents and writings relating to this Agreement constitute private and commercial acts and not public or governmental acts; and
- xiv. consents generally in respect of the enforcement of any judgement against it in any proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings.

**b. Representations and warranties of the Contracting Authority**

The Contracting Authority represents and warrants to the Operator that:

- i. it is duly organised, validly existing and in good standing under the laws of India;
- ii. it has full power and authority to execute, deliver and perform its obligations under this Agreement;
- iii. it has taken all necessary action to authorise the execution, delivery and performance of this Agreement;
- iv. this Agreement constitutes the legal, valid and binding obligation of the Contracting Authority, enforceable against it in accordance with the terms hereof; and
- v. there are no actions, suits or proceedings pending or to its best knowledge, threatened against or affecting it before any court, administrative body or arbitral tribunal which might materially and adversely affect its ability to meet or perform any of its obligations under this Agreement.

**c. Disclosure**

- i. 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 obligation of either Party under this Agreement.

## ARTICLE 20

### **y) Miscellaneous provisions**

#### **a. Amendments**

- i. No amendment or waiver of any provision of this Agreement, nor consent to any departure by any of the parties therefrom, shall in any event be effective unless the same shall be in writing and signed by the parties hereto and then such waiver or consent shall be effective only in the specific instance and for the specified purpose for which given.

#### **b. Agreement to override other Agreements**

- i. This Agreement supersedes all previous agreements or arrangements between parties, including any memoranda of understanding entered into in respect of the contents hereof and represents the entire understanding between the parties in relation thereto.

#### **c. Survival of Obligations**

- i. Any cause of action which may have occurred in favour of either Party or any right which is vested in either Party under any of the provisions of this Agreement during the Contract Period as the case may be as a result of any act, omission, deed, matter or thing done or omitted to be done by either Party before the expiry of the Contract Period by efflux of time or otherwise in accordance with the provisions of this Agreement shall survive the expiry of the Contract Period/ termination of this Agreement.

#### **d. Articles to survive Termination**

- i. The provisions of Articles 16 to 21 shall, to the fullest extent necessary to give effect thereto, survive the Contract Period/the termination of this Agreement and the obligations of Parties to be performed/discharged following the termination/early determination of this Agreement shall accordingly be performed/discharged by the Parties.

#### **e. Several Obligations**

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

#### **f. Severability**

- i. If for any reason whatsoever any provision or any part(s) of this Agreement is held or shall be declared to be void or illegal or invalid under present or future laws or regulations effective and applicable during the Contract Period, by any competent arbitral tribunal or court, and if such provisions shall be fully separable and this Contract shall be constructed as if such provision or such part(s) of this Agreement never comprised part of this Agreement and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such void or illegal or invalid provision or by its severance from this Agreement.

**g. Waiver; remedies**

- i. No failure on the part of any party to exercise, and no delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof or a consent thereto; nor shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The remedies herein provided are the cumulative and not exclusive of any remedies provided by applicable law.

**h. Severance of terms**

- i. If any provisions of this Agreement are declared to be invalid, unenforceable or illegal, by any competent arbitral tribunal or court, such invalidity, un-enforceability or illegality shall not prejudice or affect the remaining provisions of this Agreement which shall continue in full force and effect and shall not be affected by such void.

**i. Language**

- i. All notices, certificates, correspondence or other communications under or in connection with this Agreement, and Project contracts, if any, or the Project shall be in English.

**j. Confidentiality**

- i. No Party shall, without the prior written consent of the other Parties, at any time divulge or disclose or suffer or permit its servants or agents to divulge or disclose to any person or use for any purpose unconnected with the Project any information which is, by its nature or it marked "proprietary material", concerning the other (including any information concerning the contents of this Agreement) except to their respective officers, directors, employers, agents, representatives and professional advisors or as may be required by any law, rule, regulation or any judicial process for period of five years after the transfer date; provided, however, that any Party, with the written consent of the other Parties, may issue press releases containing non-sensitive information in relation to the progress of the Project. This article shall not apply to information:

- a) Already in the public domain, otherwise than by breach of this Agreement.
- b) Already in the possession of the receiving party before it was received from any other party in connection with this Agreement and which was not obtained under any obligation of confidentiality; or
- c) Obtained from a third party who is free to divulge the same and which was not obtained under any obligation of confidentiality.
- d) Disclosure to lenders under terms of confidentiality.

**k. Notices**

Any notice to be given thereunder shall be in writing and shall either be delivered personally or sent by registered post, telex, facsimile transmission, electronic mail or other means of



telecommunication in permanent written form. The addresses and numbers for service of notice shall be given to the Parties at their respective addresses set forth below:

The Contracting Authority:

CHAIRMAN

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Fax No: Email:

\_\_\_\_\_  
\_\_\_\_\_

The Operator:

The MANAGING DIRECTOR

\_\_\_\_\_Ltd  
\_\_\_\_\_  
\_\_\_\_\_

Fax No.

Email:

or such other address, telex number, or facsimile number as may be notified by that party to the other Party from time to time, and shall be deemed to have been made or delivered (i) in the case of any communication made by letter, when delivered by hand, or by mail (registered, return receipt requested) at that address and (ii) in the case of any communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

**l. Waiver**

- i. No waiver of any term or condition or of the breach thereof by any Party shall be valid unless expressed in writing and signed by such Party and communicated by such Party to the other Party in accordance with the provisions of Article 21.7 of this Agreement. A waiver by any Party of any term or condition or breach thereof in a given case shall not be deemed or construed as a general waiver of such term or condition or the breach in the future or waiver of any other terms or conditions or breach of this Agreement.

**m. Unclaimed cargo**

- i. The terminal shall be handed over after disposal of cargo, if any, lying in the terminal. The IWAI shall dispose-off unclaimed cargo in accordance with Applicable Law.

**n. Amendments, Modifications or Alterations.**

- i. No amendments, modifications or alterations of or any additions to the terms and conditions of this Agreement shall be valid unless the same be in writing and agreed to by the Parties.

**o. Governing Law**

i. This Agreement shall be governed by and construed in accordance with the laws of the Republic of India and courts having territorial jurisdiction over the Project shall have jurisdiction over all matters relating to or arising out of this Agreement.

**p. Entire Agreement**

This Agreement and the Annexures together constitute a complete and exclusive statement of the terms of the agreement between the Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement unless specifically retained in this Agreement and the Annexures, by reference or otherwise, are abrogated and withdrawn.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have caused this Agreement on the dates indicated next to their signatures below:

Common Seal of the Contracting Authority is affixed pursuant to its resolution dated \_\_\_\_\_ of the Board in the presence of Mr. \_\_\_\_\_ who has signed this Agreement in token thereof.

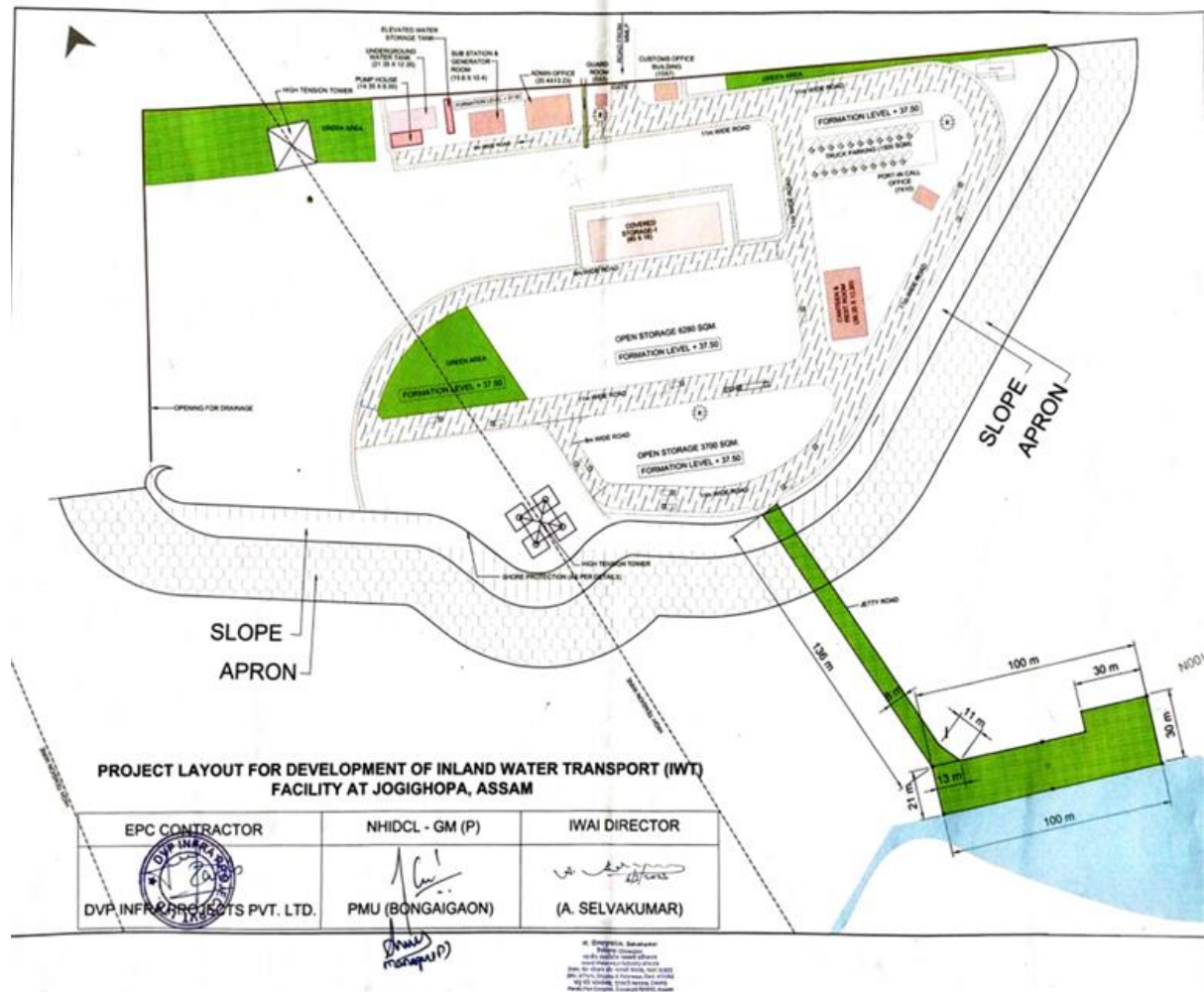
Signed and Delivered by the Operator by the hand of its authorized representative Mr. \_\_\_\_\_ pursuant to Resolution dated \_\_\_\_\_ of its Board of Directors.

**z) Annexures**

**a. Annexure I: Project site**

Please refer to the attached lay outs for Project sites including Terminal and demarcation for cruise/ferry service.

*Figure 1 Jogighopa Layout*



**b. Annexure II: Terminal assets for Jogighopa**

**List of immovable and essential movable contracted assets**

<b>Contracted assets</b>			
<b>S No</b>	<b>Particulars</b>	<b>Immovable contracted assets</b>	<b>Essential movable contracted assets</b>
1	Jetty Structures	✓	
2	Stone protection piles and stone pitching	✓	
3	Buildings	✓	
4	Electrical Works	✓	
6	Pontoon with Gangway	✓	At present one crane pontoon available for operation
7	Internal roads	✓	
8	Septic Tanks and Associated Works	✓	
9	Water Supply Works	✓	
10	Storm Water Drainage Works	✓	
11	External road, firefighting system	✓	
12	Close Circuit Television Cameras (CCTV-cameras)	✓	Installation by IWAI. The maintenance and AMC by the operator during concession period.

### **Annexure III: Scope of Work**

The scope of work (“**Scope of Work**”) shall mean and include the following:

1. Operator will be required to handle Riverine and Non-Riverine Cargo (load and unload vessels, load and unload trucks/lorries, load and unload rail rakes), safe stowage and securing of cargo on the vessels, arrange for safe storage of cargo in the terminal and evacuation and receipt of cargo in a timely manner from the terminal.
2. Operator will be responsible for safety, security and cleanliness of the terminal.
3. The terminal structure and all the equipment’s shall be properly maintained as per applicable rules and regulations
4. The Operator shall, as necessary for operation and maintenance of Terminal, arrange equipment, in addition to already available at Terminal, from time to time.
5. A detailed record of all the operations at the terminal including loading and discharging of cargo shall be maintained.
6. The Operator shall perform the Operation and maintenance of the Terminal assets as mentioned in Annexure II handed over to the Operator by the Contracting Authority in accordance with the provisions of this Agreement, applicable laws and applicable permits
7. O&M Services at the Terminal should be in a manner that the service levels are achieved and maintained at all times, in accordance with the terms of the contract.
8. The consideration for the performance of the O&M Services is the right of levying, collecting and appropriating the Charges as the case may be, in the form and manner agreed.
9. Subject to the Operator procuring the Applicable Permits (if any required), there are no restrictions on the Operator with regards to the types of cargos that the Operator may handle at the Terminal.
10. Performance and fulfilment of all other obligations of the Operator and matters incidental thereto or necessary for the performance of any or all of the obligations of the Operator under this Agreement, in accordance with the provisions of this Agreement, applicable laws and applicable permits.

**c. Annexure IIIA: List of Minimum Equipment**

None

**d. Annexure IV: Performance Standards and damages**

The following are the performance standards for the Contract agreement for the Terminal:

<b>S No</b>	<b>Key Performance Indicator</b>	<b>Threshold</b>	<b>Measurement</b>
1	Vessel turnaround time	Less than 48 hours for first 3 years,  Less than 36 hours between 3 years till end of Contract Period	Actual average vessel turnaround time = $\Sigma(\text{vessel departure time} - \text{vessel arrival time}) / \text{total vessels handled}$  Wherein:  Vessel arrival time is when vessel is berthed and handling is allowed  Vessel departure time is when vessel is handled and required documents are submitted, allowing vessel to move out of port
2	Average handling rate (operational)	For container, 6 TEUs per hour  For others, 45 tons per hour for first 3 years and 90 tons per hour thereafter	Actual average handling rate = Cargo handled / effective crane working hours  Wherein:  Cargo handled means the total amount of bulk, break-bulk, container and liquid cargo in metric tonnes handled by the crane  Effective crane working hours means the time for which the crane was deployed measured by the HMR (hour meter reading) device on the crane
3	Average turnaround time of trucks (operational)	Less than 240 minutes for loading and unloading of trucks;	Actual average turnaround of trucks = $\Sigma(\text{Gate out time} - \text{Gate in time}) / \text{total number of trucks}$  Wherein:  Gate-in time means time at which the driver enters terminal gate  Gate-out time means time of reception of documentation which would allow the truck to exit the terminal
4	Key infrastructure		<ul style="list-style-type: none"> <li>• Equipment condition</li> </ul>



S No	Key Performance Indicator	Threshold	Measurement
	quality parameters		<ul style="list-style-type: none"> <li>• Safety</li> <li>• Operating drainage system</li> <li>• Cleanliness of the Terminal</li> <li>• Signages</li> </ul>

### **Performance evaluation and calculation of liquidated damages**

Performance evaluation shall be made on a quarterly basis through a joint inspection by the Contracting Authority and Operator on a pre-defined date, in the presence of the Independent Expert. Contracting Authority will also have the right to conduct surprise evaluation any time of the year, in case of any complaints from the market or to evaluate the current performance standards at the terminal.

Key Infrastructure quality parameters to be measured by Independent Expert on an improvement index ranging from 1 to 10 where 1 is worse and 10 is best.

The Operator shall be liable to pay liquidated damages in case Operator fails to meet, atleast two of the three performance standards stated in the table above, for more than three quarters out of last twelve (12) quarters. The penalty would be higher of the two:

- INR 50 lakhs

OR

- 5% of the gross revenue for last twelve months

In case, Operator is unable to meet the standards for more than 6 (six) quarters in last 12 (twelve) quarters, Contracting Authority has the right to terminate the contract.

**e. Annexure V: Terms of Reference for Independent expert**

**1. Role and functions of the Independent expert**

The Independent Expert is expected to play a positive and independent role in discharging its functions, thereby facilitating the smooth implementation of the project. The role and functions of the Independent Expert shall include the following:

- (i) Determining the actual performance of the operator on key performance standards, as per the Agreement;
- (ii) assisting the parties in resolution of disputes as regards to the performance indicators;
- (iii) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (iii) undertaking all other duties and functions as envisaged under the Agreement

**f. Annexure VI: ESCROW Agreement**

**THIS ESCROW AGREEMENT (“Agreement”)** is entered into at [●] on this the [●] day of [●], 20[●]

**BY AND AMONGST:**

[●], a company incorporated under the provisions of the [Companies Act, 1956/2013], having corporate identity number [●] and its registered office at [●] (hereinafter referred to as the “**Operator**”, which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes).

AND

[●], having its registered office at [●] and amongst other places a branch office at [●] (hereinafter referred to as the “**Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and assigns);

AND

**INLAND WATERWAYS AUTHORITY OF INDIA**, a statutory body established by the Government of India under the provisions of Inland Waterways Authority of India Act, 1985, having its head office at A-13, Sector -1, Noida – 201 301, Uttar Pradesh, represented by its [Chairman] (hereinafter referred to as the “**Authority**”, which expression shall, unless repugnant to the context or meaning thereof, include its successors and assigns).

As the context may require, the Operator, the Escrow Bank and the Authority will hereinafter be referred to individually as a “**Party**” and collectively as the “**Parties**”.

**WHEREAS:**

- A. The Authority has entered into a Contract dated [●] with the Operator (“**Contract**”) for the performance of the O&M Services (*as defined in the Contract*) at the Terminal, in accordance with the terms and conditions as set forth in the Contract.
- B. The Contract requires the Operator to establish an Escrow Account, *inter alia*, on the terms and conditions stated therein.
- C. Accordingly, the Parties are entering into this Escrow Agreement setting forth the terms and conditions for the opening of the Escrow Account (*as defined below*) with the Escrow Bank and operation of the same.

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

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

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

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

“**Contract**” means the Contract referred to in Recital A above, and shall include any amendments made thereto in accordance with the provisions therein.

“**Cure Period**” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Operator, and shall commence from the date on which a notice is delivered by the Authority to the Operator 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.

“**Payment Date**” means, in relation to any payment specified in Clause 4.1, the date(s) specified for such payment.

## **1.2 Interpretation**

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

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

1.2.3 The rules of interpretation stated in Article 1 of the Contract shall apply *mutatis mutandis*, to this Agreement.

## **2. ESCROW ACCOUNT**

### **2.1 Escrow Bank to act as Trustee**

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

2.1.2 The Operator 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 and the Operator, and applied in accordance with the terms of this Agreement. No Person other than the Authority and the Operator shall have any rights hereunder as the beneficiaries of, or as third party beneficiaries under this Agreement.

### **2.2 Acceptance of Escrow Bank**

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account

during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Operator 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 and the Operator or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

### **2.3 Establishment and Operation of Escrow Account**

2.3.1 Within 30 (thirty) days from the date of the Contract, and in any case prior to the Appointed Date, the Operator shall open and establish the Escrow Account with the [\_\_\_\_\_] (name of Branch) Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.

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

2.3.3 The Escrow Bank and the Operator shall agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

### **2.4 Escrow Bank's Fee**

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Operator.

### **2.5 Rights of the Parties**

Save and except as otherwise provided in the Contract, the rights of the Authority and the Operator in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Authority and the Operator shall have no other rights against or to the monies in the Escrow Account.

## **3. DEPOSITS INTO ESCROW ACCOUNT**

### **3.1 Deposits by the Operator**

3.1.1 The Operator agrees and undertakes that it shall deposit or cause to be deposited all inflows and receipts arising due to the performance of the O&M Services or any right granted to it pursuant to this Contract, into the Escrow Account:

(a) all monies received in relation to the Terminal due to performance of the O&M Services or otherwise including but not limited to Service Charges and Other Charges, amounts received from shareholders or any other Person or otherwise, *provided however that*, the Statutory Charges collected by the Operator or the proceeds of any refundable payment deposits, capital receipts and insurance claims shall not be required to be deposited in the Escrow Account and further, the Statutory Charges shall be directly deposited in the account instructed by the Authority from time to time;

(b) all other revenues from or in respect of the performance of the O&M Services, including the proceeds of any rentals, etc.; and

(c) all payments by the Authority, after deduction of any outstanding Royalty payment, if any.

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

### **3.2 Intentionally Left Blank**

### **3.3 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 Operator in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

## **4. WITHDRAWALS FROM ESCROW ACCOUNT**

### **4.1 Withdrawals**

4.1.1 At the beginning of every month, the Operator by written instructions, determine that the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order for making due payments, and if such payments are not due in any month, then retain such monies and pay out therefrom on the Payment Date(s):

a) for all taxes, cess and fee payable to Government of India/ State Government/ Local Authority payable by the Operator for O&M services;

b) Statutory charges payable to Contracting Authority in term of Tariff Regulation

c) all expenses relating to operation and maintenance of Project Facilities and Services;

d) towards payment of Royalty and other sums payable to the Contracting Authority and liquidated damages, if any;

e) all development/equipment expenses relating to Project Facilities and Services;

f) the Operator shall be at liberty to withdraw any sums outstanding in Escrow Account after all the aforesaid payments due in any Quarter have been made and/or adequate reserves have been created in respect thereof for that Quarter. Provided, upon issuance of Termination Notice and/or suspension of the Operator in accordance with provisions of this Agreement, withdrawal from the Escrow Account shall be made only in accordance with written instructions of the Contracting Authority.

4.1.2 No later than 60 (sixty) days prior to the commencement of each Accounting Year, the Operator shall provide to the Escrow Bank, with prior written approval of the Authority, 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 Authority, if fresh information received during the course of the Accounting Year makes such modification necessary.

## **4.2 Withdrawals upon Termination**

Upon Termination of the Contract, 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) outstanding Royalty payment;
- b) all payments and/ or Damages payable to the Authority;
- c) statutory payments, all taxes due and payable by the Operator for and in respect of the performance of the O&M Services at the Terminal;
- d) incurred or accrued expenses for the performance of the O&M Services;
- e) any other payments required to be made under the Contract; and
- f) balance, if any, in accordance with the instructions of the Operator.

## **4.3 Application of Insufficient Funds**

Funds in the Escrow Account shall be applied in the serial order of priority, set forth in Clause 4.1 and Clause 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.

## **5. OBLIGATIONS OF THE ESCROW BANK**

### **5.1 Segregation of Funds**

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

### **5.2 Notification of Balances**

At least 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 Operator as to the relevant Payment Dates), the Escrow Bank shall notify the Authority of the balances in the Escrow Account as at the close of business on the immediately preceding Business Day.

### **5.3 Communications and Notices**

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

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

- (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 Authority of any notice or document received by it in its capacity, as the Escrow Bank from the Operator, or any other Person hereunder or in connection herewith; and
- (d) shall, within 5 (five) Business Days after receipt, deliver a copy to the Operator of any notice or document received by it from the Authority in connection herewith.

#### **5.4 No Set-Off**

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

#### **5.5 Regulatory Approvals**

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

### **6. ESCROW DEFAULT**

#### **6.1 Escrow Default**

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

- (a) the Operator 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 Operator causes the Escrow Bank to transfer funds to any account of the Operator in breach of the terms of this Agreement and fails to cure such breach by depositing the relevant funds into the Escrow Account in which such transfer should have been made, within a Cure Period of 5 (five) Business Days; or
- (c) the Operator commits or causes any other breach of the provisions of this Agreement and fails to cure the same within a Cure Period of 5 (five) Business Days.



6.1.2 The occurrence of an Escrow Default shall be an Operator's event of default under Clause 20.3.2 and the consequences thereof shall be dealt in accordance with the provisions therein.

## **7. TERMINATION OF ESCROW AGREEMENT**

### **7.1 Duration of the Escrow Agreement**

Unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this Agreement, this Agreement shall remain in full force and effect until the Termination of the Contract. Upon the termination of the Contract, the Escrow Account can be operated by and only in accordance with the instructions of the Authority, as per the Applicable Laws.

### **7.2 Substitution of Escrow Bank**

7.2.1 The Operator may, by not less than 45 (forty-five) days prior notice to the Escrow Bank, the Authority, terminate this Agreement and appoint a new Escrow Bank, *provided that* the new Escrow Bank is acceptable to the Authority and arrangements are made satisfactory to the Authority for transfer of amounts deposited in the Escrow Account, to a new Escrow Account established with the successor Escrow Bank.

7.2.2 The termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

### **7.3 Closure of Escrow Account**

The Escrow Bank shall, at the request of the Operator made on or after the payment by the Operator of all outstanding amounts under the Contract including the payments specified in Clause 4.2, and upon confirmation of receipt of such payments, close the Escrow Account and pay any amount standing to the credit thereof to the Operator.

## **8. INDEMNITY**

### **8.1 General Indemnity**

8.1.1 The Operator will indemnify, defend and hold the Authority and Escrow Bank, harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Operator of any of its obligations under this Agreement or on account of failure of the Operator to comply with Applicable Laws and Applicable Permits.

8.1.2 The Authority will indemnify, defend and hold the Operator 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 Operator's obligations under the Contract 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.

8.1.3 The Escrow Bank will indemnify, defend and hold the Operator 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 Operator's

obligations under the Contract, 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.

## **8.2 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 indemnity under Clause 8.1 or in respect of which it is entitled to reimbursement (“**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (“**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.

## **9. GOVERNING LAW AND DISPUTE RESOLUTION**

### **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 in New Delhi shall have jurisdiction over all matters arising out of or relating to this Agreement.

### **9.2 Dispute Resolution**

9.2.1 If any dispute arises between the Parties, then, either Party may provide notice to the other Party of its intention to commence arbitration, as to the matter in dispute. Any dispute in respect of which a notice of intention to commence arbitration has been provided will be finally settled by arbitration.

9.2.2 Any dispute submitted by a Party to arbitration will be heard by sole arbitrator, to be constituted in accordance with the provisions of this Clause 9.2.

9.2.3 IWAI shall propose three names and the Operator shall have the right to choose one name as the Arbitrator. If no agreement is arrived on the name of the Arbitrator, then the Arbitrator shall be appointed by the Court in terms of section 11 of the Act.

9.2.4 If for any reason an arbitrator is unable to perform its function, the mandate of the arbitrator will terminate in accordance with the provisions of Applicable Law.

9.2.5 Arbitration proceedings under this Clause 9.2 will be conducted in accordance with the Arbitration and Conciliation Act, 1996 and rules made thereunder as may be amended, modified, or supplemented from time to time in English language. The seat of the arbitration proceedings shall be New Delhi.

9.2.6 Notwithstanding the reference of any dispute to be resolved through arbitration pursuant to this Clause 9.2, the Parties will continue to perform their respective obligations under this Contract, unless they otherwise agree.

## **10. MISCELLANEOUS PROVISIONS**

### **10.1 Notices**

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and e-mail 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 PM 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.

### **10.2 Amendment**

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.

### **10.3 Waiver**

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

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

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

### **10.4 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.

### **10.5 Survival**

10.5.1 Termination of this Agreement:

- (a) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and

- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

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

**10.6 Severability**

If for any reason whatsoever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10.1 of this Agreement or otherwise.

**10.7 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.

**10.8 Original Document**

This Agreement may be executed in 3 (three) counterparts, each of which when executed and delivered, shall constitute an original of this Agreement.

**IN WITNESS WHEREOF** this Contract has been executed by the duly authorized representatives of the Parties as of the day and year 1<sup>st</sup> (first) above written on page 1 (one) of this Contract.

**Operator**

**Escrow Bank**

By: [ \_\_\_\_\_ ]  
Name: [    ]  
Title: [    ]  
Authorised by [    ]  
For and on behalf of the  
the [●]

By: [ \_\_\_\_\_ ]  
Name: [    ]  
Title: [    ]  
Authorised by [    ]  
For and on behalf of  
[●]

**Authority**

By: [●]  
Name: [●]

Title: [●]  
Authorised by [●]  
For and on behalf of the  
**INLAND WATERWAYS AUTHORITY OF INDIA**

**g. Annexure VII: Expert Committee**

Dispute resolution through the Expert Committee can be resorted to if either of the parties exercises its right for dispute resolution through the Expert Committee as provided for explicitly in this Agreement

- (i) In the event a party issues a notice (Expert Committee Notice) to refer the dispute to the Expert Committee, the parties may finalise a choice of an independent expert in the field of port and harbour engineering and/or financial and cost accounting as the case warrants within one week of such notice, failing which, each party shall appoint such an independent expert within two weeks of the Expert Committee Notice.
- (ii) Such independent experts shall have adequate experience in the design, construction, operation and maintenance of Terminal facilities and/or finances, accounting, costing and valuation practices as the case warrants.
- (iii) The two experts will jointly appoint a third expert with similar experience within one week of their appointment.
- (iv) The party issuing the Expert Committee Notice will provide the Experts with written submission of the nature of the dispute and the claim of the other party along with supporting documents within 1 (one) week of the constitution of the Expert Committee. Within one week of the furnishing of such submission, the other party may choose to provide written submissions defending its position.
- (v) The Expert Committee may call on either party to furnish additional information as deemed necessary to solve the dispute.
- (vi) The Expert Committee shall give the majority decision to both parties within three weeks of the receipt of written submission from the contracting parties.
- (vii) The decision of the Expert Committee shall be final and binding on the contracting parties unless either of the parties issues an Arbitration Notice.
- (viii) The costs of the engagement of the Expert Committees shall be shared equally by the parties.

## **h. Annexure VIII: Standards**

### **1. Operations and Maintenance Standards**

#### **1.1 Repairs, Maintenance and Replacement**

The Operator at its own cost promptly and diligently maintain, replace or restore any of the project facilities or part thereof which may be lost, damaged, destroyed or worn out.

While carrying out the repairing, maintaining and replacing the project facilities, the Operator acknowledges and accepts that it is holding and maintaining the assets (as per Annexure II), project facilities in trust for eventual transfer to the Contracting Authority on termination of the agreement and therefore, will not do any act as a result of which the value of Terminal Assets and Project Facilities and Services is diminished.

The Operator shall, at all times during the Contract Period, at its own risk, cost, charges and expenses, performance and pay for maintenance repairs, renewals and replacement of various type of assets and equipment in the Operator premises and /or the project or any parts thereof, whether due to use and operations or due to deterioration of materials and /or parts, so that on the expiry or termination of Contract Period, the same shall except normal wear and tear be in good working condition as it were at the time of commencement of the Contract Period.

While carrying out the repair, maintenance and replacement of the project facilities, the Operator shall carry out the work in accordance with the manufacturer's recommendations and the relevant latest Indian Standards or in its absence ISO/OISD Standards. In the event that the Operator, by necessity or otherwise need to follow any other country standard and it shall be equal or superior to the standard specified above.

The repairs and maintenance shall generally conform to the following specifications.

<b>S No</b>	<b>Standards</b>	<b>Description</b>
<b>1</b>	<b>Maintenance</b>	
1.1	ISO 4308-1-2003	Maintenance of lifting appliances
1.2	ISO 4309-2004	Cranes wire rope care, maintenance and discard
1.3	IS 13367: Part 1 : 1992	Safe use of cranes – Code of Practice Part 1: General
1.4	BS 7121-2-2003	Code of Practice for safe use of cranes, inspection, testing & examination
1.5	BS 7121-4-1997	Code of Practice for safe use of cranes (Lorry Loaders)
1.6	BS 7121-5-2006	Code of Practice for safe use of cranes (Tower Cranes)
<b>2</b>	<b>Painting</b>	
2.1	IS 144 : 1950	Ready mixed paint, brushing, petrol resisting, air-drying, for interior painting of tanks and container, red oxide (colour unspecified)
2.2	IS 145 : 1950	Ready mixed paint, slushing, petrol resisting, air-drying for interior painting of tanks and containers, red oxide (colour unspecified)

2.3	IS 146 : 1950	Specification for ready mixed paint, brushing, petrol resisting, stoving, for interior painting of tanks and containers, red oxide (colour unspecified)
2.4	IS 147 : 1950	Specification for ready mixed paint, brushing, petrol resisting, stoving, for interior painting of tanks and containers, red oxide (colour unspecified)
2.5	IS 164 : 1981	Specification for Ready mixed paint for road marking (first revision)
2.6	IS 1419 : 1989	Antifouling paint, brushing for ship's bottom and hulls-Specification (second revision)
2.7	IS 6714 : 1989	Ready mixed paint, finishing, non-slip, deck – Specification (first revision)
2.8	IS 6948 : 1973	Specification for Ready mixed paint, undercoat, synthetic for ships
2.9	IS 6951 : 1973	Specification for Ready mixed paint, finishing, exterior for ships
2.10	IS 1477 : Part I : 1971	Code of Practice for Painting of Ferrous Metals in Buildings - Part I : Pretreatment
2.11	IS 1477 : Part 2 : 1971	Code of practice for painting of ferrous metals in buildings: Part2 Painting
2.12	IS 9954 : 1981	Pictorial Surface Preparation Standards for Painting of Steel Surfaces

## **2. Safety Standards**

The Operator shall ensure compliance with the safety standards set out under Applicable Law/international conventions, as relevant, from time to time including those required under the following:

- 2.1 Dock Workers (Safety, Health and Welfare) Act, 1986 & Regulations framed thereunder of 1990.
- 2.2 The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989.
- 2.3 The Petroleum Act, 1934 along with the Petroleum Rules, 2002.
- 2.4 The Explosives Act, 1884 along with The Explosive Substance Act, 1983 & The Explosive Rules, 1983
- 2.5 Guidelines by Fire Advisor, CCE & DG FASLI, Government of India
- 2.6 National Fire Codes (National Fire Protection Association – USA)
- 2.7 Drill Manual for the Fire Services of India.
- 2.8 International Safety Guide for Oil Tankers & Terminal.

## **3. Safety Guidelines**



### **3.1 Safe movement**

In the operation of the facility, particular care shall be taken to ensure safety of Users. This shall include facilities for safe and efficient evacuation in case of emergency.

### **3.2 Restoration of services**

The facility shall be designed such that in the event a fault occurs, a limited service can be provided within a few minutes by isolation of the affected area or equipment, to the extent possible.

### **3.3 Contingency and safety management**

**3.3.1** The Operator shall procure and ensure that appropriate contingency arrangements are in place at the Terminal to deal with the following events in accordance with applicable guidelines of IWAI:

- (a) bomb threat to the Terminal, or any acts of terrorism;
- (b) vessel accidents at the Terminal;
- (c) non-scheduled vessel forced to berth at the Terminal;
- (d) fires at the Terminal;
- (e) natural calamities and disasters;
- (f) strikes at the Terminal;
- (g) unlawful interference with waterway; and
- (h) any other emergency at the Terminal.

**3.3.2** The Operator shall procure and ensure that the emergency alarm bells are installed and operated to link the terminal control Facility to the Terminal in charge and to all emergency services located at the Terminal, including but not limited to fire services, medical services, the Security Agency etc.

**3.3.3** A safety statement shall be prepared by the Operator once every quarter to bring out clearly the system of management of checks and maintenance tolerances for various assets, and the compliance thereof. The statement shall also bring out the nature and extent of staff training and awareness in dealing with such checks and tolerances.

### **3.4 Safety equipment**

The following safety equipment shall be provided at the Terminal:

- (a) Fire extinguishers and fire alarms at appropriate locations on the Terminal;
- (b) Life-saving appliances like life buoys etc.
- (c) Adequate number of stretchers and standard first aid boxes; and
- (d) Such other equipment as may be required in conformity with relevant IWAI guidelines and Good Industry Practice.

### **3.5 Emergency**

A set of emergency procedures shall be formulated to deal with different emergency situations and the operations staff shall be trained to respond appropriately during such emergency through periodic simulated exercises, as laid down in a manual for management of disasters (“**Disaster Management Manual**”), to be prepared and published by the Operator prior to COD. The Operator shall provide 5 (five) copies each of the Disaster Management Manual to the Authority no later than 30 (thirty) days prior to COD.

### **3.6 Fire safety**

**3.7.1** The Operator shall conform to the standards specified under safety standard in Annexure VIII.

**3.7.2** Emergency exit should be accessible without any obstructions and the exit doors should be kept locked in the ordinary course. The exit doors shall be easy to open from inside the Terminal Building in case of emergency.

**3.7.3** Escape routes shall be clearly marked by arrows in the correct direction and no cryptic symbols shall be used. In complying with the provisions of this Clause, the possibility of poor visibility due to smoke shall be duly taken into account. All notices and signages shall be uniform and standardised.

**3.7.4** Appropriate categories of rescue and fire-fighting services shall be made available and maintained in accordance with safety standards in Annexure VIII.

**3.7.5.** The operator shall prepare and submit to the Contracting Authority a terminal operation manual covering all the aspects under clause 30 .

**i. Annexure IX: Monitoring Arrangement**

**(Name of the Terminal)**

**Operation Stage Monitoring Report of for the month/ Year ended.....**

**Compliance of Obligations of the Operator**

Following Compliance Obligations of the Operator shall be furnished before COD/ Yearly, as the case may be

<b>S No.</b>	<b>Obligations of the Operator</b>	<b>Whether any action required (Yes/ No)</b>	<b>If yes, give details of action taken *</b>
1	Prompt commencement of operations after “Ready for Operation” declaration		
2	Cooperation to safety experts appointed by contract authority in access for inspection for safety audit once in a year		
3	Purchasing and Maintaining of Insurance requirements in accordance with the Agreement and Good Industry Practice		
4	Providing copies of insurance policies to the Terminal		

Following Compliance Obligations of the Operator shall be furnished Monthly/ Yearly, as the case may be

<b>S No.</b>	<b>Obligations of the Operator</b>	<b>Whether any action required (Yes/ No)</b>	<b>If yes, give details of action taken *</b>
1.	Operation of Project Facilities as per “Project Requirement”		
2.	Achieving Performance Standards		
3.	Compliance of O&M and Safety Standards		
4.	Rapid & Effective response in the event of accident/emergency		
5.	Replacement and repair of project facilities in a timely manner		
6.	Maintain & Operate Project Facilities on “First Come First Served” basis except for Priority & Preferential berthing as per GOI guidelines		
7.	Maintenance of Proper Records relating to Revenue and operation of Project Facilities		
8.	Obtaining, Maintenance of Applicable Permits and Compliance of Applicable laws		

9.	Prevention of encroachment / unauthorized use of Project Facilities		
10.	Repair & Maintain all Project Facilities as per Agreement provisions & Good Industry Practice at all times during the Contract Agreement.		
11.	Repair, Replace or Restore the damaged Project Facilities at its own costs.		
12.	Obtaining prior written permission of Contracting Authority for removal of assets		
13.	Replacement of equipment/ assets as per Good Industry Practice		
14.	Compliance with Monthly Reporting Requirements		
15.	Cooperation to Terminal representatives for inspection and review of operations also to compliance with requirements of Agreement		
16.	Installation & Operation of specified computer system and Network as specified by Contract Authority		
17.	Ensuring the prescribed Security Arrangements conforming to ISPS code		
18.	Employment of personnel of foreign origin only after requisite approvals from Government of India		
19.	Employ qualified and skilled personnel.		
20.	Meeting Minimum Guaranteed Traffic requirements		
21.	To recover tariff from users of the project facilities as per Tariff Order Notification and deposit all Tariff in Escrow Account		
22.	If requested by CA, collect the cess and charges from the users on behalf of Contracting Authority		
23.	Make timely payments to Contracting Authority viz. Royalty		
24.	To operate Escrow Account as per priority of payments		
25.	Meeting any claim/ action/ suit etc. alleging loss/ destruction of goods		
26.	Inform Contracting Authority if any Direct or indirect change of management of operator		
27.	Payment of all taxes/ duties/ levies etc., to the Government Authorities		
28.	Utilisation of money received under insurance policies as per terms of Agreement		
29.	Engagement of Management Contractor as envisaged in RFP (if applicable)		
30.	Issue of consultation notice and compliance of remedial process in case of Event of Default on the part of Terminal		

**(Name of the Terminal)**  
**Operation Stage Monitoring Report of for the month**  
**ended.....**  
**Compliance of Obligations of the Contracting Authority**

S No.	Obligations of the Contracting Authority	Whether any action required (Yes/ No)	If yes, give details of action taken *
1	Maintenance of LAD		
2	Grant approvals/ consents sought by the Operator as required under the agreement		
3	Evolve mutually acceptable mechanism for sharing the common costs by existing terminal operators		
4	Provide access to all applicable infrastructure facilities and utilities including water, electricity etc.		
5	Review performance standards from the quarterly report submitted by operator and take remedial action including recovery of liquidated damages  (To be submitted quarterly)		
6	To operate escrow account as per priority of payments		
7	Whether shareholding requirements are met by lead member/ members of the applicant consortium		
8	Assistance to operator by giving recommendation letter for getting applicable permits		
9	Shall not operationalize competing facility		
10	Issue notice of Force Majeure in the event of occurrence of any Force Majeure event  (in case of Force Majeure event)		
11	Extension of time for performing obligations due to occurrence of Force majeure  (in case of Force Majeure event)		
12	Compliance of provisions of Article 14 in the event of force majeure continuing beyond 120 days  (in case of Force Majeure event)		
13	Payment of compensation in the event of termination due to force majeure event Payment of compensation in the event of termination due to operator event of default Payment of compensation in the event of termination due to Contracting Authority event of default		

	(in case of Force Majeure event)		
14	Authorize the operator to collect cesses and charges including infrastructure cess if required and remit the same to Contracting Authority if required		
15	Initiate action for amicably resolution of disputes		
16	Any other observation, complaint or suggestion		
17	Issue of Consultation Notice and Compliance of remedial process in case of Event of Default on the part of Operator		

**Key Performance Indicators (KPI)/Performance Standards**

S. No.	Maintenance/ Performance Standards	Indicative norms	Actual during the quarter	Shortfall, if any	Action taken to remedy shortfall
1	Average vessel turnaround time				
2	Average handling rate				
3	Average turnaround time of trucks				
4	Key infrastructure Quality parameters				

(Name of the Terminal)

**Operation Stage Monitoring Report of (Name of the Project) for the month ended.....**

**I. Basic Data of the project**

S No.	Project Parameters	Details
1.	Name of the operator	
2.	Percentage of equity holding in case of consortium	
3.	Payment of Royalty	
4.	Date of Issue of Letter of acceptance by the Contracting Authority to operator	
5.	Date of signing of Contract Agreement	

6.	Time duration for fulfilling the condition precedent as per contract agreement (a) By Operator (b) By Contracting Authority	
7.	Actual Date of award of contract after fulfilling condition precedent	
8.	Date of starting of commercial operation	
9.	Estimated cost	
10.	Actual Cost	
11.	Capacity	
12.	Project details like length of berth, design vessel size can be handled, equipments installed, backup area etc.,	
13.	Present tariff rate	
14.	MGT if any as per contract agreement	
15.	Cargo handled during this month	
16.	Cumulative cargo handled during the financial year	
17.	Any other remarks	

**j. Annexure X: Performance Bank Guarantee (Performance Security Deposit)**

**(Proforma of Bank Guarantee)**

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

In favour of:

**INLAND WATERWAYS CONTRACTING AUTHORITY OF INDIA**, a statutory body  
established by the Government of India under the provisions of Inland Waterways Contracting  
Authority of India Act, 1985, having its head office at A-13, Sector -1, Noida – 201 301, Uttar  
Pradesh, represented by its [Chairman] (hereinafter referred to as the “**the Contracting  
Authority**”, which expression shall, unless repugnant to the context or meaning thereof,  
include, its successors and assigns.

WHEREAS:

- a) The Contracting Authority, vide its Request for Proposal dated [●] (“the RFP”) invited interested bidders to implement a project envisaging (more particularly described in Annexure I and hereinafter referred to as “Project”);
- b) After evaluation of the bids received in response to the RFP, the Contracting Authority accepted the bid of the consortium comprising of and (“the Consortium”) OR the Contracting Authority accepted the bid of (“Applicant”) and issued the Letter of Intent No (“LOI”) dated to the Consortium/Applicant requiring, inter alia, the execution of the Contract Agreement, (“the Contract Agreement”) the draft whereof was provided in the RFP;
- c) Pursuant to the LOI the Applicant/Consortium has promoted and incorporated a special purpose company (“the Operator”), to enter into the Contract Agreement for undertaking, inter alia, the work with respect to the Project referred to in Recital (a) above and to perform and discharge all its obligations thereunder.
- d) In terms of the LOI and the Contract Agreement, the Operator is required to furnish to the Contracting Authority, a Performance Guarantee being an unconditional and irrevocable Bank Guarantee from a Scheduled Bank for a sum of Rs. [●] (Rupees [●] only) as security for due and punctual performance/discharge of its obligations under the Contract Agreement,
- e) At the request of the Operator, and for valid consideration the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Operator of its obligations under the Contract Agreement.

**NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:**



1. Capitalized terms used herein but not defined shall have the meaning assigned to them respectively in the Contract Agreement.
2. The Guarantor hereby irrevocably and unconditionally guarantees the due execution and punctual performance by M/s. (“the Operator”) of all its obligations under the Contract Agreement.
3. The Guarantor shall, without demur or protest, pay to the Contracting Authority sums not exceeding in aggregate Rs. [●] (Rupees [●] only) within five (5) calendar days of receipt of a written demand therefor from the Contracting Authority stating that the Operator has failed to meet its performance obligations under the Contract Agreement. The Guarantor shall not go into the veracity of any breach or failure on the part of the Operator or validity of demand so made by the Contracting Authority and shall pay the amount specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Operator or any other Person before any court, tribunal, expert, arbitrator or similar proceedings. The Guarantor’s obligations hereunder shall subsist until all such demands of the Contracting Authority are duly met and discharged in accordance with the provisions hereof. Any such demand made on the Guarantor by the Contracting Authority shall be conclusive, absolute and unequivocal as regards the amount due and payable by the Guarantor under this Agreement. The Contracting Authority shall at all times at its sole discretion have the absolute and unconditional right to call upon the Guarantor to pay the amount under the Guarantee.
4. In order to give effect to this Guarantee, the Contracting Authority shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the Contract Agreement or other documents or by the extension of time for performance granted by the Contracting Authority or postponement/non- exercise/ delayed exercise of any of its rights by the Contracting Authority or any indulgence shown by the Contracting Authority to the Operator and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non-exercise or delayed exercise by the Contracting Authority of any of the Contracting Authority’s rights or any indulgence shown by the Contracting Authority; provided nothing contained herein shall enlarge the Guarantor’s obligation hereunder.
5. This Guarantee shall be unconditional and irrevocable and shall remain in full force and effect until Scheduled Project Completion Date and for a period of twelve months thereafter unless discharged/released earlier by the Contracting Authority in accordance with the provisions of the Contract Agreement. The Guarantor’s liability in aggregate shall be limited to a sum of Rs. [●] (Rupees [●] only).
6. This Guarantee shall not be affected by any change in the constitution or winding up, insolvency, bankruptcy, dissolution or liquidation of the Operator/ the Guarantor or any absorption, merger or amalgamation of the Operator/the Guarantor with any other Person.

7. Any payment made hereunder shall be made free and clear of, and without deduction for or on account of taxes, levies, imposts, duties, charges, fees, deductions, or withholding of any nature whatsoever.

8. The Guarantor hereby irrevocably and unconditionally undertakes, agrees and acknowledges that its obligations as a Guarantor hereunder:

(a) shall not be affected by the existence of or release or variation of any other guarantee or security for any of the obligations of the Operator under the Contract Agreement;

(b) shall not be affected by any failure by the Contracting Authority to perform any of its obligations under the Agreement;

(c) shall not be affected by any failure or delay in payment of any fee or other amount payable to the Guarantor in respect hereof;

(d) shall not be affected by any exercise or non-exercise of any right, remedy, power or privilege of any person under or in respect of any payment obligations of the Operator under the Contract Agreement;

(e) shall not be affected by any failure, omission or delay on the Contracting Authority's part to enforce, assert or to exercise any right, power or remedy conferred on the Contracting Authority in this Guarantee;

(f) shall not be affected by any act, omission, matter or thing which, but for this article would reduce, release or prejudice the Guarantor from any of the obligations under this Guarantee or prejudice or diminish the obligations in whole or in part.

9. The obligations, covenants, agreements and duties herein shall not be subject to any counterclaims, cross claims, set offs, deductions, withholdings, diminutions, abatements, recoupments, suspensions, deferments, reductions or defence for any reason whatsoever and the Guarantor, shall have no right to terminate this Guarantee or to be released, relieved or discharged from any of its obligations, covenants, agreements and duties hereunder for any reason whatsoever.

10. The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorized to execute this Guarantee pursuant to the power granted under .

11. This Guarantee shall be governed by and construed in accordance with the laws of India. The Guarantor hereby irrevocably submits to the exclusive jurisdiction of the Court of \_\_\_\_\_ for the purposes of any suit, action, or other proceeding arising out of this Guarantee, or the subject matter hereof, brought by the Contracting Authority or its successors or assigns. To the extent permitted by Applicable Law, the Guarantor or its successors or assigns hereby waive, and shall not assert, by way of motion, as defence, or otherwise, in any such suit, action, or proceeding any claim that such suit, action, or proceedings is brought in

an inconvenient forum, or that the value of such suit, action, or proceeding is improper, or that the subject matter hereof may not be enforced in or by such court.

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

SIGNED AND DELIVERED by

\_\_\_\_\_ Bank by the hand of Mr. \_\_\_\_\_ its

\_\_\_\_\_ and authorized official.

**k. Annexure XI: Applicable Permits to be obtained by the Operator**

The following are the Applicable Permits to be obtained by the Operator:

1. Approval under Section 13 of the IWAI Act, for the execution and delivery of this Contract;
2. Environmental Clearance in accordance with the provisions of Environment Impact Assessment Notification, 2006;
3. Approval from Central Empowered Committee constituted by the Supreme Court in respect of the Terminal, in accordance with the provisions of Wildlife Protection Act-1972;
4. Consent to Operate in accordance with the provisions of the Water (Prevention and Control of Pollution) Act, 1974;
5. Consent to Operate in accordance with the provisions of the Air (Prevention and Control of Pollution) Act, 1981;
6. No-objection certificate in respect of the building from the Assam Fire Service Directorate

The above list is not exhaustive and may be modified as per requirement to commence the operation, as per prevailing Rules and Regulations.

The operator to obtain the required NOCs. IWAI will assist to obtain NOC by the operator, to the extent possible. However, after appointed date, the renewal, fee etc shall be the responsibility of the operator and IWAI will provide required assistance, if any in the role of custodian.

**1. Annexure XII:**

1. Operator is free to fix the tariff as per market rates except statutory levy and fee notified by IWAI.
2. Post award of work, appointed operator has to submit the fee and charges for the port operation to IWAI to notify on IWAI website before COD.
3. Any change in tariff by the operator, subsequently it is to be published in IWAI website before implementation.

**Schedule I**

[See regulation 4.(a.)]

(For Waterways usage charges, Vessel related charges and Composite charges for all terminals)

**(I) Waterway usage charges**

Sl. No	Name of the service	Charges (in rupees)
1.	Movement of cargo vessels	NIL
2.	Movement of passenger or cruise vessels	NIL
2 (a).	Movement of Ro-Ro vessels	NIL
3.	Movement of any other vessel not covered in above categories	NIL

**(II) Vessel related charges**

Sl. No.	Name of the service	Charges (in rupees)
1.	Berthing charges	For all vessels except Ro-Ro vessels: i. 3000/- for Kolkata (Garden Reach Jetty-I, Garden Reach Jetty-II and British Indian Steamer Navigation Jetty) for twenty-four hours or part thereof - 6AM to 6AM (next day). ii. 3000/-* for Haldia Multimodal Terminal for twenty-four hours or part thereof - 6AM to 6AM (next day). iii. 3000/-** for Sahibganj Multimodal Terminal for twenty-four hours or part thereof - 6AM to 6AM (next day). iv. 1500/- * for Varanasi Multimodal Terminal for twenty-four hours or part thereof - 6AM to 6AM (next day). v. 1500/- for all Inland Waterways Authority of India terminals (except those mentioned in paragraph (i.) to (iv.) above for twenty-four hours or part thereof - 6AM to 6AM (next day). vi. 500/- for all Inland Waterways Authority of India temporary pontoons for twenty-four hours or part thereof - 6AM to 6AM (next day). For Ro-Ro vessels: i. 100/- per hour or part thereof for all Inland Waterways Authority of India terminals or 1500/- for 24 hours whichever is lesser.
2.	Towage	On specific request as per actual cost.
3.	Pilotage	750/- per day or part thereof per pilot.

\* (1) This shall be applicable and remain valid for ten years or till the end of Equip, Operate and Transfer concession in respect of Haldia Multimodal Terminal and Varanasi Multi Modal Terminal, whichever is earlier; after which there shall be a one-time escalation equal to sixty per cent of average Year-On-Year Wholesale Price Index variation (from notification of tariff to time of escalation).

(2) The escalated ceiling tariff level shall further be applicable and remain valid for ten years or till the end of Equip, Operate and Transfer (or any other concession/contract for terminal operations) whichever is earlier; after which there shall be another escalation equal to sixty

percent of average Year-On-Year Wholesale Price variation (from previous escalation to time of escalation in question).

(3) The same tariff revision mechanism shall be followed further.

\*\* (1) This shall be applicable and remain valid for ten years or till the end of Operation, Management and Development concession for Sahibganj Multimodal Terminal, whichever is earlier; after which there shall be a one-time escalation equal to sixty percent of average Year-On-Year Wholesale Price variation (from notification of

*tariff to time of escalation).*

*(2) The escalated ceiling tariff level shall further be applicable and remain valid for ten years or till the end of Operation, Management and Development (or any other concession or contract for terminal operations) whichever is earlier; after which there shall be another escalation equal to sixty percent of average Year-On-Year Wholesale Price variation (from previous escalation to time of escalation in question).*

*(3) The same tariff revision mechanism shall be followed further.*

**(III) Composite charges**

Sl No	Name of the service	Charges (in Rupees)
1.	Movement of Over Dimensional Cargo	1.50/- per metric ton per kilometer* for use of National Waterways 1, 2, 3, 4 and Indo-Bangladesh Protocol Route within Indian Territory*
*A user paying Over Dimensional Cargo charges would be exempt from payment of waterway charges and vessel related charges.		

Note: Composite charges shall also be applicable on all National Waterways or part thereof which are included in the Indo-Bangladesh Protocol Route.

**(IV) Taxes**

*Taxes extra, as applicable*

**m. Annexure XIII: Negative list for non-operational activities**

This annexure presents only an indicative and not exhaustive list of activities that shall be prohibited within the Terminal. For any construction at the Terminal however, a final approval of Contracting Authority shall be sought by Operator.

- (i) manufacture or handling or storage or disposal of hazardous substances as specified in Notifications of the Government of India in the Ministry of Environment and Forests
- (ii) setting up and expansion of units/mechanism for disposal of waste and effluents, except facilities required for discharging treated effluents into the water course with approval under the Water (Prevention and Control of Pollution) Act, 1974; and except for storm water drains
- (iii) dumping of city or town waste for the purposes of landfilling or otherwise
- (iv) night clubs
- (v) casinos
- (vi) bars
- (vii) any commercial activity interrupting any existing social and cultural practice prevalent locally; this shall exclude any activity related to infrastructure to be developed mandatorily as per scope of work mentioned in Annexure III of this agreement
- (viii) organizations facilitating gambling and similar recreational activities such as night-clubs and casinos
- (ix) arranging for musical or any other concerts
- (x) setting up of any educational institution or university
- (xi) setting up of healthcare facilities for commercial purpose
- (xii) setting up of any religious structure/ monument, neither permanent construction nor temporary constructions
- (xiii) allocating the land for purpose of rehabilitation
- (xiv) allocating the land for any residential construction



**n. Annexure XIV**

**i. Appointment of Auditors**

- a) The Operator 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 (“Panel of Chartered Accountants”), such list to be prepared substantially in accordance with the criteria set forth in Schedule P. All fees and expenses of the Statutory Auditors shall be borne by the Operator.
- b) The Operator may terminate the appointment of its Statutory Auditors in accordance with the provisions of the Companies Act, 2013, subject to the replacement Statutory Auditors being appointed from the Panel of Chartered Accountants.
- c) Notwithstanding anything to the contrary contained in this Agreement, the Authority has the right, but not the obligation, to appoint at its cost from time to time and at any time, another firm (“**Additional Auditors**”) from the Panel of Chartered Accountants to audit and verify all those matters, expenses, costs, realisations and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.
- d) Further, the Operator shall change the Statutory Auditor from time to time to comply with the provisions of the Companies Act, 2013 and any rules and regulations framed thereunder.

**ii. Panel of Chartered Accountants**

Pursuant to the provisions of the Agreement, the Authority and the Operator shall prepare a mutually agreed panel of 5 (five) reputable firms of Chartered Accountants having their registered offices in India (“**Panel of Chartered Accountants**”).

**iii. Invitation for Empanelment**

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, 2013, 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 5 (five) practicing Chartered Accountants on its rolls, each with a minimum experience of 10 (ten) years in the profession;
- (c) the firm or any of its partners should not have been disqualified or black-listed by the Comptroller and Auditor General of India or the Authority; and

- (d) the firm should have an office in the State or in an adjacent State with at least 2 (two) practicing Chartered Accountants on its rolls in such State.

Interested firms meeting the eligibility criteria shall be required to submit a statement of their capability, including the biodata of all the practicing Chartered Accountants, on its rolls. In particular, each firm shall be required to furnish year-wise information relating to the names of all the companies with an annual turnover exceeding Rs. 25,00,00,000 (Rupees Twenty-Five Crore) whose annual accounts were audited by such firm in any of the preceding 5 (five) Accounting Years.

iv. Evaluation and Selection

- e) The information furnished by each firm shall be scrutinised and evaluated by the Contracting Authority and 1 (one) point shall be awarded for each annual audit of the companies specified in Paragraph above. (By way of illustration, a firm which has conducted audit of the annual accounts of any such company for 5 (five) years shall be awarded 5 (five) points).
- f) The Contracting Authority shall prepare a list of all the eligible firms along with the points scored by each such firm and 5 (five) firms scoring the highest points shall be identified and included in the draft Panel of Chartered Accountants.

v. Consultation with the Operator

The Contracting Authority shall convey the aforesaid panel of firms to the Operator for scrutiny and comments, if any. The Operator shall be entitled to scrutinise the relevant records of the Contracting 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 Contracting Authority within 15 (fifteen) days of receiving the aforesaid panel.

vi. Mutually Agreed Panel

The Contracting Authority shall, after considering all relevant factors including the comments, if any, of the Operator, finalise and constitute a panel of 5 (five) firms which shall be deemed to be the mutually agreed Panel of Chartered Accountants.

After completion of every 2 (two) years from the date of preparing the mutually agreed Panel of Chartered Accountants, or such earlier period as may be agreed between the Contracting Authority and the Operator, a new panel shall be prepared.