

ARBITRAL AWARD ESCROW ACCOUNT AGREEMENT

THIS ARBITRAL AWARD ESCROW AGREEMENT is entered into on this theday of 20..... AMONGST

1 [_____]1, a company incorporated under the provisions of the Companies Act, [1956/2013] and having its registered office at _____ (hereinafter referred to as the “[Concessionaire/ Contractor]” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);

1 Name of the concessionaire / contractor to be inserted

2 To be inserted, in case applicable. In cases where reference to Lenders’ Representative is not applicable, all references of Lenders’ Representative to be deleted from the Agreement

3 Name of the Project to be included

4 Type of project development model to be included

2 THE MUMBAI PORT TRUST, established under the Major Ports Act 1963 / having its office at Port Bhavan, S.V. Marg, Ballard Estate, Mumbai – 400 001 (hereinafter referred to as the “Authority” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns)

3 (insert name and particulars of the Arbitral Award Escrow Bank) and having its registered office at _____ (hereinafter referred to as the “Arbitral Award Escrow Bank” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and

[42 _____ (insert name and particulars of Lenders’ Representative) and having its registered office at _____ acting for and on behalf of the Senior Lenders as their duly authorized agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “Lenders’ Representative” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);]

WHEREAS:

(A) The “[Concessionaire / Contractor]” and the Authority have entered into a [Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract] dated (the “Agreement”) whereby the Authority agreed to the [Concessionaire / Contractor] undertaking [name of the work] on [build, operate and transfer/design, build, finance, operate and transfer]3 [(“DBFOT”)]4 basis (the “Project”), subject to and in accordance with the provisions of the Agreement;

(B) During the course of implementation of the Project, disputes/claims arose in respect of the Agreement. As the disputes could not be resolved amicably, the same were referred to Arbitration and accordingly a three member Arbitral Tribunal, as per the terms of the Agreement, was constituted to resolve the disputes between Authority and the [Concessionaire/ Contractor] under the Agreement;

(C) The Arbitration Tribunal on [Date] passed the Award in favour of the [Concessionaire / Contractor] (hereinafter referred to as the “Arbitral Award”) allowing [claims]5 of the [Concessionaire / Contractor] amounting to [Rs. _____]6 as on [Date]7 [along with interest @ ___% per annum till the date of Award]8 and the [total amount along with interest @ ___% as on _____ is Rs. _____]9;

5 Details of the claims to be inserted

6 Amount in Figures and words to be inserted

7 Date of Arbitral award to be inserted

8 To be inserted, in case applicable

9 Interest rate, date of calculation of amount and total amount to be inserted

10 Details of the court, where the appeal has been filed to be provided

(D) The Authority have preferred appeal against the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Appeal") before the

[_____]10 (hereinafter referred to as the Court), challenging the Arbitral Award;

(E) Pursuant to NITI Aayog's OM No. 14070/14/2016- PPPAU dated 5th September 2016, Ministry of Road Transport and Highways, vide its Office Order No. NH-35014/10/2016-H dated 16.09.2016 (the "Office Order") has directed the Authority that, in case of claims where the Arbitration Tribunal has passed the Arbitral Award and the Authority has challenged the Arbitral Award, the Authority may pay an amount equal to 75% (seventy five percent) of the Arbitral Award as awarded in favour of the [Concessionaire /Contractor] to the [Concessionaire /Contractor] against Bank Guarantee, without prejudice to the final order of the Court in the matter under challenge;

(F) The Office Order requires the payment to be made by the Authority into a designated Escrow Account to be opened for this purpose and the amount so released shall be used, *inter alia*, on the terms and conditions stated herein;

(G) The Concessionaire has approached the Authority and vide letter no. _____ dated _____ has requested the Authority to release the amount equivalent to 75% of the Arbitral Award and has confirmed its acceptance to the terms and conditions as provided in the Office Order, including but

not limited to its obligation of submission of the Bank Guarantee(s) and payment of interest on the said amount;

(H) That Authority has favorably considered the above request of the Concessionaire and vide its letter dated ___ has agreed to deposit the said amount in the Arbitral Award Escrow Account subject to the Concessionaire paying interest at the rate of interest awarded under the Arbitral Award under challenge (i.e. ___ %), in case the Authority is successful in the Appeal;

(I) The Concessionaire has conveyed its acceptance to the above terms vide its letter No. ___ dated _____.

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

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

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

“Arbitral Award” shall have the meaning ascribed thereto in Recital C;

“Arbitral Award Escrow Account” means an escrow account established in terms of and under this Agreement;

“Arbitral Award Escrow Default” shall have the meaning ascribed thereto in Clause 7.1;

“Bank Guarantee(s)” shall have the meaning ascribed thereto in Clause 4.1;

“[Concession Agreement /Construction Contract / Engineering Procurement Commissioning Contract]” means the [Concession Agreement /Construction Contract / Engineering Procurement Commissioning Contract] referred to in Recital (A) above and annexed hereto as Annex-A, and shall include all of its Recitals and Schedules and any amendments made thereto in accordance with the provisions contained in this behalf therein;

“Cure Period” means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the [Concessionaire / Contractor], and shall commence from the date on which a notice is delivered by the Authority [or the Lenders’ Representative], as the

case may be, to the [Concessionaire / Contractor] asking the latter to cure the breach or default specified in such notice;

[“Lenders’ Representative” means the person referred to as the Lenders’ Representative in the foregoing Title Clause;]

“Parties” means the parties to this Agreement collectively and “Party” shall mean any of the Parties to this Agreement individually;

“Permitted Investments” shall mean:

the investments (including encashment, re-investment and change in investment) in:

(i) treasury bills or debt instruments or other securities issued by the Government of India or backed by full Government of India guarantee;

(ii) deposits with or certificates of deposits issued by scheduled commercial banks;

1.2 Interpretation

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

1.2.2 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the [Concession Agreement/Construction Contract / Engineering Procurement Commissioning Contract] shall, unless repugnant to the context, have the meaning ascribed thereto in the [Concession Agreement/Construction Contract / Engineering Procurement Commissioning Contract].

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

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

11 To be updated with respect to the Concession Agreement / Contract

2 ARBITRAL AWARD ESCROW ACCOUNT

2.1 Arbitral Award Escrow Bank to act as trustee

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

2.1.2 The [Concessionaire / Contractor] hereby declares that all rights, title and interest in and to the Arbitral Award Escrow Account shall be vested in the Arbitral Award Escrow Bank and held in trust for the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor], and applied in accordance with the terms of this Agreement. No person other than the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor] shall have any rights hereunder as the beneficiaries of or as third party beneficiaries under this Agreement.

2.2 Acceptance of Arbitral Award Escrow Bank

The Arbitral Award Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Arbitral Award Escrow Bank pursuant to the provisions of this Agreement. The Arbitral Award Escrow Bank shall hold and safeguard the Arbitral Award Escrow Account during the term of this Agreement and shall treat the amount in the Arbitral Award Escrow Account as monies deposited by the Authority with the Arbitral Award Escrow Bank or any interest thereon. In performing its functions and duties under this Agreement, the Arbitral Award Escrow Bank shall act in trust for the benefit of, and as agent for, the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor]. For the avoidance of doubt, in case there is a conflict between the interests of Authority, [the Lenders' Representative] and the [Concessionaire / Contractor] or their nominees, successors or assigns, the Arbitral Award Escrow Bank shall keep the interest of the Authority as paramount.

2.3 Establishment and operation of Arbitral Award Escrow Account

2.3.1 Within 30 (thirty) days from the date of this Agreement, the [Concessionaire / Contractor] shall open and establish the Arbitral Award Escrow Account with the (name of Branch) Branch of the Arbitral Award Escrow Bank. The Arbitral Award Escrow Account shall be denominated in Indian Rupees.

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

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

2.4 Arbitral Award Escrow Bank's fee

The Arbitral Award Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Arbitral Award Escrow Bank and the [Concessionaire / Contractor]. For the avoidance of doubt, such fee and expenses shall be paid

by the [Concessionaire / Contractor] directly to the Arbitral Award Escrow Bank and shall not seek any reimbursement for the same from the Authority.

2.5 Rights of the Parties

The rights of the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor] in the monies held in the Arbitral Award Escrow Account are set forth in their entirety in this Agreement and the Authority, [the Lenders' Representative] and the [Concessionaire / Contractor] shall have no other rights against or to the monies in the Arbitral Award Escrow Account.

[2.6 Substitution of the Concessionaire

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

3 DEPOSITS INTO ARBITRAL AWARD ESCROW ACCOUNT

3.1 Deposits by the Authority

The Authority agrees and undertakes that it shall deposit into and/or credit the Arbitral Award Escrow Account with an amount equivalent to 75 % of the amount equivalent to the Arbitral Award. A detailed statement of account on the amount to be deposited and breakup thereof is attached hereto as [Annex – B].

3.2 Interest on deposits

The Arbitral Award Escrow Bank agrees and undertakes that all interest accruing on the balances of the Arbitral Award Escrow Account from the Permitted Investments shall be credited to the Arbitral Award Escrow Account.

4 BANK GUARANTEE(S)

4.1 The [Concessionaire / Contractor] in consideration of the Authority depositing the amount as stated in Clause 3, has provided the following bank guarantee(s)

12 Add details of all the Bank Guarantee(s) to be submitted S. No.	Bank Guarantee issued by	Bank Guarantee Number	Amount (in figures)	Amount (in words)
	*****	*****	*****	*****

1.

Bank Guarantee as security for advance towards payment of Arbitral Award under litigation
(On a stamp paper of appropriate amount)

The Chairman,
National Highways Authority of India
New Delhi

WHEREAS:

(A) [..... (the "Concessionaire / Contractor")] and the National Highways Authority of India (the "Authority") have entered into a [Concession Agreement / Construction Contract / Engineering Procurement Commissioning Contract] dated (the "Agreement") whereby the Authority has agreed to the [Concessionaire / Contractor] undertaking [Two / Four / Six Laning of the _____ section of National Highway No. ____ from Km _____ to Km _____ under NHDP in the State of _____ on [build, operate and transfer/design, build, finance, operate and transfer]1 [{"DBFOT"}]2 basis (the "Project"), subject to and in accordance with the provisions of the Agreement.

1Name of the Project to be included

2Type of project development model to be included

3Details of the claims to be inserted

4Amount in Figures and words to be inserted

5Date of Arbitral award to be inserted

6To be inserted, in case applicable

7Interest rate, date of calculation of amount and total amount to be inserted

8Details of the court, where the appeal has been filed to be provided

(B) During the course of implementation of the Project, disputes/claims arose in respect of the Agreement. As the disputes could not be resolved amicably, the same were referred to Arbitration and accordingly a three member Arbitral Tribunal, as per the terms of the Agreement, was constituted to resolve the disputes between Authority and the [Concessionaire/ Contractor] under the Agreement.

(C) The Arbitration Tribunal on [Date] passed the Award in favour of the [Concessionaire / Contractor] (hereinafter referred to as the Arbitral Award) allowing [claims]3 of the [Concessionaire / Contractor] amounting to [Rs. _____]4 as on [Date]5 [along with interest @ ___% per annum till the date of Award]6 and the [total amount along with interest @ ___% as on _____ is Rs. _____]lakhs]7.

(D) Authority have preferred appeal against the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Appeal") before the [_____]8 (hereinafter referred to as the "Court"), challenging the Arbitral Award.

(E) Pursuant to NITI Aayog's OM No. 14070/14/2016- PPPAU dated 5th September 2016, Ministry of Road Transport and Highways, vide its Office Order No. NH-35014/10/2016-H dated 16.09.2016, has directed the Authority that, in case of claims where the Arbitration Tribunal has passed the Arbitral Award and the Authority has challenged the Arbitral Award, the Authority may pay an amount equal to 75% (seventy five percent) of the Arbitral Award as awarded in favour of the [Concessionaire / Contractor] to the [Concessionaire / Contractor] against Bank

Guarantee without prejudice to the final order of the Court in the matter under challenge, subjected to the terms as stated herein

(F) The [Concessionaire / Contractor] is required to open an account with the Arbitral Award Escrow Bank (the "Arbitral Award Escrow Account") and enter into an Arbitral Award Escrow Agreement with the Authority, Arbitral Award Escrow Bank [and the Lenders Representative]⁹ (the "Arbitral Award Escrow Agreement").

9 To be inserted, in case applicable

(G) The Arbitral Award Escrow Agreement requires the Concessionaire to furnish a Bank Guarantee to the Authority in a sum of Rs ***** (Rupees ***** only) (the "Guarantee Amount") as security for the amount to be deposited by the Authority in the Arbitral Award Escrow Account and for due and faithful performance of its obligations under and in accordance with Arbitral Award Escrow Agreement.

(H) We,through our Branch at (the "Bank") have agreed to furnish this Bank Guarantee ("Guarantee").

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

1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the [Concessionaire's / Contractor's] obligations under and in accordance with the Arbitral Award Escrow Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the [Concessionaire / Contractor], such sum or sums upto an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of an Officer not below the rank of General Manager in the Authority, that the Court has decided the appeal in favor of the Authority and the [Concessionaire / Contractor] needs to repay the Guaranteed Amount or that there has been an Arbitral Award Escrow Default by the [Concessionaire / Contractor] as per the provisions of Arbitral Award Escrow Agreement, shall be conclusive, final and binding on the Bank and the Bank shall immediately release the Guaranteed Amount to the Authority. The Bank further agrees that the Authority's letter in this regard shall be final and binding on the Bank, notwithstanding any differences between the Authority and the [Concessionaire / Contractor].
3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank is the principal debtor and any change in the constitution of the [Concessionaire / Contractor] and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the [Concessionaire / Contractor] before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Arbitral Award

Escrow Agreement or to extend the time or period for the compliance with, fulfilment and/ or performance of all or any of the obligations of the [Concessionaire / Contractor] contained in Arbitral Award Escrow Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the [Concessionaire / Contractor], and either to enforce or forbear from enforcing any of the terms and conditions contained in Arbitral Award Escrow Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the [Concessionaire / Contractor] or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.

6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Arbitral Award Escrow Agreement or for the fulfillment, compliance and/or performance of all or any of the obligations of the [Concessionaire / Contractor] under the Arbitral Award Escrow Agreement

7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount. This Bank Guarantee shall come in force from the date on which the Authority deposits an amount equal to 75% of the Arbitral Award awarded to the [Concessionaire / Contractor] and shall remain in force until, the earlier of the [1 (one) year] from the date of such deposits or two (2) months from the date of the Court deciding the Appeal in favor of the [Concessionaire / Contractor].

8. Upon request made by the [Concessionaire / Contractor] for release of this Guarantee along with the particulars required hereunder, the Authority shall release the Guarantee forthwith.

9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous

express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.

10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorised to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.

11. Notwithstanding anything contained herein:

(a) our liability under this Bank Guarantee shall not exceed (in words)

(b) this Bank Guarantee shall be valid upto

(c) we are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if the Authority serve upon us a written claim or demand on or before

.....

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

SIGNED, SEALED AND DELIVERED

For and on behalf of

the BANK by:

(Signature)
(Name)
(Designation)
(Code Number)
(Address)
NOTES:

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