

DRAFT CONCESSION AGREEMENT

FOR

DEVELOPMENT OF  
NEW CENTRAL STADIUM  
IN THIRUVANANTHAPURAM, KERALA

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## CONCESSION AGREEMENT

**THIS CONCESSION AGREEMENT** is entered into on this the ----- day of -----in Two Thousand and Fourteen at Thiruvananthapuram, Kerala, India.

BETWEEN

National Games Secretariat, registered as a society under Travancore – Cochin Literary Scientific and Charitable Societies Act – 1955, and having its principal office at Chandrsekharan Nair Stadium, Palayam, Thiruvananthapuram-695033, Kerala, India (hereinafter referred to as “NGS” or “Authority” which expression shall, unless repugnant to the context or meaning thereof, be deemed to include its successors, legal representatives and assigns) through its duly authorized representative, XXX;

AND

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

**WHEREAS,**

- A. NGS is keen to implement a project envisaging development of -----  
----- (more particularly described in Schedule A and hereinafter referred to as “the Project”) with private sector participation on Annuity basis;
  - B. NGS invited tenders from eligible persons for implementing the Project;
  - C. In response to the aforesaid invitation for tenders, NGS received bids from several persons for implementing the Project;
  - D. NGS evaluated the Financial Proposals submitted by all qualified Bidders who met the Technical Qualification Criterion specified in the RFP document and accepted the Proposal/Bid submitted by the “Successful Bidder” consisting of M/s \_\_\_\_\_, \_\_\_\_\_ & \_\_\_\_\_ (collectively the "Consortium) with \_\_\_\_\_ as its Lead Member or M/s \_\_\_\_\_ (Single/ Individual Bidder) and a Letter of Award, bearing No. \_\_\_\_\_ Dated \_\_\_\_\_ was issued to the Successful Bidder.
  - E. As per the terms and conditions of the RFP Document, the Successful Bidder have incorporated the Concessionaire as a Special Purpose Company in India under the Companies Act, 1956 to implement the Project on Annuity basis.
  - E. NGS has agreed to grant to the Concessionaire, the Concession (as hereinafter defined) on the terms, conditions and covenants hereinafter set forth in this Agreement.
-

NOW THEREFORE THIS AGREEMENT WITNESSETH AS FOLLOWS:

## **ARTICLE 1 DEFINITIONS AND INTERPRETATION**

### **1.1 Definitions**

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

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

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

**"Applicable Laws"** means all laws, promulgated or brought into force and effect by GOI or STG including regulations and rules made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, as may be in force and effect during the subsistence of this Agreement.

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

**"Arbitration Act"** means the Arbitration and Conciliation Act, 1996 and shall include modifications to or any re-enactment thereof as in force from time to time.

**"Cashflow Projections"** means the estimates of cashflows of the Project as set out in Schedule „D,,.

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

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

**"COD"** means the commercial operations date of the Project which shall be the date on which the Independent Consultant has issued the Completion Certificate or the Provisional Certificate upon completion of construction of **the P** Project.

**"Commencement Date"** means the date on which the physical possession of the Project Site is delivered to the Concessionaire and shall be deemed to be the date of commencement of the Concession Period. For the avoidance of doubt, every Condition Precedent shall have been satisfied or waived prior to the Appointed Date and in the event all Conditions Precedent are not satisfied or waived, as the case may be, the Appointed Date shall be deemed to occur only when each and every Condition Precedent is either satisfied or waived, as the case may be.

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

**"Concession"** shall have the meaning ascribed thereto in Article 2.1.

**"Concession Period"** means the period as applicable specified in Article 2.2.

**"Concessionaire"** means M/s. XXXX and shall include its successors and permitted assigns expressly approved by NGS.

**"Consortium"**<sup>3</sup> means the consortium consisting of (i) AAAA (ii) BBBB and (iii) CCCC formed/ acting pursuant to the Memorandum of Understanding dated ----- (Schedule L) entered into by them, for the purpose of bidding for the Project and in the event of being successful to implement the Project through a special purpose vehicle to be formed and incorporated by them in India.

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

**"Contractor"** means Person with whom the Concessionaire has entered into/ may enter into contract(s) for execution of the Project;

**"Cure Period"** means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Party responsible for such breach or default.

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

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

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

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

**"Drawings"** means all of the drawings, designs, calculations and documents pertaining to the Project as set forth in Schedule „F“ and shall include "as built" drawings of the Project.

**"Emergency"** means a condition or situation that is likely to endanger the security of the individuals on or about the Project including users thereof or which poses an immediate threat of material damage to any of the Project Assets.

**"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

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

loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances and encroachments on the Project Site.

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

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

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

**"Force Majeure Event"** shall have meaning ascribed thereto in Article 15.1.

**"GOI"** means the Government of India.

**"Good Industry Practice"** means those practices, methods, techniques, standards, skills, diligence and prudence which are generally and reasonably expected of and accepted internationally from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement, and would mean good engineering practices in the design, engineering, construction and project management and which would be expected to result in the performance of its obligations by the Concessionaire in accordance with this Agreement, Applicable laws, Applicable Permits, reliability, safety, environment protection, economy and efficiency.

**"Government Agency"** means NGS or any state government or governmental, department, commission, board, body, bureau, agency, authority, instrumentality, court or other judicial or administrative body, central, state, or local, having jurisdiction over the Concessionaire, the Project Assets or any portion thereof, or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement.

**"Gross Revenue"** means the total amount of receipts in the normal course of business, as per the Audited Profit & Loss Account, and as adjusted with any qualifications in the Auditors' Report.

**"Implementation Period"** means the period beginning from the Commencement Date and ending on the COD.

**"Independent Consultant"** means the Independent Consultant appointed pursuant to Article 6.1.



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

**“Initial Investment”** means the Project construction costs estimated by the Concessionaire at the time of bidding.

**“KSSC”** means the Kerala State Sports Council."

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

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

**"Maintenance Programme"** shall have the meaning ascribed to it in Article 9.6.

**"Material Adverse Effect"** means material adverse effect on (a) the ability of the Concessionaire to observe and perform any of its rights and obligations under and in accordance with the provisions of this Agreement and/or (b) the legality, validity, binding nature or enforceability of this Agreement.

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

**“Minimum Maintenance Requirements”** means minimum maintenance requirements for the maintenance of the Project as set forth in Schedule „H“.

**“Monitoring Committee”** means the Monitoring Committee constituted pursuant to Article 7.1.

**“NGS or the National Games Secretariat”** means a society set-up by the Government of Kerala and registered under Travancore – Cochin Literary Scientific & Charitable Societies Act – 1955 for the purposes of 35<sup>th</sup> National Games to be held in Kerala. For the scenario where NGS ceases to exist while the Agreement is still in operation, NGS includes any agency or person duly authorized by NGS or STG in this regard.

**“Non Political Event”** shall have the meaning ascribed thereto in Article 15.2.

**“NPV”** – Net Present Value of the annuity payments quoted by the bidder in the financial bid

**"O&M"** means the operation and maintenance of the Project during Operations Period including but not limited to functions of maintenance, collection and retention of Fees and performance of other services incidental thereto.

**"O&M Contract"** means the Operation and Maintenance Contract that may be entered into between the Concessionaire and the O&M Contractor for O&M of the Project.

**"O&M Contractor"** means the person or entity with whom the Concessionaire has entered into an O&M Contract for discharging O&M functions for and on behalf of the Concessionaire.

**"O&M Expense"** means expenses incurred by or on behalf of the Concessionaire, duly certified by its Statutory Auditors for all regularly scheduled and reasonably anticipated O&M during Operations Period, including, without limitation (a) all cost of salaries and other

employee compensation and contract fee payable to the O&M Contractor, if any, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all franchise,

excise, property and other similar taxes and all costs and fees incurred in order to obtain and maintain all Applicable Permits necessary for the O&M of the Project at its full design capacity, (e) all repair, replacement and maintenance costs of the Project, and (f) all other expenditures required to be incurred under Applicable Law or under Applicable Permits necessary for the operation and maintenance of the Project according to the Specifications and Standards at its full design capacity.

**"Operations Period"** means in the case of the Concession granted on BOT basis, the period commencing from COD and ending at the expiry of the Concession Period.

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

**"Performance Security"** means the Performance Security for construction or Performance Security for operation and maintenance as applicable in terms of Article 3.

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

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

**"Preliminary Notice"** shall have the meaning assigned to that expression in Article 16.2;

**"Project"** means the project described in Schedule „A" which the Concessionaire is required to engineer, procure, finance, construct & transfer back or engineer, procure, finance, construct, operate, maintain & transfer back, as the case may be, in accordance with the provisions of this Agreement. It further includes collectively the facilities on the Project Site to be constructed, built, installed, erected or provided by the Concessionaire by implementing the Project. Project includes development of the whole Project Site, including landscaping, horticulture works and development of boundary wall & access gates.

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

**"Project Assets"** means all physical and other assets relating to and forming part of the Project including but not limited to (i) rights over the Project Site in the form of license, right of way or otherwise, (ii) tangible assets such as civil works including foundations, superstructures, embankments, pavements, road surface, interchanges, drainage works, lighting facilities, sign boards, electrical works for lighting on the Project, telephone and other communication systems and equipment for the Project, rest areas, wayside amenities, administration and maintenance depots, relief centers, service facilities etc. (iii) all Project facilities situated on the Project Site, (iv) the rights of the Concessionaire under any Project Agreements, (v) financial assets, such as security deposits for electricity supply, telephone and other utilities, etc., (vi) insurance proceeds subject to Lenders" rights thereto and (vii) Applicable Permits and authorisations relating to or in respect of the Project.

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

**"Project Completion Schedule"** means the progressive Project milestones set forth in Schedule „C" for the implementation of the Project.

**"Project Facility"** means collectively the facilities, permanent as well as temporary, on the Project Site to be constructed, built, installed, erected or provided by the Concessionaire by implementing the Project".

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

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

**"Punch List"** shall have the meaning ascribed thereto in Article 9.3(e).

**"Reverse Annuity"** means the scenario where the Concessionaire quotes for paying the Project Consideration to NGS / SMC in terms of Annuity payment.

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

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

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

**"Specifications and Standards"** means the specifications and standards relating to the quality, capacity and other requirements for the Project as set forth in Schedule „G" and any modifications thereof, or additions thereto submitted by the Concessionaire to, and expressly approved by NGS.

**"SMC or the "Stadium Management Committee"** means the body nominated by NGS and responsible for management & administration of the development and operations of the Project/ Project Facility, the members of which will be decided by the Government of Kerala.

**"STG"** means the Government of the State of Kerala.

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

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

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

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

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

**“Termination Payment”** means the aggregate of the amounts payable by NGS to the Concessionaire under this Agreement upon Termination including Termination Payment receivable by the Concessionaire pursuant to Article 15 and 16.

**“Tests”** means the tests to be carried out to determine the Project Completion and its certification by the Independent Consultant/ Monitoring Committee/ SMC prior to commencement of commercial operation of the Project.

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

- (a) a sum of Rs. [ ] millions;
- (b) actual capital cost of the Project upon completion of the Project as certified by the Statutory Auditors; or
- (c) total project cost as set forth in Financing Documents.

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

## **1.2 Interpretation**

1.2.1 In this Agreement, unless the context otherwise requires,

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

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

#### 1.2.2 Measurements and Arithmetic Conventions

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

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

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

## **ARTICLE 2 CONCESSION AND PROJECT SITE**

### **2.1 Grant of Concession**

Subject to and in accordance with the terms and conditions set forth in this Agreement, NGS hereby grants to and authorises the Concessionaire to investigate, study, engineer, procure, finance, construct & transfer back basis (the Build & Transfer or BT) or investigate, study, engineer, procure, finance, construct, operate, maintain & transfer back basis (the Build, Operate & Transfer, or BOT), as the case may be, the Project/ Project Facility and to exercise and/ or enjoy the rights, powers, privileges, authorisations and entitlements as set forth in this Agreement (collectively "the **Concession**"). Only the development rights to the Project Site for the period of construction shall form a part of the Concession given to the Concessionaire. Additionally, in case of BOT, the rights for the Project Site will be provided in the form of leasehold interest or licence, as may be approved by NGS, for the Concession Period, which again forms part of the Concession Agreement only. NGS shall cause the owners of the Project Site to lease/ licence to the Concessionaire. The terms of the lease/ licence will allow the Concessionaire appropriate rights to occupy and operate the Project Site under the terms of BOT.

### **2.2 Concession Period**

The Concession hereby granted is for a period of \_\_\_ years commencing from the Commencement Date (the Concession Period) during which the Concessionaire is authorised to implement or implement and operate the Project/ Project Facility in accordance with the provisions hereof. For clearance of doubt, it is clarified that in case of BT, Concession Period shall equal Implementation Period and in case of BOT, Concession Period shall equal Implementation Period & Operations Period. Furthermore, the period of annuity payments, \_\_\_ years, as quoted by the Concessionaire in its Financial Bid, may be different from the Concession, Implementation and Operations Period, which is \_\_\_ years. Provided that;

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

### **2.3 Acceptance of the Concession**

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

### **2.4 Project Site**

- (a) NGS hereby undertakes to handover or cause the owner of the Project Site to handover, to the Concessionaire physical possession of the Project Site free from Encumbrance within 30 days from the date of this Agreement together with the necessary rights of way/ way leaves for the purpose of implementing the Project in accordance with this Agreement.
- (b) NGS confirms that upon the Project Site being handed over pursuant to the preceding sub-article (a) the Concessionaire shall have the exclusive right to enter upon, occupy and use the Project Site and to make at its costs, charges and expenses such development and improvements in the Project Site as may be necessary or appropriate to implement the Project and to provide Project Facility subject to and in accordance with the provisions of this Agreement.

## **2.5 Use of the Project Site**

The usage of the Project Facility and Revenues shall be as per the provisions and guidelines detailed in Article 4 of this Agreement.

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

(b) SMC"s Sports Event

- i. During the Operations Period, the right to use the Play Arena of the Project/ Project Facility shall be as per Article 4 of this Agreement. Such events shall not be conducted as a vehicle of revenue generation.
- ii. During these days, the Concessionaire shall be responsible for maintenance of the civil, electrical, horticulture, landscaping, water and sewerage works at its own resources. SMC shall reimburse the utility bills on electrical, water & fuel supply to the Concessionaire and be responsible for total operation, housekeeping, security and waste management during the event at its own resources. SMC shall also compensate for the damages incurred during this period
- iii. For any such event, some temporary structures and overlays might be required to be installed, for which SMC shall bear all costs. The Concessionaire, however, will be required to assist SMC in planning, installation and deinstallation of the same at its own resources.
- iv. For this event, SMC shall have the exclusive rights and responsibilities in regard to marketing, advertising & broadcasting at the interior as well as exterior of the Play Arena of the Project/ Project Facility.
- v. NGS/ SMC shall provide at least 30 days advance notice to the Concessionaire of its intent to hold such sports event at the Project/ Project Facility.
- vi. SMC"s Sports Event may include the 35th National Games and the Project/ Project Facility should meet the requirements given under the Host City Contract, the relevant part of which is shared with the Concessionaire.

(c) Concessionaire"s Non-Sports Event

During the Operations Period, except during the period of SMC"s Sports Event, the Concessionaire could use any part or the whole of the Play Arena of the Project/ Project Facility for organising any non-sports event for a maximum period of 60 days per annum and not more than 10 days in any one calendar month. If any damage occurs to the Play Area or any other portion of the Project Facility during such usage, the Concessionaire shall rectify the same at its cost. For any such event, the Concessionaire will have the intent to hold such event may display conspicuously displayed appropriate materials or sign hoardings, outside as well as inside the premises of the Project Facility at least 1 day in advance. In case to hold such event the Concessionaire"s has scheduled earlier than 30 days prior to the event, it would need to bring the same to the notice of NGS / SMC within 7 days of fixing such schedule.

## **2.6 Information about the Project Site**

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

## **2.7 Peaceful Possession**

NGS warrants that :

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

## **2.8 Rights and Interest over the Project Site**

- (a) Subject to the provisions of this Agreement and the lease / license agreement, the Concessionaire shall have exclusive rights to the use of the Project Site in accordance with the provisions of this Agreement and for this purpose it may regulate the entry and use of the same by third parties.
- (b) The Concessionaire shall allow access to, and use of the Project Site/ Project Facility for telegraph lines, electric lines or such other public purposes as NGS/ SMC may specify, provided that such access or use and subsequent restoration does not result in a Material Adverse Effect or closure of Project Facility for a period exceeding 120 days and that NGS/ SMC undertakes to ensure that the Project Facility is restored at the cost and expenses of NGS/ SMC as per the Specifications and Standards. For such access or use and subsequent restoration, NGS/ SMC shall have to provide at least 90 days notice to the Concessionaire. In case the period of access/ use and restoration exceeds 120 days, the Concession Period shall get extended by those exceeding number of days.
- (c) The Concessionaire shall not part with or create any Encumbrance on the whole or any part of the Project Site save and except as set forth and permitted under this Agreement provided however that nothing contained herein shall be construed or interpreted as restriction on the right of the Concessionaire to appoint any Contractor for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project/ Project Facility.



### **3.1 Performance Security**

#### **(a) During Implementation Period**

- (i) The Concessionaire shall, for due and punctual performance of its obligations during the Implementation Period, deliver to NGS, simultaneously with the execution of this Agreement a bank guarantee from a scheduled/ nationalized bank, in the form set forth in Schedule J, (the "Performance Security for construction") for a sum equivalent to 5% of the NPV of the annuity quotes in the Financial Bid of the Concessionaire.
- (ii) In the absence of invocation of the Performance Security for construction, the Performance Security shall be returned to the Concessionaire on satisfactory completion of the Defects Liability Period, as certified by the Independent Consultant/ NGS/ SMC.

#### **(b) In case of BOT, during Operations Period**

- (i) The Concessionaire shall, for due and punctual performance of obligations during the Operations Period deliver to NGS / SMC, on or before the COD, another bank guarantee from a scheduled/ nationalized bank, in the form set forth in the said Schedule, (the "Performance Security for operation and maintenance") for a sum equivalent to 1% of the NPV of annuity quotes in the Financial Bid of the Concessionaire.
- (ii) In the absence of invocation of the Performance Security for operation and maintenance, the Performance Security shall be returned to the Concessionaire on satisfactory completion of the Defects Liability Period, as certified by the Independent Consultant/ NGS/ SMC.

### **3.2 Fresh Performance Security**

In the event of the encashment of the Performance Security by SMC/NGS as the case may be pursuant to Encashment Notice issued in accordance with the provisions of Article 16 the Concessionaire shall within 30 (thirty) days of the Encashment Notice furnish to NGS / SMC fresh Performance Security failing which NGS/SMC shall be entitled to terminate this Agreement in accordance with the provisions of Article 16. The provisions set forth in Article 3.1 above shall apply mutatis mutandis to such fresh Performance Security.

**ARTICLE 4  
USAGE OF THE PROJECT FACILITY AND REVENUES**

**4.1 During Implementation Period**

The Concessionaire shall not levy/ demand/ collect any fee or charge from any party for any activity on the Project Site anytime on or before the COD.

**4.2 During Operations Period (if in case of BOT)**

- (i) For the purpose of Operations and Management of the various Project Facilities, the following guidelines shall be applicable including sharing of “Gross Revenues”.
- (ii) Subject to the provisions of this Agreement, the Concessionaire is entitled to levy, demand and collect Fees from the users of the Project facility at the rate agreed with or approved by NGS / SMC. The rate of Fee agreed or approved by NGS / SMC shall be conspicuously displayed outside as well as inside the premises of the Project Facility.

**CENTRAL STADIUM**

Facility	Component	Operation/ Management	Maintenance	Special terms	Share of Gross Revenues
Sports Facilities	Indoor as well as outdoor FOP, Seating, Change rooms and Toilets in the same block	SMC (Stadium Management Committee)	Concessionaire	-	SMC-100%
Support Facilities	Administration block, Guest rooms and Dormitory	SMC	Concessionaire	For any commercial development decided by SMC, first right of refusal to Concessionaire	SMC-100%
Commercial Facilities & Parking	Any commercial space and open as well as covered vehicle parking	Concessionaire	Concessionaire	1/3 <sup>rd</sup> of the built-up Parking Space reserved for Government/ KSSC/ Directorate of Sports vehicles	SMC-10% Concessionaire -90%

**Note:**

The Concessionaire may contract with an outside agency for naming/ branding rights of the whole or any part of the Project/ Project Facility, with prior written approval of NGS /SMC. In that case, NGS / SMC shall get 30% share in the revenues, whether received in cash or kind. The Concessionaire shall make such payment to NGS / SMC through a demand draft within 30 days of receipt of the consideration from the agency.

## **ARTICLE 5 OBLIGATIONS AND UNDERTAKINGS**

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

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

The Concessionaire shall at its own cost and expense:

- (i) investigate, study, construct & transfer back, or investigate, study, construct, operate, maintain & transfer back, or construct & transfer back, or construct, operate, maintain & transfer back, as the case may be, the Project in accordance with the provisions of this Agreement, Good Industry Practices and Applicable Laws;
- (ii) obtain all Applicable Permits in conformity with the Applicable Laws and be in compliance with thereof at all times during the Concession Period;
- (iii) procure and maintain in full force and effect, as necessary, appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used in or incorporated into the Project;
- (iv) ensure and procure that each Project Agreement contains provisions that would entitle NGS or a nominee of NGS to step into such agreement at NGS's discretion, in place and substitution of the Concessionaire in the event of Termination pursuant to the provisions of this Agreement;
- (v) provide all assistance to the Independent Consultant and Monitoring Committee as they may reasonably require for the performance of their duties and services under this Agreement;
- (vi) provide to the Monitoring Committee reports on a regular basis during the Implementation Period and the Operations Period in accordance with the provisions of this Agreement;
- (vii) appoint, supervise, monitor and control the activities of Contractors under their respective Project Agreements as may be necessary;
- (viii) make efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Concessionaire's obligations under this Agreement;
- (ix) develop, implement and administer a surveillance and safety program for the Project/ Project Facility and the users thereof and the Contractors personnel engaged in the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Applicable Laws and Good Industry Practice;
- (x) take all reasonable precautions for the prevention of accidents on or about the Project Site/ Project Facility and provide all reasonable assistance and emergency medical aid to accident victims;
- (xi) not to place or create nor to permit any Contractor or other person claiming through or under the Concessionaire to create or place any Encumbrance over all or any part of the Project Assets, or on any rights of the Concessionaire therein, save and except as expressly set forth in this Agreement;
- (xii) make its own arrangements for quarrying, if necessary, and observe and fulfill the environmental and other requirements under the Applicable Laws and Applicable Permits;
- (xiii) be responsible for safety, soundness and durability of the Project Facility including all structures forming part thereof and their compliance with the Specifications and Standards;
- (xiv) ensure that the Project Site remains free from all encroachments and take all steps necessary to remove encroachments, if any;
- (xv) make payment to Police Department or any Government Agency, if required, for provision of such services as are not provided in the normal course or are available only on payment;

- (xvi) in case of Concession granted on BOT basis, operate and maintain the Project at all times during the Operations Period in conformity with this Agreement including but not limited to the Specifications and Standards, the Maintenance Programme and Good Industry Practice;
- (xvii) remove promptly according to Good Industry Practice, from the Project Site, all surplus construction machinery and materials, waste materials (including, without limitation, hazardous materials and waste water), rubbish and other debris (including without limitation accident debris) and keep the Project Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable Permits;
- (xviii) Transfer back the Project Facility on expiration of the Concession Period.

## **5.2 Obligations of the Concessionaire during Implementation Period**

- (a) The Concessionaire shall, before commencement of construction of the Project;
  - (i) submit to the Independent Consultant with due regard to Project Completion Schedule and Scheduled Project Completion Date, its engineering and construction time schedule, Critical Path Method (CPM)/ Project Evaluation and Review Technique (PERT) charts for the completion of the said activities;
  - (ii) have requisite organisation and designate and appoint suitable officers/ representatives as it may deem appropriate to supervise the Project and to deal with the Independent Consultant/ the Monitoring Committee and to be responsible for all necessary exchange of information required pursuant to this Agreement;
  - (iii) undertake, do and perform all such acts, deeds and things as may be necessary or required to adhere to the Project Completion Schedule and to achieve Project Completion under and in accordance with this Agreement;
  - (iv) construct, provide and maintain a furnished site office accommodation for the Independent Consultant at the Project Site; and
  - (v) provide and maintain an adequately equipped field laboratory as required for the Project Site control on the quality of materials and the Construction Works.
- (b) The Concessionaire shall, at all times, afford access to the Project Site, to the Monitoring Committee, the authorised representatives of NGS, SMC, the Independent Consultant and officer of any Government Agency having jurisdiction over the Project, including those concerned with safety, security or environmental protection to inspect the Project and to investigate any matter within their authority and upon reasonable notice, the Concessionaire shall provide to such persons reasonable assistance necessary to carry out their respective duties and functions.
- (c) The Concessionaire shall be responsible for ensuring that any existing utility on, under or above the Project Site is kept in continuous satisfactory use, if necessary, by the use of suitable temporary or permanent diversions.
- (d) The Concessionaire shall bear all costs and charges for special or temporary rights of way required by it in connection with access to the Project Site. The Concessionaire shall obtain at its cost such facilities on or outside the Project Site as may be required by it for the purposes of the Project and the performance of its obligations under this Agreement .

## **5.3 General Obligations of NGS**

NGS shall:

- (i) handover or cause to be handed over, the physical possession of Project Site together with necessary right of way/ way leaves to the Concessionaire within 30 days from the date of this Agreement, free from any Encumbrance;
- (ii) grant or where appropriate provide necessary assistance to the Concessionaire in securing Applicable Permits;
- (iii) grant in a timely manner all such approvals, permissions and authorisations which the Concessionaire may require or is obliged to seek from NGS in connection with implementation of the Project and the performance of the Concessionaire's obligations under this Agreement;

- (iv) subscribe to the Substitution Agreement within 30 days of intimation by the Concessionaire regarding Financial Close and submission of copies of Financing Documents as per Article 10.1 (c) below;
- (v) ensure peaceful use of the Project Site by the Concessionaire under and in accordance with the provisions of this Agreement without any let or hindrance from NGS or persons claiming through or under it;
- (vi) upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent facilities/ utilities;
- (vii) procure that no barriers are erected or placed by NGS or any Governmental Agency on the Project Facility/ Project Site, except on account of any law and order situation or upon national security considerations;
- (viii) assist the Concessionaire in obtaining police assistance against payment of prescribed costs and charges, if any, for patrolling and provision of security on the Project Site/ Project Facility and implementing this Agreement in accordance with the provisions hereof;
- (ix) observe and comply with all its obligations set forth in this Agreement.

#### **5.4 Project Consideration**

5.4.1 Subject to the provisions of this Agreement, the Concessionaire upon achieving COD for the Project Facilities and in consideration of the Concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, Authority agrees and undertakes to pay to the Concessionaire, for each Annuity Payment Period, on each Annuity Payment Date as set forth in the Annuity Payment Schedule, the sum set forth in the Bid and specified in the Annuity Payment Schedule at Schedule D.

##### **5.4.2 Payment of Annuity**

5.4.2.1 Subject to the provisions of this Clause 5.4 and any other applicable provisions of this Agreement, Authority shall make payment of Annuity to the Concessionaire on each Annuity Payment Date. For avoidance of doubt the number of such Annuities shall not exceed 13, during a period of 13 (Thirteen) years from the Scheduled Project Completion Date.

5.4.2.2 The first Annuity Payment Date shall be the date falling after 12 (twelve) calendar months from COD or the Scheduled Project Completion Date, whichever is later. In case COD is after the Scheduled Project Completion Date, the Annuity Payment Schedule at Schedule D shall be suitably modified. Each Annuity payment period shall be deemed to be a period of 12 (twelve) calendar months from the preceding Annuity Payment date ("**Annuity Payment Period**").

5.4.2.3 Notwithstanding anything contrary contained anywhere in this Agreement, Authority's obligation to pay Annuity shall arise subject to and only upon occurrence of COD.

#### **5.4.3 Submission of invoice and certification**

5.4.3.1 The Concessionaire shall at least 30 days prior to the relevant Annuity Payment Date submit to the Independent Engineer, its invoice, addressed to the Authority for payment of Annuity for the applicable Annuity Payment Period.

5.4.3.2 The Independent Engineer shall after verification and certification of the amount claimed in the invoice, forward the invoice to Authority with necessary documentation recommending payment in full or part thereof so as to reach Authority at-least 15 days prior to the relevant Annuity Payment Date.

5.4.3.3 Upon receipt of the invoice together with recommendation for payment forwarded by the Independent Engineer, Authority shall take all necessary steps and ensure payment of Annuity on the relevant Annuity Payment Date. The mode of payment of Annuity shall be as provided in Clause 5.4.4.

5.4.3.4 For avoidance of doubt, the Parties agree that notwithstanding any dispute which either of them may have as to the amount of invoice/Annuity certified and recommended for payment by the Independent Engineer, the Annuity payable on the relevant Annuity Payment Date shall be that certified by the Independent Engineer. Provided such payment shall be without prejudice to a final adjustment according to the terms on which such dispute is resolved whether amicably or through arbitration in accordance with the provisions of Article 19.

#### **5.4.4 Mode of Payment**

5.4.4.1 The Concessionaire hereby expressly authorises Authority to pay the Annuity, and any other payment which becomes payable by Authority to the Concessionaire under this Agreement directly by the credit to the Escrow Account.

5.4.4.2 The Concessionaire hereby agrees, undertakes and confirms that the payment to the credit of the Escrow Account shall be made by Authority notwithstanding any instructions to the contrary issued or disputes raised by the Concessionaire and such payments made in accordance with this Clause 5.4.4 shall constitute Authority's valid discharge of its Annuity payment obligations under this Agreement and Authority shall to the extent of the payment so made be relieved and discharged of all its obligations in respect of such payments under this Agreement.

## 5.5 Conditions Precedent

- 5.5.1 Save and except as expressly provided in Articles 2.7, 3, 5, 10, 15, 19 and 21 or unless the context otherwise requires the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 5.5 (the “**Conditions Precedent**”).
- 5.5.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 3, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 5.5.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have:
- (a) procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 2.4, Clause 2.7 and;
  - (b) handed over the Site to the Concessionaire, free from Encumbrance, for development of the Project Facilities;
  - (c) executed with the Competent Authority the Project Site Lease Deed ( co-terminus with this Agreement) in favour of the Concessionaire and handed over to the Concessionaire the Vacant Possession of the Project Site along with all Easementary Rights free from Encumbrances in accordance with the terms and conditions of this Agreement, provided that the Concessionaire shall have given a bank guarantee to the Authority as Construction Performance Security in accordance with the terms hereof ;
  - (d) submitted to the Concessionaire a panel of three reputed engineering firms and pursuant to approval by the Concessionaire, appointed one out of such three (3) as Independent Consultant, in accordance with the terms hereof; and
- 5.5.3 The Conditions Precedent required to be satisfied by the Concessionaire prior to the Commencement Date shall be deemed to have been fulfilled when the Concessionaire shall have:
- (a) provided Performance Security to the Authority;
  - (b) executed and procured execution of the Escrow Agreement;
  - (c) executed and procured execution of the Substitution Agreement;
  - (d) procured all the Applicable Permits specified in the respective Schedule unconditionally or if subject to conditions, then all such conditions required to be fulfilled by the date specified therein shall have been satisfied in full and such Applicable Permits are in full force and effect;
  - (e) executed the Financing Agreements and delivered to the Authority 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;
  - (f) delivered to the Authority 3 (three) true copies of the Financial Package and

the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders;

- (g) delivered to the Authority from the selected bidder, their respective confirmation, in original, of the correctness of their representations and warranties set forth in Sub clauses (i) to (v) and (xi) of Article 20 of this Agreement; and delivered to the Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof:
- (h) The Authority shall have received from the Concessionaire copies of the constitutional documents of the Concessionaire duly certified true by an authorised officer of the Concessionaire; and
- (i) The Authority shall have received copies (certified as true copies by a Director of the Concessionaire) of all resolutions adopted by the Board of Directors of the Concessionaire authorizing the execution, delivery and performance by the Concessionaire of this Agreement and each of the Project Agreements.

Provided that upon request in writing by the Concessionaire, the Authority may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 5.5.3. For the avoidance of doubt, the Authority may, in its sole discretion, grant any waiver hereunder with such conditions as it may deem fit.

5.5.4 Each Party shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible.

5.5.5 The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

5.5.6 In the event that (i) the Concessionaire does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 5.5.3 (save and except Clause 5.5.3 (d)) within a period of 180 (one hundred and eighty) days from the date of this Agreement, and (ii) the delay has not occurred as a result of failure to fulfil the obligations under Clause 5.5.2 or other breach of this Agreement by the Authority, or due to Force Majeure, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty percent) of the Performance Security.

Provided that in the event, the Concessionaire is not able to procure all the Applicable Permits as specified in Clause 5.5.3 (d) above within 180 days from the date of this Agreement, it shall be entitled to a further period not exceeding 180 (one hundred and eighty) days without any obligation to pay any Damages. However, in the event of Concessionaire failing to procure all the Applicable Permits as specified in Clause 5.5.3 (d) above within the extended period provided herein, Concessionaire shall be entitled for further period subject to payment of Damages in an amount calculated at the rate of 0.2% (zero point two per cent) of the Performance Security for each day's delay



until the fulfilment of such Conditions Precedent and further subject to a maximum of 20% (twenty percent) of the Performance Security.

## **ARTICLE 6**

### **INDEPENDENT CONSULTANT**

#### **6.1 Appointment of Independent Consultant**

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

#### **6.2 Remuneration**

The remuneration, cost and expenses of the Independent Consultant shall be paid by NGS / SMC and one-half of such remuneration, cost and expenses shall be reimbursed by the Concessionaire to NGS / SMC, within 15 days of receiving a statement of such remuneration, cost and expenses from NGS / SMC.

#### **6.3 Termination and Fresh Appointment**

- 6.3.1 NGS / SMC may, in its discretion, terminate the appointment of the Independent Consultant at any time, but only after appointment of another Independent Consultant in accordance with sub-article (a) and (b) of Article 6.1 above;
- 6.3.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the Authority and seek termination of the appointment of the Independent Engineer. Upon receipt of such representation, the Authority shall hold a tripartite meeting with the Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the Authority and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the appointment of the Independent Engineer is terminated hereunder, the Authority shall appoint forthwith another Independent Engineer in accordance with Clause 6.1

#### **6.4 Dispute Resolution**

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

## **ARTICLE 7 MONITORING COMMITTEE**

### **7.1 Constitution**

The progress of works shall be certified by a Monitoring Committee, the constitution of which will be decided later as may be recommended by the Government of Kerala and its authorized representatives.

### **7.2 Function and Powers**

The Monitoring Committee shall have the powers, in addition to the functioning responsibility prescribed/ conferred under this Agreement, to settle any dispute arising between NGS/ SMC and the Concessionaire. The various duties of the Monitoring Committee are mentioned in the appropriate sections in this Agreement.

### **7.3 Expenses**

The expenses for appointment and monitoring by the Monitoring Committee shall be borne by the individual parties for their representatives (i.e. NGS shall bear the expenses for their respective representative and the Concessionaire shall bear the expenses for its representative). All expenses related to the appointment and monitoring by the independent member and all other common expenses incurred by the Monitoring Committee shall be between the NGS and Concessionaire.

## **ARTICLE 8 DRAWINGS**

### **8.1 Preparation of Drawings**

The Concessionaire should adopt without any modifications the Drawings provided by NGS at the time of signing the Agreement, unless prior written approval of NGS and/ or Monitoring Committee and/ or Independent Consultant is obtained. Notwithstanding such adoption, the Concessionaire shall be solely responsible for the adequacy of the Drawings.

### **8.2 Review and Approval of Drawings**

- (a) The Concessionaire shall, within 30 days of signing of this Agreement, engage a structural engineer from a reputed Government institution like IIT/NIT, for proof checking and validation of the drawings provided by NGS.
- (b) Within 90 (ninety) days of the COD, the Concessionaire shall furnish to NGS three copies of "as built" Drawings duly vetted by the Independent Consultant reflecting the Project as actually designed, engineered and constructed, including without limitation an "as built" survey illustrating the layout of the Project and setback lines, if any, of the buildings and structures forming part of Project Facility.

**ARTICLE 9**  
**PROJECT IMPLEMENTATION AND OPERATIONS**

**9.1 Monitoring and Supervision during Implementation Period**

- (a) During the Implementation Period, the Concessionaire shall furnish to the Monitoring Committee quarterly reports on actual progress of the Construction Works and furnish any other relevant information as may reasonably be required by the Monitoring Committee.
- (b) For the purposes of determining that Construction Works are being undertaken in accordance with Specifications and Standards and Good Industry Practice and for quality assurance, the Concessionaire shall carry out such Tests at such time and frequency and in such manner as may be required by the Independent Consultant or as may be necessary in accordance with Good Industry Practice. The Concessionaire shall with due diligence carry out all such Tests in accordance with the instructions and under the supervision of the Independent Consultant. Without limiting the Concessionaire's obligations, the Concessionaire shall promptly carry out such remedial measures as may be necessary to cure the defects or deficiencies, if any, indicated in such Test results. The Independent Consultant shall furnish the results of such Tests to the Monitoring Committee within seven days thereof and also promptly report to the Monitoring Committee the remedial measures taken by the Concessionaire to cure the defects/deficiencies if any indicated in the Test results.
- (c) If the Independent Consultant reasonably determines that the rate of progress of the construction of the Project is such that the Project Completion is not feasible on or before the Scheduled Project Completion Date, it shall so notify the Concessionaire and the Monitoring Committee. Thereupon, the Concessionaire shall within 15 (fifteen) days thereof notify the Monitoring Committee and the Independent Consultant about the steps it proposes to take to expedite progress and the period within which it shall achieve COD.
- (d) Upon recommendation of the Independent Consultant, Monitoring Committee may, by written notice, require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if in the reasonable opinion of the Monitoring Committee such work is being carried on in a manner which threatens the safety of the Construction Works or the users of the Project.
- (e) The Concessionaire shall upon, instructions of the Monitoring Committee pursuant to sub-article (d) above suspend the Construction Works or any part thereof as the case may be, for such time and in such manner as may be specified by Monitoring Committee and the costs if any incurred by NGS/ SMC during such suspension to properly protect and secure the Construction Works or such part thereof as is necessary in the opinion of the Monitoring Committee, shall be borne by the Concessionaire.
- (f) If the Monitoring Committee issues any instructions requiring suspension of Construction Works for any reason other than default or breach of this Agreement by the Concessionaire the Project Completion Schedule and the Scheduled Project Completion Date shall be extended by the period of suspension.

**9.2 Project Completion**

- (a) The Project shall be complete only when the Completion Certificate or the Provisional Certificate is issued by the Independent Consultant in accordance with the provisions of Article 9.3 (the "Project Completion").
- (b) The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the provisions of this Agreement on a date not later than 24 months from the Commencement Date ("the Scheduled Project Completion Date").
- (c) If the Project Completion is not achieved by the Scheduled Project Completion Date for any reason other than Force Majeure or reasons attributable to NGS, the Concessionaire shall be liable to pay liquidated damages for delay beyond the Scheduled Project Completion Date, for a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day. Provided that nothing contained in

this sub-article (c) shall be deemed or construed to authorise any delay in achieving Project Completion.

- (d) If the COD does not occur within 90 days from the Scheduled Project Completion Date, NGS shall subject to the provisions of this Agreement relating to excuse from performance of the Concessionaire's obligations hereunder, be entitled to Terminate this Agreement in accordance with the provisions of Article 16.2.
- (e) Similarly, if the Concessionaire is not able to achieve 25% completion by the end of Year 1 from the Commencement Date, the Concessionaire shall pay liquidated damages as per clause 9.2 c through a demand draft to NGS/ SMC within 15 days of notice for the same being served by NGS/ SMC. In case the Concessionaire is able to achieved Project Completion by the Scheduled Project Completion Date, the amount of liquidated damages will be refunded back to the Concessionaire within 30 days of such certification by the Independent Consultant.

### 9.3 Tests

- (a) At least 30 (thirty) days prior to the likely completion of the Project, the Concessionaire shall notify the Independent Consultant and the Monitoring Committee of the same and shall give notice to them of its intent to conduct Tests. The Concessionaire shall give the Independent Consultant and the Monitoring Committee at least 10 (ten) days prior notice of the actual date on which it intends to commence the Tests and at least 7 (seven) days prior notice of the commencement date of any subsequent Tests.
- (b) All Tests shall be conducted in accordance with the Applicable Laws and Applicable Permits. The Monitoring Committee shall have the right to suspend or postpone any Test if it is reasonably anticipated or determined during the course of the Test that the performance of the Project or any part thereof does not meet the Specifications and Standards. The Monitoring Committee may designate a representative with suitable qualifications and experience to witness and observe the Tests.
- (c) The Independent Consultant shall monitor the results of the Tests to determine the compliance of the Project with the Specifications and Standards and shall provide to the Monitoring Committee copies of all Test data including detailed Test results.
- (d) Upon the Independent Consultant determining the Tests to be successful, it shall forthwith issue to the Concessionaire a certificate (the "Completion Certificate "), with a copy to NGS.
- (e) The Independent Consultant may at the request of the Concessionaire issue a provisional certificate of completion ("Provisional Certificate") if the Tests are successful and all parts of Project can be legally, safely and reliably opened for commercial operation though certain works or things forming part thereof are not yet complete. In such an event, Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Consultant and the Concessionaire ("Punch List"). All Punch List items shall be completed by the Concessionaire within 30 (thirty) days of the date of issue of such Provisional Certificate. Upon completion of all Punch List items to the satisfaction of the Independent Consultant, it shall issue the Completion Certificate to the Concessionaire with a copy to NGS. In the event of the Concessionaire's failure to complete the Punch List items within the said period, NGS may, without prejudice to any other rights or remedy available to it under this Agreement, have such items completed at the risk and costs of the Concessionaire. The Concessionaire shall reimburse to NGS on demand the entire costs incurred by NGS in completing the Punch List items.
- (f) If the Independent Consultant certifies that it is unable to issue the Completion Certificate or Provisional Certificate because of events or circumstances which excuse the performance of the Concessionaire's obligations in accordance with this Agreement and as a consequence thereof the Tests could not be held or had to be suspended, the Concessionaire shall re-schedule the Tests and hold the same as soon as reasonably practicable.
- (g) The Concessionaire shall bear all the expenses relating to Tests under this Agreement.

#### **9.4 Operation and Maintenance**

In case of the Concession granted on BOT basis, the Concessionaire shall operate and maintain the Project/ Project Facility by itself, or through a Contractor and if required, modify, repair or otherwise make improvements to the Project/ Project Facility to comply with Specifications and Standards, and other requirements set forth in this Agreement, Good Industry Practice, Applicable Laws, Applicable Permits and international associations" for the respective sport and manufacturers" guidelines & instructions with respect to the flooring, equipment etc. More specifically, the Concessionaire shall be responsible for:

- (i) ensuring smooth and uninterrupted sports operations during normal operating conditions;
- (ii) charging, collecting and appropriating Fee in accordance with this Agreement;
- (iii) minimizing disruption to users in the event of incidents affecting the safety and use of the Project/ Project Facility by providing a rapid and effective response and for this purpose maintaining liaison with emergency services;
- (iv) undertaking routine maintenance including prompt repairs and replacement of nets, flooring, sports lighting, sports equipment, potholes, cracks, concrete joints, drains, line marking, lighting and signage;
- (v) undertaking maintenance works in accordance with Maintenance Manual and the Maintenance Programme;
- (vi) preventing with the assistance of concerned law enforcement agencies where necessary, any unauthorised entry to and exit from the Project;
- (vii) preventing with the assistance of the concerned law enforcement agencies where necessary, any encroachments on the Project/ Project Site and preserving the right of way of the Project;
- (viii) adherence to the safety standards applicable under all relevant laws.

#### **9.5 Maintenance Manual**

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

#### **9.6 Maintenance Programme**

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

## 9.7 Emergency De-commissioning

- (a) If, in the reasonable opinion of the Concessionaire, there exists an Emergency which warrants decommissioning and closure to construction of whole or any part of the Project/ Project Facility, the Concessionaire shall be entitled to de-commission and close the whole or the relevant part of the Project construction for so long as such Emergency and the consequences thereof warrant. Provided, however, that such decommissioning will be notified to the Independent Consultant promptly. The Independent Consultant may issue such directions as it may deem appropriate to the Concessionaire for dealing with such Emergency and the Concessionaire shall abide by the same.
- (b) The Concessionaire shall re-commission the Project/ Project Facility or the affected part thereof as quickly as practicable after the Emergency leading to its de-commissioning and closure has ceased to exist.
- (c) The Concessionaire shall not close any part of the Project/ Project Facility for undertaking maintenance or repair works except with the prior written approval of NGS / SMC. Such approval shall be sought by the Concessionaire through a written request to be made at least 7 (seven) days before the proposed closure of part and shall be accompanied by particulars indicating the nature and extent of repair works and the arrangements made for safe movement of users, the length and section required to be closed and the period of closure. The Concessionaire shall also furnish particulars indicating the minimum time required for completing such repair works. Within 5 (five) days of receiving such request, NGS / SMC shall grant permission with such modifications as it may deem necessary. Upon receiving such permission, the Concessionaire shall be entitled to close the part in accordance with such permission and re-open it within the period stipulated in such permission.
- (d) Save and except as otherwise expressly provided in this Agreement, if the Project or any part thereof shall suffer any loss or damage during the Concession Period, from any cause whatsoever, the Concessionaire shall, at its cost and expense rectify and remedy such loss or damage in a manner so as to make the Project conform in every respect to the Specifications and Standards, quality and performance as prescribed by this Agreement.
- (e) In the event the Concessionaire does not maintain and/ or repair the Project or part thereof upto and in accordance with the Specifications and Standards and/ or in accordance with the Maintenance Programme or the Maintenance Manual or the O&M Inspection Report, as the case may be, and shall have failed to commence remedial works within (30) thirty days of notice in this behalf from NGS / SMC, NGS / SMC shall, without prejudice to its rights/ remedies under this Agreement, including Termination, be entitled to undertake to cause the repair and maintenance of the Project at the risk and cost of the Concessionaire. The Concessionaire shall, reimburse to NGS / SMC within seven days of demand the costs and expenses incurred for undertaking such repairs and maintenance. .
- (f) If the Concessionaire commences any works for curing any defects or deficiencies in the Project, it shall complete such works expeditiously in accordance with Good Industry Practice.
- (g) The Concessionaire shall not be considered in breach of its obligations under this Agreement if any part of the Project is not available to users on account of any of the following for the duration thereof:
  - (i) Force Majeure Event;
  - (ii) measures taken to ensure the safe use of the Project except when unsafe conditions occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
  - (iii) compliance with a request from NGS / SMC or the directions of any Government Agency the effect of which is to close all or any part of the Project.

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



## **9.8 Monitoring and Supervision during Operations Period**

- (a) In case of the Concession granted on DBOT basis, the Concessionaire shall undertake periodic inspection of the Project in accordance with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and this Agreement and shall submit reports of such inspection ("Maintenance Reports") to NGS, the Monitoring Committee and SMC.

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

**ARTICLE 10**  
**FINANCING ARRANGEMENT**

**10.1 Financing Arrangement**

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

**10.2 Amendments to Financing Documents**

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

**ARTICLE 11  
SUPERVISION**

All works under or in course of execution/ or executed in pursuance of this Agreement shall at all times be open to the inspection and supervision by the authorised representatives of NGS/ SMC. The Concessionaire shall at all the times during the usual working hours and at all other times at which reasonable notice of the intention of the representatives to visit the work shall have been given to the Concessionaire, have a responsible agent/ representative present at the Project Site for that purpose.

## **ARTICLE 12 INSURANCES**

### **12.1 Insurance during the Implementation Period**

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

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

### **12.2 Insurance during the Operations Period**

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

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

### **12.3 Insurance Companies**

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

### **12.4 Evidence of Insurance Cover**

The Concessionaire shall, from time to time, provide to NGS copies of all insurance policies (or appropriate endorsements, certifications or other satisfactory evidence of insurance) obtained by the Concessionaire in accordance with this Agreement.

### **12.5 Application of Insurance Proceeds**

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

### **12.6 Validity of the Insurance Cover**

The Concessionaire shall pay the premium payable on such insurance policy(ies) so as to keep the policy(ies) in force and valid throughout the Concession Period and furnish copies of the same to NGS/SMC. Each insurance policy shall provide that the same shall not be cancelled or terminated unless 10 Days' clear notice of cancellation is provided to NGS/SMC in writing. If at any time the Concessionaire fails to purchase and maintain in full force and

effect any and all of the insurances required under this Agreement, NGS/ SMC may at its option purchase and maintain such insurance and all sums incurred by the NGS/ SMC therefore shall be reimbursed by the Concessionaire forthwith on demand, failing which the same shall be recovered by the NGS/ SMC by exercising right of set off or otherwise.

**ARTICLE 13  
CHANGE OF SCOPE**

**13.1 Change of Scope**

NGS/ SMC shall be competent to make addition/ deletion to the works and services stated under the scope of the Project as contemplated by this Agreement ("Change of Scope"), without making any additional payment for the same to the Concessionaire, provided such changes do not require expenditure exceeding 5% of the NPV of the annuity quotes and do not adversely affect the Scheduled Project Completion Date. All such changes shall be made by NGS/ SMC by an order (the "Change of Scope Order") issued in accordance with the procedure set forth in Article 13.2. If the increase/decrease in the scope requires increase/decrease in the expenditure beyond 5% of the NPV of the annuity quotes, such

changes shall be mutually agreed by NGS/SMC and Concessionaire for adjustment in the annuity payments for increase or decrease as the case may be as per procedure set forth in the Article 13.3. Any Dispute regarding the change of scope shall be resolved in accordance with the Dispute Resolution Procedure. Any works or services which are provided under and in accordance with this Article 13 shall form part of the Project Facilities and the provisions of this Agreement shall apply *mutatis mutandis* to such works or services.

**13.2 Procedure for Change of Scope within 5%**

- (a) NGS/ SMC shall whenever it desires provision of addition/ deletion of works and services within 5% of the NPV of the annuity quotes, issue to the Concessionaire a notice of Change of Scope (the "Change of Scope Notice") through the Independent Consultant.
- (b) Upon receipt of Change of Scope Notice, the Concessionaire shall, within a period of 15 (fifteen) days, provide to the Independent Consultant such information as is necessary and reasonable together with preliminary documentation in support of the following:
  - (i) the impact which the Change of Scope is likely to have on the Project Completion Schedule if the work is required to be carried out before COD, and
  - (ii) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the Authority to its contractors, along with the proposed premium/discount on such rates.
- (c) Independent Consultant shall review the information provided by the Concessionaire, assess the change in quantities of items of work, verify the analysis of rates if required, determine the additional cost to the Concessionaire as a result of such Change of Scope in the case of addition. The Independent Consultant shall communicate its recommendation to the Monitoring Committee within a period of 15 (fifteen) days from the receipt of information from the Concessionaire. NGS/ SMC shall issue the Change of Scope Order within a period of 15 (fifteen) days from the date of recommendation made by the Independent Consultant in accordance with preceding sub-article (c) above.
- (d) The Change of Scope Order shall be effective and binding upon receipt thereof by the Concessionaire. Notwithstanding a Dispute regarding cost and time for implementation of such order, the Concessionaire shall proceed with the performance of such order promptly following receipt thereof.
- (e) All calculations by the Concessionaire pursuant to this Article 13.2 shall be

supported by such documentation as is reasonably sufficient for Independent Consultant to determine the accuracy thereof, including invoices from Contractors and certification of such calculations by the Statutory Auditors.

### **13.3 Procedure for Change of Scope beyond 5%**

- (a) NGS/ SMC shall whenever it desires provision of addition/ deletion of works and services beyond 5%, issue to the Concessionaire a notice of Change of Scope (the "Change of Scope Notice") through the Independent Consultant.
- (b) Upon receipt of Change of Scope Notice, the Concessionaire shall, within a period of 15 (fifteen) days, provide to the Independent Consultant such information as is necessary and reasonable together with preliminary documentation in support of the following:
  - (i) the impact which the Change of Scope is likely to have on the Project Completion Schedule if the work is required to be carried out before COD, and
  - (ii) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the Authority to its contractors, along with the proposed premium/discount on such rates.
- (c) Independent Consultant shall review the information provided by the Concessionaire, assess the change in quantities of items of work, verify the analysis of rates if required, determine the addition/reduction in the cost to the Concessionaire as a result of such Change of Scope. The Independent Consultant shall communicate its recommendation to the Monitoring Committee within a period of 15 (fifteen) days from the receipt of information from the Concessionaire.
- (d) NGS/ SMC shall issue the Change of Scope Order within a period of 15 (fifteen) days from the date of recommendation made by the Independent Consultant in accordance with preceding sub-article (c) above.
- (e) The Change of Scope Order shall be effective and binding upon receipt thereof by the Concessionaire. Notwithstanding a Dispute regarding cost and time for implementation of such order, the Concessionaire shall proceed with the performance of such order promptly following receipt thereof. Any Dispute regarding the extension in the Concession Period recommended by the Independent Consultant shall be resolved in accordance with the Dispute Resolution Procedure.
- (f) All calculations by the Concessionaire pursuant to this Article 13.2 shall be supported by such documentation as is reasonably sufficient for Independent Consultant to determine the accuracy thereof, including invoices from Contractors and certification of such calculations by the Statutory Auditors.
- (g) In case of increase in cost due to Change of Scope beyond 5% of the NPV of the annuity quotes on cumulative basis, Concessionaire shall be compensated for the additional cost beyond 5% by increase in impending annuity payment, keeping the annuity period unchanged.
- (h) In the case of reduction in cost due to Change of Scope beyond 5% of the NPV of the annuity quotes on cumulative basis, the impending annuity payment shall be reduced to cover the effect on the cost beyond 5% keeping the annuity period unchanged.

### **13.4 Change of Scope request by Concessionaire**

If the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved infrastructure and services, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings thereof in accordance with this Article 13 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope.



**ARTICLE 14**  
**CAPACITY AUGMENTATION**

- 14.1 NGS/ SMC may at any time after COD decide to augment/ increase the capacity of the Project (Capacity Augmentation) with a view to provide the desired level of service to the users of the Project Facility.
- 14.2 NGS/ SMC shall invite proposals from eligible Persons for Capacity Augmentation. The Concessionaire shall have option to submit its proposal for Capacity Augmentation.
- 14.3 In case the Concessionaire, after participating in the bidding procedure, fails to give the lowest offer, the Concessionaire shall be given the first right of refusal to match the preferred offer. If the Concessionaire matches the preferred offer the Parties shall enter into a suitable agreement supplemental to this Agreement to give effect to the changes in scope of the Project, Concession Period and all other necessary and consequential changes. In such an event the Concessionaire shall pay to the bidder who had made the lowest offer sum equivalent to 0.1% of the estimated cost of Capacity Augmentation towards bidding costs incurred by such bidder.
- 14.4 In case the Concessionaire wishes to augment/ increase the capacity of the Project at its own resources with a view to provide the desired level of service to the users of the Project Facility, the same shall be undertaken only after prior written approval of NGS / SMC.

## **ARTICLE 15 FORCE MAJEURE**

### **15.1 Force Majeure Event**

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

### **15.2 Non Political Event.**

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

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

### **15.3 Indirect Political Event**

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

- (i) An act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion, or politically motivated sabotage which prevents Construction of Works by the Concessionaire for a period exceeding a continuous period of 7 (seven) days;
- (ii) Industry wide or state wide or India wide strikes or industrial action which prevents Construction of Works by the Concessionaire for a period exceeding a continuous period of 7(seven) days; or
- (iii) Any public agitation which prevents Construction of Works by the Concessionaire for a period exceeding a continuous period of 7 (seven) days.

### **15.4 Political Event**

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

- (i) Change in Law, only when provisions of Article 17 cannot be applied;

- (ii) Expropriation or compulsory acquisition by any Government Agency of any Project Assets or rights of the Concessionaire or of the Contractors; or
- (iii) Any unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is condition precedent) provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits.

#### **15.5 Effect of Force Majeure Event.**

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

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

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

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

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

For avoidance of doubt, Force Majeure Costs shall not include any debt repayment obligations but shall include interest payments on such debt and all other costs directly attributable to the Force Majeure Event.

#### **15.7 Termination**

If a Force Majeure Event continues or is in the reasonable judgement of the Parties is likely to continue beyond a period 120 days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms. If the Parties are

unable to reach an agreement in this regard, the Affected Party shall after the expiry of the said period of 120 days, be entitled to terminate this Agreement by issuing Termination Notice.

#### **15.8 Termination Payment for Force Majeure Events**

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

- (a) If the Termination is on account of a Non Political Event, the Concessionaire shall be entitled to receive from NGS / SMC by way of Termination Payment an amount equal to 90% of the Debt Due less pending insurance claims, if any. Provided that in the event such insurance claims or any part thereof are not admitted and paid, the Concessionaire shall be entitled to receive from NGS / SMC further sum equal to 90% of amount of such claims not admitted.
- (b) If the Termination is on account of an Indirect Political Event, the Concessionaire shall be entitled to receive from NGS / SMC by way of Termination Payment an amount equal to:
  - (i) the total Debt Due, less pending Insurance claims, if any. Provided, however, that if any of such insurance claims are not admitted and paid, the Concessionaire shall be entitled to receive from NGS / SMC further sum equal to 80%(eighty percent) of such claims not admitted, plus
  - (ii) 110% (one hundred ten percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived shall be reduced every year by 7.5%(seven and half percent) per annum.
- (c) If the Termination of this Agreement is on account of a Political Event, the Concessionaire shall be entitled to receive from NGS / SMC by way of Termination Payment an amount equal to:
  - (i) the total Debt Due, plus
  - (ii) 150% (one hundred fifty percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Commencement Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year, and the adjusted amount so arrived at shall be reduced by 7.5% (seven and half percent) per annum.

#### **15.9 Dispute Resolution**

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

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

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

#### **15.11 Duty to Report**

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

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

#### **15.12 Excuse from performance of obligations**

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

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

**ARTICLE 16**  
**EVENTS OF DEFAULT AND TERMINATION**

**16.1 Event of Default**

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

**a) Concessionaire Event of Default**

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

- (1) The Concessionaire fails to commence the Construction Works within 30 days from the Commencement Date.
- (2) The Concessionaire fails to achieve COD within 180 days from the Scheduled Project Completion Date.
- (3) Any representation made or warranties given by the Concessionaire under this Agreement is found to be false or misleading.
- (4) The Concessionaire creates any Encumbrance on the Project Site/ Project Facility in favour of any Person save and except as otherwise expressly permitted under Article 21.1.
- (5) The transfer, pursuant to law of either (a) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or (b) all or material part of the Concessionaire except where such transfer in the reasonable opinion of NGS/ SMC does not affect the ability of the Concessionaire to perform, and the Concessionaire has the financial and technical capability to perform, its material obligations under the Project Agreements.
- (6) A resolution is passed by the shareholders of the Concessionaire for the voluntary winding up of the Concessionaire.
- (7) Any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction made with prior approval of NGS / SMC, provided that, as part of such amalgamation or reconstruction, the property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements, and provided that:
  - (i) the amalgamated or reconstructed entity has the technical capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
  - (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at Commencement Date; and
  - (iii) each of the Project Agreements remains in full force and effect.
- (8) A default has occurred under any of the Financing Documents and any of the Lenders has recalled its financial assistance and demanded payment of the amounts outstanding under the Financing Documents or any of them as applicable.
- (9) The Concessionaire suspends or abandons the operations of the Project without the prior consent of NGS/ SMC, provided that the Concessionaire shall be deemed not to have suspended/ abandoned operation if such suspension/ abandonment was (i) as a result of Force Majeure Event and is only for the period such Force Majeure is continuing, or (ii) is on account of a breach of its obligations under this Agreement by NGS/ SMC.
- (10) The Concessionaire repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.

- (11) The Concessionaire suffers an attachment being levied on any of its assets causing a Material Adverse Affect on the Project and such attachment continues for a period exceeding 45 days.
- (12) The Concessionaire has delayed any payment that has fallen due under this Agreement and if such delay exceeds 90(ninety) days.
- (13) The Concessionaire is otherwise in Material Breach of this Agreement.

**(b) NGS Event of Default.**

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

- (1) NGS is in Material Breach of this Agreement and has failed to cure such breach within 60 (sixty) days of receipt of notice in that behalf from the Concessionaire;
- (2) NGS repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.
- (3) NGS or STG or any Governmental Agency has by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligations by the Concessionaire and has failed to cure the same within 60 days of notice thereof by the Concessionaire.
- (4) NGS has delayed payment of any amount that has fallen due in terms of this Agreement beyond 90 (ninety) days.
- (5) Any representation made or warranties given by the NGS under this Agreement is found to be false or misleading

**16.2 Termination due to Event of Default**

**(a) Termination for Concessionaire Event of Default**

- (1) Without prejudice to any other right or remedy which NGS may have in respect thereof under this Agreement, upon the occurrence of a Concessionaire Event of Default, NGS shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire,  
provided that before issuing the Termination Notice, NGS shall by a notice in writing inform the Concessionaire of its intention to issue the Termination Notice (the "**Preliminary Notice**"). In case the underlying breach/default is not cured within a period of 60(sixty) days from the date of the Preliminary Notice (Cure Period) NGS shall be entitled, to terminate this Agreement by issuing the Termination Notice. Provided further, that
  - (a) if the default is not cured within 30(thirty) days of the Preliminary Notice, NGS shall be entitled to encash the Performance Security with a notice to the Concessionaire (Encashment Notice),
  - (b) if the default is not cured within 30(thirty) days of the Encashment Notice and a fresh Performance Security is not furnished within the same period in accordance with Article 3.2, NGS shall subject to the provisions of the Substitution Agreement be entitled to issue the Termination Notice.
- (2) The following shall apply in respect of cure of any of the defaults and/or breaches of this Agreement :
  - (i) The Cure Period provided in this Agreement shall not relieve the Concessionaire from liability for damages caused by its breach or default;
  - (ii) The Cure Period shall not in any way be extended by any period of suspension under this Agreement;
  - (iii) If the cure of any breach by the Concessionaire requires any reasonable action by Concessionaire that is subject to approval by NGS or the Government Agency hereunder the applicable Cure Period shall be extended

by the period taken by NGS or the Government Agency to accord the required approval.



- (3) In case of the Concession granted on BOT basis, upon Termination by NGS on account of occurrence of a Concessionaire Event of Default during the Operations Period, the NGS shall pay to the Concessionaire by way of Termination Payment an amount equal to 90% of the Debt Due less pending insurance claims, if any. Provided, however, that in the event of such insurance claims or any part thereof are not admitted and paid, the Concessionaire shall be entitled to receive from NGS further sum equal to 80%(eighty percent) of amount of such claims not admitted.

**(b) Termination for NGS Events of Default**

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

**16.3 Rights of NGS/SMC on Termination**

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

- (i) take possession and control of Project Assets forthwith;
- (ii) prohibit the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Project Assets/dealing with or any part thereof;
- (iii) step in and succeed upon election by NGS without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as NGS may in its discretion deem appropriate with effect from the date of communication of such election to the counter party to the relative Project Agreements. Provided any sums claimed by such counter party as being due and owing for work and services performed or accruing on account of any act, omission or event prior to such date of election shall and shall always constitute debt between the Concessionaire and such counter party and NGS shall in no way or manner be liable or responsible for such sums. The Concessionaire shall ensure that the Project Agreements contain provisions necessary to give effect to the provision of this Article 16.3.

**16.4 Termination Payments**

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

**16.5 Mode of Payment**

Notwithstanding any instructions to the contrary issued or any dispute raised by the Concessionaire, the Termination Payment, and all other payments that would become payable by NGS under any of the provisions of this Agreement shall, so long as the Debt Due is remaining outstanding, be made only by way of credit directly to a bank account designated therefor by the Lenders and advised to NGS and the Concessionaire in writing. Any payment

so made shall to the extent of such payment constitute a valid discharge to NGS of its obligations towards the Concessionaire with regard to the Termination Payment and payment of any other monies due hereunder.

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

**ARTICLE 17  
CHANGE IN LAW**

**17.1 Change in Law**

If as a result of Change in Law, the Concessionaire incurs an increase/ in costs or reduction in net after tax return or other financial burden, the aggregate financial effect of which is greater or lower by 25% of the NPV of the annuity quotes in any Accounting Year, the Concessionaire may notify the same to NGS/ SMC/ Monitoring Committee and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. NGS/SMC/Monitoring Committee may also initiate the above procedure as deemed appropriate.

**17.2 Extension of Concession Period**

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

**ARTICLE 18**  
**HANDOVER AND DEFECT LIABILITY PERIOD**

**18.1 Handing Over of the Project Assets**

Upon the expiry of the Concession by efflux of time and in the normal course, the Concessionaire shall at the end of the Concession Period, handover vacant and peaceful possession of the Project Assets including Project Site/ Facility at no cost to NGS.

**18.2 Joint Inspection and Removal of Deficiency**

The handing over process shall be initiated atleast 1 month before COD by a joint inspection by the Independent Consultant and the Concessionaire. The Independent Consultant shall, within 7 days of such inspection prepare and furnish to the Concessionaire a list of works/ jobs/ additions/ alterations, if any, to be carried out to bring the Project to the prescribed level of service condition at least 7 days prior to COD. In case the Concessionaire fails to carry out the above works, within the stipulated time period, the NGS shall be at liberty to have these works executed by any other Person at the risk and cost of the Concessionaire and any cost incurred by NGS in this regard shall be reimbursed by the Concessionaire to NGS within 7 days of receipt of demand. For this purpose, NGS shall, without prejudice to any other right/ remedy available to it under this Agreement, have the right to appropriate the Performance Security and/ or to set off any amounts due, if any, and payable by NGS to the Concessionaire to the extent required/ available and to recover deficit amount, if any, from the Concessionaire.

**18.3 Defect Liability Period**

18.3.1 The Defect Liability Period shall, in regard to

- a. water-proofing/ wet-areas defects shall be 5 years ; and
- b. other defects be 1 year,

after the successful handover of the Project Facility back to NGS/ SMC on completion of the Concession Period.

18.3.2 The Concessionaire shall, at its own risk and cost, make good, any defects and/ or complete left over work as required by the Independent Consultant and/ or Monitoring Committee and/ or SMC during the Defect Liability Period.

18.3.3 In the event the Concessionaire is unable to remedy the defect within the timelines specified by the Independent Consultant and/ or Monitoring Committee and/ or SMC, the Concessionaire shall be liable to pay damages of a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day in remedying the defect. The Concessionaire shall deposit this amount of penalty within 7 days from the date of notification by SMC of such default, failing which NGS/ SMC shall be free, without prejudice to its other rights and remedies, to invoke the Performance Security and / or to recover from any sum due or may become to the Concessionaire.

## **ARTICLE 19 DISPUTE RESOLUTION**

### **19.1 Amicable Resolution**

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

### **19.2 Arbitration**

#### **a) Arbitrators**

Any Dispute which is not resolved amicably as provided in Article 19.1 shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

#### **b) Place of Arbitration**

The place of arbitration shall be anywhere in India at Thiruvananthapuram or such other place as may be mutually agreed upon, by the Concessionaire and NGS from time to time.

#### **c) English Language**

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

#### **d) Procedure**

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

#### **e) Enforcement of Award**

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

#### **f) Fees and Expenses**

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

#### **g) Performance during Arbitration**

Pending the submission of and/or decision on a Dispute, difference or claim or until the arbitral award is published, the Parties shall continue to perform all of their obligations

under this Agreement without prejudice to a final adjustment in accordance with such award.

**ARTICLE 20**  
**REPRESENTATIONS AND WARRANTIES**

**20.1 Representations and Warranties of the Concessionaire**

The Concessionaire represents and warrants to NGS 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 and to carry out the transactions contemplated hereby;
- (iii) it has taken all necessary corporate and other action under Applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement;
- (iv) it has the financial standing and capacity to undertake the Project;
- (v) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (vi) it is subject to civil and commercial laws of India with respect to this Agreement and it hereby expressly and irrevocably waives any immunity in any jurisdiction in respect thereof;
- (vii) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under or accelerate performance required by any of the terms of the Concessionaire's Memorandum and Articles of Association or any member of the Consortium or any Applicable Laws or any covenant, agreement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (viii) there are no actions, suits, proceedings, or investigations pending or, to the Concessionaire's knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the breach of or constitute a default of the Concessionaire under this Agreement or which individually or in the aggregate may result in any Material Adverse Effect;
- (ix) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Agency which may result in any material adverse effect or impairment of the Concessionaire's ability to perform its obligations and duties under this Agreement;
- (x) it has complied with all Applicable Laws and has not been subject to any fines, penalties, injunctive relief or any other Civil or criminal liabilities which in the aggregate have or may have Material Adverse Effect;
- (xi) each member of Consortium was and is duly organised and existing under the laws of the jurisdiction of its incorporation and has full power and authority to consent to and has validly consented to and requested NGS to enter into this Agreement with the Concessionaire and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (xii) subject to receipt by the Concessionaire from NGS of the Termination Payment and any other amount due under any of the provisions of this Agreement, in the manner and to the extent provided for under the applicable provisions of this Agreement all rights and interests of the Concessionaire in and to the Project Assets shall pass to and vest in NGS/SMC on the Termination Date free and clear of all Encumbrances without any further act or deed on the part of the Concessionaire or NGS/SMC;
- (xiii) no representation or warranty by the Concessionaire contained herein or in any other document furnished by it to NGS/SMC or to any Government Agency in relation to Applicable Permits contains or will contain any untrue statement of material fact or omits or will omit to state a material fact necessary to make such representation or warranty not misleading; and
- (xiv) no sums, in cash or kind, have been paid or will be paid, by or on behalf of the Concessionaire, to any person by way of fees, commission or otherwise for securing

the Concession or entering into of this Agreement or for influencing or attempting to influence any officer or employee of NGS in connection therewith.

## **20.2 Disclaimer**

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

## **20.3 Representations and Warranties of NGS**

NGS represents and warrants to the Concessionaire that:

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



**ARTICLE 21  
MISCELLANEOUS**

**21.1 Assignment and Charges**

- (a) Subject to sub-articles (b) and (c) hereinbelow, this Agreement shall not be assigned by the Concessionaire save and except with prior consent in writing of NGS, which consent NGS shall be entitled to decline without assigning any reason whatsoever.
- (b) Subject to sub-article (c) hereinbelow, the Concessionaire shall not create nor permit to subsist any Encumbrance over or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which Concessionaire is a party except with prior consent in writing of NGS, which consent NGS shall be entitled to decline without assigning any reason whatsoever.
- (c) Restraint set forth in sub-articles (a) and (b) above shall not apply to:
  - (i) liens/ encumbrances arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project ;
  - (ii) mortgages/pledges/hypothecation of goods/assets other than Project Site, as security for indebtedness, in favour of the Lenders and working capital providers for the Project;
  - (iii) assignment of Concessionaire's rights, title and interest under this Agreement to or in favour of the Lenders pursuant to and in accordance with the Substitution Agreement as security for their financial assistance.
- (d) Upon occurrence of the Concessionaire Event of Default the Lenders shall have the right of substitution as provided in the Substitution Agreement.
- (e) Notwithstanding anything to the contrary set forth herein, NGS may, with an advance notice in writing of 30 days to the Concessionaire, assign any of its rights and bedfits and / or obligations under this Agreement in whole or in part to any Person, who is, in the opinion of NGS, capable of performing and observing all of NGS's then outstanding obligations under this Agreement. NGS may, with notice in writing to the Concessionaire, nominate any other Person or agency to exercise any of its rights and privileges under this Agreement.

**21.2 Liability And Indemnity**

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

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

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

provided that if sub-articles (2), (3) or (4) of Article 21.2(e)(ii) shall be applicable, counsel for the Indemnified Party shall have the right to direct the defence of such claim, action, suit or proceeding on behalf of the Indemnified Party and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

### **21.3 Advertising on the Project Site**

The Concessionaire shall not undertake or permit any form of commercial advertising, display or hoarding at any place on the Project Site if such advertising, display or hoarding shall affect the safety of users of the Project Facility while using the facilities.

### **21.4 Governing Law and Jurisdiction**

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

### **21.5 Waiver**

- (a) Waiver by either Party of any default by the other Party in the observance and performance of any provision of or obligations or under this Agreement:
  - (i) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions or obligations under this Agreement;
  - (ii) shall not be effective unless it is in writing and executed by a duly authorised representative of such Party; and
  - (iii) shall not affect the validity or enforceability of this Agreement in any manner.
- (b) Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

### **21.6 Survival**

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

**21.7 Amendments**

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the Agreement between the Parties on the subject hereof and no amendment or modification hereto shall be valid and effective unless agreed to by all the Parties hereto and evidenced in writing.

**21.8 Notices**

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

If to National Games Secretariat

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Fax No. -----

If to the Concessionaire  
The Managing Director,  
----- Limited,

-----  
-----.

Fax No. -----

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

**21.9 Severability**

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

**21.10 No Partnership**

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

**21.11 Language**

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

**21.12 Exclusion of Implied Warranties etc.**

This Agreement expressly excludes any warranty, condition or other undertaking implied at

law or by custom or otherwise arising out of any other agreement between the Parties or any representation by any Party not contained in a binding legal agreement executed by the Parties.

**21.13 Counterparts**

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

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

SIGNED SEALED AND DELIVERED

For and on behalf of National Games Secretariat (NGS)  
by

(Signature)

(Name)

(Designation)

SIGNED, SEALED AND DELIVERED

For and on behalf of CONCESSIONAIRE by:

In the presence of.

1)

2)