

**Vol III: MODEL SERVICE AGREEMENT**

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## SERVICE AGREEMENT

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

BETWEEN,

THE MANAGING DIRECTOR, APTDC in his executive capacity for the Andhra Pradesh Tourism Development Corporation, hereinafter referred to as "AUTHORITY" (which expression shall include its successors and assigns),

AND

M/s XXXX, a company/proprietor/partnership incorporated under the <<insert the relevant act>>, having its registered office at ----- hereinafter referred to as the "Operator" (which expression shall include its permitted successors and assignees).

WHEREAS,

- A. AUTHORITY is keen to implement a project envisaging operation and maintenance of -----  
----- (more particularly described in Schedule 'A' and hereinafter referred to as "the Project") with private sector participation on Operate and Maintain basis;
- B. AUTHORITY invited tenders from eligible persons for implementing the Project;
- C. In response to the aforesaid invitation for tenders, AUTHORITY received bids from several parties including the Operator (as hereinafter defined) for implementing the Project;
- D. AUTHORITY, after evaluating the aforesaid bids, accepted the bid submitted by the Operator and issued the Letter of Acceptance dated ----- (LOA) to the Operator;

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 'I' 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 AUTHORITY or the State Government or the Government of India or any statutory or regulatory body affiliated directly or indirectly to these governments including regulations and rules made thereunder, and judgments, 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 Operator, in order to implement the Project and to provide Project Facility 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.

**"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 operator commences operations.

**"Commencement Date"** means the date on which the physical possession of the Project Site is delivered by AUTHORITY to the Operator.

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

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

**"Operator"** means M/s. \_\_\_\_\_ and shall include its successors and permitted assigns expressly approved by AUTHORITY.

**"Construction Works - AUTHORITY"** means all works and things necessary to be completed by AUTHORITY as listed in schedule 'C' of this Agreement.

**"Completion Works - O&M Operator"** means all finishing works, furniture and fittings, all required plants and machinery, landscaping and other things necessary for the operation of the facility, as listed in schedule 'C' of this agreement.

**"Contractor"** means Person with whom the Operator has entered into/ may enter into all or any of the Project Agreements.

**"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.

**"Dispute"** shall have the meaning ascribed thereto in Article 13

**"Dispute Resolution Procedure"** means the procedure for resolution of Dispute set forth in Article 13.1

**"Drawings"** means all of the drawings, designs, calculations and documents pertaining to the Project as set forth in Schedule 'G' 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 loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, physical encumbrances and encroachments on the Project Site.

**"Force Majeure Event"** shall have meaning ascribed thereto in Article 9.

**"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 acting generally in accordance with the provisions of the guidelines issued from time to time by Ministry of Tourism, Government of India.

**"Government Agency"** means AUTHORITY 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 Operator, the Project Assets or any portion thereof, or the performance of all or any of the services or obligations of the Operator under or pursuant to this Agreement.

**"Gross Revenue"** means the total income generated by the Hotel / Resort Project for which this service agreement is being entered into.

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

**"Indirect Political Event"** shall have the meaning ascribed thereto in Article 9.3.

**"Maintenance Manual"** shall have the meaning ascribed to it in Article 7.2.

**"Maintenance Programme"** shall have the meaning ascribed to it in Article 7.3.

**"Material Adverse Effect"** means material adverse effect on (a) the ability of the Operator 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 Assured Annual Revenue Share"** The minimum annual amount to be paid by the operator to AUTHORITY quoted for the first year starting from scheduled COD and escalating at the rate of 5% per year for the entire service period.

**"Minimum Operation & Maintenance Requirements"** means minimum maintenance requirements for the maintenance of the Project as set forth in Schedule 'H'

**"Non-Political Event"** shall have the meaning ascribed thereto in Article 9.2.

**"Operations Period"** means the period commencing from COD and ending at the expiry of the Service 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 operation and maintenance as applicable in terms of Article 3.

**"Person"** means any individual, company, corporation, partnership, joint venture, government or Government Agency.

**“Political Event”** shall have the meaning ascribed thereto in Article 9.4.

**“Project”** means the project described in Schedule ‘A’ which the Operator is required to plan, design, supervise construction, marketing, operations and management and transfer in accordance with the provisions of this Agreement.

**“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 right of way or otherwise, (ii) tangible assets such as civil works including foundations, embankments, pavements, road surface, interchanges, road over bridges, drainage works, lighting facilities, traffic signals, sign boards, electrical works for lighting on the Project, telephone and other communication systems and equipment for the Project, rest areas, amenities, administration and maintenance depots, relief centers, service facilities etc. (iii) Project Facility situated on the Project Site, (iv) financial assets, such as security deposits for electricity supply, telephone and other utilities, etc., (v) insurance proceeds subject to statutory deductions thereto and (vi) Applicable Permits and authorisations relating to or in respect of the Project.

**“Project Facility”** means collectively the facilities on the Project Site to be constructed, built, installed, erected or provided by the AUTHORITY & THE Operator more specifically set out in Schedule ‘C’.

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

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

**“Specifications and Standards”** means the specifications and standards relating to the quality, capacity and other requirements for the Project as set forth in Schedule ‘F’ and any modifications thereof, or additions thereto as included in the design and engineering for the Project submitted by the Operator to, and expressly approved by AUTHORITY.

**“Scheduled Project Completion Date”** shall be months from AUTHORITY handing over the Project site to the Operator.

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

**“Termination”** means termination of this Agreement and the Service 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/Service due to expiry to the Service Period in the normal course.

**“Termination Date”** means the date on which the Termination occurs which shall be the date on which Letter of Termination 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 invocation of Termination clauses in accordance with the applicable provisions of this Agreement.

## 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, organizations 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, authorization,, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Project Architect shall be valid and effectual only if it is in writing under the hands of duly authorized representative of such Party or the Project Architect, 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 Operator to AUTHORITY/AUTHORITY Officials and/or the Project Architect shall be provided free of cost and in three copies and if AUTHORITY/AUTHORITY Officials and/or the Project Architect 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 later shall prevail.

## ARTICLE 2

### SERVICE AND PROJECT SITE

#### 2.1 Grant of Service

Subject to and in accordance with the terms and conditions set forth in this Agreement, AUTHORITY hereby grants and authorizes the Operator to investigate, study, operate and maintain the Project/Project Facility and to exercise and/or enjoy the rights, powers, privileges, authorizations and entitlements as set forth in this Agreement, including but not limited to the right to levy, demand, collect and appropriate fees from persons liable to payment of Fee for using the Project/Project Facility or any part thereof (collectively “the Service”).

#### 2.2 Service Period

The Service hereby granted is for a period of years commencing from the signing of agreement (the Service Period) during which the Operator is authorized to operate Project Facility in accordance with the provisions hereof.

#### 2.3 Acceptance of the Service

The Operator hereby accepts the Service 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) AUTHORITY hereby undertakes to handover to the Operator physical possession of the Project Site free from Encumbrance together with the necessary rights of way/way leaves as informed through LOI, for the purpose of operating the Project in accordance with this Agreement.
- (b) AUTHORITY confirms that upon the Project Site being handed over pursuant to the preceding sub-article (a) the Operator shall have the exclusive right to enter upon, occupy and use the Project Site subject to and in accordance with the provisions of this Agreement.

#### 2.5 Use of the Project Site

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

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

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

## **2.7 Peaceful Possession**

AUTHORITY 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 AUTHORITY, and that AUTHORITY has full powers to hold, dispose of and deal with the same consistent, inter alia, with the provisions of this Agreement;
- (b) the Operator 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 AUTHORITY; and
- (c) the Operator shall, subject to complying with the terms and conditions of this Agreement, remain in peaceful possession and enjoyment of the Project Site during the Service Period. In the event the Operator 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, restraint, 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, AUTHORITY shall, if called upon by the Operator, defend such claims and proceedings and also keep the Operator indemnified against any direct or consequential loss or damages which the Operator may suffer, on account of any such right, title, interest or charge.

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

- (a) The Operator 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.

AUTHORITY shall continue to enjoy the free rights on the project assets during the service period also.

- (b) The Operator shall not part with or create any Encumbrance on the whole or any part of the Project assets however that nothing contained herein shall be construed or interpreted as restriction on the right of the Operator to appoint any Contractor for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project / Project Facility.

### **ARTICLE 3**

#### **PERFORMANCE SECURITY**

### **3.1 Performance Security**

- (a) The Operator shall, for due and punctual performance of its obligations during the Service Period, deliver to AUTHORITY, as a precondition to the execution of this Agreement, a bank guarantee

from a scheduled bank acceptable to AUTHORITY, in the form set forth in format provided in the Request for Proposal, (the "Performance Security ") for a sum of Rs. -----<sup>1</sup>.

- (b) The validity of Performance Guarantee shall be 3 years. Every 4th year in the service period, a fresh performance guarantee equivalent to minimum assured amount for that year should be issued with a validity of 3 years. In this way, fresh performance guarantees should be issued in 4th, 7th, 10th, 13th, 16th, 19th, 22nd, 25th, 27th and 30th year of service period.

### **3.2 Fresh Performance Security**

In the event of the encashment of the Performance Security by AUTHORITY pursuant to Encashment Notice issued in accordance with the provisions of Article 10 the Operator shall within 15 (fifteen) days of the Encashment Notice furnish to AUTHORITY fresh Performance Security failing which amounts to default of the Operator and AUTHORITY shall be entitled to terminate this Agreement in accordance with the provisions of Article 10. The provisions set forth in Article 3.1 above shall apply mutatis mutandis to such fresh Performance Security.

## **ARTICLE 4**

### **USER CHARGES AND REVENUE SHARE**

#### **4.1 Levy, Collection and appropriation of Tariff / User charges / Fee**

- (a) Subject to the provisions of this Agreement, the Operator shall during Operations Period be entitled to levy, demand and collect Fee or Tariff in accordance with the industry norms and practices for the use of rooms as well as allied facilities at the Project for the duration of the service period.
- (b) AUTHORITY will not be involved in the determination of such fee or tariff that Operator will charge.
- (c) The Operator may formulate, publish and implement appropriate scheme(s) for frequent users as may reasonably be required by local circumstances from time to time.
- (d) The Operator shall conspicuously display the basic Fee / Tariff at the reception counter in accordance to regulations of the Indian tourism industry.
- (e) The Operator is entitled to revise the fee from time to time and such revisions can be either increase or decrease in the tariff / fee.

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<sup>1</sup> 12 months' equivalent of monthly Minimum Assured Annual Revenue Share

## 4.2 Revenue share to be paid by Operator to AUTHORITY

- (a) The Operator will pay to AUTHORITY the agreed revenue share within 7 days of every quarter end. The revenue shared agreed and payable is the higher of \_\_\_\_<sup>2</sup>% of Gross Revenues from the project or Minimum Assured Annual Revenue Share \_\_\_\_\_ as declared in the bidding documents of the Operator.
- (b) The Minimum Assured Annual Revenue Share will be increased by 5% every year and the Performance Security will also increase accordingly

## 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 Operator

The Operator shall at its own cost and expense:

- i. The Operator has to run the property at (insert project name) as a well-maintained and good quality tourist facility.
- ii. investigate, study, operate and maintain the Project Assets/Project Facility in accordance with the provisions of this Agreement, Good Industry Practice and Applicable Laws;
- iii. obtain all Applicable Permits in conformity with the Applicable Laws and be in compliance with thereof at all times during the Service Period;
- iv. 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;
- v. ensure that each Project Agreement contains provisions that would entitle AUTHORITY or a nominee of APTDC to step into such agreement at AUTHORITY's discretion, in place and substitution of the Operator in the event of Termination pursuant to the provisions of this Agreement; provide all assistance to the AUTHORITY/AUTHORITY Engineer and / or the AUTHORITY Officials as they may reasonably require for the performance of their duties and services under this Agreement;
- vi. provide all assistance to the AUTHORITY and / or the AUTHORITY Officials as they may reasonably require for the performance of their duties and services under this Agreement;
- vii. provide to the AUTHORITY Officials reports on a regular basis during the Operations Period in accordance with the provisions of this Agreement;
- viii. appoint, supervise, monitor and control the activities of Contractors / Staff or any other service provider under their respective Project Agreements as may be necessary;
- ix. make efforts to maintain harmony and good industrial relations among the personnel employed in connection with the performance of the Operator's obligations under this Agreement;
- x. develop, implement and administer a surveillance and safety program for the Project/Project Facility and the users thereof and the 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;
- xi. 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;
- xii. not to place or create nor to permit any contractor or vendor or service provider or any other person claiming through or under the Operator to create or place any Encumbrance over all or any part of the Project Assets, or on any rights of the Operator therein, save and except as expressly set forth in this Agreement;
- 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;

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<sup>2</sup> Project specific

- xv. make payment to Government Agencies for any service, if required, for provision of such services as are not provided in the normal course or are available only on payment;
- xvi. operate and maintain the Project at all times during the Operations Period in conformity with this Agreement 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. Provide to AUTHORITY at the end of each quarter/month as agreed in the SA audited profit and loss statement within 7 days of the end of the quarter / month
- xix. Provide access to the auditors and inspectors of AUTHORITY whenever AUTHORITY chooses to conduct such audit or assessment.

## 5.2 Obligations of the Operator during Implementation Period

- (a) The operator shall submit a Detailed Project Report (DPR) within 30 days from signing of the agreement wherever development of new facilities is involved for approval of the Authority. In turn the Authority shall either approve or seek clarifications or communicate objections within 15 days. In case of non-response from the Authority, the DPR shall be deemed as approved.
- (b) Within months AUTHORITY handing over the Project to the Operator, the Operator will complete the interiors, exteriors, fittings, landscaping and furnishings etc., listed at Schedule C and make the Project operational. If the Operator fails to make the project operational within \_\_\_\_\_ months, the Minimum Assured Annual Revenue Share will still become payable from the date of COD, or after months of AUTHORITY handing over the Project to the Operator whichever is earlier.
- (c) In the case the Operator is unable to make the property operational even after \_\_\_\_\_ months from the commencement date, AUTHORITY may extend the completion period without prejudice to receiving the payments by a period deemed fit. If the project is not made operational even during the extended period, it will be treated as an event of default which dealt with in article 10 of this agreement.

## 5.3 Obligations of AUTHORITY

AUTHORITY shall:

- (i) hand over the Project Site together with necessary right of way/ way leaves to the Operator for completion of the works and for operating the project free from any Encumbrance as detailed in LOI.;
- (ii) the physical facility that will be handed over will be constructed in accordance to the section B and in keeping with the standards and specification provided in Schedule F;
- (iii) grant or where appropriate provide necessary assistance to the Operator in securing Applicable Permits;
- (iv) grant in a timely manner all such approvals, permissions and authorizations which the Operator may require or is obliged to seek from AUTHORITY in connection with implementation of the Project and the performance of the Operator's obligations under this Agreement as an O&M operator;
- (v) ensure peaceful use of the Project Site by the Operator under and in accordance with the provisions of this Agreement without any let or hindrance from AUTHORITY or persons claiming through or under it;

- (vi) upon written request from the Operator, assist the Operator in obtaining access to all necessary infrastructure facilities and utilities, including water, electricity and telecommunication facilities at rates and on terms no less favorable to the Operator than those generally available to commercial customers receiving substantially equivalent facilities/utilities;
- (vii) procure that no barriers are erected or placed by AUTHORITY 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 Operator in obtaining necessary authority to regulate traffic on the Project Site/Project Facility subject to and in accordance with the Applicable Laws;
- (ix) assist the Operator in obtaining police assistance against payment of prescribed costs and charges, if any, for traffic regulation, patrolling and provision of security on the Project Site/Project Facility and implementing this Agreement in accordance with the provisions hereof;
- (x) Observe and comply with all its obligations set forth in this Agreement.

## **ARTICLE 6**

### **AUTHORITY OFFICIALS**

AUTHORITY officials shall have the right to inspect the facility to ensure the good standard operations by the operator any time during the operations.

## **ARTICLE 7**

### **PROJECT OPERATIONS**

#### **7.1 Operation and Maintenance**

The Operator shall operate and maintain the Project/Project Facility by itself and can hire contractors and if required, 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 and Applicable Permits and manufacturer's guidelines and instructions with respect to equipment used at the facility. More specifically, the Operator shall be responsible for:

- (i) Marketing and promotion of the property;
- (ii) Maintaining and managing services throughout the term of the contract in accordance to the guidelines issued by AUTHORITY;
- (iii) undertaking routine maintenance and prompt repairs to all facilities within the project;
- (iv) undertaking maintenance works in accordance with Maintenance Manual and the Maintenance Programme;
- (v) preventing with the assistance of concerned law enforcement agencies where necessary, any unauthorized entry to and exit from the Project;
- (vi) ensuring that suitable ISO certifications are awarded and maintained for the project;

- (vii) ensuring that all client queries, suggestions and complaints are dealt with in a timely and diligent manner
- (viii) taking complete responsibility of any liabilities arising out the hotel / resort operations at the Project
- (ix) adherence to the Safety Standards set out in Schedule 'I'.

## **7.2 Maintenance Manual**

The Operator shall in consultation with the AUTHORITY Officials 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 Operator shall supply, at least within two months of COD, 10 (ten) copies of the Maintenance Manual to the AUTHORITY Officials.

## **7.3 Maintenance Programme**

- (a) Not later than forty five (45) days before the beginning of each Accounting Year, the Operator shall provide to AUTHORITY, its proposed programme of preventive and other scheduled maintenance of the Project subject to the Minimum Maintenance Requirements set forth in 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 Operator 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 equipment, pavements, bridges, structures and other civil works which are part of the Project/Project Facility.
- (c) The Operator shall keep the Project Facility in a clean, tidy and orderly condition free of litter and debris.
- (d) The Operator shall be responsible for the maintenance of the approach roads to and underpasses, overpasses and drainages within the Project Site in accordance with Good Industry Practice.

## **7.4 Emergency De-commissioning**

- (a) If, in the reasonable opinion of the Operator there exists an Emergency which warrants decommissioning and closure to tourist traffic of whole or any part of the Project/Project Facility, the Operator shall be entitled to de-commission and close the whole or the relevant part of the Project to tourists for so long as such Emergency and the consequences thereof warrant. Provided, however, that such decommissioning will be notified to the AUTHORITY promptly. The AUTHORITY may issue such directions as it may deem appropriate to the Operator for dealing with such Emergency and the Operator shall abide by the same.
- (b) The Operator 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 Operator shall not close any part of the Project/Project Facility for undertaking maintenance or repair works except with the prior written approval of the AUTHORITY. Such approval shall be sought by the Operator through a written request to be made at least 7 (seven) days before the proposed closure of section / facility and shall be accompanied by particulars indicating the nature and extent of repair works and the arrangements made for safe usage of the section / facility, the actual area and section required to be closed and the period of closure. The Operator shall also furnish particulars indicating the minimum time required for completing such repair works. Within 5 (five) days of receiving such request, the AUTHORITY shall grant permission with such repairs as it may deem necessary. Upon receiving such permission, the Operator shall be entitled to close the section / facility 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 Service Period, from any cause whatsoever, the Operator 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 Operator does not maintain and/ or repair the Project or part thereof up to 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 the AUTHORITY, such failure amounts to maintenance default on the part of the operator.
- (f) If the Operator 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 Operator shall not be considered in breach of its obligations under this Agreement if any part of the Project is not available to tourist traffic 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 on the road occurred because of failure of the Operator to perform its obligations under this Agreement; or
  - (iii) Compliance with a request from AUTHORITY 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 Operator shall keep all unaffected parts of the Project open to business and use provided they can be safely operated and kept open.

#### **7.5 Monitoring and Supervision during Operations**

- (a) The Operator shall undertake periodic inspection of the Project in accordance with the Maintenance Manual, the Maintenance Programme, Specifications and Standards and this Agreement and shall submit reports of such inspection ("Maintenance Reports") to the AUTHORITY Officials and the AUTHORITY.
- (b) The AUTHORITY shall undertake periodic (at least once every calendar quarter) inspection of the Project jointly with the Operator 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 Operator with a copy thereof to the AUTHORITY Officials. The O&M Inspection Report shall set forth defects and deficiencies, if any. The Operator shall within 30 (thirty) days of the receipt of the O&M Inspection Report from the AUTHORITY remedy the defects and deficiencies and furnish compliance thereto and/or results thereof to the AUTHORITY along with a report (O&M Inspection Compliance Report) with a copy to the AUTHORITY Officials 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 Operator shall not relieve or absolve the Operator of its obligations and liabilities hereunder in any manner whatsoever. The O&M inspection will not be limited to the physical infrastructure at the Project but also include all the services being provided by the O&M operator to the guests at the Project in terms of the availability of the services, timeliness of the services, quality of the services and any other relevant parameter.

## **ARTICLE 8**

### **INSURANCES**

#### **8.1 Insurance during the Implementation Period**

The Operator 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 Operator, its employees, guests 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).

#### **8.2 Insurance during the Operations Period**

The Operator 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 Operator's general liability arising out of the Service;
- (c) liability to third parties; and
- (d) any other insurance that may be necessary to protect the Operator, its employees and guests, including all Force Majeure Events that are insurable and not otherwise covered in items (a) to (c).

#### **8.3 Insurance Companies**

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

#### **8.4 Evidence of Insurance Cover**

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

#### **8.5 Application of Insurance Proceeds**

All moneys received under insurance policies shall be promptly applied by the Operator towards repair or renovation or restoration or substitution of the Project Facility or any part thereof which

may have been damaged or destroyed under written intimation to AUTHORITY. The Operator 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.

#### **8.6 Validity of the Insurance Cover**

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

### **ARTICLE 9**

#### **FORCE MAJEURE**

##### **9.1 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 9.2, 9.3 and 9.4 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.

##### **9.2 Non Political Event.**

For purposes of Article 9.1 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 Operator, 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 9.3;
- (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 Operator by or on behalf of such Contractor;
- (v) any judgment or order of any court of competent jurisdiction or statutory authority in India made against the Operator in any proceedings for reasons other than failure of the Operator 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 AUTHORITY;
- (vi) any event or circumstances of a nature analogous to any of the foregoing.

### **9.3 Indirect Political Event**

For purposes of Article 9.1 hereinabove, Indirect Political Event shall mean one or more of the following acts or events:

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

### **9.4 Political Event**

For purposes of Article 9.1 hereinabove, Political Event shall mean one or more of the following acts or events by or on account of AUTHORITY or any other Government Agency:

- (i) Change in Law, only when provisions of Article 11 cannot be applied;
- (ii) Expropriation or compulsory acquisition by any Government Agency of any Project Assets or rights of the Operator or of the Contractors; or
- (iii) Any unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Operator 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 Operator's or any Contactor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits.

### **9.5 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 9.7 hereinafter;
- (b) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of the Article 9.6 hereinafter.

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

Subject to the provisions of Article 9.5 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 Operator;

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

#### **9.7 Termination.**

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

#### **9.8 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.

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

Save and except as expressly provided in this Article 9, 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 9.

**9.10** In case of delays in completion of the project as per the scheduled commercial date of operations, the Licensee shall be liable to pay liquidated Damages at Rs. 2500 (Two Thousand and Five Hundred) per day for every day of delay for Hotels/Resorts and Rs. 500 (Five Hundred) per day for every day of delay for other projects. The overall liquidated damages shall be capped at 10% of the cost of project. During the period of levy of penalty, AUTHORITY shall provide an opportunity to the operator to submit justification for such delays and additional time required for completion of the project. AUTHORITY shall however, have the right to cancel the contract in case the delay is beyond 3 months post scheduled date of commercial operations.

#### **9.11 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 9 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 9 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 9.10 and such other information as the other Party may reasonably request the Affected Party to provide.

#### **9.12 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 10**

#### **EVENTS OF DEFAULT AND TERMINATION**

##### **10.1 Event of Default**

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

##### **a) Operator Event of Default**

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

- (1) The Operator fails to commence the operations within the specified moratorium period (Appendix IX in Vol - I of RFP) from the handover of the Project by AUTHORITY.
- (2) The Operator fails to pay the Quarterly Revenue Share of \_\_\_<sup>3</sup>% of Gross Revenues or Minimum Assured Annual Revenue Share whichever is higher, after 7 days of end of each Quarter. This will attract an interest of 24% of the overdue amount for the number of days of delay. If it remains unpaid after 60 days, it will lead to automatic termination of contract and encashment of Performance Security by AUTHORITY.
- (3) If the operator fails to pay the liquidity damages as per the notice.
- (4) Any representation made or warranties given by the Operator under this Agreement is found to be false or misleading.
- (5) The Operator creates any Encumbrance on the Project Site/ Project Facility.

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<sup>3</sup> Project specific

- (6) The transfer, pursuant to law of either (a) the rights and/or obligations of the Operator under any of the Project Agreements, or (b) all or material part of the Operator except where such transfer in the reasonable opinion of AUTHORITY does not affect the ability of the Operator to perform, and the Operator has the financial and technical capability to perform, its material obligations under the Project Agreements.
- (7) A resolution is passed by the shareholders of the Operator for the voluntary winding up of the Operator.
- (8) Any petition for winding up of the Operator is admitted by a court of competent jurisdiction or the Operator is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction, provided that, as part of such amalgamation or reconstruction, the property, assets and undertaking of the Operator are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Operator 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 Operator as at Commencement Date; and
  - (iii) each of the Project Agreements remains in full force and effect.
- (9) The Operator suspends or abandons the operations of the Project without the prior consent of AUTHORITY, provided that the Operator 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 AUTHORITY.
- (10) The Operator repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.
- (11) The Operator suffers an attachment being levied on any of its assets causing a Material Adverse Effect on the Project and such attachment continues for a period exceeding 45 days.
- (12) The Operator has delayed any payment that has fallen due under this Agreement and if such delay exceeds 60(sixty) days.
- (13) The Operator is otherwise in Material Breach of this Agreement.

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

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

- (1) AUTHORITY is in breach of this Agreement and has failed to cure such breach within 120 days of receipt of notice in that behalf from the Operator;
- (2) AUTHORITY repudiates this Agreement or otherwise evidences an intention not to be bound by this Agreement.

- (3) AUTHORITY 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 Operator and has failed to cure the same within 60 days of notice thereof by the Operator.
- (4) Any representation made or warranties given by the AUTHORITY under this Agreement is found to be false or misleading

## 10.2 Termination due to Event of Default

### (a) Termination for Operator Event of Default

- (1) Without prejudice to any other right or remedy which AUTHORITY may have in respect thereof under this Agreement, upon the occurrence of an Operator Event of Default, AUTHORITY shall be entitled to terminate this Agreement by issuing a Termination Notice to the Operator, provided that before issuing the Termination Notice, AUTHORITY shall by a notice in writing inform the Operator 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) AUTHORITY 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, AUTHORITY shall be entitled to encash the Performance Security with a notice to the Operator (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 15 days, AUTHORITY shall subject to the provisions of the Service 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 Operator 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 Operator requires any reasonable action by Operator that must be approved by AUTHORITY or the Government Agency hereunder the applicable Cure Period shall be extended by the period taken by AUTHORITY or the Government Agency to accord the required approval.
- (3) Upon default of payment of   <sup>4</sup>% share of Gross Revenue or Minimum Assured Annual Revenue Share, as the case may be, if the default or interest accrued on the defaulted amounts remains outstanding after 60 days, AUTHORITY will not be required to issue any notice before termination of the agreement.
- (4) Deficiencies identified during O&M inspections will lead to penalty of 2% of the Performance Security on first occurrence, a penalty of 5% of Performance Security upon second occurrence of the same deficiency and upon 3<sup>rd</sup> occurrence of the same deficiency, AUTHORITY will have the right to terminate the contract without further notice.

### (b) Termination for AUTHORITY Events of Default

- (1) The Operator may, upon the occurrence and continuation of any of AUTHORITY Event of Default, terminate this Agreement by issuing Termination Notice to AUTHORITY.

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<sup>4</sup> Project specific

### **10.3 Rights of AUTHORITY on Termination**

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

- (i) take possession and control of Project Assets forthwith;
- (ii) prohibit the Operator and any person claiming through or under the Operator from entering upon the Project Assets/dealing with or any part thereof;
- (iii) step in and succeed upon election by AUTHORITY without the necessity of any further action by the Operator, to the interests of the Operator under such of the Project Agreements as AUTHORITY may in its discretion deem appropriate with effect from the date of communication of such election to the counter party to the relative Project 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 Operator and such counter party and AUTHORITY shall in no way or manner be liable or responsible for such sums. The Operator shall ensure that the Project Agreements contain provisions necessary to give effect to the provision of this Article 10.3.

### **10.4 Termination with mutual consent**

Both parties can terminate the contract without cause through issue of 6 months' notice and mutual consent without being required to pay termination related charges. Rights of AUTHORITY for damages, losses for actions of the Operator will not be effected by termination through mutual consent.

### **10.5 Mode of Payment**

Notwithstanding any instructions to the contrary issued or any dispute raised by the Operator, the Termination Payment, and all other payments that would become payable by AUTHORITY 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 AUTHORITY and the Operator in writing. Any payment so made shall to the extent of such payment constitute a valid discharge to AUTHORITY of its obligations towards the Operator with regard to the Termination Payment and payment of any other monies due hereunder.

- 10.6 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 11**

### **CHANGE IN LAW**

#### **11.1 Change in Law**

Any change either direct or indirect in the laws after the agreement will not affect the obligations of the parties under the agreement.

## **ARTICLE 12**

### **HANDOVER AND DEFECT LIABILITY PERIOD**

### **12.1 Handing Over of the Project Assets**

Upon the expiry of the Service by efflux of time and in the normal course, the Operator shall at the end of the Service Period, hand over vacant and peaceful possession of the Project Assets including Project Site/Facility at no cost to AUTHORITY.

### **12.2 Joint Inspection and Removal of Deficiency**

The handing over process shall be initiated at least 12 months before the actual date of expiry of the Service Period by a joint inspection by the AUTHORITY Engineer and the Operator. The AUTHORITY Engineer shall, within 15 days of such inspection prepare and furnish to the Operator a list of works/jobs/additions/alterations, if any, to be carried out to bring the Project to the prescribed level of service condition at least two months prior to the date of expiry of the Service Period. In case the Operator fails to carry out the above works, within the stipulated time period the AUTHORITY shall be at liberty to have these works executed by any other Person at the risk and cost of the Operator and any cost incurred by AUTHORITY in this regard shall be reimbursed by the Operator to AUTHORITY within 7 days of receipt of demand. For this purpose, AUTHORITY 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 AUTHORITY to the Operator to the extent required/ available and to recover deficit amount, if any, from the Operator.

## **ARTICLE 13**

### **DISPUTE RESOLUTION**

#### **13.1 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 AUTHORITY Officials 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 Vice Chairman and MD, AUTHORITY by the Operator, 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 13.2 below.

#### **13.2 Arbitration**

##### **a) Arbitrators**

Any Dispute which is not resolved amicably as provided in Article 13.1(a) shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one to be appointed by each Party and the third to be appointed by the two arbitrators appointed by the Parties. A Party requiring arbitration shall appoint an arbitrator in writing, inform the other Party about such appointment and call upon the other Party to appoint its arbitrator. If the other Party fails to appoint its arbitrator, the Party appointing arbitrator shall take steps in accordance with Arbitration and Conciliation Act, 1996.

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

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

**c) English Language**

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

**d) Procedure**

The procedure to be followed within the arbitration, including appointment of arbitrator / arbitral tribunal, the rules of evidence which are to apply shall be in accordance with the 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 subject to determination by the arbitrators. The arbitrators may provide in the arbitral award for the reimbursement to the prevailing party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by Party.

**g) Performance during Arbitration**

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

**ARTICLE 14**

**REPRESENTATIONS AND WARRANTIES, DISCLAIMER**

**14.1 Representations and Warranties of the Operator**

The Operator represents and warrants to AUTHORITY 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 Operator'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 Operator'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 Operator 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 Operator'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;
- (xii) subject to receipt by the Operator from AUTHORITY 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 Operator in and to the Project Assets shall pass to and vest in AUTHORITY on the Termination Date free and clear of all Encumbrances without any further act or deed on the part of the Operator or AUTHORITY;
- (xiii) no representation or warranty by the Operator contained herein or in any other document furnished by it to AUTHORITY 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 Operator, to any person by way of fees, commission or otherwise for securing the Service or entering into of this Agreement or for influencing or attempting to influence any officer or employee of AUTHORITY in connection therewith.

#### **14.2 Disclaimer**

- (a) Without prejudice to any express provision contained in this Agreement, the Operator acknowledges that prior to the execution of this Agreement, the Operator has after a complete and careful examination made an independent evaluation of the traffic volumes, Specifications and Standards, Project Site and all the information provided by AUTHORITY, and has determined to the Operator's satisfaction the nature and extent of such difficulties, risks and hazards as are likely to arise or may be faced by the Operator in the course of performance of its obligations hereunder.
- (b) The Operator 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 AUTHORITY shall not be liable for the same in any manner whatsoever to the Operator.

#### **14.3 Representations and Warranties of AUTHORITY**

AUTHORITY represents and warrants to the Operator that:

- (i) AUTHORITY has full power and authority to grant the Service;

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

## **ARTICLE 15**

### **LIQUIDATED DAMAGES**

If the Project is not operational within the moratorium period (Appendix IX in Vol - I of RFP) and/or completion is not achieved within Scheduled Project Completion Period (Appendix IX in Vol - I of RFP) for any reason other than Force Majeure or reasons attributable to Licensor or any other Government agency, the Licensee shall be liable to pay liquidated Damages at Rs. 2500 (Two Thousand and Five Hundred) per day for every day of delay for Hotels and Resorts and Rs. 500 (Five Hundred) per day for every day of delay for other projects. A project would be liable to be terminated in case of delay in operation/completion exceeding 6 months.

## **ARTICLE 16**

### **MISCELLANEOUS**

#### **16.1 Assignment and Charges**

- (a) Subject to sub-articles (b) and (c) herein below, this Agreement shall not be assigned by the Operator save and except with prior consent in writing of AUTHORITY, which consent AUTHORITY shall be entitled to decline without assigning any reason whatsoever.
- (b) Subject to sub-article (c) herein below, the Operator 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 Operator is a party except with prior consent in writing of AUTHORITY, which consent AUTHORITY 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 Operator'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 Operator Event of Default the Lenders shall have the right of substitution as provided in the Substitution Agreement.

#### **16.2 Liability and Indemnity**

- (a) General Indemnity
  - (i) The Operator shall indemnify, defend and hold AUTHORITY and its employees harmless against any and all proceedings, judgments, suits, actions and, third party claims arising out of a damage to third party properties, or individuals as a result of breach by Operator of any

of its obligations under this Agreement except to the extent that any such claim has arisen due to AUTHORITY Event of Default).

- (ii) AUTHORITY will, indemnify, defend and hold harmless the Operator 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 AUTHORITY and/or arising of a breach by AUTHORITY, its officers, servants and agents of any obligations of AUTHORITY under this Agreement except to the extent that any such claim has arisen due to Operator Event of Default.
- (b) Without limiting the generality of this Article 16.2 the Operator shall fully indemnify, save harmless and defend AUTHORITY 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 Operator to comply with Applicable Laws and Applicable Permits, (b) payments of taxes relating to the Operator's Contractors, suppliers and representatives income or other taxes required to be paid by the Operator without reimbursement hereunder, or (c) non-payment of amounts due as a result of materials or services furnished to the Operator or any of its Contractors which are payable by the Operator or any of its Contractors.
- (c) Without limiting the generality of the provisions of this Article 16.2, the Operator shall fully indemnify, save harmless and defend the AUTHORITY from and against any and all damages which the AUTHORITY 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 Operator or by the Operator's Contractors in performing the Operator'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 Operator 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 Operator shall promptly make every reasonable effort to secure for AUTHORITY a license, at no cost to AUTHORITY, authorizing continued use of the infringing work. If the Operator is unable to secure such license within a reasonable time, the Operator 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 16.2 (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) Defense 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 defense 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 defense. 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 16.2(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 16.2(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 authorized 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 defense 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 defense 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 defenses 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 16.2(e)(iii) shall be applicable, counsel for the Indemnified Party shall have the right to direct the defense 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.

### **16.3 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 Vijayawada, Andhra Pradesh, India shall have jurisdiction over all matters arising out of or relating to this Agreement.

### **16.4 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 authorized 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.

**16.5 Survival**

Termination of this Agreement (a) shall not relieve the Operator or AUTHORITY 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.

**16.6 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.

**16.7 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 AUTHORITY

-----  
-----  
Fax No. -----

If to the Operator

-----  
-----,  
-----  
-----  
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.

**16.8 Severability**

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing 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.

**16.9 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.

**16.10 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.

**16.11 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.

**16.12 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 AUTHORITY by

(Signature)

(Name)

(Designation)

SIGNED, SEALED AND DELIVERED

For and on behalf of OPERATOR by:

In the presence of.

1)

2)

**SCHEDULE A**

**PROJECT**

1. Project Location including index map

Insert Project Location Details from RFP Vol-II: Section 2.1

2. Site related information

Insert Project Details from Vol-II: Section 2.2

**SCHEDULE B  
PROJECT SITE**

**(Description and particulars of the land on which the Project is to be implemented would need to be set out.)**

**Mentioned in Section 2 of Volume II of this RFP.**

**SCHEDULE C**  
**PROJECT FACILITIES**

**AUTHORITY will hand over the existing property to the selected bidder.**

**SCHEDULE D**  
**PROJECT COMPLETION SCHEDULE**  
(The Project Completion Schedule as finalized by the bidder).

**SCHEDULE E  
STATUTORY APPROVALS**

**SCHEDULE F  
SPECIFICATIONS AND STANDARDS**

**To be developed with the master plan and drawings**

**SCHEDULE G  
DRAWINGS**

**SCHEDULE H**  
**MINIMUM Development and Service Obligations**  
**As defined in the RFP**

**SCHEDULE I  
SAFETY STANDARDS**

**(Drafted on project specific basis by Operator and ratified by AUTHORITY)**

**SCHEDULE XXXX**

**Note: Include the RFP Vol I and Vol II here**