

# **Draft Concession Agreement**

**for**

**Kathmandu- Terai Madhes Fast Track Road Project  
(Kathmandu-Nijgadh-Pathlaiya Section)**

**on**

**Public Private Partnership/BOT**

**Government of Nepal  
Ministry of Physical Infrastructure and Transport  
Kathmandu**

**September 2014**

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## PART I PRELIMINARY

## CONCESSION AGREEMENT

THIS AGREEMENT is entered into on this the \*\* day of \*\*, 200\*

### BETWEEN

1 **MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT, GOVERNMENT OF NEPAL** (hereinafter referred to as the “MOPIT” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of One (hereinafter referred to as the “MOPIT” which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of One Part;

### AND

2 [\*\*\*\* **LIMITED**]<sup>1</sup>, a company incorporated under the provisions of the Companies Act, 2063 BS (2006) and having its registered office at \*\*\*\*, (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the Other Part.

### WHEREAS:

(A) The Government of Nepal, the **MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT** (hereinafter referred to as “MOPIT”) intends to construct the Kathmandu - Terai/Madhes Fast Track Road Project, (Kathmandu - Nijgadh - Pathlaiya Section) on build, operate and transfer (“BOT”) basis under the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)” which includes i) construction of an approximately 76 km long four-lane highway, referred to as Kathmandu-Nijgadh Expressway from Kathmandu to Nijgadh at Terai/Madhes and ii) construction of an approximately 18 km long additional two lanes expressway (making four lane expressway in total) in the existing Nijgadh-Pathlaiya section of the two-lane East West Highway. The Kathmandu Nijgadh Expressway will be a tolled highway to be operated and maintained by the Concessionaire throughout the Concession Period whereas additional two lanes expressway is to be constructed in the Nijgadh - pathlaiya

section of the East West Highway and handed over to MOPIT at the end of Project Construction Completion Schedule Date. Both the activities stated above are hereinafter called Kathmandu – Terai / Madhesh Fast Track Road Project, Kathmandu - Nijgadh - Pathlaiya Section (the " Project").

- (B) MOPIT had accordingly invited Expression of Interest (EOI) for short listing of bidders for the aforesaid under its Notice inviting EOI No. .... dated ....., inter alia, for the design, engineering, financing, procurement, construction, operation and maintenance of the above Kathmandu – Terai/Madhes Fast Track Road Project, (Kathamandu-Nijgadh-Pathlaiya Section) on BOT basis and had pursuant thereto shortlisted certain bidders including, inter alia, the [consortium comprising \*\*\*\*, \*\*\*\* and \*\*\*\* (collectively the “**Consortium**”) with \*\*\*\* as its leader].
- (C) The MOPIT had, pursuant to the RFP, laid down and the requirements for technical and financial proposals on a two envelope basis, and invited bids from the shortlisted bidders pursuant to the EOI for undertaking the Project.
- (D) After evaluation of the bids (proposals) so received, the MOPIT had accepted the bid of the [Consortium] and issued its Letter of Award No. \*\*\* dated \*\*\* (hereinafter called the “**LOA**”) to the [Consortium] requiring, inter alia, the submission of the documents required by Article 11 of the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)” but not already covered by the submissions in the proposal, and completion of negotiations leading to the concession agreement as per Article 13 of the same Act, within two (6) months from the date of receipt of the LOA.
- (E) The Consortium has promoted and incorporated the Concessionaire as a limited liability company to enter into this Concession Agreement pursuant to the LOA for undertaking, inter alia (i) survey, design, engineering, financing, procurement, construction, operation, maintenance, and transfer of an approximately 76 km long Kathmandu to Nijgadh Expressway on a BOT basis; and (ii) survey, design, engineering, financing, procurement, construction and transfer to MOPIT of an approximately 18 km long additional two-lanes expressway (making four lane expressway in total) in the existing Nijgadh to Pathlaiya section of the East West Highway and to fulfill other obligations of the Concessionaire pursuant to the LOA and has requested MOPIT to accept the Concessionaire as the entity which shall

undertake and fulfill and perform the obligations and exercise the rights of the Consortium under the LOA, including the obligation to enter into this Concession Agreement for i) survey, design, engineering, financing, procurement, construction, operation, maintenance, and transfer of an approximately 76 km long the Kathmandu to Nijgadh Expressway; and (ii) survey, design, engineering, financing, procurement, construction and transfer to MOPIT of an approximately 18 km long additional two-lanes expressway (making four lane expressway in total) in the existing Nijgadh to Pathlaiya section of the East West Highway on Public Private Partnership/BOT basis within the provisions of the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)”

- (F) The MOPIT has agreed to the said request of the [Consortium and the] Concessionaire, and has accordingly agreed to enter into this Concession Agreement with the Concessionaire pursuant to the LOA for, inter alia, the design, engineering, financing, procurement, construction, operation and maintenance of the said Project on BOT basis, subject to and on the terms and conditions set forth hereinafter.
- (G) It is deemed necessary and expedient to enter into this Agreement to record the terms of the said Agreement between the Parties.

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

## ARTICLE 1 DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

The words and expressions beginning with capital letters and defined in this Agreement (including those in Article 48) shall, unless the context otherwise requires, have the meaning ascribed thereto herein, and the words and expressions defined in the Schedules and used therein shall have the meaning ascribed thereto in the Schedules;

### 1.2 Interpretation

1.2.1 In this Agreement, unless the context otherwise requires,

- (a) references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into hereunder;
- (b) references to laws of Nepal or Nepalese law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of Nepal and as from time to time may be amended, modified, supplemented, extended or re-enacted;
- (c) references to a “**person**” and words denoting a natural person shall be construed as a reference to any individual, firm, company, corporation, society, trust, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the above and shall include successors and assigns;
- (d) the table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement;
- (e) the words “**include**” and “**including**” are to be construed without limitation and shall be deemed to be followed by “without limitation” or “but not limited to” whether or not they are followed by such phrases;

- (f) references to “**construction**” or “**build**” include, unless the context otherwise requires, investigation, design, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction, and “**construct**” and “**build**” shall be construed accordingly;
- (g) reference to “**development**” include, unless the context otherwise requires, construction, renovation, refurbishing, augmentation, up gradation and other activities incidental to “**develop**” shall be construed accordingly;
- (h) any reference to any period of time shall mean a reference to that according to Nepalese Standard Time;
- (i) any reference to day shall mean a reference to a calendar day;
- (j) references to a “**business day**” shall be construed as a reference to a day (other than a Saturday) on which the government offices are generally open for business;
- (k) any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;
- (l) references to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended pursuant to this Agreement;
- (m) any reference to any period commencing “**from**” a specified day or date and “**till**” or “**until**” a specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then the period shall run until the end of the next business day;
- (n) the words importing singular shall include plural and vice versa;
- (o) references to any gender shall include the other and the neutral gender;
- (p) “**lakh**” means a hundred thousand (100,000) and “**crore**” means ten million (10,000,000);
- (q) “**indebtedness**” shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether

present or future, actual or contingent;

- (r) references to the “**winding-up**”, “**dissolution**”, “**insolvency**”, or “**reorganisation**” of a company or corporation shall be construed so as to include any equivalent or analogous proceedings under the law of the jurisdiction in which such company or corporation is incorporated or any jurisdiction in which such company or corporation carries on business including the seeking of liquidation, winding-up, reorganisation, dissolution, arrangement, protection or relief of debtors;
- (s) save and except as otherwise provided in this Agreement, any reference, at any time, to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, licence or other document as amended, varied, supplemented, modified or suspended at the time of such reference; provided that this Sub-clause shall not operate so as to increase liabilities or obligations of the MOPIT hereunder or pursuant hereto in any manner whatsoever;
- (t) any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to this Agreement from or by any Party or the Independent Engineer shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party or the Independent Engineer, as the case may be, in this behalf and not otherwise;
- (u) the Schedules and Recitals to this Agreement form an integral part of this Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement;
- (v) references to Recitals, Articles, Clauses, Sub-clauses or Schedules in this Agreement shall, except where the context otherwise requires, mean references to Recitals, Articles, Clauses, Sub-clauses and Schedules of or to this Agreement, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a Paragraph of this Agreement or of the Schedule in which such reference appears;
- (w) the damages payable by either Party to the other of them, as set forth in this Agreement, whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and are not by way of penalty (the “**Damages**”); and

(x) time shall be of the essence in the performance of the Parties' respective obligations. If any time period specified herein is extended, such extended time shall also be of essence.

1.2.2 Unless expressly provided otherwise in this Agreement, any Documentation required to be provided or furnished by the Concessionaire to the MOPIT and/or the Independent Engineer shall be provided free of cost and in three copies, and if the MOPIT and/or the Independent Engineer is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two copies thereof.

1.2.3 The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply.

1.2.4 Any word or expression used in this Agreement shall, unless otherwise defined or construed in this Agreement, bear its ordinary English meaning.

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

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

### **1.4 Priority of Agreements and Errors/Discrepancies**

1.4.1 This agreement, and all other agreements and documents forming part of this agreement are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this agreement, the priority of this agreement and other documents and agreements forming part hereof shall, in the event of any conflict between them, be in the following order:

(a) this agreement; and

(b) all other agreements and documents forming part hereof;

i.e. the agreement at (a) above shall prevail over the agreements and documents at (b) above.

1.4.2 Subject to the provisions of Clause 1.4.1, in case of ambiguities or discrepancies

within this Agreement, the following shall apply:

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

## PART II THE CONCESSION

## ARTICLE 2 SCOPE OF THE PROJECT

### 2.1 Scope of the Project

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

- (a) survey, design, engineering, financing, procurement, construction, operation maintenance ,and transfer to MOPIT of, an approximately 76 km long, Kathmandu to Nijgadh Expressway (Fast Track Road) on a BOT basis on Public Private Partnership/BOT basis within the provisions of the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)”
- (b) survey, design, engineering, financing, procurement, construction and transfer to MOPIT of an approximately 18 km long additional two-lanes (making four lane expressway in total) expressway (Fast Track Road) in the existing Nijgadh to Pathlaiya section of the East West Highway on Public Private Partnership/BOT basis within the provisions of the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)”
- (c) on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of Project Facilities as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;
- (d) operation and maintenance of the Project in accordance with the provisions of this Agreement; and
- (e) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

The Concessionaire shall undertake its obligations at its own cost and risk.

## ARTICLE 3 GRANT OF CONCESSION

### 3.1 The Concession

3.1.1 Subject to and in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits, the MOPIT hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and MOPIT during the subsistence of this Agreement i) to construct, operate and maintain the four lane Kathmandu-Nijgadh Expressway, and ii) to construct the two lane Nijgadh-Pathlaiya Expressway (the “**Concession**”) for a period of .....Years commencing from the Appointed Date and the Concessionaire hereby accepts the Concession and agrees to implement the Project in accordance with the terms and conditions set forth herein:

3.1.2 Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle (as the case may be) the Concessionaire to:

- (a) Right of Way, access and licence to the Site to the extent conferred by the provisions of this Agreement;
- (b) Finance and construct the Project ;
- (c) manage, operate and maintain the Kathmandu to Nijgadh Expressway and regulate the use thereof by third parties;
- (d) demand, collect and appropriate Fee from vehicles and persons liable for payment of Fee for using the specified road, Kathmandu to Nijgadh Expressway, or any part thereof and refuse entry of any vehicle if the Fee due is not paid;
- (e) perform and fulfil all of the Concessionaire’s obligations under and in accordance with this Agreement;
- (f) save as otherwise expressly provided in this Agreement, bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Concessionaire under this Agreement; and
- (g) not assign, transfer or sublet or create any lien or Encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Project nor transfer, lease or part possession therewith, save and except as expressly permitted by this Agreement or the Substitution Agreement.

## ARTICLE 4 CONDITIONS PRECEDENT

### 4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles 4, 10, 24, 34, 44 and 47, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “**Conditions Precedent**”).

4.1.2 The Concessionaire may, upon providing the Performance Security to the MOPIT in accordance with Article 9, by notice require the MOPIT to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period as may be specified therein, and the obligations of the MOPIT hereunder shall be deemed to have been performed when the MOPIT shall have:

(a) procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.3.1; provided that the conditions set forth in Clause 10.3.2 shall be satisfied on or prior to the Appointed Date;

(b) procured all Applicable Permits relating to environmental protection and conservation of the Site

4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire prior to the Appointed Date shall be deemed to have been fulfilled when the Concessionaire shall have:

(a) procured execution of the Escrow Agreement;

(b) procured execution of the Substitution Agreement;

(c) procured all the Applicable Permits specified in Schedule-E unconditionally or if subject to conditions then all such conditions shall have been satisfied in full and such Applicable Permits are in full force and effect;

(d) provided Performance Security to the MOPIT;

(e) executed the Financing Agreements and delivered to the MOPIT 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;

(f) delivered to the MOPIT 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire,

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

- (g) delivered to the MOPIT from [the Consortium Members, their respective] confirmation, in original, of the correctness of their representations and warranties set forth in Sub clauses (k), (l) and (m) of clause 7.1 of this Agreement; and
- h) delivered to the MOPIT a legal opinion from the legal counsel of the Concessionaire with respect to the MOPIT of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof:

Provided that upon request in writing by the Concessionaire, the MOPIT may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3. For the avoidance of doubt, the MOPIT may, in its sole discretion, grant any waiver hereunder with such conditions as it may deem fit.

- 4.1.4 Each Party shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying the Conditions Precedent for which that Party is responsible.
- 4.1.5 The Parties shall notify each other in writing at least once a month on the progress made in satisfying the Conditions Precedent. Each Party shall promptly inform the other Party when any Condition Precedent for which it is responsible has been satisfied.

## **4.2 Damages for delay by the MOPIT**

In the event that (i) the MOPIT does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof in this Agreement, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the MOPIT shall pay to the Concessionaire Damages in an amount calculated at the rate of NRs. 100,000 (one Lakh rupees) for delay of each day until the fulfilment of such Conditions Precedent.

## ARTICLE 5 OBLIGATIONS OF THE CONCESSIONAIRE

### 5.1 Obligations of the Concessionaire

- 5.1.1 Subject to and on the terms and conditions of this Agreement, the Concessionaire shall at its cost and expense procure finance for and undertake the survey, design, engineering, procurement, construction, operation and maintenance of the Project and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- 5.1.2 The Concessionaire shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- 5.1.3 Without prejudice to Clauses 5.1.1 and 5.1.2 above, the Concessionaire shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.
- 5.1.4 Without prejudice to Clauses 5.1.1, 5.1.2 and 5.1.3 above the Concessionaire shall, at its own cost and expense observe, undertake, comply with and perform, in addition to and not in derogation of, its obligations elsewhere set out in this Agreement, the following:
- (a) make, or cause to be made, necessary applications to the relevant Governmental Agencies with such particulars and details, as may be required for obtaining all Applicable Permits (other than those set forth in Clause 4.1.2 above) and obtain such Applicable Permits in conformity with the Applicable Laws;
  - (b) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project ;
  - (c) perform and fulfil its obligations under the Financing Agreements;
  - (d) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by the it or its Contractors in connection with the performance of the its obligations under this Agreement;
  - (e) make reasonable efforts to acquire additional land required for the purposes of the Agreement at its own cost; the MOPIT shall however, cooperate and extend necessary assistance to such land acquisition by the Concessionaire.

- (f) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Concessionaire's obligations under this Agreement;
- (g) not do or omit to do any act, deed or thing which may in any manner be violate of any of the provisions of this Agreement;
- (h) support, cooperate with and facilitate the MOPIT in the implementation and operation of the Project in accordance with the provisions of this Agreement; and
- (i) transfer the Project to the MOPIT upon Termination of this Agreement, in accordance with the provisions thereof.

## **5.2 Obligations relating to Project Agreements**

- 5.2.1 It is expressly agreed that the Concessionaire shall, at all times, be responsible and liable for all its obligations under this Agreement notwithstanding anything contained in the Project Agreements or any other agreement, and no default under any Project Agreement or agreement shall excuse the Concessionaire from its obligations or liability hereunder.
- 5.2.2 The Concessionaire shall submit to the MOPIT the drafts of all Project Agreements or any amendments or replacements thereto for its review and comments, and the MOPIT shall have the right but not the obligation to undertake such review and provide its comments, if any, to the Concessionaire within 15 (fifteen) days of the receipt of such drafts. Within 7 (seven) days of execution of any Project Agreement or amendment thereto, the Concessionaire shall submit to the MOPIT a true copy thereof, duly attested by a Director of the Concessionaire, for its record. For the avoidance of doubt, it is agreed that the review and comments hereunder shall be limited to ensuring compliance with the terms of this Agreement. It is further agreed that no review and/or observation of the MOPIT and/or its failure to review and/or convey its observations on any document shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the MOPIT be liable for the same in any manner whatsoever..

- 5.2.3 The Concessionaire shall not make any addition, replacement or amendments to any of the Financing Agreements without the prior written consent of the MOPIT if such addition, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the MOPIT, and in the event that any addition, replacement or amendment is made without such consent, the Concessionaire shall not enforce such addition, replacement or amendment nor permit enforcement thereof against the MOPIT. For the avoidance of doubt, the MOPIT acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the debt of the Concessionaire.
- 5.2.4 The Concessionaire shall procure that each of the Project Agreements contains provisions that entitle the MOPIT to step into such agreement, in its sole discretion, in substitution of the Concessionaire in the event of Termination or Suspension (the “**Covenant**”). For the avoidance of doubt, it is expressly agreed that in the event the MOPIT does not exercise such rights of substitution within a period not exceeding 90 (ninety) days from the Transfer Date, the Project Agreements shall be deemed to cease to be in force and effect on the Transfer Date without any liability whatsoever on the MOPIT and the Covenant shall expressly provide for such eventuality. The Concessionaire expressly agrees to include the Covenant in all its Project Agreements and undertakes that it shall, in respect of each of the Project Agreements, procure and deliver to the MOPIT an acknowledgement and undertaking, in a form acceptable to the MOPIT, from the counter party(ies) of each of the Project Agreements, where under such counter party(ies) shall acknowledge and accept the Covenant and undertake to be bound by the same and not to seek any relief and remedy whatsoever from the MOPIT in the event of Termination or Suspension.
- 5.2.5 Notwithstanding anything to the contrary contained in this Agreement, the Concessionaire agrees and acknowledges that selection or replacement of an O & M Contractor and execution of the O & M Contract shall be subject to the prior approval of the MOPIT from national security and public interest perspective, the decision of the MOPIT in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such selection or contract without prior approval of the MOPIT. For the avoidance of doubt, it is expressly agreed that approval of the MOPIT hereunder shall be limited to national security and public interest perspective, and the MOPIT shall endeavour to convey its decision thereon expeditiously. It is also agreed that the MOPIT shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire or its Contractors from any liability or obligation under this Agreement.

### 5.3 Obligations relating to Change in Ownership

5.3.1 The Concessionaire shall not undertake or permit any Change in Ownership, except with the prior written approval of the MOPIT.

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

- (i) all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership or control of any Equity, in aggregate of not less than 15% (fifteen per cent) of the total Equity of the Concessionaire; or
- (ii) acquisition of any control directly or indirectly of the Board of Directors of the Concessionaire by any person either by himself or together with any person or persons acting in concert with him

Shall constitute a Change in Ownership requiring prior approval of the MOPIT from national security and public interest perspective, the decision of the MOPIT in this behalf being final, conclusive and binding on the Concessionaire, and undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Concessionaire without such prior approval of the MOPIT. For the avoidance of doubt, it is expressly agreed that approval of the MOPIT hereunder shall be limited to national security and public interest perspective, and the MOPIT shall endeavour to convey its decision thereon expeditiously. It is also agreed that the MOPIT shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Concessionaire from any liability or obligation under this Agreement.

For the purposes of this Clause 5.3.2:

- (a) the expression "acquirer", "control" and "person acting in concert" shall have the meaning ascribed thereto in the Securities Act 2007 of Nepal or any statutory re-enactment thereof as in force as on the date of acquisition of Equity, or the control of the Board of Directors, as the case may be, of the Concessionaire;
- (b) the indirect transfer or control of legal or beneficial ownership of Equity shall mean transfer of the direct or indirect beneficial ownership or control of any company or companies whether in Nepal or abroad which results in

the acquirer acquiring Control over the shares or voting rights of shares of the Concessionaire; and

- (c) power to appoint, whether by contract or by virtue of control or acquisition of shares of any company holding directly or through one or more companies (whether situated in Nepal or abroad) the Equity of the Concessionaire, not less than half of the directors on the Board of Directors of the Concessionaire or of any company, directly or indirectly whether situate in Nepal or abroad, having ultimate control of not less than 15% (fifteen per cent) of the Equity of the Concessionaire shall constitute acquisition of control, directly or indirectly, of the Board of Directors of the Concessionaire.

#### **5.4 Employment of foreign nationals**

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

#### **5.5 Employment of trained personnel**

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

#### **5.6 Sole Purpose of the Concessionaire**

The Concessionaire having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the Concessionaire or any of its subsidiaries shall not, except with the previous written consent of the MOPIT, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein.

#### **5.7 Branding of Project**

The Project Expressway or any part thereof shall not be branded in any manner to advertise, display or reflect the name or identity of the Concessionaire or its shareholders. The Concessionaire undertakes that it shall not, in any manner, use the

name or entity of the Project to advertise or display its own identity, brand equity or business interests, including those of its shareholders, save and except as may be necessary in the normal course of business. For the avoidance of doubt, it is agreed that the Concessionaire may display its own name at a spot where other public notices are displayed for the Users. It is further agreed that the Project shall be known, promoted, displayed and advertised by the name of Kathmandu Terai/ Madhes Expressway.

## **5.8 Facilities for physically challenged and elderly persons**

The Concessionaire shall, in conformity with the guidelines issued from time to time by the Ministry of Women, Children and Social Welfare or the related ministry of GON, or a substitute thereof, procure a barrier free environment for the physically or visually challenged and for elderly persons using the Project Expressway.

## ARTICLE 6 OBLIGATIONS OF THE MOPIT

### 6.1 Obligations of the MOPIT

6.1.1 The MOPIT shall, at its own cost and expense undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.

6.1.2 The MOPIT agrees to provide support to the Concessionaire and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:

- (a) upon written request from the Concessionaire, and subject to the Concessionaire complying with Applicable Laws, provide all reasonable support and assistance to the Concessionaire in procuring Applicable Permits required from any Government Instrumentality for implementation and operation of the Project;
- (b) upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favourable to the Concessionaire than those generally available to commercial customers receiving substantially equivalent services;
- (c) procure that no barriers are erected or placed on the Project by any Government Instrumentality or persons claiming through or under it, except for reasons of Emergency, national security, law and order;
- (d) make best endeavours to procure that no local Tax, toll or charge is levied or imposed on the use of whole or any part of the Project;
- (e) subject to and in accordance with the Applicable Laws, grant to the Concessionaire the MOPIT to regulate traffic on the Project, (on Kathmandu Nijgadh Road only);
- (f) assist the Concessionaire in procuring Police assistance for regulation of traffic, removal of trespassers and security on the Project;
- (g) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;
- (h) support, cooperate with and facilitate the Concessionaire in the implementation and operation of the Project in accordance with the provisions of this Agreement; and

- (i) upon written request from the Concessionaire and subject to the provisions of Clause 5.4, provide reasonable assistance to the Concessionaire and any expatriate personnel of the Concessionaire or its Contractors to obtain applicable visas and work permits for the purposes of discharge by the Concessionaire or its Contractors their obligations under this Agreement and the Project Agreements.

## **6.2 Obligations relating to Competing Roads**

The MOPIT shall procure that during the subsistence of this Agreement, neither the MOPIT nor any Government Instrumentality shall construct or cause to be constructed any Competing Road except for the Kathmandu - Kulekhani-Hetauda Fast Track (KKHFT) and Kathmandu-Terai or Hetauda Railway. In case of completion and coming into operation of the KKHFT or the Railway within the operation period of the Kathmandu-Terai/Madhes Expressway/Fast Track, the additional concession period required to compensate for the diverted traffic shall be considered by MOPIT.

## ARTICLE 7 REPRESENTATIONS AND WARRANTIES

### 7.1 Representations and Warranties of the Concessionaire

The Concessionaire represents and warrants to the MOPIT that:

- (a) it is duly organised and validly existing under the laws of Nepal, and has full power and MOPIT to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;
- (b) it has taken all necessary corporate and other actions under Applicable Laws to authorise the execution and delivery of this Agreement and to validly exercise its rights and perform its obligations under this Agreement;
- (c) it has the financial standing and capacity to undertake the Project in accordance with the terms of this Agreement;
- (d) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and enforceable obligations against it in accordance with the terms hereof;
- (e) it is subject to the laws of Nepal, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of this Agreement or matters arising thereunder including any obligation, liability or responsibility hereunder;
- (f) the information furnished in the Bid and as updated on or before the date of this Agreement is true and accurate in all respects as on the date of this Agreement;
- (g) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Articles of Association [or those of any member of the Consortium] or any Applicable Laws or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
- (h) there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other MOPIT, the outcome of which may result in the breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform any of its

obligations under this Agreement;

- (i) it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on its ability to perform its obligations under this Agreement and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under this Agreement;
- (j) it has complied with Applicable Laws in all material respects and has not been subject to any fines, penalties, injunctive relief or any other civil or criminal liabilities which in the aggregate have or may have a material adverse effect on its ability to perform its obligations under this Agreement;
- (k) it shall at no time undertake or permit any Change of Ownership except in accordance with the provisions of Clause 5.3 and that the {selected bidder/Consortium Members}, together with {its/their} Associates hold not less than 51% (fifty-one percent) of its issued and paid up Equity as on the date of this Agreement and up to the COD, and that no member of the Consortium whose technical and financial capacity was evaluated for the purpose of EOJ and RFP shall hold less than 26% (twenty six per cent) of such equity during the Construction Period;
- (l) [the Consortium Members and their] Associates have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with this Agreement;
- (m) [each Consortium Member] is duly organised and validly existing under the laws of the jurisdiction of its incorporation, and has requested the MOPIT to enter into this Agreement with the Concessionaire pursuant to the Letter of Award, and has agreed to and unconditionally accepted the terms and conditions set forth in this Agreement;
- (n) all its rights and interests in the Project shall pass to and vest in the MOPIT on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the MOPIT, and that none of the Project Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in this Agreement;
- (o) no representation or warranty by it contained herein or in any other document furnished by it to the MOPIT or to any Government Instrumentality 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;

- (p) no sums, in cash or kind, have been paid or will be paid, by it or on its behalf, to any person by way of fees, commission or otherwise for securing the Concession or entering into this Agreement or for influencing or attempting to influence any officer or employee of the MOPIT in connection therewith; and
- (q) all information provided by the {selected bidder/Consortium Members} in response to the Expression of Interest and Request for Proposals or otherwise, is to the best of knowledge and belief, true and accurate in all material respects.

## **7.2 Representations and Warranties of the MOPIT**

The MOPIT represents and warrants to the Concessionaire that:

- (a) it has full power and MOPIT to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;
- (b) it has taken all necessary action under the Applicable Laws to authorise the execution, delivery and performance of this Agreement;
- (c) it has the financial standing and capacity to perform its obligations under the Agreement;
- (d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;
- (e) it has complied with Applicable Laws in all material respects;
- (f) it has the right, power and MOPIT to manage operate the Project up to the Appointed Date;
- (g) it has good and valid right to the Site, and has power and MOPIT to grant a licence interest in respect thereto to the Concessionaire.

### 7.3 Disclosure

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

## ARTICLE 8 DISCLAIMER

### 8.1 Disclaimer

- 8.1.1 The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the Request for Proposal, Scope of the Project, Specifications and Standards, Site, local conditions, physical qualities of ground, subsoil and geology, traffic volumes and all information provided by the MOPIT or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. The MOPIT makes no representation whatsoever, express, implicit or otherwise, regarding the accuracy, adequacy, correctness, reliability and/or completeness of any assessment, assumptions, statement or information provided by it and the Concessionaire confirms that it shall have no claim whatsoever against the MOPIT in this regard.
- 8.1.2 The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above and hereby acknowledges and agrees that the MOPIT shall not be liable for the same in any manner whatsoever to the Concessionaire, [the Consortium Members and their] Associates or any person claiming through or under any of them.
- 8.1.3 The Parties that any mistake or error in or relating to any of the matters set forth in Clause 8.1.1 above shall not vitiate this Agreement, or render it voidable.
- 8.1.4 In the event that either Party becomes aware of any mistake or error relating to any of the matters set forth in Clause 8.1.1 above, that Party shall immediately notify the other Party, specifying the mistake or error, provided, however, that a failure on part of the MOPIT to give any notice pursuant to this Clause 8.1.4 shall not prejudice the disclaimer of the MOPIT contained in Clause 8.1.1 and shall not in any manner shift to the MOPIT any risks assumed by the Concessionaire pursuant to this Agreement.
- 8.1.5 Except as otherwise provided in this Agreement, all risks relating to the Project shall be borne by the Concessionaire and the MOPIT shall not be liable in any manner for such risks or the consequences thereof.

# PART III DEVELOPMENT AND OPERATIONS



## ARTICLE 9 PERFORMANCE SECURITY

### 9.1 Performance Security

The Concessionaire shall, for the performance of its obligations hereunder during the Construction Period, provide to the MOPIT no later than 120 (one hundred and twenty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Bank for a minimum sum of NRs 1500 (fifteen hundred) million in the form set forth in Schedule-F (the “**Performance Security**”) counter guaranteed by a reputed Commercial Bank of Nepal. Until such time the Performance Security is provided by the Concessionaire pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security pursuant hereto, the MOPIT shall release the Bid Security to the Concessionaire.

Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Concessionaire within a period of 120 (one hundred and twenty) days from the date of this Agreement, the MOPIT may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

### 9.2 Appropriation of Performance Security

Upon occurrence of a Concessionaire Default, the MOPIT shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages for such Concessionaire Default. Upon such encashment and appropriation from the Performance Security, the Concessionaire shall, within 30 (thirty) days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Concessionaire shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which the MOPIT shall be entitled to terminate this Agreement in accordance with Article 37. Upon replenishment or furnishing of a fresh Performance Security, as the case may be, as aforesaid, the Concessionaire shall be entitled to an additional Cure Period of 90 (ninety) days for remedying the Concessionaire Default, and in the event of the Concessionaire not curing its default within such Cure Period, the MOPIT shall be entitled to encash and appropriate such Performance Security as Damages, and to terminate this Agreement in accordance with Article 37.

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

The Performance Security shall remain in force and effect for a period of two years, but shall be released earlier upon the Concessionaire expending on Project construction an aggregate sum that is not less than 20% (twenty per cent) of the Total Project Cost; and provided the Concessionaire is not in breach of this Agreement. Upon request made by the Concessionaire for release of the Performance Security along with the particulars establishing satisfaction of the requirements specified under this Clause 9.3, the MOPIT shall release the Performance Security forthwith.

## ARTICLE 10 RIGHT OF WAY

### 10.1 The Site

The site of the Project shall comprise of the real estate described in Schedule-A, which shall include i) the land already acquired by MOPIT along the proposed alignment of the Kathmandu-Nijgadh Expressway and Nijgadh-Pathlaiya Expressway, ii) additional land that shall be acquired by the MOPIT for the Project, and iii) the land that shall be acquired by the Concessionaire, on behalf of the MOPIT, for alternative alignment, permanent detours, and other facilities that may be related with the Project as per the prior approval of the MOPIT. The additional land procurement may be done either by the Concessionaire on behalf of the MOPIT or by the MOPIT itself depending upon the urgency of constructions and effectiveness of the procurement or acquisition process as per mutual agreement between the Concessionaire and the MOPIT. In case of the procurement by the Concessionaire on behalf of the MOPIT, the land shall belong to the MOPIT but the cost of the land acquired shall be deducted from the toll revenue of the Concessionaire and the necessary adjustment in the concession period shall be made allowing reasonable time value for the cost of land acquired by the Concessionaire. The Right of Way shall be provided and granted by the MOPIT to the Concessionaire as a licensee under and in accordance with this Agreement (the “Site”). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for the Project as set forth in Schedule-A.

### 10.2 Licence, Access and Right of Way

10.2.1 The MOPIT hereby grants to the Concessionaire access to the Site for carrying out any surveys, investigations and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the MOPIT shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.

10.2.2 This Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the MOPIT, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, leave and licence rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule-A

hereto (the “**Licensed Premises**”), on an “as is where basis”, free of any Encumbrances, to operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed Premises, hereditaments or premises or any part thereof belonging to or in anyway appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.

- 10.2.3 The licence, access and right of way granted by this Agreement to the Concessionaire shall always be subject to existing rights of way and the Concessionaire shall perform its obligations in a manner that two existing lanes of the Nijgadh - Pathlaiya section of the East West Highway or an alternative thereof are open to traffic at all times during the Construction Period.
- 10.2.4 It is expressly agreed that the Licence granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the MOPIT to terminate the Licence, upon the Termination of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Site by the Concessionaire or its sub-licensees, the licence in respect of the Site shall automatically terminate, without any further act of the Parties, upon Termination of this Agreement.
- 10.2.5 The Concessionaire hereby appoints the MOPIT (acting directly or through a nominee) to be its true and lawful attorney, to execute and sign in the name of the Concessionaire a transfer or surrender of the License granted hereunder at any time after the Concession Period has expired or has been terminated earlier in terms hereof, a sufficient proof of which will be the declaration of any duly authorised officer of the MOPIT, and the Concessionaire consents to it being registered for this purpose.
- 10.2.6 It is expressly agreed that (i) trees on the Site are property of the MOPIT except that the Concessionaire shall be entitled to exercise usufructory rights thereon during the Concession Period, and (ii) mining rights do not form part of the licence granted to the Concessionaire under this Agreement and the Concessionaire hereby acknowledges that it shall not have any mining rights or any interest in the underlying minerals on or under the Licensed Premises. For the avoidance of doubt, mining rights mean the right to mine any and all minerals or interest therein.

### **10.3 Procurement of the Site**

- 10.3.1 Pursuant to the notice specified in Clause 4.1.2, the MOPIT Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site. Such memorandum shall have appended thereto an appendix (the “**Appendix**”) specifying in reasonable detail i) those parts of the Site to which vacant access and Right of Way has not been granted to the Concessionaire, ii) the sections of the alignment where alternatives and detours are proposed by the Concessionaire, iii) the additional land that shall be acquired by the MOPIT for the Project, iv) the land that is proposed to be acquired by the Concessionaire, on behalf of the MOPIT, by direct purchase, and v) the land that is proposed to be acquired by the Concessionaire through MOPIT under the provisions of the Land Acquisition Act 2034. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall, subject to the provisions of Clause 10.2.2, be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the MOPIT to the Concessionaire.
- 10.3.2 Without prejudice to the provisions of Clause 10.3.1, the Parties hereto agree that on or prior to the Appointed Date, the MOPIT shall have granted vacant access and Right of Way such that the Appendix shall not include more than 35% (thirty five per cent) of the total area of the Site required and necessary for the Project, and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the MOPIT shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2.
- 10.3.3 On and after signing the memorandum referred to in Clause 10.3.1, and until the Transfer Date, the Concessionaire shall maintain a round-the-clock vigil over the Site and shall ensure and procure that no encroachment thereon takes place, and in the event of any encroachment or occupation on any part thereof, the Concessionaire shall report such encroachment or occupation forthwith to the MOPIT and undertake its removal at its cost and expenses.
- 10.3.4 The MOPIT shall make best efforts to provide and grant, no later than 90 days from the Appointed Date, the Right of Way to the Concessionaire in respect of all acquired land included in the Appendix, except in the event of delay for Force Majeure or breach of this Agreement by the Concessionaire

- 10.3.5 Upon receiving Right of Way in respect of any land included in the Appendix, the Concessionaire shall complete the Construction Works thereon within the period specified in this Agreement; provided that the issue of Provisional Certificate shall not be affected or delayed on account of vacant access to any part of the Site not being granted to the Concessionaire or any construction on such part of the Site remaining incomplete on the date of Tests on account of the delay or denial of such access thereto. For the avoidance of doubt, it is expressly agreed that Construction Works on all lands for which Right of Way is granted within 90 (ninety) days of the Appointed Date shall be completed before the Project Completion Date.
- 10.3.6 The Concessionaire shall, if so required by the MOPIT, procure on behalf of the MOPIT, on the terms and to the extent specified by the MOPIT, the additional land required for alternative routes, detours, under passes, over passes, and project facilities in Schedule C, or for construction of works specified in Change of Scope Order issued under Article 16, in accordance with this Agreement and upon procurement, such land shall form part of the Site and vest in the MOPIT; provided that the Concessionaire may, by notice given to the MOPIT no later than 60 (sixty) days from [the Appointed Date or the date of Change of Scope Order, as the case may be,] require the MOPIT to initiate and undertake proceedings for acquisition of such land under the provisions of the Land Acquisition Act 2034 and the MOPIT shall take all such steps as may be reasonably necessary for such land acquisition forthwith; provided further that the cost of land acquired under this Clause 10.3.6 if borne by the Concessionaire shall be suitably adjusted in the Concession period; provided also that the land to be acquired by the MOPIT hereunder shall be deemed to be included in the Appendix referred to in this Clause 10.3 and dealt with in accordance with the provisions thereof. It is agreed that the land to be acquired for the Toll Plazas and approach roads thereof shall conform to the provisions of Schedule - B and Schedule - C. It is further agreed that the MOPIT may, at any time after the Bid Date, *suo moto* acquire the land required hereunder.
- 10.3.7 The Concessionaire may procure at its cost and expense and on its own the land that may be required by it for Additional Facilities and the MOPIT shall have no obligation or liability in respect thereof. The Concessionaire shall seek prior consent of the MOPIT to connect any Additional Facility to the Project Expressway and such consent shall not be unreasonably withheld.

#### **10.4 Site to be free from Encumbrances**

Subject to the provisions of Clause 10.3, the Site shall be made available by the MOPIT to the Concessionaire pursuant hereto free from all Encumbrances and occupations and without the Concessionaire being required to make any payment to

the MOPIT on account of any costs, compensation, expenses and charges for the acquisition and use of such Site for the duration of the Concession Period, except insofar as otherwise expressly provided in this Agreement. For the avoidance of doubt, it is agreed that existing rights of way, easements, privileges, liberties and appurtenances to the Licensed Premises shall not be deemed to be Encumbrances. It is further agreed that the Concessionaire accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition on the Site.

#### **10.5 Protection of Site from encroachments**

During the Concession Period, the Concessionaire shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Contractor or other person claiming through or under the Concessionaire to place or create any Encumbrance or security interest over all or any part of the Site or the Project Assets, or on any rights of the Concessionaire therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement.

#### **10.6 Special/temporary right of way**

The Concessionaire shall bear all costs and charges for any special or temporary right of way required by it in connection with access to the Site. The Concessionaire shall obtain at its cost such facilities on or outside the Site as may be required by it for the purposes of the Project and the performance of its obligations under this Agreement.

#### **10.7 Access to the MOPIT and Independent Engineer**

The licence, right of way and right to the Site granted to the Concessionaire hereunder shall always be subject to the right of access of the MOPIT and the Independent Engineer and their employees and agents for inspection, viewing and exercise of their rights and performance of their obligations under this Agreement.

#### **10.8 Geological and Archaeological finds**

It is expressly agreed that mining, geological or archaeological rights do not form part of the licence granted to the Concessionaire under this Agreement and the Concessionaire hereby acknowledges that it shall not have any mining rights or interests in the underlying minerals, fossils, antiquities, structures or other remnants or things either of particular geological or archaeological interest and that such rights, interest and property or on under the Site shall vest in and belong to the MOPIT or the concerned Government Instrumentality. The Concessionaire shall take

all reasonable precautions to prevent its workmen or any other person from removing or damaging such interest or property and shall inform the MOPIT forthwith of the discovery thereof and comply with such instructions as the concerned Government Instrumentality may reasonably give for the removal of such property. For the avoidance of doubt, it is agreed that any reasonable expenses incurred by the Concessionaire hereunder shall be reimbursed by the MOPIT. It is also agreed that the Government shall procure that the instructions hereunder are issued by the concerned Government Instrumentality within a reasonable period.

## **ARTICLE 11 UTILITIES, ASSOCIATED ROADS AND TREES**

### **11.1 Existing utilities and roads**

Notwithstanding anything to the contrary contained herein, the Concessionaire shall ensure that all existing roads, right of way or utilities on, under or above the Site are kept in continuous satisfactory use, if necessary, by providing suitable temporary or permanent diversions with the MOPIT of the controlling body of that road, right of way or utility, and the MOPIT shall, upon written request from the Concessionaire, initiate and undertake at the Concessionaire's cost, legal proceedings for acquisition of any right of way necessary for such diversion.

### **11.2 Shifting of obstructing utilities**

The Concessionaire shall, subject to Applicable Laws and with assistance of the MOPIT, undertake shifting of any utility including electric lines, water pipes and telephone cables, to an appropriate location or alignment within or outside the Site if and only if such utility causes a material adverse effect on the construction, operation or maintenance of the Project . The cost of such shifting shall be borne by the MOPIT or by the entity owning such utility, if the MOPIT so directs, and in the event of any delay in shifting thereof, the Concessionaire shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay on the part of the entity owning such electric lines, water pipes or telephone cables, as the case may be.

### **11.3 New utilities and roads**

11.3.1 The Concessionaire shall allow, subject to such conditions as the MOPIT may specify, access to, and use of the Site for laying telephone lines, water pipes, electric cables or other public utilities. Where such access or use causes any financial loss to the Concessionaire, it may require the user of the Site to pay compensation or damages as per Applicable Laws. For the avoidance of doubt, it is agreed that use of the Site under this Clause shall not in any manner relieve the Concessionaire of its obligation to maintain the Project in accordance with this Agreement and any damage caused by such use shall be restored forthwith.

11.3.2 The MOPIT may, by notice require the Concessionaire to connect any adjoining road to the Project , and the connecting portion thereof falling within the Site shall be constructed at the MOPIT's cost in accordance with Article 16. The maintenance of such connecting portion shall be undertaken by the

Concessionaire in accordance with the provisions of Clause 17.1.3.

11.3.3 The MOPIT may by notice require the Concessionaire to connect, through a paved road, any adjoining service station, hotel, motel or any other public facility or amenity to the Project, whereupon the connecting portion thereof that falls within the Site shall be constructed and maintained by the Concessionaire upon advance payment of the cost to be made by the beneficiary entity in accordance with the amount and period as determined by the Independent Engineer. For the avoidance of doubt, any connecting road constructed prior to the Appointed Date and falling within the Site shall be maintained by the Concessionaire upon advance payment to be made by the beneficiary entity in accordance with the provisions of this Clause.

#### **11.4 Felling of Trees**

The MOPIT shall assist the Concessionaire in obtaining the Applicable Permits for felling of trees to be identified by the MOPIT for this purpose if and only if such trees cause a material adverse effect on the construction, operation or maintenance of the Project. The cost of such felling shall be borne by the Concessionaire, and in the event of any delay in felling thereof for reasons beyond the control of the Concessionaire, it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. For the avoidance of doubt, the Parties hereto agree that the felled trees shall be deemed to be owned by the MOPIT and shall be disposed in such manner and subject to such conditions as the MOPIT may in its sole discretion deem appropriate.

## **ARTICLE 12 CONSTRUCTION OF THE PROJECT EXPRESSWAY**

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

Prior to commencement of Construction Works, the Concessionaire shall:

- (a) submit to the MOPIT and the Independent Engineer its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule as set forth in Schedule-G.
- (b) appoint its representative duly authorised to deal with the MOPIT in respect of all matters under or arising out of or relating to this Agreement;
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and
- (d) make its own arrangements for quarrying of materials needed for the Project under and in accordance with the Applicable Laws and Applicable Permits.

### **12.2 Maintenance during Construction Period**

The Concessionaire shall at all times be responsible for ensuring proper maintenance and safe operation of the Project Expressway.

### **12.3 Drawings**

In respect of the Concessionaire's obligations with respect to the Drawings of the Project as set forth in Schedule-H, the following shall apply:

- (a) The Concessionaire shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of all Drawings to the Independent Engineer for review.
- (b) By submitting the Drawings for review to the Independent Engineer, the Concessionaire shall be deemed to have represented that it has determined and verified that the design and engineering, including field construction

criteria related thereto, are in conformity with the Specifications and Standards.

- (c) Within 15 (fifteen) days of the receipt of the Drawings, the Independent Engineer shall review the same and convey its observations to the Concessionaire with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Concessionaire shall not be obliged to await the observations of the Independent Engineer on the Drawings submitted pursuant hereto beyond the said 15 (fifteen) days period and may begin or continue Construction Works at its own discretion and risk.
- (d) If the observations of the Independent Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Concessionaire and resubmitted to the Independent Engineer for review. The Independent Engineer shall give its observations, if any, within 7 (seven) days of receipt of the revised Drawings.
- (e) No review and/or observation of the Independent Engineer and/or its failure to review and/or convey its observations on any Drawings shall relieve the Concessionaire of its obligations and liabilities under this Agreement in any manner nor shall the Independent Engineer or the MOPIT be liable for the same in any manner.
- (f) Without prejudice to the foregoing provisions of this Clause 12.3, the Concessionaire shall submit to the MOPIT for review and comments, its drawings relating to alignment of the Project, finished road level, location and layout of the Toll Plaza[s] and general arrangement drawings of major bridges, flyovers and grade separators, and the MOPIT shall have the right but not the obligation to undertake such review and provide its comments, if any, within 30 (thirty) days of the receipt of such Drawings. The provisions of this Clause 12.3 shall apply *mutatis mutandis* to the review and comments hereunder.
- (g) Within 90 (ninety) days of the Construction Completion Date, the Concessionaire shall furnish to the MOPIT and the Independent Engineer a complete set of as-built Drawings, in 2 (two) hard copies and in micro film form, e-copy or in such other medium as may be acceptable to the MOPIT, reflecting the Expressway as actually designed, engineered and constructed, including an as-built survey illustrating the layout of the Project and setback lines, if any, of the buildings and structures forming part of Project Facilities.

## 12.4 Construction of the Project Expressway

- 12.4.1 On or after the Appointed Date, the Concessionaire shall undertake construction as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D. The 1826th (one thousand eight hundred and twenty sixth) day from the Appointed Date shall be the scheduled date for completion (the “**Scheduled Construction Completion Date**”) and the Concessionaire agrees and undertakes that the Project shall be completed on or before the Scheduled Construction Completion Date.
- 12.4.2 The Concessionaire shall construct the Project in accordance with the Project Completion Schedule set forth in Schedule-G. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Milestone in Schedule-G, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the MOPIT, it shall pay Damages to the MOPIT in a sum calculated at the rate of NRs. 100,000(one Lakh rupees) for delay of each day until such Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Construction Completion Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-G shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-G has been amended as above; provided further that in the event Project Completion Date is achieved on or before the Scheduled Construction Completion Date, the Damages paid under this Clause 12.4.2 shall be refunded by the MOPIT to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.4.2 shall be without prejudice to the rights of the MOPIT under this Agreement, including the right of Termination thereof
- 12.4.3 shall apply as if Schedule-G has been amended as above; provided further that in the event Project Completion Date is achieved on or before the Scheduled Construction Completion Date, the Damages paid under this Clause 12.4.2 shall be refunded by the MOPIT to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.4.2 shall be without prejudice to the rights of the MOPIT under this Agreement, including the right of Termination thereof.
- 12.4.3 In the event that Project is not completed within 270 (two hundred and seventy) days from the Scheduled Construction Completion Date, unless the delay is on account of reasons solely attributable to the MOPIT or due to Force Majeure, the MOPIT shall be entitled to terminate this Agreement.

## ARTICLE 13 MONITORING OF CONSTRUCTION

### 13.1 Monthly progress reports

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

### 13.2 Inspection

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

### 13.3 Tests

13.3.1 For determining that the Construction Works conform to the Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out or cause to be carried out Tests, at such time and frequency and in such manner as may be specified by the Independent Engineer from time to time, in accordance with Good Industry Practice for quality assurance. The size of sample for such tests shall normally comprise 10% (ten per cent) of the quantity and/or number of tests prescribed by Standard Specifications for Road and Bridge Works, Department of Roads for the construction works undertaken by the MOPIT through their contractors. The Concessionaire shall, with due diligence, carry out or cause to be carried out all the tests in accordance with the instructions of the Independent Engineer and furnish the results thereof to the Independent Engineer. One half of the costs incurred on such tests, and to the extent certified by the Independent Engineer as reasonable, shall be reimbursed by the MOPIT to the Concessionaire. For the avoidance of doubt, the costs to be incurred on any Test which is undertaken for determining the rectification of any

defect or deficiency in construction shall be borne solely by the Concessionaire.

13.3.2 In the event that results of any tests conducted under this Clause 13.3 establish any defects or deficiencies in the Construction Works, the Concessionaire shall carry out remedial measures and furnish a report to the Independent Engineer in this behalf. The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests to determine that such remedial measures have brought the Construction Works into compliance with the Specifications and Standards, and the procedure set forth in this Clause 13.3 shall be repeated until such Construction Works conform to the Specifications and Standards. For the avoidance of doubt, it is agreed that tests pursuant to this Clause 13.3 shall be undertaken in addition to and independent of the tests that shall be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice. It is also agreed that a copy of the results of such tests shall be sent by the Concessionaire to the Independent Engineer forthwith.

#### **13.4 Delays during construction**

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

#### **13.5 Suspension of unsafe Construction Works**

13.5.1 Upon recommendation of the Independent Engineer to this effect, the MOPIT may by notice require the Concessionaire to suspend forthwith the whole or any part of the Construction Works if, in the reasonable opinion of the MOPIT, such work threatens the safety public.

13.5.2 The Concessionaire shall, pursuant to the notice under Clause 13.5.1, suspend the Construction Works or any part thereof for such time and in such manner as

may be specified by the MOPIT and thereupon carry out remedial measures to secure the safety of suspended works and the Users. The Concessionaire may by notice require the Independent Engineer to inspect such remedial measures

forthwith and make a report to the MOPIT recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Independent Engineer, the MOPIT shall either revoke such suspension or instruct the Concessionaire to carry out such remedial measures as may be necessary in the reasonable opinion of the MOPIT, and the procedure set forth in this Clause 13.5 shall be repeated until the suspension hereunder is revoked.

13.5.3 Subject to the provisions of Clause 34.7, all reasonable costs incurred for maintaining and protecting the Construction Works or part thereof during the period of suspension (the “**Preservation Costs**”), shall be borne by the Concessionaire; provided that if the suspension has occurred as a result of any breach of this Agreement by the MOPIT, the Preservation Costs shall be borne by the MOPIT.

13.5.4 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine any extension of the dates set forth in the Project Completion Schedule to which the Concessionaire is reasonably entitled, and shall notify the MOPIT accordingly whereupon the MOPIT shall extend such Project Completion Schedule dates in accordance with the recommendations of the Independent Engineer. In the event that the Scheduled Construction Completion Date is extended pursuant hereto, the Concession Period shall be deemed to be extended by a period equal in length to the period of extension of the Scheduled Construction Completion Date.

### **13.6 Video recording**

During the Construction Period, the Concessionaire shall provide to the MOPIT for every calendar quarter, a video recording, which will be compiled into a 3 (three)-hour compact disc or digital video disc, as the case may be, covering the status and progress of Construction Works in that quarter. The first such video recording shall be provided to the MOPIT within 7 (seven) days of the Appointed Date and thereafter, no later than 15 (fifteen) days after the close of each quarter.

## ARTICLE 14 COMPLETION CERTIFICATE

### 14.1 Tests

14.1.1 At least 30 (thirty) days prior to the likely construction completion of the related Expressway, the Concessionaire shall notify the Independent Engineer of its intent to subject the Project Expressway to Tests. The date and time of each of the Tests shall be determined by the Independent Engineer in consultation with the Concessionaire, and notified to the MOPIT who may designate its representative to witness the Tests. The Concessionaire shall provide such assistance as the Independent Engineer may reasonably require for conducting the Tests. In the event of the Concessionaire and the Independent Engineer failing to mutually agree on the dates for conducting the Tests, the Concessionaire shall fix the dates by not less than 10 (ten) days notice to the Independent Engineer.

14.1.2 All Tests shall be conducted in accordance with Schedule-I. The Independent Engineer shall observe, monitor and review the results of the Tests to determine compliance of the Project with Specifications and Standards and if it is reasonably anticipated or determined by the Independent Engineer during the course of any Test that the performance of the Project or any part thereof does not meet the Specifications and Standards, it shall have the right to suspend or delay such Test and require the Concessionaire to remedy and rectify the defects or deficiencies. Upon completion of each Test, the Independent Engineer shall provide to the Concessionaire and the MOPIT copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Independent Engineer may require the Concessionaire to carry out or cause to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Project with Specifications and Standards.

### 14.2 Completion Certificate

Upon completion of Construction Works for i) Kathmandu-Nijgadh Expressway and ii) Nijgadh-Pathlaiya Expressway and the Independent Engineer determining the Tests to be successful, it shall forthwith issue to the Concessionaire and the MOPIT a certificate substantially in the form set forth in Schedule-J (the “**Completion Certificate**”).

### 14.3 Provisional Certificate

14.3.1 The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Schedule-J

(the “**Provisional Certificate**”) if the Tests are successful and the Project can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the “**Punch List**”); provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the MOPIT.

#### **14.4 Completion of Punch List items**

14.4.1 All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) days of the date of issue of the Provisional Certificate and for any delay thereafter, other than for reasons solely attributable to the MOPIT or due to Force Majeure, the MOPIT shall be entitled to recover Damages from the Concessionaire to be calculated and paid for each day of delay until all items are completed, at the lower of (a) 0.1% (zero point one per cent) of the Performance Security, and (b) 0.2% (zero point two per cent) of the cost of completing such items as estimated by the Independent Engineer. Subject to payment of such Damages, the Concessionaire shall be entitled to a further period not exceeding 120 (one hundred and twenty) days for completion of the Punch List items. For the avoidance of doubt, it is agreed that if completion of any item is delayed for reasons solely attributable to the MOPIT or due to Force Majeure, the completion date thereof shall be determined by the Independent Engineer in accordance with Good Industry Practice, and such completion date shall be deemed to be the date of issue of the Provisional Certificate for the purposes of Damages, if any, payable for such item under this Clause 14.4.1.

14.4.2 Upon completion of all Punch List items, the Independent Engineer shall issue the Completion Certificate. Failure of the Concessionaire to complete all the Punch List items within the time set forth in Clause 14.4.1 for any reason, other than conditions constituting Force Majeure or for reasons solely attributable to the MOPIT, shall entitle the MOPIT to terminate this Agreement.

#### **14.5 Withholding of Provisional Certificate**

14.5.1 If the Independent Engineer determines that the Project or any part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in commercial operation, it shall forthwith make a report in this behalf and send copies thereof to the MOPIT and the Concessionaire. Upon receipt of such a report from the Independent Engineer and after conducting its own inspection, if the MOPIT is of the opinion that the Project is not fit and safe for

commercial service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Concessionaire of the defects and deficiencies in the Project and direct the Independent Engineer to withhold issuance of the Provisional Certificate. Upon receipt of such notice, the Concessionaire shall remedy and rectify such defects or deficiencies and thereupon Tests shall be undertaken in accordance with this Article 14. Such procedure shall be repeated as necessary until the defects or deficiencies are rectified.

14.5.2 Notwithstanding anything to the contrary contained in Clause 14.5.1, the MOPIT may, at any time after receiving a report from the Independent Engineer under that Clause, direct the Independent Engineer to issue a Provisional Certificate under Clause 14.3, and such direction shall be complied forthwith.

#### **14.6 Rescheduling of Tests**

If the Independent Engineer certifies to the MOPIT and the Concessionaire that it is unable to issue the Completion Certificate or Provisional Certificate, as the case may be, because of events or circumstances on account of which the Tests could not be held or had to be suspended, the Concessionaire shall be entitled to re-schedule the Tests and hold the same as soon as reasonably practicable.

## **ARTICLE 15 ENTRY INTO COMMERCIAL SERVICE**

### **15.1 Commercial Operation Date (COD)**

Project shall be deemed to be complete when the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14, and accordingly the commercial operation date of the Project shall be the date on which such Completion Certificate or the Provisional Certificate is issued (the “COD”). The Project shall enter into commercial service on COD whereupon the Concessionaire shall be entitled to demand and collect Fee in accordance with the provisions of Article 27.

### **15.2 Damages for delay**

If COD does not occur prior to the 91<sup>st</sup> (ninety first) day from the Scheduled Construction Completion Date, unless the delay is on account of reasons solely attributable to the MOPIT or due to Force Majeure, the Concessionaire shall pay Damages to the MOPIT in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day until COD is achieved.

## ARTICLE 16 CHANGE OF SCOPE

### 16.1 Change of Scope

- 16.1.1 The MOPIT may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are beyond the Scope of the Project as contemplated by this Agreement (“**Change of Scope**”). Any such Change of Scope shall be made in accordance with the provisions of this Article 16 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the MOPIT in accordance with Clause 16.3.
- 16.1.2 If the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved services to the Users, it shall by notice in writing require the MOPIT to consider such Change of Scope. The MOPIT shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any, and initiate proceedings therefor in accordance with this Article 16 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope.
- 16.1.3 Any works or services which are provided under and in accordance with this Article 16 shall form part of the Project and the provisions of this Agreement shall apply *mutatis mutandis* to such works or services.

### 16.2 Procedure for Change of Scope

- 16.2.1 In the event of the MOPIT determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the “**Change of Scope Notice**”).
- 16.2.2 Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the MOPIT such information as is necessary, together with preliminary Documentation in support of:
- (a) the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period, and
  - (b) the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including

a detailed breakdown by work classifications specifying the material and labour costs calculated in accordance with the schedule of rates applicable to the works assigned by the MOPIT to its contractors, along with the proposed premium/discount on such rates; provided that the cost incurred by the Concessionaire in providing such information shall be reimbursed by the MOPIT to the extent such cost is certified by the Independent Engineer as reasonable.

16.2.3 Upon receipt of information set forth in Clause 16.2.2, if the MOPIT decides to proceed with the Change of Scope, it shall convey its preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time and costs for implementation thereof. Upon reaching an agreement, the MOPIT shall issue an order (the “**Change of Scope Order**”) requiring the Concessionaire to proceed with the performance thereof. In the event that the Parties are unable to agree, the MOPIT may, by issuing a Change of Scope Order, require the Concessionaire to proceed with the performance thereof pending resolution of the Dispute, or carry out the works in accordance with Clause 16.5.

16.2.4 The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works undertaken by the Concessionaire under this Article 16.

### **16.3 Payment for Change of Scope**

16.3.1 Within 7 (seven) days of issuing a Change of Scope Order, the MOPIT shall make an advance payment to the Concessionaire in a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the MOPIT bills for payment in respect of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the MOPIT to determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the MOPIT shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable and after making a proportionate deduction for the advance payment made hereunder, and in the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.

16.3.2 Notwithstanding anything to the contrary contained in Clause 16.3.1, all costs arising out of any Change of Scope Order issued during the Construction Period

shall be borne by the Concessionaire, subject to an aggregate ceiling of 0.25% (zero point two five per cent) of the Total Project Cost. Any costs in excess of the ceiling shall be reimbursed by the MOPIT in accordance with Clause 16.3.1. In the event that the total cost arising out of Change of Scope Orders (if any) issued prior to the Project Completion Date is less than 0.25% (zero point two five per cent) of the Total Project Cost, the difference thereof shall be credited by the Concessionaire to the Safety Fund within a period of 180 (one hundred and eighty) days of the Project Completion Date. For the avoidance of doubt, it is agreed that the aforesaid 0.25% (zero point two five percent) of the Total Project Cost shall, to the extent borne by the Concessionaire, be deemed to form part of the actual capital cost of the Project.

#### **16.4 Restrictions on certain works**

- 16.4.1 Notwithstanding anything to the contrary contained in this Article 16, but subject to the provisions of Clause 16.4.2, the MOPIT shall not require the Concessionaire to undertake any works or services if such works or services are likely to delay completion of the Project; provided that in the event that the MOPIT considers such works or services to be essential, it may issue a Change of Scope Order, subject to the condition that the works forming part of or affected by such Order shall not be reckoned for purposes of determining completion of the Project and issuing the Provisional Certificate.
- 16.4.2 Notwithstanding anything to the contrary contained in this Article 16, the Concessionaire shall be entitled to nullify any Change of Scope Order if it causes the cumulative costs relating to all the Change of Scope Orders to exceed 5% (five per cent) of the Total Project Cost in any continuous period of 3 (three) years immediately preceding the date of such Change of Scope Order or if such cumulative costs exceed 20% (twenty per cent) of the Total Project Cost at any time during the Concession Period.

#### **16.5 Power of the MOPIT to undertake works**

- 16.5.1 Notwithstanding anything to the contrary contained in Clauses 16.1.1, 16.2 and 16.3, the MOPIT may, after giving notice to the Concessionaire and considering its reply thereto, award such works or services to any person on the basis of open competitive bidding.
- 16.5.2 The works undertaken in accordance with this Clause 16.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimises

the disruption in operation of the Project Expressway. The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply *mutatis mutandis* to the works carried out under this Clause 16.5.

## **16.6 Reduction in Scope of the Project**

16.6.1 If the Concessionaire shall have failed to complete any Construction Work on account of Force Majeure or for reasons attributable to the MOPIT, the MOPIT may, in its discretion, require the Concessionaire to pay 80% (eighty percent) of the sum saved therefrom, and upon such payment to the MOPIT, the obligations of the Concessionaire in respect of such works shall be deemed to have been fulfilled. For the avoidance of doubt, it is agreed that in the event of such reduction in Scope of the Project causes or will cause a reduction in net after-tax return of the Concessionaire, the Parties shall meet, as soon as reasonably practical, and agree on a full and partial waiver of the aforesaid payment of 80% (eighty per cent) so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no reduction in Scope of the Project. It is further agreed that the liability of the MOPIT under this Clause 16.6 shall not extend beyond waiver of the aforesaid 80% (eighty per cent). It is agreed that in the event of a dispute, the Dispute Resolution Procedure shall apply.

16.6.2 For determining the obligations of the Concessionaire under this Clause 16.6, the provisions of Clauses 16.1, 16.2 and 16.4 shall apply *mutatis mutandis*, and upon issue of Change of Scope Order by the MOPIT hereunder, the Concessionaire shall pay forthwith the sum specified therein.

## ARTICLE 17 OPERATION AND MAINTENANCE

### 17.1 O&M obligations of the Concessionaire

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

- (a) permitting safe, smooth and uninterrupted flow of traffic on the Project Expressway during normal operating conditions;
- (b) collecting and appropriating the Fee;
- (c) minimising disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Expressway by providing a rapid and effective response and maintaining liaison with emergency services of the State;
- (d) carrying out periodic preventive maintenance of the Project Expressway ;
- (e) undertaking routine maintenance including prompt repairs of potholes, cracks, joints, drains, embankments, structures, pavement marking, lighting, road signs and other traffic control devices;
- (f) undertaking major maintenance such as resurfacing of pavements, repairs to structures, and repairs and refurbishment of tolling system and other equipment;
- (g) preventing, with the assistance of concerned law enforcement agencies, any unauthorised use of the Project Expressway;
- (h) preventing, with the assistance of the concerned law enforcement agencies, any encroachments on the Project Expressway; including the Site;

- (i) maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies.
- (j) operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project
- (k) maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies; and
- (l) complying with Safety Requirements in accordance with Article 18.

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

17.1.3 The Concessionaire shall maintain, in conformity with Good Industry Practice, all stretches of approach roads, over-passes, under-passes or other structures situated on the Site but not forming part of the carriageway.

## 17.2 Maintenance Requirements

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

## 17.3 Maintenance Manual

17.3.1 Not later than 180 (one hundred and eighty) days prior to the Scheduled Construction Completion Date, the Concessionaire shall, in consultation with the Independent Engineer, evolve a repair and maintenance manual (the “**Maintenance Manual**”) for the regular and preventive maintenance of the Project Expressway in conformity with the Maintenance Requirements, Safety Requirements and Good Industry Practice, and shall provide 5 (five) copies thereof to the MOPIT and 2 (two) copies to the Independent Engineer. The Maintenance Manual shall be revised and updated once every 3 (three) years and

the provisions of this Clause 17.3 shall apply, *mutatis mutandis*, to such revision.

17.3.2 Without prejudice to the provisions of Clause 17.3.1, the Maintenance Manual shall, in particular, include provisions for maintenance of Project Assets and shall provide for life cycle maintenance, routine maintenance and reactive maintenance which may be reasonably necessary for maintenance and repair of the Project Assets, including replacement thereof, such that their overall condition conforms to Good Industry Practice.

#### **17.4 Maintenance Programme**

17.4.1 On or before COD and no later than 45 (forty five) days prior to the beginning of each Accounting Year during the Operation Period, as the case may be, the Concessionaire shall provide to the MOPIT and the Independent Engineer, its proposed annual programme of preventive, urgent and other scheduled maintenance (the “**Maintenance Programme**”) to comply with the Maintenance Requirements, Maintenance Manual and Safety Requirements. Such Maintenance Programme shall include:

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

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

17.4.3 The Concessionaire may modify the Maintenance Programme as may be reasonable in the circumstances, and the procedure specified in Clauses 17.4.1 and 17.4.2 shall apply *mutatis mutandis* to such modifications.

## **17.5 Safety, vehicle breakdowns and accidents**

- 17.5.1 The Concessionaire shall ensure safe conditions for the Users, and in the event of unsafe conditions, lane closures, diversions, vehicle breakdowns and accidents, it shall follow the relevant operating procedures including the setting up of temporary traffic cones and lights, and removal of obstruction and debris without delay. Such procedures shall conform to the provisions of this Agreement, Applicable Laws, Applicable Permits and Good Industry Practice.
- 17.5.2 The Concessionaire's responsibility for rescue operations on the Project shall be limited to an initial response to any particular incident until such time that the competent MOPIT takes charge and shall include prompt removal of vehicles or debris or any other obstruction, which may endanger or interrupt the smooth flow of traffic. [For this purpose, it shall maintain and operate a round-the-clock vehicle rescue post with one mobile crane having the capacity to lift a truck with a Gross Vehicle Weight of 15,000 (fifteen thousand) kilograms;

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

- 17.6.1 If, in the reasonable opinion of the Concessionaire, there exists an Emergency which warrants de-commissioning and closure to traffic of the whole or any part of the Project, the Concessionaire shall be entitled to de-commission and close the whole or any part of the Project to traffic for so long as such Emergency and the consequences thereof warrant; provided that such decommissioning and particulars thereof shall be notified by the Concessionaire to the MOPIT without any delay, and the Concessionaire shall diligently carry out and abide by any reasonable directions that the MOPIT may give for dealing with such Emergency.
- 17.6.2 The Concessionaire shall re-commission the Project or the affected part thereof as quickly as practicable after the circumstances leading to its decommissioning and closure have ceased to exist or have so abated as to enable the Concessionaire to re-commission the Project and shall notify the MOPIT of the same without any delay.
- 17.6.3 Any de-commissioning and closure of any part of the Project and the re-commissioning thereof shall, as soon as practicable, be brought to the notice of affected persons by means of public announcements/notice.

## **17.7 Lane closure**

- 17.7.1 The Concessionaire shall not close any lane of the Project for undertaking maintenance or repair works except with the prior written approval of the Independent Engineer. Such approval shall be sought by the Concessionaire through a written request to be made at least 7 (seven) days before the proposed closure of lane and shall be accompanied by particulars thereof. Within 3 (three) days of receiving such request, the Independent Engineer shall grant permission with such modifications as it may deem necessary and a copy of such permission shall be sent to the MOPIT.
- 17.7.2 The provisions of Clause 17.7.1 shall not apply to de-commissioning under Clause 17.6.1 or to closure of any lane for a period not exceeding 2 (two) hours in a day at any time of the day and 6 (six) hours in a day at a time specified by the Independent Engineer as off-peak hours when the flow of traffic is comparatively lower.
- 17.7.3 Upon receiving the permission pursuant to Clause 17.7.1, the Concessionaire shall be entitled to close the designated lane for the period specified therein, and in the event of any delay in re-opening such lane, the Concessionaire may be liable to pay Damages as determined by the Independent Engineer

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

- 17.8.1 In the event that the Concessionaire fails to repair or rectify any defect or deficiency set forth in the Maintenance Requirements within the period specified therein, it shall be deemed to be in breach of this Agreement and the MOPIT shall be entitled to recover Damages, to be calculated and paid for each day of delay, until the breach is cured, at 0.1% (zero point one per cent) of the cost of such repair or rectification as estimated by the Independent Engineer. Recovery of such Damages shall be without prejudice to the rights of the MOPIT under this Agreement, including the right of Termination thereof.
- 17.8.2 The Damages set forth in Clause 17.8.1 may be assessed and specified forthwith by the Independent Engineer; provided that the MOPIT may, in its discretion, demand a smaller sum as Damages, if in its opinion, the breach has been cured promptly and the Concessionaire is otherwise in compliance with its obligations hereunder. The Concessionaire shall pay such Damages forthwith and in the event that it contests such Damages, the Dispute Resolution Procedure shall apply.

## **17.9 MOPIT's right to take remedial measures**

17.9.1 In the event the Concessionaire does not maintain and/or repair the Project or any part thereof in conformity with the Maintenance Requirements, the Maintenance Manual or the Maintenance Programme, as the case may be, and fails to commence remedial works within 15 (fifteen) days of receipt of the O&M Inspection Report or a notice in this behalf from the MOPIT or the Independent Engineer, as the case may be, the MOPIT shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Concessionaire, and to recover such cost from the Concessionaire. In addition to recovery of the aforesaid cost, a sum equal to 20% (twenty per cent) of such cost shall be paid by the Concessionaire to the MOPIT as Damages. For avoidance of doubt, the right of the MOPIT under this Clause 17.9.1 shall be without prejudice to its rights and remedies provided under Clause 17.8.

17.9.2 The MOPIT shall have the right, and the Concessionaire hereby expressly grants to the MOPIT the right, to recover the costs and Damages specified in Clause 17.9.1 directly from the Escrow Account as if such costs and Damages were O&M Expenses, and for that purpose, the Concessionaire hereby agrees to give irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of the MOPIT under this Clause 17.9.2 and debit the same to O&M Expenses.

## **17.10 Overriding powers of the MOPIT**

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

17.10.2 In the event that the Concessionaire, upon notice under Clause 17.10.1, fails to rectify or remove any hardship or danger within a reasonable period, the MOPIT may exercise overriding powers under this Clause 17.10.2 and take over the performance of any or all the obligations of the Concessionaire to the extent deemed necessary by it for rectifying or removing such hardship or danger;

provided that the exercise of such overriding powers by the MOPIT shall be of no greater scope and of no longer duration than is reasonably required hereunder; provided further that any costs and expenses incurred by the MOPIT in discharge of its obligations hereunder shall be deemed to be O&M Expenses, and the MOPIT shall be entitled to recover them from the Concessionaire in accordance with the provisions of Clause 17.9 along with the Damages specified therein.

17.10.3 In the event of national emergency, civil commotion or any other act specified in Clause 34.3, the MOPIT may take over the performance of any or all the obligations of the Concessionaire to the extent deemed necessary by it or as directed by the Government, and exercise such control over the Project or give such directions to the Concessionaire as may be deemed necessary; provided that the exercise of such overriding powers by the MOPIT shall be of no greater scope and of no longer duration than is reasonably required in the circumstances which caused the exercise of such overriding by the MOPIT. For avoidance of doubt, it is agreed that the consequences of such action shall be dealt in accordance with the provisions of Article 34. It is also agreed that the Concessionaire shall comply with such instructions as the MOPIT may issue in pursuance of the provisions of this Clause 17.10, and shall provide assistance and cooperation to the MOPIT, on a best effort basis, for performance of its obligations hereunder.

#### **17.11 Restoration of loss or damage to Project**

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

#### **17.12 Modifications to the Project**

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

### **17.13 Excuse from performance of obligations**

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

- (a) an event of Force Majeure;
- (b) measures taken to ensure the safe use of the Project except when unsafe conditions occurred because of failure of the Concessionaire to perform its obligations under this Agreement; or
- (c) compliance with a request from the MOPIT or the directions of any Government Instrumentality, the effect of which is to close all or any part of the Project .

Notwithstanding the above, the Concessionaire shall keep all unaffected parts of the Project open to traffic provided they can be operated safely.

### **17.14 Barriers and diversions**

The MOPIT shall procure that during the Operation Period, no barriers are erected or placed by any Government Instrumentality on the Project except for reasons of Emergency, national security or law and order. The MOPIT shall also make best endeavours to procure that no Government Instrumentality shall undertake or cause to be undertaken, except for reasons of Emergency, national security or law and order, any diversions of traffic from, or closing down of approach roads to the Project that may cause a material adverse effect on the flow of traffic to and from the Project.

### **17.15 Advertising on the Site**

The Concessionaire shall not undertake or permit any form of commercial advertising, display or hoarding at any place on the Site if such advertising, display or hoarding shall be visible to the Users while driving on such Highway; provided that this restriction shall not apply to the Toll Plaza[s], rest areas, bus shelters and telephone booths located on the Project Expressway if the advertising thereon does not, in the opinion of the MOPIT, distract the Users or violates extant guidelines of MOPIT. For the avoidance of doubt, it is agreed that the rights of the Concessionaire hereunder shall be subject to Applicable Laws, as in force and effect from time to time, and no compensation shall be claimed on account thereof.

## ARTICLE 18 SAFETY REQUIREMENTS

### 18.1 Safety Requirements

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

18.1.2 The MOPIT shall appoint an experienced and qualified firm or organisation (the “**Safety Consultant**”) for carrying out safety audit of the Project in accordance with the Safety Requirements, and shall take all other actions necessary for securing compliance with the Safety Requirements.

### 18.2 Expenditure on Safety Requirements

All costs and expenses arising out of or relating to Safety Requirements shall be borne by the Concessionaire to the extent such costs and expenses form part of the works and services included in the Scope of the Project, and works and services, if any, not forming part of the Scope of the Project shall be undertaken in accordance with the provisions of Article 16. Costs and expenses on works and services not covered hitherto before and arising out of Safety Requirements shall, subject to the provisions of Clause 16.3.2, be borne from out of a dedicated safety fund (the “**Safety Fund**”) to be funded, owned and operated by the MOPIT or a substitute thereof.

## ARTICLE 19 MONITORING OF OPERATION AND MAINTENANCE

### 19.1 Monthly status reports

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

### 19.2 Inspection

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

### 19.3 Tests

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

### 19.4 Remedial measures

19.4.1 The Concessionaire shall repair or rectify the defects or deficiencies, if any, set forth in the O&M Inspection Report or in the test results referred to in Clause 19.3 and furnish a report in respect thereof to the Independent Engineer and the MOPIT within 15 (fifteen) days of receiving the O&M Inspection Report or the test results, as the case may be; provided that where the remedying of such defects or deficiencies is likely to take more than 15 (fifteen) days, the Concessionaire shall submit progress reports of

the repair works once every week until such works are completed in conformity with this Agreement.

19.4.2 The Independent Engineer shall require the Concessionaire to carry out or cause to be carried out tests, at its own cost, to determine that such remedial measures have brought the Project into compliance with the Maintenance Requirements and the procedure set forth in this Clause 19.4 shall be repeated until the Project conforms to the Maintenance Requirements. In the event that remedial measures are not completed by the Concessionaire in conformity with the provisions of this Agreement, the MOPIT shall be entitled to recover Damages from the Concessionaire under and in accordance with the provisions of Clause 17.8.

## 19.5 Monthly Fee Statement

During the Operation Period, the Concessionaire shall furnish to the MOPIT, within 7 (seven) days of completion of each month, a statement of Fee substantially in the form set forth in Schedule-M (the “**Monthly Fee Statement**”). The Concessionaire shall also furnish to the MOPIT such other information as the MOPIT may reasonably require, at specified intervals, in discharge of its statutory functions.

## 19.6 Reports of unusual occurrence

The Concessionaire shall, prior to the close of each day, send to the MOPIT and the Independent Engineer, by facsimile or email a report stating accidents and unusual occurrences on the Project relating to the safety and security of the Users and Project. A weekly and monthly summary of such reports shall also be sent within 3 (three) days of the closing of each week and month, as the case may be. For the purposes of this Clause 19.6, accidents and unusual occurrences on the Project shall include:

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

## **ARTICLE 20 TRAFFIC REGULATION**

### **20.1 Traffic regulation by the Concessionaire**

The Concessionaire shall regulate traffic on the Project in accordance with the Applicable Laws, and subject to the supervision and control of the authorities or a substitute thereof empowered in this behalf under the Applicable Laws.

### **20.2 Police assistance**

For regulating the use of Project in accordance with the Applicable Laws and this Agreement, the MOPIT shall assist the Concessionaire in procuring police assistance from the Government or a substitute thereof. The police assistance shall include setting up of a traffic aid post (the “**Traffic Aid Post**”) [at each of the Toll Plazas with a mobile Police squad for round-the-clock patrolling of the Project].

### **20.3 Buildings for Traffic Aid Posts**

The Concessionaire shall, in accordance with the type designs prescribed for such police outpost buildings by the Government or a substitute thereof, construct buildings not exceeding 25 (twenty five) square meters of plinth area, for each of the Traffic Aid Posts, and hand them over to the MOPIT not later than 30 (thirty) days prior to the Scheduled Construction Completion Date. The Traffic Aid Post[s] shall be deemed to be part of the Site and shall vest in the MOPIT.

### **20.4 Recurring expenditure on Police assistance**

On or before the Scheduled Construction Completion Date, the Concessionaire shall provide to the Police Department or a substitute thereof one Jeep or similar vehicle in good working condition along with chauffeurs for round-the-clock patrolling as set forth in Clause 20.2 and shall meet the operating costs of such vehicles including the salaries and allowances of the chauffeurs. During the Operation Period, the Concessionaire shall also maintain the Traffic Aid Post buildings in accordance with Good Industry Practice. For the avoidance of doubt, it is agreed that the Concessionaire shall not be liable for any other expenditure incurred by the Police Department or a substitute thereof.

## **ARTICLE 21 EMERGENCY MEDICAL AID**

### **21.1 Medical Aid Posts**

For providing emergency medical aid during the Operation Period, as set forth in this Agreement, the Concessionaire shall assist the Government or a substitute thereof to be designated by the MOPIT in setting up and operating a medical aid post (the “**Medical Aid Post**”) at each of the Toll Plazas with round-the-clock ambulance services for victims of accidents on the Project

### **21.2 Buildings for Medical Aid Posts**

The Concessionaire shall, in accordance with the type designs prescribed for such buildings by the Health Department (or a substitute thereof to be designated by the MOPIT), construct an aid post building and 2 (two) residential quarters, and hand them over to the MOPIT, not later than 30 (thirty) days prior to Scheduled Construction Completion Date. The Medical Aid Post(s) shall be deemed to be part of the Site and shall vest in the MOPIT.

### **21.3 Recurring expenditure on Medical Aid Posts**

On or before the Construction Completion Date, the Concessionaire shall provide to the Health Department or a substitute thereof to be designated by the MOPIT one ambulance in good working condition along with chauffeurs for round-the-clock ambulance services as set forth in Clause 21.1 and meet the operating costs of such ambulance including the salaries and allowances of the chauffeurs. The Concessionaire shall also maintain the Medical Aid Post buildings in accordance with Good Industry Practice. For the avoidance of doubt, it is agreed that the Concessionaire shall not be liable for any other expenditure incurred by the Health Department or a substitute thereof to be designated by the MOPIT.

## **ARTICLE 22 TRAFFIC CENSUS AND SAMPLING**

### **22.1 Traffic census**

The Concessionaire shall install, maintain and operate electronic/computerised traffic counters at the Toll Plazas and collect data relating to the number and types of vehicles using the Project. The Concessionaire shall also install, maintain and operate weighing platforms (weigh-in-motion type) for recording, on a sample basis, the weight of commercial goods vehicles using the Project. A weekly statement of such data shall be compiled and furnished forthwith by the Concessionaire to the MOPIT substantially in the form specified in Schedule-N.

### **22.2 Traffic survey**

The MOPIT may require the Concessionaire to conduct, during each year of the Concession Period, a detailed traffic survey at such frequency and on such days as the MOPIT may specify, provided that the cumulative period of such survey shall not exceed 14 (fourteen) days in a year. The Concessionaire shall, at its own cost, carry out or cause to be carried out, the survey in the form and manner reasonably specified by the MOPIT and furnish a detailed report thereof within 15(fifteen) days of the completion of each survey. For the avoidance of doubt, the MOPIT may also conduct traffic surveys, in such manner as it deems fit and at its own cost, through any agency designated by it for this purpose.

### **22.3 Traffic sampling**

22.3.1 For determining the actual traffic on the Project, the MOPIT shall be entitled to inspect the relevant records of the Concessionaire, and may, at its own cost, undertake traffic sampling substantially in the manner set forth in Schedule-O at such frequency as it may deem appropriate, but in no case for less than a continuous period of 7(seven) days. The Concessionaire shall provide such assistance as the MOPIT may reasonably require for such traffic sampling

22.3.2 If the traffic sampling pursuant to this Clause 22.3 demonstrates that the actual traffic is more than the traffic reported by the Concessionaire, the traffic determined by the traffic sampling shall be deemed to be the traffic for purposes of this Agreement and in the event of any Dispute relating to the traffic sampling, the Dispute Resolution Procedure shall apply. For the avoidance of doubt, Realisable Fee for any comparable period shall be calculated with reference to the traffic determined hereunder

## 22.4 Computer systems and network

The Concessionaire shall install, operate and maintain a computer system with round the clock connections to the networks of the MOPIT and other related entities for exchange of data and information useful or necessary for efficient and transparent regulation and management of traffic. For this purpose, it shall follow such protocol for Electronic Data Interchange (the "**EDI**") as the MOPIT may specify. For the avoidance of doubt, it is agreed that the form specified in Schedule N may be modified by the MOPIT from time to time for conforming to the requirements and output of EDI.

## **ARTICLE 23 INDEPENDENT ENGINEER**

### **23.1 Appointment of Independent Engineer**

The MOPIT shall appoint a consulting engineering firm from a panel of 10 (ten) firms or bodies corporate, constituted by the MOPIT substantially in accordance with the selection criteria set forth in Schedule-P, to be the independent consultant under this Agreement (the “**Independent Engineer**”). The appointment shall be made no later than 90 (ninety) days from the date of this Agreement and shall be for a period of 3 (three) years. On expiry of the aforesaid period, the MOPIT may in its discretion renew the appointment, or appoint another firm from a fresh panel constituted pursuant to Schedule-P to be the Independent Engineer for a term of 3 (three) years, and such procedure shall be repeated after expiry of each appointment.

### **23.2 Duties and functions**

23.2.1 The Independent Engineer shall discharge its duties and functions substantially in accordance with the terms of reference set forth in Schedule-Q.

23.2.2 The Independent Engineer shall submit regular periodic reports (at least once every month) to the MOPIT in respect of its duties and functions set forth in Schedule-Q.

### **23.3 Remuneration**

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

### **23.4 Termination of appointment**

23.4.1 The MOPIT may, in its discretion, terminate the appointment of the Independent Engineer at any time, but only after appointment of another Independent Engineer in accordance with Clause 23.1.

23.4.2 If the Concessionaire has reason to believe that the Independent Engineer is not discharging its duties and functions in a fair, efficient and diligent manner, it may make a written representation to the MOPIT and seek termination of the appointment of the Independent Engineer. Upon receipt of such representation, the MOPIT shall hold a tripartite meeting with the Concessionaire and Independent Engineer for an amicable resolution of the Dispute, and if any difference or disagreement between the MOPIT and the Concessionaire remains unresolved, the Dispute shall be settled in accordance with the Dispute Resolution Procedure. In the event that the appointment of the Independent Engineer is terminated hereunder, the MOPIT shall appoint forthwith another Independent Engineer in accordance with Clause 23.1.

### **23.5 Authorised signatories**

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

### **23.6 Dispute resolution**

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

# PART IV FINANCIAL COVENANTS

## ARTICLE 24 FINANCIAL CLOSE

### 24.1 Financial Close

24.1.1 The Concessionaire hereby agrees and undertakes that it shall achieve Financial Close within 120 (one hundred and twenty) days from the date of this Agreement and in the event of delay, it shall be entitled to a further period not exceeding [120 (one hundred and twenty)] days, subject to payment of Damages to the MOPIT in a sum calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day of delay; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred solely as a result of any default or delay by the MOPIT in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure.

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

### 24.2 Termination due to failure to achieve Financial Close

24.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to Clause 34.6.1, in the event that Financial Close does not occur, for any reason whatsoever, within the period set forth in Clause 24.1.1, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties. For the avoidance of doubt, it is agreed that in the event the Parties hereto have, by mutual consent, determined the Appointed Date to precede the Financial Close, the provisions of this Clause 24.2.1 shall not apply.

24.2.2 Upon Termination under Clause 24.2.1, the MOPIT shall be entitled to encash the Bid Security and appropriate the proceeds thereof as Damages; provided, however, if Financial Close has not occurred solely as a result of the MOPIT being in default of any of its obligations under Clause 4.1.2, it shall, upon Termination, return the Bid Security forthwith along with Damages equal to 25% (twenty-five per cent) thereof.

## ARTICLE 25 GRANT

### 25.1 Grant

25.1.1 The MOPIT agrees to provide to the Concessionaire cash support by way of an outright grant equal to the sum set forth in the Bid, namely, [Rs. \*\*\* (Rupees \*\*\* crore)], in accordance with the provisions of this Article 25 (the “**Grant**”), provided the Proposal(Bid) approved has been considered on such basis.

25.1.2 The Grant, if any, shall be disbursed to the Concessionaire by way of Equity Support in accordance with the provisions of Clause 25.2, and the balance remaining, if any, shall be disbursed as O&M Support in accordance with the provisions of Clause 25.3.

### 25.2 Equity Support

25.2.1 Subject to the conditions specified in this Clause 25.2, the Grant shall be credited in the accounts of the Company and shall be applied by the Concessionaire for meeting the Total Project Cost (the “Equity Support”).

25.2.2 The Equity Support shall be equal to the sum specified in the Bid and as accepted by the MOPIT, but shall in no case be greater than the Equity, and shall be further restricted to a sum not exceeding Nepali Rupees 15 (fifteen) billion (excluding the cost of land of ROW and other land required for developing the Project) as Grant in the form of Equity Support in this Project. However, such cost of land will be additionally provided by GON to concessionaire as equity support. For the avoidance of doubt, the Total Project Cost to be reckoned for the purposes of this Clause 25.2.2 shall be inclusive of Equity Support.

25.2.3 Equity Support shall be due and payable to the Concessionaire after it has expended the Equity, and shall be disbursed proportionately along with the loan funds thereafter remaining to be disbursed by the Senior Lenders under the Financing Agreements. Disbursement of Equity Support will start only when second half year of construction period completes or 50 % financial progress is achieved, whichever occurs later. The MOPIT shall disburse each tranche of the Equity Support as and when due, but not later than 15 (fifteen) days of receiving a request from the Concessionaire along with necessary particulars.

25.2.4 In the event of occurrence of a Concessionaire Default, disbursement of Equity support shall be suspended till such Concessionaire Default has been cured by the Concessionaire.

### 25.3 O&M Support

**Not Applicable**

## **ARTICLE 26 CONCESSION FEE**

**Not Applicable**

## **ARTICLE 27 USER FEE**

### **27.1 Collection and appropriation of Fee**

27.1.1 On and from the COD till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Fee from the Users in accordance with this Agreement as per Schedule R, provided that the Concessionaire may determine and collect Fee at such lower rates as it may, by public notice to the Users, specify in respect of all or any category of Users or vehicles.

27.1.2 The Concessionaire acknowledges and agrees that upon payment of Fee, any User shall be entitled to use the Project Expressway and the Concessionaire shall not place, or cause to be placed, any restriction on such use, except to the extent specified in any Applicable Law, Applicable Permit or the provisions of this Agreement.

27.1.3 The Concessionaire acknowledges and agrees that any User who is not liable for payment of the Fee shall be entitled to use the Project without any restrictions, except to the extent specified in any Applicable Law, Applicable Permit or the provisions of this Agreement. For the avoidance of doubt, the Concessionaire hereby acknowledges that Exempted Vehicles are not liable to payment of Fee.

27.1.4 The Kathmandu-Nijgadh Expressway shall be fully access controlled with access only at interchanges. There will be toll plazas, one at Kathmandu and one at Nijgadh. The entire expressway shall be fenced in order to prevent unplanned access. The interchanges shall be built in the first phase at Kathmandu, Budune, Shreepur, and Nijgadh and at Kulekhani and Malta. in the second phase.

27.1.5 Toll charges at the interchanges, and the charges for penalty, and other applicable charges not mentioned specifically in the agreement shall be based on the prior approval of MOPIT as per Schedule - R.

### **27.2 Revision of Fee**

27.2.1 The Parties hereto acknowledge and agree that the Fee shall be increased by 10% (ten percent) every five year in accordance with the provisions of the Toll Fee in this

Agreement.

27.2.2 The Parties hereto acknowledge and agree that the Fee shall be levied and collected only upon completion of Construction of Project and from COD.

27.2.3 The Concessionaire hereby acknowledges and agrees that it is not entitled to any revision of Fee or other relief from the MOPIT or any Government Instrumentality, except in accordance with the express provisions of this Agreement.

### **27.3 Discounted Fee for frequent Users**

27.5.1 The Concessionaire may issue discounted toll pass as it deems fit.

### **27.4 Tolling Contractor**

The Concessionaire may appoint a Tolling Contractor or any other person to collect the Fee for and on behalf of the Concessionaire, provided that notwithstanding such appointment, the Concessionaire shall be and remain solely liable and responsible for the collection of Fee in accordance with this Agreement and its deposit into the Escrow Account and for compliance with the provisions of this Agreement.

### **27.5 Fee collection points**

Fee shall ordinarily be collected at the Toll Plaza[s] / Toll Gates from vehicles crossing the Toll Plaza[s] and using the whole or part of the Project Expressway.

### **27.6 Additional charge for evasion of Fee**

In the event that any vehicle uses the Project without payment of Fee due, the Concessionaire shall, subject to Applicable Law and Applicable Permits, be entitled to determine and collect from such vehicle the Fee due and an equivalent amount towards predetermined liquidated damages for attempt to make unauthorised use of the Project ; provided that the determination and collection of such Fee and liquidated damages shall be at the risk and cost of the Concessionaire and the MOPIT shall not in any manner be liable on account thereof

### **27.7 Additional fee for overloaded vehicles**

Without prejudice to the liability incurred under the Applicable Laws by any person driving a vehicle that is loaded in excess of the permissible limit set forth in such laws,

the Concessionaire may, in its discretion and pending action under the Applicable Laws, allow such vehicle to use the Project upon payment of an additional fee (the “**Additional Fee**”) in lieu of the likely deterioration that may be caused to the Project by such use. The Additional Fee shall not exceed:

- (a) 50% (fifty per cent) of the Fee if the overloading of such vehicle exceeds 10% (ten per cent) of the permissible load but is not greater than 20% (twenty per cent) thereof; and
- (b) 100% (one hundred per cent) of the Fee if such overloading exceeds 20% (twenty per cent) of the permissible load:

Provided that the Additional Fee shall be levied on the basis of actual Gross Vehicle Weight as measured by a standardised static weighing machine to be installed by the Concessionaire at [each of] the Toll Plaza[s]:

Provided further that determination and collection of Additional Fee shall be regulated and enforced entirely at the risk and cost of the Concessionaire and it shall have no claim against the MOPIT in the event of its inability or failure to collect such Additional Fee in full or part for any reason whatsoever.

## **27.8 Display of Fee rates**

27.8.1 The Concessionaire shall 500 (five hundred) metres before the Toll Plaza and 50 (fifty) metres before entry to the Toll Plaza[s], prominently display the applicable rates of Fee for information of Users approaching the Toll Plaza and shall also publish and display such other information in such manner as may be prescribed by MOPIT.

27.8.2 The Concessionaire shall, from time to time, inform the MOPIT of the applicable Fee in accordance with the provisions of this Agreement.

27.8.3 The Concessionaire shall not revise, display or collect any amounts in excess of the rates of Fee payable under the provisions of this Agreement. In the event any excess amounts are collected by or on behalf of the Concessionaire, it shall, upon receiving a notice to this effect from the MOPIT, refund such excess amounts to the MOPIT along with Damages equal to 25% (twenty five percent) thereof.

## ARTICLE 28 REVENUE SHORTFALL LOAN

**Not Applicable**

## ARTICLE 29 EFFECT OF VARIATIONS IN TRAFFIC GROWTH

### 29.1 Effect of variations in traffic growth

- 29.1.1 It is expressly agreed that any difference between the predefined (minimum assured) traffic as quoted by the Concessionaire and the actual traffic on the Project Road is the risk borne by MOPIT (GON), if the minimum assured one is more than the actual traffic for the particular year during the concession period. Deficit of revenue because of this difference shall be paid by GON (MOPIT) yearly basis. If the minimum assured traffic is less than the actual traffic for the particular year during the concession period, the surplus revenue generated by this shall be shared equally between GON and Concessionaire. It should be noted, therefore, that the variation in traffic shall neither constitute a ground for Variation in the Concession Period nor the Toll Rates.

## ARTICLE 30

### CONSTRUCTION OF ADDITIONAL TOLL WAY

#### 30.1 Restriction on construction of Additional Toll way

- 30.1.1 Notwithstanding anything to the contrary contained in this Agreement but subject always to Clause 30.2, the MOPIT shall not construct, and shall procure that no Government Instrumentality shall construct or cause to be constructed, any expressway or other toll road between, inter alia, Kathmandu and Nijgadh/Pathlaya (collectively the “**Additional Toll way**”) for use by traffic at any time before the expiry of the Concession Period, except for the Kathmandu-Kulekahni-Hetauda Fast Track (KKHFT), in which case, the Concessionaire shall have the freedom to make a revenue sharing mechanism for common section, if any, with the concessionaire of KKHFT at his own risk and cost. However, the Concessionaire shall be eligible to get an extension of the concession period commensurate with the revenue loss resulting from any traffic diversion to the KKHFT that may occur after the completion of the KKHFT.
- 30.1.2 If the MOPIT shall be in breach of the provisions of Clause 30.1.1, the Concessionaire shall, without prejudice to its other rights and remedies under this Agreement including Termination thereof, be entitled to receive compensation from the MOPIT under and in accordance with the provisions of Clause 35.4.

## ARTICLE 31 ESCROW ACCOUNT

### 31.1 Escrow Account

31.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the “**Escrow Bank**”) in accordance with this Agreement read with the Escrow Agreement.

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

### 31.2 Deposits into Escrow Account

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

- (a) all funds constituting the Financial Package;
- (b) all Fee and any other revenues from or in respect of the Project , including the proceeds of any rentals, deposits, capital receipts or insurance claims; and
- (c) all payments by the MOPIT, after deduction of any other outstanding fee, if any:

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

### 31.3 Withdrawals during Concession Period

31.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as

necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) all payments relating to construction of the Project , subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (d) O&M Expenses and other costs and expenses incurred by the MOPIT in accordance with the provisions of this Agreement, and certified by the MOPIT as due and payable to it;
- (e) Any Royalty due and payable to MOPIT;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) all payments and Damages certified by the MOPIT as due and payable to it by the Concessionaire, including repayment of Revenue Shortfall Loan, if any;
- (h) monthly proportionate provision of debt service payment due in an Accounting Year in respect of Subordinated Debt;
- (i) any reserve requirements set forth in the Financing Agreements; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire.

31.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 31.3.1, except with the prior written approval of the MOPIT.

### 31.4 Withdrawals upon Termination

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

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project;
- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) outstanding fee, if any;
- (d) all payments and Damages certified by the MOPIT as due and payable to it by the Concessionaire, including repayment of Revenue Shortfall Loan if any;
- (e) retention and payments relating to the liability for defects and deficiencies set forth in Article 39;
- (f) outstanding Debt Service including the balance of Debt Due;
- (g) outstanding Subordinated Debt;
- (h) incurred or accrued O&M Expenses;
- (i) any other payments required to be made under this Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that no appropriations shall be made under Sub-clause (j) of this Clause 31.4.1 until a Vesting Certificate has been issued by the MOPIT under the provisions of Article 38.

31.4.2 The provisions of this Article 31 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 31.4.1 have been discharged.

## **ARTICLE 32 INSURANCE**

### **32.1 Insurance during Concession Period**

The Concessionaire shall effect and maintain at its own cost, during the Construction Period and the Operation Period, such insurances for such maximum sums as may be required under the Financing Agreements, and the Applicable Laws, and such insurances as may be necessary or prudent in accordance with Good Industry Practice. The Concessionaire shall also effect and maintain such insurances as may be necessary for mitigating the risks that may devolve on the MOPIT as a consequence of any act or omission of the Concessionaire during the Construction Period. The Concessionaire shall procure that in each insurance policy, the MOPIT shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Escrow Account. For the avoidance of doubt, the level of insurance to be maintained by the Concessionaire after repayment of Senior Lenders' dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lenders' dues.

### **32.2 Notice to the MOPIT**

Not later than 45 (forty-five) days prior to commencement of the Construction Period or the Operation Period, as the case may be, the Concessionaire shall by notice furnish to the MOPIT, in reasonable detail, information in respect of the insurances that it proposes to effect and maintain in accordance with this Article 32. Within 30 (thirty) days of receipt of such notice, the MOPIT may require the Concessionaire to effect and maintain such other insurances as may be necessary pursuant hereto, and in the event of any difference or disagreement relating to any such insurance, the Dispute Resolution Procedure shall apply.

### **32.3 Evidence of Insurance Cover**

All insurances obtained by the Concessionaire in accordance with this Article 32 shall be maintained with insurers on terms consistent with Good Industry Practice. Within 15 (fifteen) days of obtaining any insurance cover, the Concessionaire shall furnish to the MOPIT, notarised true copies of the certificate(s) of insurance, copies of insurance policies and premier payment receipts in respect of such insurance, and no such insurance shall be cancelled, modified, or allowed to expire or lapse until the expiration of at least 45 (forty five) days after notice of

such proposed cancellation, modification or non-renewal has been delivered by the Concessionaire to the MOPIT.

#### **32.4 Remedy for failure to insure**

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

#### **32.5 Waiver of subrogation**

All insurance policies in respect of the insurance obtained by the Concessionaire pursuant to this Article 32 shall include a waiver of any and all rights of subrogation or recovery of the insurers thereunder against, *inter alia*, the MOPIT, and its assigns, successors, undertakings and their subsidiaries, affiliates, employees, insurers and underwriters, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy or in any way connected with any loss, liability or obligation covered by such policies of insurance.

#### **32.6 Concessionaire's waiver**

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

### **32.7 Application of insurance proceeds**

The proceeds from all insurance claims, except life and injury, shall be paid to the Concessionaire by credit to the Escrow Account and it shall, notwithstanding anything to the contrary contained in Clause 31.3, apply such proceeds for any necessary repair, reconstruction, reinstatement, replacement, improvement, delivery or installation of the Project , and the balance remaining, if any, shall be applied in accordance with the provisions contained in this behalf in the Financing Agreements.

## ARTICLE 33 ACCOUNTS AND AUDIT

### 33.1 Audited accounts

- 33.1.1 The Concessionaire shall maintain books of accounts recording all its receipts (including all Realisable Fees and other revenues derived/collected by it from or on account of the Project and/or its use), income, expenditure, payments (including payments from the Escrow Account), assets and liabilities, in accordance with this Agreement, Good Industry Practice, Applicable Laws and Applicable Permits. The Concessionaire shall provide 2 (two) copies of its Balance Sheet, Cash Flow Statements and Profit and Loss Account, along with a report thereon by its Statutory Auditors, within 90 (ninety) days of the close of the Accounting Year to which they pertain and such audited accounts, save and except where expressly provided to the contrary, shall form the basis of payments by either Party under this Agreement. The MOPIT shall have a right to inspect the records of the Concessionaire during office hours and require copies of relevant extracts of books of accounts, duly certified by the Statutory Auditors, to be provided to the MOPIT for verification of basis of payments, and in the event of any discrepancy or error being found, the same shall be rectified and such rectified account shall form the basis of payments by either Party under this Agreement.
- 33.1.2 The Concessionaire shall, within 30 (thirty) days of the close of each quarter of an Accounting Year, furnish to the MOPIT its unaudited financial results in respect of the preceding quarter, in the manner and form prescribed by the for publication of quarterly results.
- 33.1.3 On or before the thirty-first day of the end of the Accounting Year, the Concessionaire shall provide to the MOPIT, for the preceding Accounting Year, a statement duly audited by its Statutory Auditors giving summarised information on (a) the traffic count for each category of vehicles using the Project and liable for payment of Fee therefor, (b) Fee charged and received, Realisable Fee and other revenues derived from the Project , and (c) such other information as the MOPIT may reasonably require.

### 33.2 Appointment of auditors

- 33.2.1 The Concessionaire shall appoint, and have during the subsistence of this Agreement as its Statutory Auditors, a firm chosen by it from the mutually agreed list of 10(ten) reputable firms of chartered accountants (the “**Panel of Chartered Accountants**”), such list to be prepared substantially in accordance with the criteria set forth in Schedule-T. All fees and expenses of the Statutory Auditors shall be borne by the Concessionaire.

33.2.2 The Concessionaire may terminate the appointment of its Statutory Auditors after a notice of 45 (forty five) days to the MOPIT, subject to the replacement Statutory Auditors being appointed from the Panel of Chartered Accountants.

33.2.3 Notwithstanding anything to the contrary contained in this Agreement, the MOPIT shall have the right, but not the obligation, to appoint at its cost from time to time and at anytime, another firm (the “**Additional Auditors**”) from the Panel of Chartered Accountants to audit and verify all those matters, expenses, costs, realisations and things which the Statutory Auditors are required to do, undertake or certify pursuant to this Agreement.

33.2.4 In the event that the Grant exceeds 20% (twenty per cent) of the Total Project Cost, the MOPIT shall have the right, but not the obligation, to appoint at its cost, for the duration of the Construction Period, another firm (the “**Concurrent Auditors**”) from the Panel of Chartered Accountants to undertake concurrent audit of the Concessionaire’s accounts.

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

Any claim or document provided by the Concessionaire to the MOPIT in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto shall be valid and effective only if certified by its Statutory Auditors. For avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business including the submission of Monthly Fee Statements under Clause 19.5.

### **33.4 Set-off**

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

### **33.5 Dispute resolution**

In the event of there being any difference between the findings of the Additional Auditors, and the certification provided by the Statutory Auditors, such Auditors shall meet to resolve the differences and if they are unable to resolve the same, such Dispute shall be resolved by the MOPIT by recourse to the Dispute Resolution Procedure.

# PART V FORCE MAJEURE AND TERMINATION

## ARTICLE 34 FORCE MAJEURE

### 34.1 Force Majeure

As used in this Agreement, the expression “**Force Majeure**” or “**Force Majeure Event**” shall mean occurrence in Nepal of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 34.2, 34.3 and 34.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the “**Affected Party**”) of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party.

### 34.2 Non-Political Event

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

- (a) act of God, epidemic or plague, extremely adverse weather conditions, lightning, earthquake, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);
- (b) strikes or boycotts (other than those involving the Concessionaire, Contractors or their respective employees/representatives, or attributable to any act or omission of any of them) interrupting supplies and services to the Project for a continuous period of 24 (twenty four) hours and an aggregate period exceeding 7 (seven) days in an Accounting Year, and not being an Indirect Political Event set forth in Clause 34.3;
- (c) any failure or delay of a Contractor but only to the extent caused by another Non-Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Concessionaire in any proceedings for reasons other than (i) failure of the Concessionaire to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or

- (iv) exercise of any of its rights under this Agreement by the MOPIT;
- (e) the discovery of geological conditions, toxic contamination or archaeological remains on the Site that could not reasonably have been expected to be discovered through a site inspection; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

### **34.3 Indirect Political Event**

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

- (a) an act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage;
- (b) industry-wide or Country-wide strikes or industrial action for a continuous period of 24 (twenty four) hours and exceeding an aggregate period of 7 (seven) days in an Accounting Year;
- (c) any civil commotion, boycott or political agitation which prevents collection of Fee by the Concessionaire for an aggregate period exceeding 7 (seven) days in an Accounting Year;
- (d) any failure or delay of a Contractor to the extent caused by any Indirect Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor;
- (e) any Indirect Political Event that causes a Non-Political Event; or
- (f) any event or circumstances of a nature analogous to any of the foregoing.

#### **34.4 Political Event**

A Political Event shall mean one or more of the following acts or events by or on account of any Government Instrumentality:

- (a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Article 41 and its effect, in financial terms, exceeds the sum specified in Clause 41.1;
- (b) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;
- (c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the Contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;
- (d) any failure or delay of a Contractor but only to the extent caused by another Political Event and which does not result in any offsetting compensation being payable to the Concessionaire by or on behalf of such Contractor; or
- (e) any event or circumstance of a nature analogous to any of the foregoing.

#### **34.5 Duty to report Force Majeure Event**

34.5.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 34 with evidence in support thereof;

- (b) 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;
  - (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and
  - (d) any other information relevant to the Affected Party's claim.
- 34.5.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event not later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.
- 34.5.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 34.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

### **34.6 Effect of Force Majeure Event on the Concession**

- 34.6.1 Upon the occurrence of any Force Majeure Event prior to the Appointed Date, the period set forth in Clause 24.1.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event.
- 34.6.2 At any time after the Appointed Date, if any Force Majeure Event occurs:
- (a) before COD, the Concession Period and the dates set forth in the Project Construction Completion Schedule shall be extended by a period equal in length to the duration for which such Force Majeure Event subsists; or
  - (b) after COD, whereupon the Concessionaire is unable to collect Fee despite making best efforts or it is directed by the MOPIT to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from collection of Fee on account thereof; provided that in the event of partial collection of Fee where the daily collection is less than 90% (ninety per cent) of the Average Daily Fee, the MOPIT shall

extend the Concession Period in proportion to the loss of Fee on a daily basis. For the avoidance of doubt, loss of 25% (twenty-five per cent) in collection of Fee as compared to the Average Daily Fee for four days shall entitle the Concessionaire to extension of one day in the Concession Period.

### **34.7 Allocation of costs arising out of Force Majeure**

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

34.7.2 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Project (the “**Force Majeure Costs**”) shall be allocated and paid as follows:

- (a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof;
- (b) upon occurrence of an Indirect Political Event, all Force Majeure Costs attributable to such Indirect Political Event, and not exceeding the Insurance Cover for such Indirect Political Event, shall be borne by the Concessionaire, and to the extent Force Majeure Costs exceed such Insurance Cover, one half of such excess amount shall be reimbursed by the MOPIT to the Concessionaire; and
- (c) upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be reimbursed by the MOPIT to the Concessionaire.

For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent that such information is relevant.

34.7.3 Save and except as expressly provided in this Article 34, neither Party 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 hereto.

### **34.8 Termination Notice for Force Majeure Event**

If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 34, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

### **34.9 Termination Payment for Force Majeure Event**

34.9.1 If Termination is on account of a Non-Political Event, the MOPIT shall make a Termination Payment to the Concessionaire in an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover.

34.9.2 If Termination is on account of an Indirect Political Event, the MOPIT shall make a Termination Payment to the Concessionaire in an amount equal to:

(a) Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due; and

(b) 110% (one hundred and ten per cent) of the Adjusted Equity.

34.9.3 If Termination is on account of a Political Event, the MOPIT shall make a Termination Payment to the Concessionaire in an amount that would be payable under Clause 37.3.2 as if it were an MOPIT Default.

### **34.10 Dispute resolution**

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be finally settled in accordance with the Dispute Resolution Procedure; provided that the

burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.

### **34.11 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 notice to that effect and shall promptly resume performance of its obligations hereunder.

## **ARTICLE 35 COMPENSATION FOR BREACH OF AGREEMENT**

### **35.1 Compensation for default by the Concessionaire**

Subject to the provisions of Clause 6.2 and Clause 35.5, in the event of the Concessionaire being in material breach or default of this Agreement, it shall pay to the MOPIT by way of compensation, all direct costs suffered or incurred by the MOPIT as a consequence of such material breach or default, within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no compensation shall be payable under this Clause 35.1 for any material breach or default in respect of which Damages are expressly specified and payable under this Agreement or for any consequential losses incurred by the MOPIT.

### **35.2 Compensation for default by the MOPIT**

Subject to the provisions of Clause 35.5, in the event of the MOPIT being in material breach or default of this Agreement at any time after the Appointed Date, it shall pay to the Concessionaire by way of compensation, all direct costs suffered or incurred by the Concessionaire as a consequence of such material breach or default within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material breach or default but shall not include loss of Fee revenues, debt repayment obligations or other consequential losses, and for determining such compensation, information contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant.

### **35.3 Extension of Concession Period**

Subject to the provisions of Clause 35.5, in the event that a material breach or default of this Agreement set forth in Clause 35.2 causes delay in achieving the COD or leads to suspension of or reduction in collection of Fee, as the case may be, the MOPIT shall, in addition to payment of compensation under Clause 35.2, extend the Concession Period, such extension being equal in duration to the period by which the Project Completion Date was delayed or the collection of Fee remained suspended on account thereof, as the case may be; and in the event of reduction in collection of Fee where the daily collection is less than 90% (ninety per cent) of the Average Daily Fee, the MOPIT shall, in addition to payment of compensation hereunder, extend the Concession Period in proportion to the loss of Fee on a daily basis. For the avoidance of doubt, loss of 25% (twenty five per cent) in collection of Fee as compared to the

Average Daily Fee for four days shall entitle the Concessionaire to extension of one day in the Concession Period.

#### **35.4 Compensation to be in addition**

Compensation payable under this Article 35 shall be in addition to, and not in substitution for, or derogation of, Termination Payment, if any.

#### **35.5 Mitigation of costs and damage**

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

## **ARTICLE 36 SUSPENSION OF CONCESSIONAIRE'S RIGHTS**

### **36.1 Suspension upon Concessionaire Default**

Upon occurrence of a Concessionaire Default, the MOPIT shall be entitled, without prejudice to its other rights and remedies under this Agreement including its rights of Termination hereunder, to (i) suspend all rights of the Concessionaire under this Agreement including the Concessionaire's right to collect Fee, and other revenues pursuant hereto, and (ii) exercise such rights itself and perform the obligations hereunder or authorise any other person to exercise the same on its behalf during such suspension (the "Suspension"). Suspension hereunder shall be effective forthwith upon issue of notice by the MOPIT to the Concessionaire and may extend up to a period not exceeding 180 (one hundred and eighty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders' Representative, the MOPIT shall extend the aforesaid period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days.

### **36.2 MOPIT to act on behalf of Concessionaire**

- 36.2.1 During the period of Suspension, the MOPIT shall, on behalf of the Concessionaire, collect all Fee and revenues under and in accordance with this Agreement and deposit the same in the Escrow Account. The MOPIT shall be entitled to make withdrawals from the Escrow Account for meeting the costs incurred by it for remedying and rectifying the cause of Suspension, and thereafter for defraying the expenses specified in Clause 31.3.
- 36.2.2 During the period of Suspension hereunder, all rights and liabilities vested in the Concessionaire in accordance with the provisions of this Agreement shall continue to vest therein and all things done or actions taken, including expenditure incurred by the MOPIT for discharging the obligations of the Concessionaire under and in accordance with this Agreement and the Project Agreements, shall be deemed to have been done or taken for and on behalf of the Concessionaire and the Concessionaire undertakes to indemnify the MOPIT for all costs incurred during such period. The Concessionaire hereby licences and sub-licences respectively, the MOPIT or any other person authorised by it under Clause 36.1 to use during Suspension, all Intellectual Property belonging to or licenced to the Concessionaire with respect to the Project and its design, engineering, construction, operation and maintenance, and which is used or created by the Concessionaire in performing its obligations under the Agreement.

### **36.3 Revocation of Suspension**

36.3.1 In the event that the MOPIT shall have rectified or removed the cause of Suspension within a period not exceeding 90 (ninety) days from the date of Suspension, it shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement. For the avoidance of doubt, the Parties expressly agree that the MOPIT may, in its discretion, revoke the Suspension at any time, whether or not **the** cause of Suspension has been rectified or removed hereunder.

36.3.2 Upon the Concessionaire having cured the Concessionaire Default within a period not exceeding 90 (ninety) days from the date of Suspension, the MOPIT shall revoke the Suspension forthwith and restore all rights of the Concessionaire under this Agreement.

#### **36.4 Substitution of Concessionaire**

At any time during the period of Suspension, the Lenders' Representative, on behalf of Senior Lenders, shall be entitled to substitute the Concessionaire under and in accordance with the Substitution Agreement, and upon receipt of notice thereunder from the Lenders' Representative, the MOPIT shall withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of Suspension, and any extension thereof under Clause 36.1, for enabling the Lenders' Representative to exercise its rights of substitution on behalf of Senior Lenders.

#### **36.5 Termination**

36.5.1 At any time during the period of Suspension under this Article 36, the Concessionaire may by notice require the MOPIT to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 36.4, the MOPIT shall within 15 (fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 37.

36.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 36.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, *mutatis mutandis*, to such Termination as if a Termination Notice had been issued by the MOPIT upon occurrence of a Concessionaire Default.

## ARTICLE 37 TERMINATION

### 37.1 Termination for Concessionaire Default

37.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (a “**Concessionaire Default**”), unless the default has occurred solely as a result of any breach of this Agreement by the MOPIT or due to Force Majeure. The defaults referred to herein shall include:

- (a) the Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a Cure Period of 30 (thirty) days;
- (b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to cure, within a Cure Period of 90 (ninety) days, the Concessionaire Default for which whole or part of the Performance Security was appropriated.
- (c) the Concessionaire does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-G and continues to be in default for 90 (ninety) days;
- (d) the Concessionaire abandons or manifests intention to abandon the construction or operation of the Project without the prior written consent of the MOPIT;
- (e) Project Completion Date does not occur within the period specified in Clause 12.4.3;
- (f) the Punch List items have not been completed within the period set forth in Clause 14.4.1;
- (g) the Concessionaire is in breach of the Maintenance Requirements or the safety requirements, as the case may be;

- (h) the Concessionaire has failed to make any payment to the MOPIT within the period specified in this Agreement;
- (i) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;
- (j) upon occurrence of a Financial Default, the Lenders' Representative has by notice required the MOPIT to undertake Suspension or Termination, as the case may be, in accordance with the Substitution Agreement and the Concessionaire fails to cure the default within the Cure Period specified hereinabove;
- (k) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;
- (l) the Concessionaire creates any Encumbrance in breach of this Agreement;
- (m) the Concessionaire repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- (n) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- (o) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all or part of the assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
- (p) an execution levied on any of the assets of the Concessionaire has caused a Material Adverse Effect;
- (q) the Concessionaire is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its assets that has a material bearing on the Project;
- (r) the Concessionaire has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the MOPIT, a Material Adverse Effect;
- (s) a resolution for winding up of the Concessionaire is passed, or any petition for

winding up of the Concessionaire is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements; and provided that:

- (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;
- (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
- (iii) each of the Project Agreements remains in full force and effect;
- (t) any representation or warranty of the Concessionaire herein contained which is, as of the date hereof, found to be materially false, incorrect or misleading or the Concessionaire is at any time hereafter found to be in breach thereof;
- (u) the Concessionaire submits to the MOPIT any statement, notice or other document, in written or electronic form, which has a material effect on the MOPIT's rights, obligations or interests and which is false in material particulars;
- (v) the Concessionaire has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
- (w) the Concessionaire commits a default in complying with any other provision of this Agreement if such a default causes Material Adverse Effect on the MOPIT.

37.1.2 Without prejudice to any other rights or remedies which the MOPIT may have under this Agreement, upon occurrence of a Concessionaire Default, the MOPIT shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the MOPIT shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a

representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause 37.1.3.

37.1.3 The MOPIT shall, if there be Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 37.1.2 to inform the Lenders' Representative and grant 15 (fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the MOPIT receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement:

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

Provided further that upon written request from the Lenders' Representative and the Concessionaire, the MOPIT shall extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the MOPIT may deem appropriate.

## **37.2 Termination for MOPIT Default**

37.2.1 In the event that any of the defaults specified below shall have occurred, and the MOPIT fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the MOPIT shall be deemed to be in default of this Agreement (the "**MOPIT Default**") unless the default has occurred as a result of any breach of this Agreement by the Concessionaire or due to Force Majeure. The defaults referred to herein shall include:

- (a) The MOPIT commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Concessionaire;

- (b) the MOPIT has failed to make any payment to the Concessionaire within the period specified in this Agreement;
  - (c) the MOPIT repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement; or
- 37.2.2 Without prejudice to any other right or remedy which the Concessionaire may have under this Agreement, upon occurrence of an MOPIT Default, the Concessionaire shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the MOPIT; provided that before issuing the Termination Notice, the Concessionaire shall by a notice inform the MOPIT of its intention to issue the Termination Notice and grant 15 (fifteen) days to the MOPIT to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

### **37.3 Termination Payment**

- 37.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the MOPIT shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due. For the avoidance of doubt, the Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD.
- 37.3.2 Upon Termination on account of the MOPIT Default, the MOPIT shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:
- (a) Debt Due; and
  - (b) 150% (one hundred and fifty per cent) of the Adjusted Equity.
- 37.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the MOPIT with the necessary particulars, and in the event of any delay, the MOPIT shall pay interest at a rate equal to 3% (three per cent) above the Bank

Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the MOPIT of its payment obligations in respect thereof hereunder.

37.3.4 The Concessionaire expressly agrees that Termination Payment under this Article 37 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

#### **37.4 Other rights and obligations of the MOPIT**

Upon Termination for any reason whatsoever, the MOPIT shall:

- (a) be deemed to have taken possession and control of the Project forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- (c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;
- (d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 38.1; and
- (e) succeed upon election by the MOPIT, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the MOPIT may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the MOPIT elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees, that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the MOPIT shall not in any manner be liable for such sums. It is further agreed that in the event the MOPIT elects to cure any outstanding defaults under such Project Agreements, the amount expended

by the MOPIT for this purpose shall be deducted from the Termination Payment.

### **37.5 Survival of rights**

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 37.3.4, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments and Divestment Requirements, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.

## ARTICLE 38 DIVESTMENT OF RIGHTS AND INTEREST

### 38.1 Divestment Requirements

38.1.1 Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements:

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

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

### **38.2 Inspection and cure**

Not earlier than 90 (ninety) days before Termination but not later than 15 (fifteen) days before the effective date of such Termination, the Independent Engineer shall verify, after giving due notice to the Concessionaire of the time, date and venue of such verification, compliance by the Concessionaire with the Maintenance Requirements, and if required, cause appropriate tests to be carried out at the Concessionaire’s cost for this purpose. Defaults, if any, in the Maintenance Requirements shall be cured by the Concessionaire at its cost and the provisions of Article 39 shall apply, *mutatis mutandis*, in relation to curing of defects or deficiencies under this Article 38.

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

38.3.1 The Parties shall cooperate on a best effort basis and take all necessary measures, in good faith, to achieve a smooth transfer of the Project in accordance with the provisions of this Agreement so as to protect the safety of and avoid undue delay or inconvenience to the Users, other members of the public or the lawful occupiers of any part of the Site.

38.3.2 The Parties shall provide to each other, 9 (nine) months prior to the Transfer Date in the event of Termination by efflux of time and immediately in the event of either Party conveying to the other Party its intent to issue a Termination Notice, as the case may be, as much information and advice as is reasonably practicable regarding the proposed arrangements for operation of the Project following the Transfer Date. The Concessionaire shall further provide such reasonable advice and assistance as the MOPIT, its concessionaire or agent may reasonably require for operation of the Project until the expiry of 6 (six) months after the Transfer Date.

38.3.3 The MOPIT shall have the option to purchase or hire from the Concessionaire at a fair market value and free from any encumbrance all or any part of the plant and machinery used in connection with the Project but which does not form part of the assets specified in Clause 38.1.1 and is reasonably required in connection with operation of the Project. For the avoidance of doubt, in the event of dispute or difference relating to fair market value, the Dispute Resolution Procedure shall apply.

#### **38.4 Vesting Certificate**

The divestment of all rights, title and interest in the Project shall be deemed to be complete on the date when all of the Divestment Requirements have been fulfilled, and the MOPIT shall, without unreasonable delay, thereupon issue a certificate substantially in the form set forth in Schedule-U.1 and U.2 (the “**Vesting Certificate**”), separately for the Nijgadh - Pathlaiya section and the Kathmandu - Nijgadh Section of the Kathmandu-Terai/Madhes Expressway which will have the effect of constituting evidence of divestment by the Concessionaire of all of its rights, title and interest in the Project, and their vesting in the MOPIT pursuant hereto. It is expressly agreed that any defect or deficiency in the Divestment Requirements shall not in any manner be construed or interpreted as restricting the exercise of any rights by the MOPIT or its nominee on, or in respect of, the Project on the footing that all Divestment Requirements have been complied with by the Concessionaire.

#### **38.5 Additional Facilities**

Notwithstanding anything to the contrary contained in this Agreement, all Additional Facilities shall continue to vest in the Concessionaire upon and after Termination.

#### **38.6 Divestment costs etc.**

38.6.1 The Concessionaire shall bear and pay all costs incidental to divestment of all of the rights, title and interest of the Concessionaire in the Project in favour of the MOPIT upon Termination

38.6.2 In the event of any dispute relating to matters covered by and under this Article 38, the Dispute Resolution Procedure shall apply.

## ARTICLE 39 DEFECTS LIABILITY AFTER TERMINATION

### 39.1 Liability for defects after Termination

The Concessionaire shall be responsible for all defects and deficiencies in the Project for a period of 120 (One hundred and twenty) days after Termination, and it shall have the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Independent Engineer in the Project during the aforesaid period. In the event that the Concessionaire fails to repair or rectify such defect or deficiency within a period of 15 (fifteen) days from the date of notice issued by the MOPIT in this behalf, the MOPIT shall be entitled to get the same repaired or rectified at the Concessionaire's risk and cost so as to make the Project conform to the Maintenance Requirements. All costs incurred by the MOPIT hereunder shall be reimbursed by the Concessionaire to the MOPIT within 15 (fifteen) days of receipt of demand thereof, and in the event of default in reimbursing such costs, the MOPIT shall be entitled to recover the same from the Escrow Account.

### 39.2 Retention in Escrow Account

39.2.1 Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 39.2.3, a sum equal to 5% (five per cent) of the total Realisable Fee for the year immediately preceding the Transfer Date shall be retained in the Escrow Account for a period of 120 (one hundred and twenty) days after Termination for meeting the liabilities, if any, arising out of or in connection with the provisions of Clause 39.1.

39.2.2 Without prejudice to the provisions of Clause 39.2.1, the Independent Engineer shall carry out an inspection of the Project at any time between 210 (two hundred and ten) and 180 (one hundred and eighty) days prior to the Termination and if it recommends that the status of the Project Expressway is such that a sum larger than the amount stipulated in Clause 39.2.1 should be retained in the Escrow Account and for a period longer than the aforesaid 120 (one hundred and twenty) days, the amount recommended by the Independent Engineer shall be retained in the Escrow Account for the period specified by it.

39.2.3 The Concessionaire may, for the performance of its obligations under this Article 39, provide to the MOPIT a guarantee from a Bank for a sum equivalent to the amount determined under Clause 39.2.1 or 39.2.2, as the case may be, and for the period specified therein, substantially in the form set forth in Schedule-F (the “**Performance Guarantee**”), to be modified, *mutatis mutandis*, for this purpose, and the MOPIT shall, without prejudice to its other rights and remedies hereunder or

in law, be entitled to encash and appropriate the required amounts from the Performance Guarantee for undertaking the repairs or rectification at the Concessionaire's risk and cost in accordance with the provisions of this Article 39. Upon furnishing of a Performance Guarantee under this Clause 39.2.3, the retention of funds in the Escrow Account in terms of Clause 39.2.1 or 39.2.2, as the case may be, shall be dispensed with.

## PART VI OTHER PROVISIONS

## **ARTICLE 40 ASSIGNMENT AND CHARGES**

### **40.1 Restrictions on assignment and charges**

40.1.1 Subject to Clauses 40.2 and 40.3, this Agreement shall not be assigned by the Concessionaire to any person, save and except with the prior consent in writing of the MOPIT, which consent the MOPIT shall be entitled to decline without assigning any reason.

40.1.2 Subject to the provisions of Clause 40.2, the Concessionaire shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreement to which the Concessionaire is a party except with prior consent in writing of the MOPIT, which consent the MOPIT shall be entitled to decline without assigning any reason.

### **40.2 Permitted assignment and charges**

The restraints set forth in Clause 40.1 shall not apply to:

- (a) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project ;
- (b) mortgages/pledges/hypothecation of goods/assets other than Project Assets, and their related documents of title, arising or created in the ordinary course of business of the Project , and as security only for indebtedness to the Senior Lenders under the Financing Agreements and/or for working capital arrangements for the Project ;
- (c) assignment of rights, interest and obligations of the Concessionaire to or in favour of the Lenders' Representative as nominee and for the benefit of the Senior Lenders, to the extent covered by and in accordance with the Substitution Agreement as security for financing provided by Senior Lenders under the Financing Agreements; and
- (d) liens or encumbrances required by any Applicable Law.

### 40.3 Substitution Agreement

40.3.1 The Lenders' Representative, on behalf of Senior Lenders, may exercise the right to substitute the Concessionaire pursuant to the agreement for substitution of the Concessionaire (the "**Substitution Agreement**") to be entered into amongst the Concessionaire, the MOPIT and the Lenders' Representative, on behalf of Senior Lenders, substantially in the form set forth in Schedule-V.

40.3.2 Upon substitution of the Concessionaire under and in accordance with the Substitution Agreement, the Nominated Company substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations of the Concessionaire under this Agreement as if it were the Concessionaire; provided that where the Concessionaire is in breach of this Agreement on the date of such substitution, the MOPIT shall by notice grant a Cure Period of 120 (one hundred and twenty) days to the Concessionaire for curing such breach.

### 40.4 Assignment by the MOPIT

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

## ARTICLE 41 CHANGE IN LAW

### 41.1 Increase in costs

If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 100 crore (Rupees one hundred crore) and 10% (ten percent) of the Realisable Fee in any Accounting Year, the Concessionaire may so notify the MOPIT and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the cost increase, reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement:

Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the MOPIT to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the MOPIT shall pay the amount specified therein; provided that if the MOPIT shall dispute such claim of the Concessionaire, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 41.1 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

### 41.2 Reduction in costs

If as a result of Change in Law, the Concessionaire benefits from a reduction in costs or increase in net after-tax return or other financial gains, the aggregate financial effect of which exceeds the higher of Rs. 100 crore (Rupees one hundred crore) and 10% (ten percent) of the Realisable Fee in any Accounting Year, the MOPIT may so notify the Concessionaire and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the decreased costs, increase in return or other financial gains as aforesaid. Upon notice by the MOPIT, the Parties shall meet, as soon as reasonably practicable

but no later than 30 (thirty) days from the date of notice, and either agree on such amendments to this Agreement or on any other mutually agreed arrangement:

Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the MOPIT may by notice require the Concessionaire to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Concessionaire shall pay the amount specified therein to the MOPIT; provided that if the Concessionaire shall dispute such claim of the MOPIT, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 41.2 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.

#### **41.3 Protection of NPV**

Pursuant to the provisions of Clauses 41.1 and 41.2 and for the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Parties shall rely on the Financial Model to establish a net present value (the "NPV") of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred.

#### **41.4 Restriction on cash compensation**

The Parties acknowledge and agree that the demand for cash compensation under this Article 41 shall be restricted to the effect of Change in Law during the respective Accounting Year and shall be made at any time after commencement of such year, but no later than one year from the close of such Accounting Year. Any demand for cash compensation payable for and in respect of any subsequent Accounting Year shall be made after the commencement of the Accounting Year to which the demand pertains, but no later than two years from the close of such Accounting Year.

#### **41.5 No claim in the event of recovery from Users**

Notwithstanding anything to the contrary contained in this Agreement, the MOPIT shall not in any manner be liable to reimburse to the Concessionaire any sums on account of a Change in Law if the same are recoverable from the Users.

## ARTICLE 42 LIABILITY AND INDEMNITY

### 42.1 General indemnity

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

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

### 42.2 Indemnity by the Concessionaire

42.2.1 Without limiting the generality of Clause 42.1, the Concessionaire shall fully indemnify, hold harmless and defend the MOPIT and the MOPIT Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits;

- (b) payment of taxes required to be made by the Concessionaire in respect of the income or other taxes of the Concessionaire's contractors, suppliers and representatives; or
- (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its contractors which are payable by the Concessionaire or any of its contractors.

42.2.2 Without limiting the generality of the provisions of this Article 42, the Concessionaire shall fully indemnify, hold harmless and defend the MOPIT Indemnified Persons from and against any and all suits, proceedings, actions, claims, demands, liabilities and damages which the MOPIT Indemnified Persons may hereafter suffer, or pay by reason of any demands, claims, suits or proceedings arising out of claims of infringement of any domestic or foreign patent rights, copyrights or other intellectual property, proprietary or confidentiality rights with respect to any materials, information, design or process used by the Concessionaire or by the Concessionaire's Contractors in performing the Concessionaire's obligations or in any way incorporated in or related to the Project. If in any such suit, action, claim or proceedings, a temporary restraint order or preliminary injunction is granted, the Concessionaire shall make every reasonable effort, by giving a satisfactory bond or otherwise, to secure the revocation or suspension of the injunction or restraint order. If, in any such suit, action, claim or proceedings, the Project, or any part thereof or comprised therein, is held to constitute an infringement and its use is permanently enjoined, the Concessionaire shall promptly make every reasonable effort to secure for the MOPIT a licence, at no cost to the MOPIT, authorising continued use of the infringing work. If the Concessionaire is unable to secure such licence within a reasonable time, the Concessionaire shall, at its own expense, and without impairing the Specifications and Standards, either replace the affected work, or part, or process thereof with non-infringing work or part or process, or modify the same so that it becomes non-infringing.

### 42.3 Notice and contest of claims

In the event that either Party receives a claim or demand from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 42 (the "**Indemnified Party**") it shall notify the other Party (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim or demand and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that

the Indemnifying Party wishes to contest or dispute the claim or demand, it may conduct the proceedings in the name of the indemnified Party, subject to the Indemnified Party being secured against any costs involved, to its reasonable satisfaction.

#### **42.4 Defence of claims**

42.4.1 The Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and reasonable costs and expenses thereof shall be indemnified by the Indemnifying Party. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party in respect of loss to the full extent provided by this Article 42, the Indemnifying Party shall be entitled, at its option, to assume and control the defence of such claim, action, suit or proceeding, liabilities, payments and obligations at its expense and through the counsel of its choice; provided it gives prompt notice of its intention to do so to the Indemnified Party and reimburses the Indemnified Party for the reasonable cost and expenses incurred by the Indemnified Party prior to the assumption by the Indemnifying Party of such defence. The Indemnifying Party shall not be entitled to settle or compromise any claim, demand, action, suit or proceeding without the prior written consent of the Indemnified Party, unless the Indemnifying Party provides such security to the Indemnified Party as shall be reasonably required by the Indemnified Party to secure the loss to be indemnified hereunder to the extent so compromised or settled.

42.4.2 If the Indemnifying Party has exercised its rights under Clause 42.3, 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).

42.4.3 If the Indemnifying Party exercises its rights under Clause 42.3, the Indemnified Party shall nevertheless have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless:

- (a) the employment of counsel by such party has been authorised in writing by the Indemnifying Party; or

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

Provided that if Sub-clauses (b), (c) or (d) of this Clause 42.4.3 shall be applicable, the counsel for the Indemnified Party shall have the right to direct the defence of such claim, demand, action, suit or proceeding on behalf of the Indemnified Party, and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

#### **42.5 No consequential claims**

Notwithstanding anything to the contrary contained in this Article 42, the indemnities herein provided shall not include any claim or recovery in respect of any cost, expense, loss or damage of an indirect, incidental or consequential nature, including loss of profit, except as expressly provided in this Agreement.

#### **42.6 Survival on Termination**

The provisions of this Article 42 shall survive Termination.

## **ARTICLE 43 RIGHTS AND TITLE OVER THE SITE**

### **43.1 Licensee rights**

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

### **43.2 Access rights of the MOPIT and others**

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

43.2.2 The Concessionaire shall, for the purpose of operation and maintenance of any utility or road specified in Article 11, allow free access to the Site at all times for the authorised persons and vehicles of the controlling body of such utility or road.

### **43.3 Property taxes**

All property taxes on the Site shall be payable by the MOPIT as owner of the Site; provided, however, that any such taxes payable by the Concessionaire under Applicable Laws for use of the Site shall not be reimbursed or payable by the MOPIT.

### **43.4 Restriction on sub-letting**

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

## ARTICLE 44 DISPUTE RESOLUTION

### 44.1 Dispute resolution

44.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “**Dispute**”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

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

### 44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Secretary of the MOPIT and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

### 44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Panel of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Arbitration Act 2055 BS (1999) as per rules of arbitration of Nepal Council of Arbitration. The venue of such arbitration shall be Kathmandu, and the language of arbitration proceedings shall be English.

- 44.3.2 There shall be a Panel of three arbitrators, of whom each Party shall select one, and the third arbitrator, who shall act as the chief arbitrator, shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Arbitration Act referred to in Clause 44.3.1 above.
- 44.3.3 The arbitrators shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties , and the Concessionaire and the MOPIT agree and undertake to carry out such Award without delay.
- 44.3.4 The Concessionaire and the MOPIT agree that an Award may be enforced against the Concessionaire and/or the MOPIT, as the case may be, and their respective assets wherever situated.
- 44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

## ARTICLE 45 DISCLOSURE

### 45.1 Disclosure of Specified Documents

The Concessionaire shall make available for inspection by any person, copies of this Concession Agreement, the Maintenance Manual, the Maintenance Programme and the Maintenance Requirements (hereinafter collectively referred to as the “**Specified Documents**”), free of charge, during normal business hours on all working days at the Toll Plaza[s] and Concessionaire’s Registered Office. The Concessionaire shall prominently display at [each of] the Toll Plaza[s] and toll booths, public notices stating the availability of the Specified Documents for such inspection, and shall make copies of the same available to any person upon payment of copying charges on a ‘no profit no loss’ basis.

### 45.2 Disclosure of Documents relating to safety

The Concessionaire shall make available for inspection by any person copies of all Documents and data relating to safety of the Project, free of charge, during normal business hours on all working days, at the Concessionaire’s Registered Office. The Concessionaire shall make copies of the same available to any person upon payment of copying charges on a ‘no profit no loss’ basis.

45.3 Notwithstanding the provisions of Clauses 45.1 and 45.2, the MOPIT shall be entitled to direct the Concessionaire, from time to time, to withhold the disclosure of Protected Documents (as defined herein below) to any person in pursuance of the aforesaid Clauses.

#### *Explanation:*

The expression Protected Documents shall mean such of the Specified Documents or documents referred to in Clauses 45.1 and 45.2, or portions thereof, the disclosure of which the MOPIT is entitled to withhold under the provision of the Right to Information Act, 2007.

## ARTICLE 46 REDRESSAL OF PUBLIC GRIEVANCES

### 46.1 Complaints Register

- 46.1.1 The Concessionaire shall maintain a public relations office at [each of] the Toll Plaza[s] where it shall keep a register (the “**Complaint Register**”) open to public access at all times for recording of complaints by any person (the “**Complainant**”). Information relating to the availability of and access to the Complaint Register shall be prominently displayed by the Concessionaire at each Toll Plaza[s] so as to bring it to the attention of all Users.
- 46.1.2 The Complaint Register shall be securely bound and each page thereof shall be duly numbered. It shall have appropriate columns including the complaint number, date, name and address of the Complainant, substance of the complaint and the action taken by the Concessionaire. Immediately after a complaint is registered, the Concessionaire shall give a receipt to the Complainant stating the date and complaint number.
- 46.1.3 Without prejudice to the provisions of Clauses 46.1.1 and 46.1.2, the MOPIT may, in consultation with the Concessionaire, specify the procedures for making complaints in electronic form and for response thereto.

### 46.2 Redressal of complaints

- 46.2.1 The Concessionaire shall inspect the Complaint Register at reasonable intervals and take prompt and reasonable action for redressal of each complaint. The action taken shall be briefly noted in the Complaint Register and a reply stating the particulars thereof shall be sent by the Concessionaire to the Complainant under a certificate of posting.
- 46.2.2 Within 7 (seven) days of the close of each month, the Concessionaire shall send to the MOPIT and to the Independent Engineer a true photocopy each of all the pages of the Complaint Register on which any entry has been recorded during the course of such month, and upon perusal thereof, the MOPIT may, in its discretion, advise the Concessionaire to take such further action as the MOPIT may deem appropriate for a fair and just redressal of any grievance. The Concessionaire shall consider such advice and inform the MOPIT of its decision thereon, and if the MOPIT is of the opinion that the Complainant is entitled to further relief, it may refer the matter to the competent forum for its disposal under the Consumer Protection Act, 1998, and advise the Complainant to pursue the complaint at his own risk and cost.

## **ARTICLE 47 MISCELLANEOUS**

### **47.1 Governing law and jurisdiction**

This Agreement shall be construed and interpreted in accordance with and governed by the laws of Nepal..

### **47.2 Waiver of immunity**

Each Party unconditionally and irrevocably:

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

### **47.3 Depreciation**

47.3.1 For the purposes of depreciation under the Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the MOPIT shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under the Applicable Laws.

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

#### **47.4 Delayed payments**

The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to 3% (three per cent) above the Bank Rate, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof.

#### **47.5 Waiver**

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

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

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

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

Except to the extent expressly provided in this Agreement:

- (a) no review, comment or approval by the MOPIT or the Independent Engineer of any Project Agreement, Document or Drawing submitted by the Concessionaire nor any observation or inspection of the construction, operation or maintenance of the Project nor the failure to review, approve, comment, observe or inspect hereunder shall relieve or absolve the Concessionaire from its obligations, duties and liabilities under this Agreement, the Applicable Laws and Applicable Permits;

and

- (b) the MOPIT shall not be liable to the Concessionaire by reason of any review, comment, approval, observation or inspection referred to in Subclause (a) above.

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

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

#### **47.8 Survival**

##### **47.8.1 Termination shall:**

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

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

#### **47.9 Entire Agreement**

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

#### **47.10 Severability**

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

#### **47.11 No partnership**

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

#### **47.12 Third Parties**

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

#### **47.14 Successors and Assigns**

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

#### **47.15 Notices**

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

and shall:

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

Attention:

Designation:

Address:

- (b) Fax No: E-mail: in the case of the MOPIT, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the Secretary of the MOPIT with a copy delivered to the MOPIT Representative or such other person as the MOPIT may from time to time designate by notice to the Concessionaire; provided that if the Concessionaire does not have an office in Kathmandu it may send such notice by facsimile or e-mail and by registered acknowledgement due, air mail or by courier;

Address:

Fax No.:

E-mail:

and

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

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

#### **47.17 Counterparts**

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

## ARTICLE 48 DEFINITIONS

### 48.1 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 the first day of Shrawan of Nepali Calendar (Bikram Sambat) which falls on 16 or 17 of July of the Gregorian Calendar, and ending on the thirty-first day of Asadh (around 15 or 16 of July) of the next calendar year;

“**Additional Facilities**” means the facilities such as service stations, motels, restaurants, shopping areas and amusement parks which the Concessionaire may, in its discretion and subject to Applicable Laws, provide or procure for the benefit of the Users, and which are in addition to the Project Facilities, and not situated on the Site;

“**Additional Tollway**” shall have the meaning set forth in Clause 30.1.1;

“**Adjusted Equity**” means the Equity funded in Nepalese Rupees and adjusted on the first day of the current month (the “**Reference Date**”), in the manner set forth below, to reflect the change in its value on account of depreciation and variations in WPI, and for any Reference Date occurring:

- (a) on or before the Project Construction Completion Date, the Adjusted Equity shall be a sum equal to the Equity funded in Nepalese Rupees and expended on the Project, revised to the extent of one half of the variation in WPI occurring between the first day of the month of Appointed Date and the Reference Date;
- (b) from the Project Completion Date and until the 4<sup>th</sup> (fourth) anniversary thereof, an amount equal to the Adjusted Equity as on the Project Completion Date shall be deemed to be the base (the “**Base Adjusted Equity**”) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following the Project Completion Date to the extent of variation in WPI occurring between the Project Completion Date and the Reference Date;

(c) after the 4<sup>th</sup> (fourth) anniversary of the Project Completion Date, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by a monthly factor, which is arrived by dividing 100 by the total nos. of months of the concession period rounded off to two decimal (for example,  $100/240 = 0.42\%$  for a concession period of 240 months), thereof at the commencement of each month following the 4<sup>th</sup> (fourth) anniversary of the Project Completion Date and the amount so arrived at shall be revised to the extent of variation in WPI occurring between the Project Completion Date and the Reference Date;

For the avoidance of doubt, the Adjusted Equity shall, in the event of Termination, be computed as on the Reference Date immediately preceding the Transfer Date; provided that no reduction in the Base Adjusted Equity shall be made for a period equal to the duration, if any, for which the Concession Period is extended, but the revision on account of WPI shall continue to be made;

“**Affected Party**” shall have the meaning set forth in Clause 34.1;

“**Agreement**” or “**Concession Agreement**” means this Agreement, its Recitals, the Schedules hereto and any amendments thereto made in accordance with the provisions contained in this Agreement;

“**Applicable Laws**” means all laws, brought into force and effect by GON including rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement;

“**Applicable Permits**” means all clearances, licences, permits, authorisations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the construction, operation and maintenance of the Project Expressway/ Highway during the subsistence of this Agreement;

“**Appointed Date**” means the date on which Financial Close is achieved or an earlier date that the Parties may by mutual consent determine, and shall be deemed to be the date of commencement of the Concession Period;

“**Arbitration Act**” means the Arbitration Act, 2055 BS (1999) and shall include modifications to or any re-enactment thereof, as in force from time to time;

“**Associate**” or “**Affiliate**” means, in relation to either Party [and/or Consortium Members], a person who controls, is controlled by, or is under the common control with such Party [or Consortium Member] (as used in this definition, the expression “**control**” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);

“**MOPIT Default**” shall have the meaning set forth in Clause 37.2.1;

“**MOPIT Representative**” means such person or persons as may be authorised in writing by the MOPIT to act on its behalf under this Agreement and shall include any person or persons having MOPIT to exercise any rights or perform and fulfil any obligations of the MOPIT under this Agreement;

“**Bank**” means a commercial bank incorporated in Nepal or any other bank acceptable to Senior Lenders, but does not include a bank in which any Senior Lender has an interest;

“**Bid**” means the documents in their entirety comprised in the proposal/bid submitted by in response to the Notice for Invitation for Bids (IFB) or Request for Proposal (RFP) in accordance with the provisions thereof;

“**Bid Security**” means the security provided by the [Concessionaire/Consortium] to the MOPIT along with the Bid in a sum of Rs. 76 (Rupees seventy six), million in accordance with the RFP Notice, and which is to remain in force until substituted by the Performance Security;

“**COD**” or “**Commercial Operation Date**” shall have the meaning set forth in Clause 15.1;

“**Change in Law**” means the occurrence of any of the following after the date of Bid:

- (a) the enactment of any new Nepalese law;
- (b) the repeal, modification or re-enactment of any existing Nepali law;

- (c) the commencement of any Nepalese law which has not entered into effect until the date of Bid;
- (d) a change in the interpretation or application of any Nepalese law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the date of Bid; or
- (e) any change in the rates of any of the Taxes that have a direct effect on the Project;

“**Change in Ownership**” means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the [existing promoters/Consortium Members] together with their Associates in the total Equity to decline below (i) 51% (fifty one per cent) thereof during Construction Period, (ii) 33% (thirty three per cent) thereof during a period of 3 (three) years following Project Completion Date, and (iii) 26% (twenty six per cent) thereof, or such lower proportion as may be permitted by the MOPIT during the remaining Concession Period;

provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process) in the proportion of the equity holding of [any Consortium Member] to the total Equity, if it occurs prior to the Project Completion Date, shall constitute Change in Ownership unless it is preceded by written consent of the MOPIT, which consent the MOPIT may in its discretion refuse;

“**Change of Scope**” shall have the meaning set forth in Clause 16.1;

“**Company**” means the Company acting as the Concessionaire under this Agreement;

“**Completion Certificate**” shall have the meaning set forth in Clause 14.2;

“**Concession**” shall have the meaning set forth in Clause 3.1.1;

“**Concessionaire**” shall have the meaning attributed thereto in the array of Parties hereinabove as set forth in the Recitals;

“**Concession Fee**” shall have the meaning set forth in Clause 26;

“**Concession Period**” means the period starting on and from the Appointed Date and ending on the Transfer Date;

“**Concessionaire Default**” shall have the meaning set forth in Clause 37.1.1;

“**Conditions Precedent**” shall have the meaning set forth in Clause 4.1.1;

“**Consortium**” shall have the meaning set forth in Recital (B) under Part I

Concession;

“**Consortium Member**” means a company specified in Recital (B), under Part I Concession;, as a member of the Consortium;

“**Construction Period**” means the period beginning from the Appointed Date and ending on the Construction Phase Completion Date;

**"Construction Phase Completion Date" means the date of completion of Construction Works (CPCD)**

“**Construction Works**” means all works and things necessary to complete the Project Roads / Expressway in accordance with this Agreement;

“**Contractor**” means the person or persons, as the case may be, with whom the Concessionaire has entered into any of the EPC Contract, the O&M Contract, the Tolling Contract or any other agreement or contract for construction, operation and/or maintenance of the Project Expressway or matters incidental thereto;

“**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 and shall:

- (a) commence from the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;
- (b) not relieve any Party from liability to pay Damages or compensation under the provisions of this Agreement; and
- (c) not in any way be extended by any period of Suspension under this Agreement;

provided that if the cure of any breach by the Concessionaire requires any reasonable action by the Concessionaire that must be approved by the

MOPIT or the Independent Engineer hereunder, the applicable Cure Period shall be extended by the period taken by the MOPIT or the Independent Engineer to accord their approval;

“**Damages**” shall have the meaning set forth in Sub-clause (w) of Clause 1.2;

“**Debt Due**” means the aggregate of the following sums expressed in Nepalese Rupees outstanding on the Transfer Date:

- (a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the “**principal**”) but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;
- (b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to MOPIT Default; and
- (c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;

provided that if all or any part of the Debt Due is convertible into Equity at the option of Senior Lenders and/or the Concessionaire, it shall be deemed to be Debt Due even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

“**Debt Service**” means the sum of all payments on account of principal, interest, financing fees and charges due and payable in an Accounting Year to the Senior Lenders under the Financing Agreements;

“**Development Period**” means the period from the date of this Agreement until the Appointed Date;

“**Dispute**” shall have the meaning set forth in Clause 44.1.1;

“**Dispute Resolution Procedure**” means the procedure for resolution of Disputes set forth in Article 44;

“**Divestment Requirements**” means the obligations of the Concessionaire for and in respect of Termination as set forth in Clause 38.1;

“**Document**” or “**Documentation**” means documentation in printed or written form, or in tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form;

“**Drawings**” means all of the drawings, calculations and documents pertaining to the Project as set forth in Schedule-H, and shall include ‘as built’ drawings of the Project;

“**EPC Contract**” means the engineering, procurement and construction contract or contracts entered into by the Concessionaire with one or more Contractors for, inter alia, engineering and construction of the Project in accordance with the provisions of this Agreement;

“**EPC Contractor**” means the person with whom the Concessionaire has entered into an EPC Contract;

“**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;

“**Encumbrances**” means, in relation to the Project, any encumbrances 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 any designation of loss payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project, where applicable herein but excluding utilities referred to in Clause 11.1;

“**Equity**” means the sum expressed in Nepalese Rupees, or in other freely convertible currency, representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost, and shall include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Company, and any interest-free funds advanced by any shareholder of the Company for meeting such equity component, but does not include Equity Support;

“**Equity Support**” shall have the meaning set forth in Clause 25.2.1;

“**Escrow Account**” means an Account which the Concessionaire shall open and maintain with a Bank in which all inflows and outflows of cash on account of capital and revenue receipts and expenditures shall be credited and debited, as the case may be, in accordance with the provisions of this Agreement, and includes the Sub-Accounts of such Escrow Account;

“**Escrow Agreement**” shall have the meaning set forth in Clause 31.1.2;

“**Escrow Bank**” shall have the meaning set forth in Clause 31.1.1;

“**Escrow Default**” shall have the meaning set forth in Schedule-S;

“**Exempted Vehicle**” means a vehicle exempted from payment of Fee in accordance with the Concession Agreement;

“**Fee**” means the charge levied on and payable for a vehicle using the Project Road/Expressway or a part thereof, in accordance with the Concession Agreement;

“**Financial Close**” means the fulfilment of all conditions precedent to the initial availability of funds under the Financing Agreements;

“**Financial Default**” shall have the meaning set forth in Schedule-V;

“**Financial Model**” means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein;

“**Financial Package**” means the financing package indicating the total capital cost of construction and operation of the Kathmandu - Terai/Madhes Fast Track Road Project, (Kathmandu - Nijgadh - Pathlaiya Section) and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements, Subordinated Debt and Equity Support, if any;

“**Financing Agreements**” means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments

including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.2;

“**Force Majeure**” or “**Force Majeure Event**” shall have the meaning ascribed to it in Clause 34.1;

“**GON**” means the Government of Nepal;

“**Good Industry Practice**” means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced operator engaged in the same type of undertaking as envisaged under this Agreement and which would be expected to result in the performance of its obligations by the Concessionaire in accordance with this Agreement, Applicable Laws and Applicable Permits in reliable, safe, economical and efficient manner;

“**Government**” means the Government of Nepal;

“**Government Instrumentality**” means any department, division or sub-division of the Government and includes any commission, board, MOPIT, agency or municipal and other local MOPIT or statutory body, as the case may be, and having jurisdiction over all or any part of the Project Roads or the performance of all or any of the services or obligations of the Concessionaire under or pursuant to this Agreement;

“**Grant**” shall have the meaning set forth in Clause 25.1.1;

“**IRC**” means the Indian Roads Congress;

“**Indemnified Party**” means the Party entitled to the benefit of an indemnity pursuant to Article 42;

“**Indemnifying Party**” means the Party obligated to indemnify the other Party pursuant to Article 42;

“**Independent Engineer**” shall have the meaning set forth in Clause 23.1;

“**Indirect Political Event**” shall have the meaning set forth in Clause 34.3;

“**Insurance Cover**” means the aggregate of the maximum sums insured under the insurances taken out by the Concessionaire pursuant to Article 32, and when used in

the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable in relation to such act or event;

“**LOA**” or “**Letter of Award**” means the letter of award referred to in Recital (D);

“**Lenders’ Representative**” means the person duly authorised by the Senior Lenders to act for and on behalf of the Senior Lenders with regard to matters arising out of or in relation to this Agreement, and includes his successors, assigns and substitutes;

“**MOPIT**” means the MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT or any substitute thereof dealing with Strategic Roads or its authorized representative;

“**Maintenance Manual**” shall have the meaning ascribed to it in Clause 17.3;

“**Maintenance Programme**” shall have the meaning ascribed to it in Clause 17.4.1;

“**Maintenance Requirements**” shall have the meaning set forth in Clause 17.2;

“**Material Adverse Effect**” means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement and which act or event causes a material financial burden or loss to either Party;

[“**Medical Aid Post**” shall have the meaning set forth in Clause 21.1;]

“**Nominated Company**” means a company selected by the Lenders’ Representative and proposed to the MOPIT for substituting the Concessionaire in accordance with the provisions of the Substitution Agreement;

“**Non-Political Event**” shall have the meaning set forth in Clause 34.2;

“**O&M**” means the operation and maintenance of the Kathmandu-Nijgadh Expressway and includes all matters connected with or incidental to such operation and maintenance, provision of services and facilities, and collection of Fee in accordance with the provisions of this Agreement;

“**O&M Contract**” means the operation and maintenance contract that may be entered into between the Concessionaire and the O&M Contractor for performance of all or any of the O&M obligations;

“**O&M Contractor**” means the person, if any, with whom the Concessionaire has

entered into an O&M Contract for discharging O&M obligations for and on behalf of the Concessionaire;

“**O&M Expenses**” means expenses incurred by or on behalf of the Concessionaire or by the MOPIT, as the case may be, for all O&M including (a) cost of salaries and other compensation to employees, (b) cost of materials, supplies, utilities and other services, (c) premium for insurance, (d) all taxes, duties, cess and fees due and payable for O&M, (e) all repair, replacement, reconstruction, reinstatement, improvement and maintenance costs, (f) payments required to be made under the O&M Contract, Tolling Contract or any other contract in connection with or incidental to O&M, and (g) all other expenditure required to be incurred under Applicable Laws, Applicable Permits or this Agreement;

“**O&M Inspection Report**” shall have the meaning set forth in Clause 19.2;

“**O&M Support**” shall have the meaning set forth in Clause 25.3.1;

“**Operation Period**” means the period commencing from the Construction Phase Completion Date (CPCD) and ending on the Transfer Date;

“**Panel of Chartered Accountants**” shall have the meaning set forth in Clause 33.2.1;

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

“**Performance Security**” shall have the meaning set forth in Clause 9.1;

“**Political Event**” shall have the meaning set forth in Clause 34.4;

“**Project**” means the development, survey, design, financing, procurement, engineering and construction, operation and maintenance of the Kathmandu - Nijgadh Expressway and the development, survey, design, financing, procurement, engineering and construction of the additional two lanes of the 18 km long Nijgadh Pathlaiya section of the East West Highway in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Project;

“**Project Agreements**” means this Agreement, the Financing Agreements, EPC Contract, O&M Contract, Tolling Contract, and any other agreements or contracts that may be entered into by the Concessionaire with any person in connection with matters relating to, arising out of or incidental to the Project, but does not include the Escrow

Agreement and the Substitution Agreement;

“**Project Assets**” means all physical and other assets relating to and forming part of the Site including (a) rights over the Site in the form of licence, Right of Way or otherwise; (b) tangible assets such as civil works and equipment including foundations, embankments, pavements, road surface, interchanges, bridges, culverts, road over bridges, drainage works, traffic signals, sign boards, kilometre-stones, toll plaza[s], electrical systems, communication systems, rest areas, relief centres, maintenance depots and administrative offices; (c) Project Facilities situated on the Site; (d) all rights of the Concessionaire under the Project Agreements; (e) financial assets, such as receivables, security deposits etc.; (f) insurance proceeds; and (g) Applicable Permits and authorisations relating to or in respect of the Project , but does not include Additional Facilities;

“**Project Completion Date**” means the date on which the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14.

“**Project Completion Schedule**” means the progressive Project Milestones set forth in Schedule-G for completion of the Project on or before the Scheduled Date;

“**Project Facilities**” means all the amenities and facilities situated on the Site, as described in Schedule-C;

“**Project Milestones**” mean the project milestones set forth in Schedule-G;

“**Provisional Certificate**” shall have the meaning set forth in Clause 14.3;

“**Punch List**” shall have the meaning ascribed to it in Clause 14.3;

“**NRB**” means the Nepal Rastra Bank, as constituted and existing under the Nepal Rastra Bank Act 2012 BS , including any statutory modification or replacement thereof, and its successors;

“**Reference Exchange Rate**” means, in respect of any one currency that is to be converted into another currency in accordance with the provisions of this Agreement, the exchange rate for the relevant date quoted by the Nepal Rastra Bank;

“**Re.**”, “**Rs.**” or “**Rupees**” or “**Nepalese Rupees**” means the lawful currency of the Republic of Nepal;

“**RFP**” or “**Request for Proposal/Invitation for Bid**” shall have the meaning set

forth in Recital ‘C’;

“**Revenue Shortfall Loan**” shall have the meaning set forth in Clause 28;

“**Right of Way**” means the constructive possession of the Site, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project in accordance with this Agreement;

“**Safety Consultant**” shall have the meaning set forth in Clause 18.1.2;

“**Safety Requirements**” shall have the meaning set forth in Clause 18.1.1;

“**Safety Fund**” shall have the meaning set forth in Clause 18.2

“**Scheduled Date**” shall have the meaning set forth in Clause 12.4.1;

“**Scope of the Project**” shall have the meaning set forth in Clause 2.1;

“**Senior Lenders**” means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold *parri passu* charge on the assets, rights, title and interests of the Concessionaire;

“**Site**” shall have the meaning set forth in Clause 10.1;

“**Specifications and Standards**” means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Project, as set forth in Schedule-D, and any modifications thereof, or additions thereto, as included in the design and engineering for the Project submitted by the Concessionaire to, and expressly approved by, the MOPIT;

“**Statutory Auditors**” means a reputable firm of chartered accountants acting as the statutory auditors of the Concessionaire under the provisions of the Companies Act, 2063 BS (2006) including any statutory modification or re-enactment thereof, for the time being in force, and appointed in accordance with Clause 33.2.1;

“**Subordinated Debt**” means the aggregate of the following sums expressed in Nepalese Rupees or in the currency of debt, as the case may be, outstanding as on the Transfer Date:

- (a) the principal amount of debt provided by lenders or the Concessionaire for meeting the Total Project Cost and subordinated to the financial assistance provided by the Senior Lenders; and
- (b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Rate in case of loans expressed in Nepalese Rupees and lesser of the actual interest rate and six-month LIBOR (London Inter Bank Offer Rate) plus 2% (two per cent) in case of loans expressed in foreign currency, but does not include any interest that had fallen due one year prior to the Transfer Date;

provided that if all or any part of the Subordinated Debt is convertible into Equity at the option of the lenders and/or the Concessionaire, it shall be deemed to be Subordinated Debt even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

“**Substitution Agreement**” shall have the meaning set forth in Clause 40.3;

“**Suspension**” shall have the meaning set forth in Clause 36.1;

“**Taxes**” means any Nepalese taxes including excise duties, customs duties, value added tax, sales tax, local taxes, cess, income tax and any impost or surcharge of like nature (whether Central, State or local) on the goods, materials, equipment and services incorporated in and forming part of the Project charged, levied or imposed by any Government Instrumentality, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever;

“**Termination**” means the expiry or termination of this Agreement and the Concession hereunder;

“**Termination Notice**” means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;

“**Termination Payment**” means the amount payable by the MOPIT to the Concessionaire upon Termination and may consist of payments on account of and restricted to the Debt Due and Adjusted Equity, as the case may be, which form part of the Total Project Cost in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, it is agreed that within a period of 60 (sixty) days from the Project

Construction Completion Date, the Concessionaire shall notify to the MOPIT, the Total Project Cost as on the Project Construction Completion Date and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment, and it is further agreed that in the event such disaggregation is not notified to the MOPIT, Equity shall be deemed to be the amount arrived at by subtracting Debt Due from Total Project Cost;

“**Tests**” means the tests set forth in Schedule-I to determine the completion of construction in accordance with the provisions of this Agreement

“**Toll Plaza**” means the structures and barriers erected near each of the two ends (and at the interchange, as applicable) of the Kathmandu - Nijgadh Expressway for the purpose of regulating the entry and exit of vehicles in accordance with the provisions of this Agreement and shall include all land, buildings, equipment, and other facilities required in accordance with or incidental to the provisions of this Agreement; provided that such Toll Plaza[s] shall be situated at locations to be decided by the Concessionaire in consultation with the Independent Engineer;

“**Toll Gate**” means the structures and barriers to collect toll from the interchanges and access roads as agreed between MOPIT and the Concessionaire.

“**Tolling Contract**” means the contract, if any, entered into by the Concessionaire with the Tolling Contractor for collection of Fee for and on behalf of the Concessionaire and matters incidental thereto;

“**Tolling Contractor**” means the person, if any, with whom the Concessionaire has entered into a Tolling Contract;

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

- (a) the capital cost of the Project, less Equity Support as set forth in the Financial Package;
- (b) the actual capital cost of the Project upon completion of the Project less Equity Support; and
- (c) a sum of Rs.75,918 million at 2014, less Equity Support];

provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement;

“**Traffic Aid Post**” shall have the meaning set forth in Clause 20.2;

“**Transfer Date**” means the date on which this Agreement and the Concession hereunder expires pursuant to the provisions of this Agreement or is terminated by a Termination Notice;

“**User**” means a person who travels on the Project Expressway or any part thereof in/on any vehicle;

“**Vesting Certificate**” shall have the meaning set forth in Clause 38.3; and

“**WPI**” means the Wholesale Price Index for all commodities as published by the Nepal Rastra Bank and shall include any index which substitutes the WPI, and any reference to WPI shall, unless the context otherwise requires, be construed as a reference to the WPI published for the period ending with the preceding month.

**IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED  
THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE  
WRITTEN.**

SIGNED, SEALED AND  
DELIVERED  
For and on behalf of  
THE GOVERNMENT  
OF NEPAL by:

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

(Signature)  
(Name)  
(Designation)

(Signature)  
(Name)  
(Designation)

In the presence of:

1.

2.

# SCHEDULES

## SCHEDULE – A SITE OF THE PROJECT

(See Clause 10.1)

### SITE OF THE PROJECT

#### 1 The Site

- 1.1 Site of the Project shall include the land, buildings, structures and road works as described in Annex-I of this Schedule-A.
- 1.2 An inventory of the Site including the land, buildings, structures, road works, trees and any other immovable property on, or attached to, the Site shall be prepared jointly by the MOPIT Representative and the Concessionaire, and such inventory shall form part of the memorandum referred to in Clause 10.3.1 of the Agreement..
- 1.3 Additional land required for [Toll Plazas, Traffic Aid Posts, Medical Aid Posts and vehicle rescue posts, alternative alignments, or for] construction of works specified in Change of Scope Order shall be acquired by the Concessionaire, for and on behalf of the MOPIT, in accordance with the provisions of this Agreement. Upon acquisition, such land shall form part of the Site and vest in the MOPIT.

## **Annex 1 Schedule A The Road Alignment and the Land<sup>1</sup>**

Site of the Project include the 2008 Feasibility Survey proposed alignment and the possible changes in the alignment and the related Right of Way (ROW) already acquired, in the process of acquisition and to be acquired during the implementation.

### **Kathmandu-Nijgadh Expressway**

The status of the land Acquisition in the present alignment, which is the alignment defined by the Feasibility Survey of 2008 under ADB Technical Assistance, is as follows:

- a) Land Acquisition within the 100 m wide ROW corridor is complete in the sections, km 6+300 to 12+720; and km 68+500 to 76+245
- b) Land Acquisition within the ROW corridor is almost complete, that means notice has been published, compensation rates are fixed and compensation is being distributed in the sections km 17+500 to 68+500
- c) Land Acquisition notice is published, but compensation is being distributed in sections km 12+720 to 17+500.
- d) Land Acquisition notice is yet to be published in sections km 00+ 000 to 6+300,

There is a possibility that certain changes in the alignment may be agreed by MOPIT based on the Concessionaire's selection of best alternative in some section of the Feasibility Survey Route and the detailed designs therein. Some of the possible alternative approaches to design are introduction of several, say 15 to 20 nos. of short tunnels 50 metre to 250 metre lengths instead of high cut slopes; use of buried culverts or bridges to reduce the high and long span bridges where 100 year return period flood discharges can be taken by such culverts or bridges; use of long single span bridges instead of high pier height bridges; use of a long tunnel, about 4 km, between Bagmati River and Simat Khola at about 700 to 800msl altitude, reduction on pier heights in the flat or rolling terrain by lowering the grade and increasing the length, etc.

The Concessionaire is responsible to develop the most practicable and cost effective design of the Expressway meeting the given design standards. MOPIT does not assume any responsibility for the cost and time overruns resulting from the selection of routes and detail design approaches.

### **Nijgadh - Pathlaiya Expressway**

There is already a two lane Highway as a part of the East West Highway. An additional two lane Expressway parallel to this Highway and in the south of this Highway shall be constructed to result in two double-lane (making four lane in total) Expressway approximately 18.3 km long. Since the existing Highway has a ROW of 25 metre each side of central line, Land Acquisition problem is almost non-existent except for the

<sup>1</sup> To be updated at the time of Concession Agreement

interchanges and some possible local conditions during actual implementations.

### **Access to the Starting Point of the Expressway at Kathmandu**

At present it is assumed that outer Ring Road shall have been completed before the completion of the Expressway. In case this does not materialize, the MOPIT shall take measures to have a proper access from the Inner Ring Road to the Starting point of the proposed Expressway before the Expressway comes into operation.

## **SCHEDULE - B DEVELOPMENT OF THE PROJECT EXPRESSWAY**

*(See Clause 2.1)*

### **1 Development of the Project (Fast Track Road) Expressway**

Development of the Project Expressway, also called Fast Track, shall include construction of the Project Expressway as described in this Schedule-B, Annex I of Schedule B and in Schedule-C.

### **2 Construction shall be undertaken and completed by the Concessionaire in conformity with the Specifications and Standards set forth in Annex-I of Schedule-D.**

## **Annex - I of Schedule B Description of the Alignment of the Kathmandu - Terai/Madhes Fast Track Road (Expressway)**

### **1. Background**

Nepal is a landlocked and mountainous country located along the southern slopes of the Himalayan mountain range between India and the Tibet Autonomous Region of China. The country has a rugged terrain and topography of middle and high mountains in the north and a very fertile land the Terai<sup>2</sup> in the south. The Terai, running along the border with India, is the area of greatest food production and industry. Besides agricultural production, the country has high potentials of hydropower, natural resources, and tourism.

At the present time the main trade corridor in Nepal is the East-West Highway (EWH) in the Terai and there is no direct north-south high class “fast track” connection linking Kathmandu and other major cities with Birgunj (dry port) and to India despite the fact that the Birgunj-Kathmandu section of this corridor carries more than 60% of the total north south long distance traffic.

In 2002, the Department of Roads (DoR) produced a National Transport Policy and 20 Year Road Master Plan (RMP). The RMP discusses the importance of international trade corridors and proposed eight such corridors between India and PRC; included in these corridors is the Birgunj-Kathmandu “fast track”. At a Sub-regional Expert Group meeting in 2004, the Government of Nepal (GoN) highlighted the construction of a high standard link from the Terai to Kathmandu as a priority project and this link is also considered a priority transit link in the South Asian Sub-regional Economic Cooperation (SASEC) program and is part of the Asian Highway network.

The Priority Investment Plan (PIP<sup>3</sup>) study it was noted that “The provision of an alternative access to Kathmandu from either the south (Terai) or west (Prithivi Highway) is possibly the single most important prospect for the improvement of traffic conditions and the creation of a major economic impact in Nepal over the coming decade.”

Currently there are two sealed motorable roads between Kathmandu and Pathlaiya via Hetauda: the winding mountainous Tribhuvan Highway (133 km Kathmandu-Hetauda), and the route using the EWH from Hetauda to Narayanghat connecting to the Narayanghat-Mugling Highway and in turn to the Prithivi Highway from Mugling to Naubise and on to Kathmandu, a total of 245km (221 km to Hetauda). Over 90 percent

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<sup>2</sup> The Terai is the name for the southern plains of Nepal and is also called Madhes. It is bordering India. It has an average width of about 20 km. In general it has a sub-tropical climate.

<sup>3</sup> Road Maintenance and Development Project. “Sector Wide Road Programme & Priority Investment Plan”, April 2007, DHV Consultants.

of trucks carrying loads use the latter longer route via Mugling as the Tribhuvan Rajpath route is too narrow windy, steep and hilly for loaded trucks and large passenger buses and is subject to landslides in the monsoon season. There are also dry weather routes from Kathmandu through Pharping over Humane pass to Kulekhani Dam, another from Pharping via Chisnari pass, thence following the Kulekhani River, crossing it downstream of the dam, a route from Thankot through Chitlan pass and down the Chitlan valley to Kulekhani dam and an Electricity MOPIT access road from Tistung on the Tribhuvan Highway to Kulekhani dam. All routes then use the Electricity MOPIT road from Kulekhani Dam to Bhimphedi and then the district road to Bhainse and Tribhuvan Highway to Hetauda. All routes are over 100 km and only carry four wheel drive taxis/micro buses and local agricultural traffic. It takes about 4-5 hours from Kathmandu to Hetauda if conditions are good; in the monsoon period the routes are often impassable.

The present route from Kathmandu to the Terai (Pathlaiya) requires 5-6 hours travel using a roundabout route of about 260 km; if the “fast track” route is realized the travel time is expected to shorten to 1.5 hours since the distance is reduced to 94 km and the speed is also increased to 80 kph except some difficult mountainous terrain where the speed may be limited to 60 KPH.

The main aim of the Project is to improve transport reliability by providing a cost effective investment program to improve transport links between Birgunj and Kathmandu, and on to Kodari/Rasuwegadhi, by a high class road (“Fast Track”) connecting Kathmandu with Terai and the Indian Border in the South and Chinese Border in the north. This would not only provide an immediate huge savings on fuel, foreign exchange and travel time, but would also have a multiplier effects on overall Nepalese economy through reduced transportation costs and increased trade between China and India via this route.

1. Detailed Feasibility Study and Project Review Study of the proposed Fast Track carried out under the Technical Assistance of Asian Development Bank (ADB) may be seen in the Project Overview at the MOPIT’s website <http://www.mopit.gov.np>.

## **2. Description of the Fast Track Alignment from Kathmandu to Nijgadh at Terai as per Feasibility Studies Preliminary Design of May 2008<sup>4</sup>**

The Kathmandu Terai/Madhes Fast Track links Kathmandu Valley to the south and runs from the middle hills areas of the Bagmati Zone to the Terai in Central Development Region. The road originates at Sano Khokana (1300 masl) in Lalitpur district in the Valley and runs along the Bagmati River crossing it near to Danuwargaon of Dukuchhap

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<sup>4</sup> Feasibility Studies and Preliminary Design, May 2008 by Oriental Consultants Co. Ltd, ADB TA 4842-NEP Study

VDC, at Km.8+500. The alignment, generally follows the Bagmati River, crossing it several times swinging from left bank to right bank, for the first 30km. The road passes through fertile agriculture land and settlements until Dukuchhap VDC, at Km 8+500 . From Km 8+500.....at Simpanimukhbasti, the alignment is in Kathmandu district and there after it runs through the mid-hills (Mahabharat Range). The road continues along the right bank of Bagmati river until Km..13+500.. at Salletar of Sisnery VDC. Approximately one km length of the road runs at the left bank at Damsingtar and the road crosses Bagmati river once again at Besibagar at Km.14+500



6.13.2017

The road then bifurcates so that the southbound two lanes run along the left bank until Jhagatkotbesi of Ghusel VDC at about 18 Km where the road passes mostly through agriculture land and settlements which are characterized by confined narrow sections of the Mahabharat Hills. The northbound carriageway is on the right bank and makes a broader sweep to cross the Kulekhani river (1040masl) at Km.16+900 and run along the right bank of Bagmati River up to Jhagatkotbesi. After passing through a narrow gorge where Bagmati River passes Malta (920masl, km.22+400), the road crosses Ipa Khola at km...22+850., ...NA...msl continuing along the right bank of the Bagmati River. The terrain in this section is composed of terraced fields, forest and steep rocky slopes.

The road alignment meets the alignment of Kanti Rajpath at Phaplan (900masl, km.27+400) in Ipapanchakanya VDC and runs alongside it until Thingan, Km. 30. Here the alignment passes through a Government forest and the terrain in this section is composed of patches of terraced fields and rocky slopes at a few locations. The alignment also crosses a few landslides in this section. The alignment leaves the Bagmati catchment area at this point (Km.27+400) and turns west at Thingan to pass through a tunnel. The tunnel exit is in the Simat Khola catchment. The road runs at the right bank of Simat Khola crossing several tributaries and again runs alongside with Kanti Rajpath for about a kilometre at Lendanda (880masl) 38+500. The section from Thingan to Lendanda is characterized by scattered houses, terraced agriculture fields and forest areas. A registered community forest lies on this section.

The alignment then passes through another forest area and agriculture fields with gentle slopes in the Ranisera area (640masl), Km. 43. The alignment then bends right and crosses Budune Khola at Km. 45+100 to run through a forest along the right bank of Budhune Khola. The junction for the connecting road to Hetauda is planned in this area at about Km. 48+000.

Moving south from Budune the main alignment takes a left turn towards the Shripur area (500masl) . Km.56+000 and crosses Bakiya Khola again. The road then runs near the banks of Bakiya Khola crossing it at a few places from km60 to km 69. The alignment passes through the Siwalik hills, forest areas, patches of the agricultural fields near the river course and several scattered settlements.

From the exit of the river from Siwalik hills (km 69) up to the East West Highway the alignment follows the right bank of Bakaiya Khola. In this stretch the alignment runs about 1km from the right bank of the Bakiya Khola through dense Sal forest. The KTFT meets East West Highway south of Nijghad (150masl) at Km..76+245.. near the Unasi watering hole.

Construction of additional two lane from Nijgadh to Pathlaiya parallel to the EWH also included in the KTFT alignment scope. The construction is on the south side but there are also possibilities of viable alternatives to that alignment on the EWH.

### **Geology along Road Alignment**

Geologically, the alignment crosses through Kathmandu valley deposit, the lesser Himalayan, Sub-Himalayan and the northern fringe of the Terai Region. The Bagmati river flows north east to south west which is more or less across the strike of the bedrock. The rocks generally dip towards north (northeast to northwest) at angles ranging from 20<sup>0</sup> to 80<sup>0</sup> which is most favorable for the road alignment running north – south (northeast – northwest). The road alignment passes through four different zones with respect to morphology, geology and structure. From north to south they are:

Kathmandu Valley synclinal basin (ch. 0+000 to ch. 8+400) with flat to gentle terrain and prevailing soil geology.

Lesser Himalaya forms the southern limb of Mahabharat synclinorium (ch. 8+400 to 32+250) with prevailing moderate to steep topography, bedrock geology and complex tectonic history (structure).

Siwalik (ch. 32+250 to 69+000) with prevailing gentle to moderate topographic feature, wide river valley, soft bed rock geology and comparatively simple tectonism.

Terai (ch. 69+000 to ch. 94+000) with flat terrain and coarse soil geology.

### **Slope Stability**

The road alignment passes through different geological (tectonics, structures, rock type formation), topographical (plain, gentle, mild and steep) and geo-hydrological (rainfall/cloud burst, seepage, density of cross cutting gullies) features.

Detailed description reflecting the above mentioned conditions is presented in the table below. The road alignment passes firstly along Bagmati valley corridor and then enters into Simat – Bakaiya Khola valley corridor crossing through a 1,350m long tunnel near Gangate (ch. 29+900) situated approximately at an elevation of 1,056m; instabilities will be described accordingly. During field visits it was observed that generally the left bank of both the Bagmati and Bakaiya valleys are susceptible to instability/landslides. Large landslides are distributed more along Bagmati river left bank than along its right bank. These are restricted mainly to phyllites, slates and metasandstones of Tistung Formation (ti) and calcareous schist of Markhu Formation (mrs), usually with longitudinal / strike fault.

## Bridges and Crossings

### I Kathamandu-Nijgadh Component

There are approximately 40 numbers of major bridges, 80 nos. of minor bridges, and 175 nos. of culverts in the Kathamandu-Nijgadh Highway. The Table below gives a list of special long high bridges. These are however, indicative and the actual size and type has to be determined by the Bidder.

The following table lists the chainage and approximate lengths of the long high bridges

S. No.	Bridge	Approx Chainage	Approx length	Approx Height of road above the valley floor(m)
1	Pre Tunnel Bridge 1	29+160	250	95
2	Pre Tunnel Bridge 2	29+770	250	60
3	Post Tunnel	31+650	200	52
4	Dhedre River	32+470	320	115
5	Jitpur Approach	35+650	200	80
6	Jitpur River	36+300	300	105
7	Budne River	44+960	170 or 250	70

### II Nijgadh-Pathlaiya Component

There are approximately 6 numbers of major bridges, 16 nos. of minor bridges, and .....nos. of culverts. The Table below gives a list of major bridges in the alignment.

S. No.	Bridge	Approx Chainage	Approx length	Approx Height of road (m)
1	Unashi	0+320	100	<10m
2	Pasaha	8+470	175	<15m
3	Balgandi	9+870	120	<10m
4	Balganga	10+020	80	<10m
5	Bijaura	13+670	50	<10m
6	Dhudhaura	14+420	100	<10m

## Cost Estimates<sup>5</sup>

<sup>5</sup> Feasibility Studies and Preliminary Design, May 2008

The total likely cost of the Project at 2014 prices as per calculation below comes to NRs. 76 Billion (US\$ 844million) including, survey, design , training, supervision, toll plazas, bioengineering, landscaping, boundary fencing, insurance, access roads, tunnels, bridges, structures, earthworks, pavements, etc but not including operation and maintenance and contingencies. The costs for the components of the project are:

<b>Cost Estimate at 2008 Prices as per the FS Report 2008 under ADB T.A.</b>			
<b>Costs</b>	<b>Kathmandu-Nijgadh Expressway</b>	<b>Nijgadh-Pathlaiya Expressway</b>	<b>Total</b>
Cost including Land Acquisition, Million NRs.	53,543	1576	55,119
Cost Excluding LA	51854	1576	53,430
Cost in NRs. portion at 56% of total cost, million NRs.	29,038	882.6	29,921
Cost in US\$ portion at 44% of total cost at 1 \$=NRs.63.25, million US\$	361	10.96	371.96
<b>Cost Estimate at 2014, assuming 6 % price increase in Rupee component</b>			
<b>Costs</b>	<b>Kathmandu-Nijgadh Expressway</b>	<b>Nijgadh-Pathlaiya Expressway</b>	<b>Total</b>
Cost in NRs. portion, million NRs.	41,190	1,252	42,442
Cost in US\$ portion, million US\$	361	10.96	371.96
Adding 20 % for financing and deducting 20 % for possible reductions in cost by design efficiency, the total cost remains unchanged			
Total cost in Nepali Rupees considering 1US \$ = Rs 90, in million	73,680	2,238	75,918
Total Cost in US\$, million	818.66	24.86	843.52

The estimated cost figure is a preliminary design stage figure and may vary considerably on the lower side or higher side depending upon the alignment, detailed design, and timing of constructions. It is the Bidder who is expected to make his own assessment.

### **3. Alternatives Designs**

High bridges and tunnels constitute key design skill and the cost reduction challenges for the proposed Fast Track. Construction of the tunnel represents around 5% of the estimated total construction cost. Tunneling is a high cost item. A 1.35 km long tunnel between Km 29+900 and Km 31+250 is proposed in the FS design. There are seven

major bridges with overall lengths over 250m, main span lengths of up to 136 m, and heights ranging from 50 to 100m. These structures are major bridges in any project context and the height of the pier may be a challenge for construction as well as maintenance / rehabilitations. There may be possibilities of several improvements. The Concessionaire has to look into the various possibilities and design techniques including optimization of balance between horizontal and vertical profiles in order to produce the most practicable, cost effective, and easily implementable solutions to achieving an expressway with 4-lanes generally meeting Asian Highway Standard - I Highway from Kathmandu to Nijgadh. The Employer undertakes to facilitate the land acquisition in these changed sections, if satisfied with such changes.

#### 4. Status of Land Acquisition and Service Track (Refer the Attached map)

This Land Acquisition status is described in Annex 1 to Schedule A.

##### Service Track:

A 7.5 to 12 meter wide track is being opened along the alignment. 63 km track has been opened so far. The status of the track opened in different sections is given below: opened so far. The status of the track opened in different sections is given below:

S. No.	Chainage		Track Opened (Km)	Remarks
1	9+300	13+500	4.20	Kathmandu District
2	13+500	14+600	1.10	Lalitpur District
3	14+600	15+300	0.70	Makwanpur District
4	15+300	18+400	3.10	Lalitpur District
5	15+300	18+400	3.10	Makwanpur District
6	18+400	18+900	0.50	Makwanpur District
7	18+900	19+400	0.50	Lalitpur District
8	19+400	30+400	11.00	Makwanpur District
9	30+400	31+700	-	<b>Tunnel = 1.30 km</b>
10	31+700	32+700	1.00	Makwanpur District
11	32+700	34+000	-	1.30 Km Remain
12	34+000	37+300	3.30	Makwanpur District
13	37+300	38+600	0.20	1.10 Km Remain "
14	38+600	66+000	27.40	Makwanpur District
15	66+000	66+400	-	0.40 Km Remain
16	66+400	66+700	0.30	Makwanpur District
17	66+700	67+200	-	0.90 Km Remain "
18	67+200	67+900	0.70	Makwanpur District
19	67+900	76+442	9.34	Bara District
		<b>Total</b>	<b>63.34</b>	

#### 5. Design Standards

2. This is described in Schedule D

## **SCHEDULE - C PROJECT FACILITIES**

*(See Clause 2.1)*

### **1 Project Facilities**

The Concessionaire shall construct the Project Facilities in accordance with the provisions of this Agreement. Such Project Facilities shall include:

- (a) toll plaza[s];
- (b) roadside furniture;
- (c) street lighting;
- (d) pedestrian crossing overpass or underpass facilities;
- (e) landscaping and tree plantation;
- (f) rest areas;
- (g) truck lay-bys;
- (h) bus-Terminals/bays and bus shelters;
- (i) Overhead/Underground vehicular crossings for Kantipath and Dharan - Chatara Highways.
- (j) cattle crossings;
- (k) development of site for wayside amenities
- (l) traffic aid posts
- (m) medical aid posts;

- (n) vehicle rescue posts;
- (o) telecom system; and
- (p) highway traffic management system.

## **SCHEDULE - D SPECIFICATIONS AND STANDARDS**

### **A) Standards:**

The Kathmandu Terai/Madhes Fast Track Road (Expressway) is an access controlled 4-lane Highway and its standards shall conform to Asian Highway Class I Standards.

#### **(a) The Terrain Classification shall be:**

Level - Slope 0 to 10 %,  
Rolling - More than 10 to 25%  
Mountainous - More than 25 to 60%  
Steep - More than 60 %

#### **(b) Design Speed:**

Level - 100 to 120 kph,  
Rolling - 80 to 100 kph  
Mountainous - 50 to 80 kph  
Steep - 50 to 60 kph

#### **(c) Minimum Radii:**

Level - 350 to 520 m ; desirable 600 to 1000 m,  
Rolling - 210 to 350m , desirable 350 to 600 m  
Mountainous - 80 to 210 m, desirable 110 to 350 m  
Steep -80 to 115 m , desirable 110 to 160 m

#### **(d) Pavement Slope = 2%**

#### **(e) Shoulder Slope = 3 to 6 %**

#### **(f) Maximum Super elevation = 10 %**

#### **(g) Road Width and Grade in Rolling or Plain Areas for 4-lanes shall be:**

Width of Carriageway in metres (m) in Rolling/Plain Areas =  $7 \times 2 = 14$

Width of Shoulders in metres(m) = 2.5

Width of Inside Shoulder in metres (m) = 2.5

Width of Median in metres (m) = 3.0

Formation Width in metres(m) = 22.0 + Side drain as required in the cut sections

Maximum Gradient = 2(Two) %

#### **(h) Road Width and Grade in Steep Areas for 4-Lanes shall be:**

Width of Carriageway in metres (m) in Rolling/Plain Areas =  $7 \times 2 = 14$

Width of Shoulders in metres(m) = 2.0

Width of Inside Shoulder in metres (m) = 2.0

Width of Median in metres (m) = 2.5

Formation Width in metres(m) = 20.5 + side drain in cut sections

Maximum Gradient = 4(Four) %

**(i) Road Width Gully Cutting for 4-Lanes shall be:**

Width of Carriageway in metres (m) in Rolling/Plain Areas =  $7 \times 2 = 14$

Width of Shoulders in metres(m) = 2.0

Width of Inside Shoulder in metres (m) = 2.0

Width of Median in metres (m) = 3.0

Formation Width in metres(m) = 21.0 + side drain both sides

**(j) Road Width and Grade in Two separate Two-lanes in difficult sections for the Kathmandu - Nijgadh Expressway**

Width of Carriageway in metres (m) in Rolling/Plain Areas =  $3.5 \times 2 = 7.0$

Width of Shoulders in metres (m) = 2.0

Width of Inside Shoulder in metres (m) = 2.0

Formation Width in metres (m) = 11.0 + Side drain as required in the cut sections

Maximum Gradient = 4 (Four) %

**(k) Road Width and Grade for Additional Two Lanes Nijgadh - Pathlaiya Expressway - New Construction**

Width of Carriageway in metres (m) in Rolling/Plain Areas =  $3.5 \times 2 = 7.0$

Width of Shoulders in metres (m) = 2.5

Width of Inside Shoulder in metres (m) = 2.5

Formation Width in metres(m) = 12.0

Maximum Gradient = 2(Two) %

## **B) Specifications:**

### **The following specifications shall generally be followed:**

#### **Pavement:**

Pavement Type shall be Asphalt Concrete or Cement Concrete. The pavement shall be designed to stand traffic volume and axle loads over the Concession period plus 5 years for over 90 percent reliability. Pavement drainage below the subgrade and in the granular sub-base and base shall be adequately designed in wet areas with weak subgrades.

#### **Major Bridges:**

Structures shall be designed for HS 20 - 44 design loading or IRC Class AA and for a 100 years return period flood with probability of exceedance less than 10 % in 100 years.

#### **Culverts:**

Culverts shall be designed for 35 years return period flood

#### **River Training:**

Revetments with foundation below the scour depth shall be provided for river training upstream and downstream of the rivers in the flood plains.

#### **Retaining Walls:**

Major Retaining walls shall be designed with due regard to slope stability and protection against failure of toe slopes and washouts by floods for 100 year return period .

Back battered retaining walls in cement masonry shall be used where gravity retaining walls are appropriate in the hilly areas.

Solid rock slopes shall not be blasted with explosives for preparing foundation for the retaining walls. The foundation shall be prepared by preparing stepping/ benches by careful excavations or by light blasting of the rock slope if blasting is unavoidable

#### **Seismicity:**

Adequate Seismic factors shall be duly considered in designing the road structures

#### **Materials:**

Local materials shall be used as much as possible for the culverts and retaining walls.

The general specifications for materials and construction shall conform to the general specifications of Roads and Bridges of the Department of Roads, GON.

#### **Cut Slopes:**

Split blasting shall be used where blasting is unavoidable in rocks slopes. Cut slopes excavations shall be done so that the factor of safety of the cut slope is at least 1.5.

Cut Slope stabilization by measures such as rock bolting, soil anchoring, horizontal drains,

breast walls, and biotechnical stabilizations shall, as appropriate, shall be done in mountainous areas.

**Erosion Control:**

Outfalls: Outfalls of Culverts shall be properly protected to prevent erosion of downhill slopes or culvert beds.

**Side drains shall be covered RCC drains.**

**Access Control/ROW Protection**

The right of way shall be duly fenced to protect from encroachments and random lateral accesses.

**Manual:**

A Manual of Specifications and Standards shall be prepared by the Concessionaire and got approved by the MOPIT or authorized representatives of GON before the start of the relevant works.

## SCHEDULE - E APPLICABLE PERMITS

(See Clause 4.1.3)

### 1 Applicable Permits

- 1.1 The Concessionaire shall obtain, as required under the Applicable Laws, the following Applicable Permits on or before the Appointed Date, save and except to the extent of a waiver granted by the MOPIT in accordance with Clause 4.1.3 of the Agreement.
- (a) Permission of the GON or concerned Local Body for extraction of boulder from quarry;
  - (b) Licence for use of explosives;
  - (h) Permission of GON/Concerned Local Bodies for borrow earth and disposal;
  - (i) Permission of Ministry of Forest and Ministry of Environment for cutting of trees;
  - (j) Any other permits or clearances required under Applicable Laws.
- 1.2 Applicable Permits, as required, relating to environmental protection and conservation shall have been procured by the MOPIT.
- 1.3 The Concessionaire shall apply for the permits to the concerned agency of the Government of Nepal through the MOPIT, who shall provide necessary recommendations.

## SCHEDULE – F PERFORMANCE SECURITY

(See Clause 9.1)

The Project Manager,  
Kathmandu -Terai/Madhes Fast Track Road Project  
MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT  
Government of Nepal

### WHEREAS:

- (A) \*\*\*\* (the “**Concessionaire**”) and the Joint Secretary (the “**MOPIT**”) have entered into a Concession Agreement dated .....(the “**Agreement**”) whereby the MOPIT has agreed to the Concessionaire undertaking the Kathmandu - Terai/Madhes Fast Track Road (Expressway) (Kathmandu-Nijgadh Expressway and Nijgadh-Pathlaiya Expressway) on build, operate and transfer (“**BOT**”) basis, subject to and in accordance with the provisions of the Agreement.
- (B) The Agreement requires the Concessionaire to furnish a Performance Security to the MOPIT in a sum of NRs. 1500 million (Nepali Rupees fifteen hundred million) (the “**Guarantee Amount**”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the Construction Period (as defined in the Agreement).
- (C) We, \*\*\*\*\* through our Branch at \*\*\*\*\* (the “**Bank**”) have agreed to furnish this Bank Guarantee by way of Performance Security.

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

1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Concessionaire’s obligations during the Construction Period, under and in accordance with the Agreement, and agrees and undertakes to pay to the MOPIT, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Concessionaire, such sum or sums up to an aggregate sum of the Guarantee Amount as the MOPIT shall claim, without the MOPIT being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.

2. A letter from the MOPIT, under the hand of an Officer not below the rank of Joint Secretary of the MOPIT, Government of Nepal, that the Concessionaire has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the MOPIT shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Construction Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the MOPIT and the Concessionaire, or any dispute between them pending before any court, tribunal, arbitrators or any other MOPIT or body, or by the discharge of the Concessionaire for any reason whatsoever.
3. In order to give effect to this Guarantee, the MOPIT shall be entitled to act as if the Bank were the principal debtor and any change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the MOPIT to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee.
5. The MOPIT shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfilment and/or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the MOPIT against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the MOPIT, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the MOPIT of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the MOPIT or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this

provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.

6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the MOPIT in respect of or relating to the Agreement or for the fulfilment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for the period specified in paragraph 8 below and unless a demand or claim in writing is made by the MOPIT on the Bank under this Guarantee, not later than 6 (six) months from the date of expiry of this Guarantee, all rights of the MOPIT under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.
8. The Performance Security shall cease to be in force and effect when the Concessionaire shall have expended on Project construction an aggregate sum not less than 4 (four) times the amount of Performance Security, and provided the Concessionaire is not in breach of this Agreement. Upon request made by the Concessionaire for release of the Performance Security along with the particulars required hereunder, duly certified by a statutory auditor of the Concessionaire, the MOPIT shall release the Performance Security forthwith.
9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the MOPIT in writing, and declares that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
10. Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorised to receive such notice and to effect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and a certificate signed by an officer of the MOPIT that the envelope was so posted shall be conclusive.

11. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of one year or until it is released earlier by the MOPIT pursuant to the provisions of the Agreement. This Guarantee is counter guaranteed by ....., a reputed Commercial Bank of Nepal.
- 12.

Signed and sealed this \*\* day of \*\*\*, 200\* at \*\*\*.

SIGNED, SEALED AND DELIVERED

For and on behalf of the BANK by:

(Signature)

(Name)

(Designation)

(Address)

Signature of the Authorised Signatory of the

Counter Guaranteeing Bank of Nepal

(Official Seal)

## SCHEDULE - G PROJECT COMPLETION SCHEDULE

(See Clause 12.1)

### 1 Project Completion Schedule

During Construction Period, the Concessionaire shall comply with the requirements set forth in this Schedule-G for each of the Project Milestones and the Scheduled Date for completion of the Constructions of the Kathmandu-Nijgadh Expressway and Nijgadh-Pathlaiya Expressway (the “**Project Completion Schedule**”). Within 15 (fifteen) days of the date of each Project Milestone, the Concessionaire shall notify the MOPIT of such compliance along with necessary particulars thereof.

### 2 Project Milestone-I - Final Designs and Drawings Except for Tunnels and Bridges for Kathmandu-Nijgadh and Nijgadh-Pathlaiya Section

2.1 Project Milestone-I shall occur on the date falling on the [180<sup>th</sup> (one hundred and eightieth)] day from the Appointed Date (the “**Project Milestone-I**”).

2.2 Prior to the occurrence of Project Milestone-I, the Concessionaire shall have commenced import of 50% equipment, opening of service track and establishment of camp site..

### 3 Project Milestone-II - Earthwork, Retaining Walls, and Culverts for 30 % of the length of the Project

3.1 Project Milestone-II shall occur on the date falling on the 548<sup>th</sup> (five hundred forty eighth) day from the Appointed Date (the “**Project Milestone-II**”).

3.2 Prior to the occurrence of Project Milestone-II, the Concessionaire shall have completed the detail design of tunnels and bridges and commenced their construction.

### 4 Project Milestone-III - Completion of 70 (Seventy) percent of Earthwork, Retaining Walls, Culverts, 40 (forty) percent of bridges and river training works, and 30 % of Tunnels.

4.1 Project Milestone-III shall occur on the date falling on the 1096 (one thousand ninety sixth) day from the Appointed Date (the “**Project Milestone-III**”).

4.2 Prior to the occurrence of Project Milestone-III, the Concessionaire shall have completed the preparations for pavements and side drains constructions.

## **5 Scheduled Date for Completion of all Constructions**

- 5.1 The Scheduled Date for completion of all constructions of Kathmandu-Nijgadh - Pathlaiya Fast Track Road (Expressway) including slope stabilizations, fencing of both sides of ROW, toll plazas, interchanges shall occur on the [1825<sup>th</sup> (eighteen hundred twenty fifth) day from the Appointed Date.
- 5.2 On or before the Scheduled Date, the Concessionaire shall have completed all the activities for operation of the Expressway in accordance with this Agreement.

## **6 Extension of period**

Upon extension of any or all of the aforesaid Project Milestones, as the case may be, under and in accordance with the provisions of this Agreement, the Project Completion Schedule shall be deemed to have been amended accordingly.

## SCHEDULE - H DRAWINGS

(See Clause 12.3)

### 1 Drawings

In compliance of the obligations set forth in Clause 12.3 of this Agreement, the Concessionaire shall furnish to the Independent Engineer, free of cost, all Drawings listed in Annex-I of this Schedule-H.

### 2 Additional drawings

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

Annex-I  
(Schedule-H)

**List of Drawings**

The Concessionaire is required to furnish under Clause 12.3. the following drawings for the Kathmandu-Nijgadh Fast Track Road (Expressway) and Nijgadh-Pathlaiya Fast Track Road (Expressway):

1. Plan and Profile of the Expressway
2. Detail design of high cut slopes and major slope stabilizations
3. Plan, Profile and types of biotechnical stabilizations including vegetation, and plantations
4. Detail design of major retaining walls and river trainings
5. Detail design of tunnels and bridges
6. Detail design of pavements
7. Typical designs of side drains, outfall protections, and breast walls
8. As built drawings after constructions and the maintenance and operation drawings during the operation of the Expressway.
9. Complete set of drawings at the time of transfer of the Project. The drawings shall indicate the remaining life of major components of the Expressway such as pavement and bridges; and equipment such as tunnel ventilation and electrical systems, and operation and maintenance equipment for the tunnel, bridges, retaining walls, and critical slopes. All the plants, vehicles and equipment used for the operation and maintenance of the Expressway shall be handed over at a running condition and shall not require replacement in the next five years after the handover. All the operation and maintenance manuals of the Expressway Components and major equipment shall also be included in the set of drawings.

## SCHEDULE - I TESTS

(See Clause 14.1.2)

### 1 Schedule for Tests

- 1.1 The Concessionaire shall, not later than 30 (thirty) days prior to the likely completion of the Expressway, notify the Independent Engineer and the MOPIT of its intent to subject the Project Expressway to Tests, and not later than 7 (seven) days prior to the actual date of Tests, furnish to the Independent Engineer and the MOPIT detailed inventory and particulars of all works and equipment forming part of the Project.
- 1.2 The Concessionaire shall notify the Independent Engineer of its readiness to subject the Project Expressway to Tests at any time after 7 (seven) days from the date of such notice, and upon receipt of such notice, the Independent Engineer shall, in consultation with the Concessionaire, determine the date and time for each Test and notify the same to the MOPIT who may designate its representative to witness the Tests. The Independent Engineer shall thereupon conduct the Tests itself or cause any of the Tests to be conducted in accordance with Article 14 and this Schedule-I.

### 2 Tests

- 2.1 Visual and physical Test: The Independent Engineer shall conduct a visual and physical check of to determine that all works and equipment forming part thereof conform to the provisions of this Agreement.
- 2.2 Test drive: The Independent Engineer shall undertake a test drive of the Project Expressway by a Car and by a fully loaded Truck to determine that the quality of service conforms to the provisions of the Agreement.
- 2.3 Riding quality Test: Riding quality of each lane of the carriageway shall be checked with the help of a calibrated bump integrator and the maximum permissible roughness for purposes of this Test shall be [1,800 (one thousand and eight hundred)] mm for each kilometre.
- 2.4 Pavement Composition Test: The thickness and composition of the pavement structure shall be checked on a sample basis by digging pits to determine conformity of such pavement structure with Specifications and Standards. The sample shall consist of one pit in each direction of travel to be chosen at random in each stretch of 5 (five) kilometres of the Project Expressway. The first pit for the sample shall be selected by the Independent Engineer through an open draw

of lots and every fifth kilometre from such first pit shall form part of the sample for this pavement quality Test.

- 2.5 Cross-section Test: The cross-sections of the Project shall be checked on a sample basis through physical measurement of their dimensions for determining the conformity thereof with Specifications and Standards. For the road portion, the sample shall consist of one spot to be selected at random in each stretch of 1 (one) kilometre of the Project Expressway. The first spot for the sample shall be selected by the Independent Engineer through an open draw of lots and the spots located at every one kilometre from such first spot shall form part of the sample. For the bridge portion, one spot shall be selected at random by the Independent Engineer in each span of the bridge.
- 2.6 Structural Test for bridges: All major and minor bridges constructed by the Concessionaire shall be subjected to the Rebound Hammer and Ultrasonic Pulse Velocity tests, to be conducted in accordance with the procedure described in Special Report No. 17: 1996 of the IRC Highway Research Board on Non-destructive Testing Techniques, at two spots in every span, to be chosen at random by the Independent Engineer. Bridges with a span of 15 (fifteen) metres or more shall also be subjected to load testing.
- 2.7 Environmental audit: The Independent Engineer shall carry out a check to determine conformity of the Project with the environmental requirements set forth in Applicable Laws and Applicable Permits.
- 2.8 Safety review: Safety audit of the Project Expressway shall have been undertaken by the Safety Consultant as set forth in Schedule-L, and on the basis of such audit, the Independent Engineer shall determine conformity of the Project Expressway with the provisions of this Agreement.

### **3 Agency for conducting Tests**

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

### **4 Completion/Provisional Certificate**

Upon successful completion of Tests, the Independent Engineer shall issue the Completion Certificate or the Provisional Certificate, as the case may be, in accordance with the provisions of Article 14.

## SCHEDULE - J COMPLETION CERTIFICATE

(See Clauses 14.2 & 14.3)

- 1 I, \*\*\*\* (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated \*\*\* (the “**Agreement**”), for the construction of a 76 km long four lane Fast Track Road (Expressway) from Kathmandu to Nijgadh and a 18 km long additional two lane (making four lane in total) Fast Track Road (Expressway) from Nijgadh to Pathlaiya in Nepal (the “**Project Expressway**”) on build, operate and transfer (BOT) basis, through \*\*\*\* (Name of Concessionaire), hereby certify that the Tests specified in Article 14 and Schedule-I of the Agreement have been successfully undertaken to determine compliance of the Project Expressway with the provisions of the Agreement, and I am satisfied that the Project Expressway can be safely and reliably placed in commercial service of the Users thereof.
  
- 2 It is certified that, in terms of the aforesaid Agreement, all works forming part of [Four-Laning] have been completed, and the Project is hereby declared fit for entry into commercial operation on this the \*\*\* day of \*\*\* 200\*.

SIGNED, SEALED AND DELIVERED

For and on behalf of  
INDEPENDENT ENGINEER by:

(Signature)

(Name)

(Designation)

(Address)

## Provisional Certificate

- 1 I, \*\*\*\* (Name of the Independent Engineer), acting as Independent Engineer, under and in accordance with the Concession Agreement dated \*\*\* (the “**Agreement**”), for the construction of a 76 km long four lane Fast Track Road (Expressway) from Kathmandu to Nijgadh and a 18 km long additional two lane (making four lane in total) Fast Track Road (Expressway) from Nijgadh to Pathlaiya in Nepal (the “**Project**”) on build, operate and transfer (BOT) basis through \*\*\*\*\* (Name of Concessionaire), hereby certify that the Tests specified in Article 14 and Schedule-I of the Agreement have been undertaken to determine compliance of the Project with the provisions of the Agreement.
  
- 2 Construction Works that were found to be incomplete and/or deficient have been specified in the Punch List appended hereto, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. (Some of the incomplete works have been delayed as a result of reasons attributable to the MOPIT or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire,)+ I am satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Project, pending completion thereof.
  
- 3 In view of the foregoing, I am satisfied that the Project can be safely and reliably placed in commercial service of the Users thereof, and in terms of the Agreement, the Project is hereby provisionally declared fit for entry into commercial operation on this the \*\*\* day of \*\*\* 200\*.

ACCEPTED, SIGNED, SEALED  
AND DELIVERED

For and on behalf of  
CONCESSIONAIRE by:

(Signature)  
(Name and Designation)  
(Address)

SIGNED, SEALED AND  
DELIVERED

For and on behalf of  
INDEPENDENT ENGINEER by:

(Signature)  
(Name and Designation)  
(Address)

## **SCHEDULE – K MAINTENANCE REQUIREMENTS**

*(See Clause 17.2)*

### **1 Maintenance Requirements**

- 1.1 The Concessionaire shall, at all times, operate and maintain the Project in accordance with the provisions of the Agreement, Applicable Laws and Applicable Permits. In particular, the Concessionaire shall, at all times during the Operation Period, conform to the maintenance requirements set forth in this Schedule-K (the “**Maintenance Requirements**”).
- 1.2 The Concessionaire shall repair or rectify any defect or deficiency set forth in Paragraph 2 of this Schedule-K within the time limit specified therein and any failure in this behalf shall constitute a breach of the Agreement. Upon occurrence of any breach hereunder, the MOPIT shall be entitled to recover Damages as set forth in Clause 17.8 of the Agreement, without prejudice to the rights of the MOPIT under the Agreement, including Termination thereof.

### **2 Repair/rectification of defects and deficiencies**

The obligations of the Concessionaire in respect of Maintenance Requirements shall include repair and rectification of the defects and deficiencies specified in Annex - I of this Schedule - K within the time limit set forth therein.

### **3 Other defects and deficiencies**

- 3.1 In respect of any defect or deficiency not specified in Annex - I of this Schedule-K, the Concessionaire shall undertake repair or rectification in accordance with Good Industry Practice.
- 3.2 In respect of any defect or deficiency not specified in Annex - I of this Schedule-K, the Independent Engineer may, in conformity with Good Industry Practice, specify the permissible limit of deviation or deterioration with reference to the Specifications and Standards, and any deviation or deterioration beyond the permissible limit shall be repaired or rectified by the Concessionaire within the time limit specified by the Independent Engineer.

#### **4 Extension of time limit**

Notwithstanding anything to the contrary specified in this Schedule-K, if the nature and extent of any defect or deficiency justifies more time for its repair or rectification than the time specified herein, the Concessionaire shall be entitled to additional time in conformity with Good Industry Practice. Such additional time shall be determined by the Independent Engineer and conveyed to the Concessionaire and the MOPIT with reasons thereof.

#### **5 Emergency repairs/restoration**

Notwithstanding anything to the contrary contained in this Schedule-K, if any defect, deficiency or deterioration in the Project poses danger to the life or property of the Users thereof, the Concessionaire shall promptly take all reasonable measures for eliminating or minimizing such danger.

#### **6 Daily Inspection by the Concessionaire**

The Concessionaire shall, through its engineer, undertake a daily visual inspection of the Project and maintain a record thereof in a register to be kept in such form and manner as the Independent Engineer may specify. Such record shall be kept in safe custody of the Concessionaire and shall be open to inspection by the MOPIT and the Independent Engineer at any time during office hours.

#### **7 Divestment Requirements**

All defects and deficiencies specified in this Schedule-K shall be repaired and rectified by the Concessionaire so that the Project conforms to the Maintenance Requirements on the Transfer Date.

#### **8 Display of Schedule - K**

The Concessionaire shall display a copy of this Schedule - K at the Toll Plaza[s] along with the Complaint Register stipulated in Article 46.

Annex – I (Schedule-K)

**Repair/Rectification of Defects and Deficiencies**

The Concessionaire shall repair and rectify the defects and deficiencies specified in this Annex - I of Schedule - K within the time limit set forth herein.

<b>Nature of defect or deficiency</b>		<b>Time limit for repair/rectification</b>
<b>ROADS</b>		
<b>(a) Carriageway and paved shoulders</b>		
(i) Breach or blockade	-	Temporary restoration of traffic within 24 hours
(ii) Roughness value exceeding 2,500 mm in a stretch of 1 km (as measured by a standardised rough meter/ bump integrator)	-	180 days
(iii) Pot holes	-	48 hours
(iv) Cracking in more than 5% of road surface in a stretch of 1 km	-	30 days
(v) Rutting exceeding 10 mm in more than 2% of road surface in a stretch of 1 km (measured with 3 m straight edge)	-	30 days
(vi) Bleeding/skidding	-	7 days
(vii) Ravelling/Stripping of bitumen surface exceeding 10 sq. m	-	15 days
(viii) Damage to pavement edges exceeding 10 cm	-	15 days

Removal of debris	-	6 hours
<b>Hard/earth shoulders, side slopes, drains and culverts</b>		
Variation by more than 2% in the prescribed slope of camber/cross fall	-	30 days
Edge drop at shoulders exceeding 40 mm	-	7 days
Variation by more than 15% in the prescribed side (embankment) slopes	-	30 days
Rain cuts/gullies in slope	-	7 days
Damage to or silting of culverts and side drains during and immediately preceding the rainy season	-	7 days
De silting of drains in urban/semi-urban areas	-	48 hours
<b>Road side furniture including road signs and pavement marking</b>		
Damage to shape or position; poor visibility or loss of retro-reflectivity	-	48 hours
<b>Street lighting and telecom (ATMS)</b>		
Any major failure of the system	-	24 hours
Faults and minor failures	-	8 hours
<b>Trees and plantation</b>		
Obstruction in a minimum head-room of 5 m above carriageway or obstruction in visibility of road signs	-	24 hours

(ii)	Deterioration in health of trees and bushes	-	Timely watering and treatment
(iii)	Replacement of trees and bushes	-	90 days
(iv)	Removal of vegetation affecting sight line and road structures	-	15 days
<b>(f)</b>	<b>Rest areas</b>		
(i)	Cleaning of toilets	-	Every 4 hours
(ii)	Defects in electrical, water and sanitary installations	-	24 hours
<b>(g)</b>	<b>Toll plaza[s]</b>		
(i)	Failure of toll collection equipment or lighting	-	8 hours
(ii)	Damage to toll plaza	-	7 days
<b>(h)</b>	<b>Other Project Facilities and Approach roads</b>		
(i)	Damage or deterioration in Approach Roads, [pedestrian facilities, truck lay-bys, bus-bays, bus- shelters, cattle crossings, Traffic Aid Posts, Medical Aid Posts and other works]	-	15 days
	<b>BRIDGES</b>		
<b>(a)</b>	<b>Superstructure of bridges</b>		
(i)	Cracks - Temporary measures Permanent measures	- - -	within 48 hours within 45 days
(ii)	Spalling/scaling	-	15 days

<b>(b)</b>	<b>Foundations of bridges</b>	
(i)	Scouring and/or cavitation	- 15 days
<b>(c)</b>	<b>Piers, abutments, return walls and wing walls of bridges</b>	
(i)	Cracks and damages including settlement and tilting	- 30 days
<b>(d)</b>	<b>Bearings (metallic) of bridges</b>	
(i)	Deformation	- 15 days
<b>(e)</b>	<b>Joints in bridges</b>	
(i)	Loosening and malfunctioning of joints	- 15 days
<b>(f)</b>	<b>Other items relating to bridges</b>	
(i)	Deforming of pads in elastomeric bearings	- 7 days
(ii)	Gathering of dirt in bearings and joints; or clogging of spouts, weep holes and vent-holes	- 3 days
(iii)	Damage or deterioration in parapets and handrails	- 3 days
(iv)	Rain-cuts or erosion of banks of the side slopes of approaches	- 15 days
(v)	Damage to wearing coat	- 15 days
(vi)	Damage or deterioration in approach slabs, pitching, apron, toes, floor or guide bunds	- 30 days
(vii)	Growth of vegetation affecting the structure or obstructing the waterway	- 15 days

## **SCHEDULE - L SAFETY REQUIREMENTS**

*(See Clause 18.1.1)*

### **1 Guiding principles**

- 1.1 Safety Requirements aim at reduction in injuries, loss of life and damage to property resulting from accidents on the Project Expressway, irrespective of the person(s) at fault.
- 1.2 Users of the Project Expressway include motorised and non-motorised vehicles as well as pedestrians and animals involved in, or associated with accidents. Vulnerable Road Users (VRU) include pedestrians as well as riders of motorised two-wheelers, bicycles and other vehicles which do not provide adequate occupant protection.
- 1.3 Safety Requirements apply to all phases of construction, operation and maintenance with emphasis on identification of factors associated with accidents, consideration of the same, and implementation of appropriate remedial measures.
- 1.4 Safety Requirements include measures associated with traffic management and regulation such as road signs, pavement marking, traffic control devices, roadside furniture, highway design elements, enforcement and emergency response.

### **2 Obligations of the Concessionaire**

The Concessionaire shall abide by the following insofar as they relate to safety of the Users:

- (a) Applicable Laws and Applicable Permits;
- (b) Manual for Safety in Road Design, issued by MOPIT;
- (c) relevant Standards/Guidelines of IRC relating to road geometrics, bridges, culverts, road signs, pavement marking and roadside furniture;
- (d) provisions of this Agreement; and
- (e) Good Industry Practice.

### 3 Appointment of Safety Consultant

For carrying out safety audit of the Project MOPIT under and in accordance with this Schedule-L, the MOPIT shall appoint from time to time, one or more qualified firms or organisations as its consultants (the “**Safety Consultant**”). The Safety Consultant shall employ a team comprising, without limitation, one road safety expert and one traffic planner to undertake safety audit of the Project MOPIT

### 4 Safety measures during Development Period

- 4.1 Not later than 90 (ninety) days from the date of this Agreement, the MOPIT shall appoint a Safety Consultant for carrying out safety audit at the design stage of the Project. The Safety Consultant shall collect data on all fatal crashes and other road accidents which occurred on the Project Expressway in the preceding two years by obtaining copies of the relevant First Information Reports (FIRs) from the police stations having jurisdiction. The information contained in such FIRs shall be summarised in the form prescribed by IRC for this purpose and the data shall be analysed for the type of victims killed or injured, impacting vehicles, location of accidents and other relevant factors.
- 4.2 The Concessionaire shall provide to the Safety Consultant, in four copies, the relevant drawings containing the design details that have a bearing on safety of Users (the “**Safety Drawings**”). Such design details shall include horizontal and vertical alignments; sightlines; layouts of intersections; interchanges; road cross-section; bridges and culverts; side drains; provision for parked vehicles, slow moving vehicles (tractors, bullock carts, bicycles) and pedestrians; bus bays; truck lay-bys; and other incidental or consequential information. The Safety Consultant shall review the design details and forward three copies of the Safety Drawings with its recommendations, if any, to the Independent Engineer who shall record its comments, if any, and forward one copy each to the MOPIT and the Concessionaire.
- 4.3 The accident data and the design details shall be compiled, analysed and used by the Safety Consultant for evolving a package of recommendations consisting of safety related measures for the Project Expressway. The safety audit shall be completed in a period of three months and a report thereof (the “**Safety Report**”) shall be submitted to the MOPIT, in five copies. One copy each of the Safety Report shall be forwarded by the MOPIT to the Concessionaire and the Independent Engineer forthwith.

- 4.4 The Concessionaire shall endeavour to incorporate the recommendations of the Safety Report in the design of the Project Expressway, as may reasonably be required in accordance with Applicable Laws, Applicable Permits, Manuals and Guidelines of MOPIT and IRC, Specifications and Standards, and Good Industry Practice. If the Concessionaire does not agree with any or all of such recommendations, it shall state the reasons thereof and convey them to the MOPIT forthwith. In the event that any or all of the works and services recommended in the Safety Report fall beyond the scope of Schedule-B, Schedule-C or Schedule-D, the Concessionaire shall make a report thereon and seek the instructions of the MOPIT for funding such works in accordance with the provisions of Article 18.
- 4.5 Without prejudice to the provisions of Paragraph 4.4, the Concessionaire and the Independent Engineer shall, within 15 (fifteen) days of receiving the Safety Report, send their respective comments thereon to the MOPIT, and not later than 15 (fifteen) days of receiving such comments, the MOPIT shall review the same alongwith the Safety Report and by notice direct the Concessionaire to carry out any or all of the recommendations contained therein with such modifications as the MOPIT may specify; provided that any works or services required to be undertaken hereunder shall be governed by the provisions of Article 18.

## **5 Safety measures during Construction Period**

- 5.1 A Safety Consultant shall be appointed by the MOPIT, not later than 4 (four) months prior to the expected Project Completion Date, for carrying out a safety audit of the completed Construction Works.
- 5.2 The Safety Consultant shall collect and analyse the accident data for the preceding two years in the manner specified in Paragraph 4.1 of this Schedule-L. It shall study the Safety Report for the Development Period and inspect the Project Expressway to assess the adequacy of safety measures. The Safety Consultant shall complete the safety audit within a period of 4 (four) months and submit a Safety Report recommending a package of additional road safety measures, if any, that are considered essential for reducing accident hazards on the Project Expressway. Such recommendations shall be processed, *mutatis mutandis*, and acted upon in the manner set forth in Paragraphs 4.3, 4.4 and 4.5 of this Schedule-L.
- 5.3 The Concessionaire shall make adequate arrangements during the Construction Period for the safety of workers and road Users in accordance with the guidelines

of IRC for safety in construction zones, and notify the MOPIT and the Independent Engineer about such arrangements.

## **6 Safety measures during Operation Period**

- 6.1 The Concessionaire shall develop, implement and administer a surveillance and safety programme for Users, including correction of safety violations and deficiencies and all other actions necessary to provide a safe environment in accordance with this Agreement.
- 6.2 The Concessionaire shall establish a Highway Safety Management Unit (the “HSMU”) to be functional on and after COD, and designate one of its officers to be in-charge of the HSMU. Such officer shall have specialist knowledge and training in road safety and traffic engineering by having attended a course conducted by a reputed organisation on the subject.
- 6.3 The Concessionaire shall keep a copy of every FIR recorded by the Police with respect to any accident occurring on the Project Expressway. In addition, the Concessionaire shall also collect data for all cases of accidents not recorded by the Police but where a vehicle rolled over or had to be towed away. The information so collected shall be summarised in the form prescribed by MOPIT or other relevant agency for this purpose. The Concessionaire shall also record the exact location of each accident on a road map. The aforesaid data shall be submitted to the MOPIT at the conclusion of every quarter and to the Safety Consultant as and when appointed.
- 6.4 The Concessionaire shall submit to the MOPIT before the 31st (thirty first) May of each year, an annual report (in ten copies) containing, without limitation, a detailed listing and analysis of all accidents of the preceding Accounting Year and the measures taken by the Concessionaire pursuant to the provisions of Paragraph 6.1 of this Schedule-L for averting or minimising such accidents in future.
- 6.5 Once in every Accounting Year, a safety audit shall be carried out by the Safety Consultant to be appointed by the MOPIT. It shall review and analyse the annual report and accident data of the preceding year, and undertake an inspection of the Project Expressway. The Safety Consultant shall complete the safety audit within a period of 1 (one) month and submit a Safety Report recommending specific improvements, if any, required to be made to the road, bridges, culverts,

markings, signs, road furniture and Project Facilities, including cattle crossings and pedestrian crossings. Such recommendations shall be processed, *mutatis mutandis*, and acted upon in the manner set forth in Paragraphs 4.3, 4.4 and 4.5 of this Schedule-L.

## **7 Costs and expenses**

Costs and expenses incurred in connection with the Safety Requirements set forth herein, including the provisions of Paragraph 2 of this Schedule, shall be met in accordance with Article 18, and in particular, the remuneration of the Safety Consultant, safety audit, and costs incidental thereto, shall be met out of the Safety Fund.

## SCHEDULE - M MONTHLY FEE STATEMENT

(See Clause 19.5)

**Project Expressway:**

**Month:**

Type of Vehicle	For Corresponding Month of Previous Year		For Preceding Month		For the Month Reported upon		
	No. of Vehicles	Fee Collected (in lakh Rs.)	No. of Vehicles	Fee Collected (in lakh Rs.)	Fee per Vehicle (in Rs.)	No. of Vehicles	Fee Collected (in lakh Rs.)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
A Motor Cycle							
B Car							
C Light Bus							
D Medium Bus							
E Heavy Bus							
F Light Truck							
G Medium Truck							
H Heavy Truck							
<b>G Total</b>							

**Note 1:** The above statement does not include Local Traffic and vehicles travelling on Daily Passes or Monthly Passes

**Note 2:** Monthly Fee Statements for Monthly Passes and Daily Passes have been prepared separately in the above format and are enclosed.

**Remarks, if any:**

## SCHEDULE - N WEEKLY TRAFFIC CENSUS

(See Clause 22.1)

**Project Expressway:**

**Week ending:**

Type of Vehicle	No. of vehicles using the Project Expressway during		
	Corresponding week/last year	Preceding week	Week of report
(1)	(2)	(3)	(4)
<b>I. Fee paying Traffic</b>			
<b>A. Motor Cycle</b>			
<b>B</b> Car			
<b>C</b> Light Bus			
<b>D</b> Medium Bus			
<b>E</b> Heavy Bus			
<b>F</b> Light Truck			
<b>G</b> Medium Truck			
<b>H</b> Heavy Truck			
<b>Total of (I)</b>			
<b>II Local Traffic</b>			
<b>B1</b> Car			
<b>Total (II)</b>			
<b>III Exempted Vehicles</b>			
<b>B21</b> Car			
<b>C2</b> Light Bus			
<b>D2</b> Medium Bus			
<b>F2</b> Light Truck			
<b>G2</b> Medium Truck			
<b>I</b> Tractor			
<b>Total (III)</b>			
<b>IV Total Traffic (I+II+III)</b>			
<b>A</b> Motor Cycle			
<b>B</b> Car			
<b>C</b> Light Bus			
<b>D</b> Medium Bus			
<b>E</b> Heavy Bus			
<b>F</b> Light Truck			
<b>G</b> Medium Truck			
<b>H</b> Heavy Truck			
<b>I</b> Tractor			
<b>Grand Total</b>			

**Remarks, if any:**

## SCHEDULE - N1 WEEKLY REPORT FOR WEIGH STATIONS

**Project Expressway:**

**Week ending:**

Type of Vehicle	Permitted	No. of	No. of Vehicles carrying load:			
			Within permissible limits	Up to 10% in excess	Over 10% and up to 20% in excess	Over 20% in excess
(1)	(2)	(3)	(4)	(5)	(6)	(7)
A Light Truck						
B Truck						
C Heavy Truck						
<b>D Total</b>						

[**Note:** Sample size shall not be less than 200 trucks per week and 20 trucks per day, and should include a proportionate number of Heavy Trucks.

**Remarks, if any:]**

## **SCHEDULE - O TRAFFIC SAMPLING**

*(See Clause 22.3.1)*

### **1 Traffic sampling**

The MOPIT may, in its discretion and at its own cost, undertake traffic sampling, pursuant to Clause 22.3, in order to determine the actual traffic on the Project. Such traffic sampling shall be undertaken through the Independent Engineer in the manner set forth below.

### **2 Manual traffic count**

The Independent Engineer shall employ the required number of enumerators who shall count, classify and record all the vehicles as they pass by, and divide the survey into fixed time periods. The count stations shall be located near the Toll Plaza[s] on a straight section of the road with good visibility. The survey shall be conducted continuously for a minimum of 24 (twenty four) hours and maximum of 7 (seven) days at a time. The count period shall be 15 (fifteen) minutes with results summarised hourly.

### **3 Automatic traffic count**

For automatic traffic count to be conducted on intermittent (non-continuous) basis, the Independent Engineer shall use suitable and standardised equipment to classify and record the range of vehicles passing through the Toll Plaza[s]. For this purpose, the counter shall be checked with at least 100 (one hundred) vehicles, including all major vehicle types, over a range of speeds to ensure that all vehicles are being counted and classified correctly.

### **4 Variation between manual and automatic count**

Average Daily Traffic (ADT) for each type of vehicle shall be determined separately by the aforesaid two methods and in the event that the number of vehicles in any category, as counted by the manual method, varies by more than 1% (one per cent) of the number of such vehicles as counted by the automatic method, the manual and automatic count of such category of vehicles shall be repeated, and in the event of any discrepancy between the two counts in the second enumeration, the average thereof shall be deemed to be the actual traffic.

## SCHEDULE - P SELECTION OF INDEPENDENT ENGINEER

(See Clause 23.1)

### 1 Selection of Independent Engineer

- 1.1 The provisions of the latest edition of the Request for Proposal (RFP) for Consultancy Assignments: Time Based issued by the Public Procurement Monitoring Office (PPMO), GON shall apply, *mutatis mutandis*, for invitation of bids and evaluation thereof save as otherwise provided herein.
- 1.2 The MOPIT shall invite expressions of interest from consulting engineering firms or bodies corporate to undertake and perform the duties and functions set forth in Schedule-Q and thereupon shortlist ten (10) qualified firms in accordance with pre-determined criteria. The MOPIT shall convey the aforesaid list of firms to the Concessionaire for scrutiny and comments, if any. The Concessionaire shall be entitled to scrutinise the relevant records of the MOPIT to ascertain whether the selection of firms has been undertaken in accordance with the prescribed procedure and it shall send its comments, if any, to the MOPIT within 15 (fifteen) days of receiving the aforesaid list of firms. Upon receipt of such comments, if any, the MOPIT shall, after considering all relevant factors, finalise and constitute a panel of 10 (ten) firms (the “**Panel of Firms**”) and convey its decision to the Concessionaire.
- 1.3 The MOPIT shall invite the aforesaid firms in the Panel of Firms to submit their respective technical and financial offers, each in a separate sealed cover. The Request for Proposal shall be for Quality Based System(QBS). All the technical bids so received shall be opened and pursuant to the evaluation thereof, the financial Proposals of the firm securing the highest score in the Technical Proposal shall be opened and the firm shall be invited for negotiations.

### 2 Fee and expenses

- 2.1 In determining the nature and quantum of duties and services to be performed by the Independent Engineer during the Development Period and Construction Period, the MOPIT shall endeavour that payments to the Independent Engineer on account of fee and expenses do not exceed 2% (two per cent) of the Total Project Cost.
- 2.2 The nature and quantum of duties and services to be performed by the Independent Engineer during the Operation Period shall be determined by the MOPIT in conformity with the provisions of this Agreement and with due regard for economy

in expenditure. All payments made to the Independent Engineer on account of fee and expenses during the Construction and Operation Period shall be borne equally by the MOPIT and the Concessionaire.

### **3 Constitution of fresh panel**

Not later than three years from the date of this Agreement, and every three years thereafter, the MOPIT shall prepare a fresh panel of firms and invite competitive proposals (RFP) to select the independent consultant in accordance with the criteria set forth in this Schedule-P ; provided that the MOPIT may, at any time, prepare a fresh panel with prior written consent of the Concessionaire.

### **4 Appointment of government entity as Independent Engineer**

Notwithstanding anything to the contrary contained in this Schedule, the MOPIT and the Concessionaire may jointly appoint an independent engineer / engineering firm directly from the existing Panel or from a Government owned consultancy firm as independent engineer as a stop gap measure that is for a short period, not exceeding 6 (six) months at a time when the procurement process of appointing the independent engineer as per the PPMO procedure is in progress.

## SCHEDULE - Q TERMS OF REFERENCE FOR INDEPENDENT ENGINEER

(See Clause 23.2.1)

### TERMS OF REFERENCE FOR INDEPENDENT ENGINEER

#### 1 Scope

- 1.1 These Terms of Reference for the Independent Engineer (the “TOR”) are being specified pursuant to the Concession Agreement dated \*\*\* (the “Agreement”), which has been entered into between the MOPIT and \*\*\*\* (the “Concessionaire”) for Kathmandu-Terai/Madhes Expressway (Kathmandu - Nijgadh- Pathlaiya Expressway on build, operate and transfer (BOT) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this TOR.
- 1.2 This TOR shall apply to construction, operation and maintenance of the four lane Kathmandu - Nijgadh Expressway and construction of a two lane Nijgadh-Pathlaiya Expressway

#### 2 Definitions and interpretation

- 2.1 The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.
- 2.2 References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.
- 2.3 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Agreement shall apply, *mutatis mutandis*, to this TOR.

#### 3 Role and functions of the Independent Engineer

- 3.1 The role and functions of the Independent Engineer shall include the following:
- (i) review of the Drawings and Documents as set forth in Paragraph 4;
  - (ii) review, inspection and monitoring of Construction Works as set forth in Paragraph 5;

- (iii) conducting Tests on completion of construction and issuing Completion/ Provisional Certificate as set forth in Paragraph 5;
- (iv) review, inspection and monitoring of O&M as set forth in Paragraph 6;
- (v) review, inspection and monitoring of Divestment Requirements as set forth in Paragraph 7;
- (vi) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
- (vii) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (viii) assisting the Parties in resolution of disputes as set forth in Paragraph 9; and
- (ix) undertaking all other duties and functions in accordance with the Agreement.

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

#### **4 Development Period**

- 4.1 During the Development Period, the Independent Engineer shall undertake a detailed review of the Drawings to be furnished by the Concessionaire along with supporting data, including the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites, topographical surveys and traffic surveys. The Independent Engineer shall complete such review and send its comments/observations to the MOPIT and the Concessionaire within 15 (fifteen) days of receipt of such Drawings. In particular, such comments shall specify the conformity or otherwise of such Drawings with the Scope of the Project and Specifications and Standards.
- 4.2 The Independent Engineer shall review any modified Drawings or supporting Documents sent to it by the Concessionaire and furnish its comments within 7 (seven) days of receiving such Drawings or Documents.
- 4.3 The Independent Engineer shall review the Drawings sent to it by the Safety Consultant in accordance with Schedule-L and furnish its comments thereon to

the MOPIT and the Concessionaire within 7 (seven) days of receiving such Drawings. The Independent Engineer shall also review the Safety Report and furnish its comments thereon to the MOPIT within 15 (fifteen) days of receiving such report.

- 4.4 The Independent Engineer shall review the detailed design, construction methodology, quality assurance procedures and the procurement, engineering and construction time schedule sent to it by the Concessionaire and furnish its comments within 15 (fifteen) days of receipt thereof.
- 4.5 Upon reference by the MOPIT, the Independent Engineer shall review and comment on the EPC Contract or any other contract for construction, operation and maintenance of the Project Expressway, and furnish its comments within 7 (seven) days from receipt of such reference from the MOPIT.

## 5 Construction Period

- 5.1 In respect of the Drawings, Documents and Safety Report received by the Independent Engineer for its review and comments during the Construction Period, the provisions of Paragraph 4 shall apply, *mutatis mutandis*.
- 5.2 The Independent Engineer shall review the monthly progress report furnished by the Concessionaire and send its comments thereon to the MOPIT and the Concessionaire within 7 (seven) days of receipt of such report.
- 5.3 The Independent Engineer shall inspect the Construction Works and the Project Expressway once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out a report of such inspection (the “**Inspection Report**”) setting forth an overview of the status, progress, quality and safety of construction, including the work methodology adopted, the materials used and their sources, and conformity of Construction Works with the Scope of the Project and the Specifications and Standards. In a separate section of the Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in the construction of the Project Expressway. The Inspection Report shall also contain a review of the maintenance of the existing lanes in conformity with the provisions of the Agreement. The Independent Engineer shall send a copy of its Inspection Report to the MOPIT and the Concessionaire within 7 (seven) days of the inspection.

- 5.4 The Independent Engineer may inspect the Project Expressway more than once in a month if any lapses, defects or deficiencies require such inspections.
- 5.5 For determining that the Construction Works conform to Specifications and Standards, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance. For purposes of this Paragraph 5.5, the tests specified in the IRC Special Publication-11 (Handbook of Quality Control for Construction of Roads and Runways) and the Specifications for Road and Bridge Works or any modification/substitution thereof shall be deemed to be tests conforming to Good Industry Practice for quality assurance. The Independent Engineer shall issue necessary directions to the Concessionaire for ensuring that the tests are conducted in a fair and efficient manner, and shall monitor and review the results thereof.
- 5.6 The sample size of the tests, to be specified by the Independent Engineer under Paragraph 5.5, shall comprise 10% (ten per cent) of the quantity or number of tests prescribed for each category or type of tests in the Quality Control Manuals; provided that the Independent Engineer may, for reasons to be recorded in writing, increase the aforesaid sample size by up to 10% (ten per cent) for certain categories or types of tests.
- 5.7 The timing of tests referred to in Paragraph 5.5, and the criteria for acceptance/rejection of their results shall be determined by the Independent Engineer in accordance with the Quality Control Manuals. The tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the tests that may be carried out by the Concessionaire for its own quality assurance in accordance with Good Industry Practice.
- 5.8 In the event that the Concessionaire carries out any remedial works for removal or rectification of any defects or deficiencies, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests to determine that such remedial works have brought the Construction Works into conformity with the Specifications and Standards, and the provisions of this Paragraph 5 shall apply to such tests.
- 5.9 In the event that the Concessionaire fails to achieve any of the Project Milestones, the Independent Engineer shall undertake a review of the progress of construction

and identify potential delays, if any. If the Independent Engineer shall determine that completion of the Project Expressway is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within 15 (fifteen) days the steps proposed to be taken to expedite progress, and the period within which the Project Completion Date shall be achieved. Upon receipt of a report from the Concessionaire, the Independent Engineer shall review the same and send its comments to the MOPIT and the Concessionaire forthwith.

- 5.10 If at any time during the Construction Period, the Independent Engineer determines that the Concessionaire has not made adequate arrangements for the safety of workers and Users in the zone of construction or that any work is being carried out in a manner that threatens the safety of the workers and the Users, it shall make a recommendation to the MOPIT forthwith, identifying the whole or part of the Construction Works that should be suspended for ensuring safety in respect thereof.
- 5.11 In the event that the Concessionaire carries out any remedial measures to secure the safety of suspended works and Users, it may, by notice in writing, require the Independent Engineer to inspect such works, and within 3 (three) days of receiving such notice, the Independent Engineer shall inspect the suspended works and make a report to the MOPIT forthwith, recommending whether or not such suspension may be revoked by the MOPIT.
- 5.12 If suspension of Construction Works is for reasons not attributable to the Concessionaire, the Independent Engineer shall determine the extension of dates set forth in the Project Completion Schedule, to which the Concessionaire is reasonably entitled, and shall notify the MOPIT and the Concessionaire of the same.
- 5.13 The Independent Engineer shall carry out, or cause to be carried out, all the Tests specified in Schedule-I and issue a Completion Certificate or Provisional Certificate, as the case may be. For carrying out its functions under this Paragraph 5.13 and all matters incidental thereto, the Independent Engineer shall act under and in accordance with the provisions of Article 14 and Schedule-I.
- 5.14 Upon reference from the MOPIT, the Independent Engineer shall make a fair and reasonable assessment of the costs of providing information, works and services as set forth in Article 16 and certify the reasonableness of such costs for payment by the MOPIT to the Concessionaire.

5.15 The Independent Engineer shall aid and advise the Concessionaire in preparing the Maintenance Manual.

## **6 Operation Period**

6.1 In respect of the Drawings, Documents and Safety Report received by the Independent Engineer for its review and comments during the Operation Period, the provisions of Paragraph 4 shall apply, *mutatis mutandis*.

6.2 The Independent Engineer shall review the annual Maintenance Programme furnished by the Concessionaire and send its comments thereon to the MOPIT and the Concessionaire within 15 (fifteen) days of receipt of the Maintenance Programme.

6.3 The Independent Engineer shall review the monthly status report furnished by the Concessionaire and send its comments thereon to the MOPIT and the Concessionaire within 7 (seven) days of receipt of such report.

6.4 The Independent Engineer shall inspect the Project Expressway once every month, preferably after receipt of the monthly status report from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out an O&M Inspection Report setting forth an overview of the status, quality and safety of O&M including its conformity with the Maintenance Requirements and Safety Requirements. In a separate section of the O&M Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses, defects or deficiencies observed by it in O&M of the Project Expressway. The Independent Engineer shall send a copy of its O&M Inspection Report to the MOPIT and the Concessionaire within 7 (seven) days of the inspection.

6.5 The Independent Engineer may inspect the Project Expressway more than once in a month, if any lapses, defects or deficiencies require such inspections.

6.6 The Independent Engineer shall in its O&M Inspection Report specify the tests, if any, that the Concessionaire shall carry out, or cause to be carried out, for the purpose of determining that the Project Expressway is in conformity with the Maintenance Requirements. It shall monitor and review the results of such tests and the remedial measures, if any, taken by the Concessionaire in this behalf.

6.7 In respect of any defect or deficiency referred to in Paragraph 3 of Schedule-K, the Independent Engineer shall, in conformity with Good Industry Practice,

specify the permissible limit of deviation or deterioration with reference to the Specifications and Standards and shall also specify the time limit for repair or rectification of any deviation or deterioration beyond the permissible limit.

- 6.8 The Independent Engineer shall determine if any delay has occurred in completion of repair or remedial works in accordance with the Agreement, and shall also determine the Damages, if any, payable by the Concessionaire to the MOPIT for such delay.
- 6.9 The Independent Engineer shall examine the request of the Concessionaire for closure of any lane(s) of the carriageway for undertaking maintenance/repair thereof, keeping in view the need to minimise disruption in traffic and the time required for completing such maintenance/repair in accordance with Good Industry Practice. It shall grant permission with such modifications, as it may deem necessary, within 5 (five) days of receiving a request from the Concessionaire. Upon expiry of the permitted period of closure, the Independent Engineer shall monitor the re-opening of such lane(s), and in case of delay, determine the Damages payable by the Concessionaire to the MOPIT under Clause 17.7.
- 6.10 The Independent Engineer shall monitor and review the curing of defects and deficiencies by the Concessionaire as set forth in Clause 19.4.
- 6.11 In the event that the Concessionaire notifies the Independent Engineer of any modifications that it proposes to make to the Project Expressway, the Independent Engineer shall review the same and send its comments to the MOPIT and the Concessionaire within 15 (fifteen) days of receiving the proposal.
- 6.12 The Independent Engineer shall undertake traffic sampling, as and when required by the MOPIT, under and in accordance with Article 22 and Schedule-O.

## **7 Termination**

- 7.1 At any time, not earlier than 90 (ninety) days prior to Termination but not later than 10 (ten) days prior to such Termination, the Independent Engineer shall, in the presence of a representative of the Concessionaire, inspect the Project Expressway for determining compliance by the Concessionaire with the Divestment Requirements set forth in Clause 38.1 and, if required, cause tests to be carried out at the Concessionaire's cost for determining such compliance. If the Independent Engineer determines that the status of the Project Expressway is such that its repair and rectification would require a larger amount than the sum set

forth in Clause 39.2, it shall recommend retention of the required amount in the Escrow Account and the period of retention thereof.

- 7.2 The Independent Engineer shall inspect the Project Expressway once in every 15 (fifteen) days during a period of 90 (ninety) days after Termination for determining the liability of the Concessionaire under Article 39, in respect of the defects or deficiencies specified therein. If any such defect or deficiency is found by the Independent Engineer, it shall make a report in reasonable detail and send it forthwith to the MOPIT and the Concessionaire.

## **8 Determination of costs and time**

- 8.1 The Independent Engineer shall determine the costs, and/or their reasonableness, that are required to be determined by it under the Agreement.
- 8.2 The Independent Engineer shall determine the period, or any extension thereof, that is required to be determined by it under the Agreement.

## **9 Assistance in Dispute resolution**

- 9.1 When called upon by either Party in the event of any Dispute, the Independent Engineer shall mediate and assist the Parties in arriving at an amicable settlement.
- 9.2 In the event of any disagreement between the Parties regarding the meaning, scope and nature of Good Industry Practice, as set forth in any provision of the Agreement, the Independent Engineer shall specify such meaning, scope and nature by issuing a reasoned written statement relying on good industry practice and authentic literature.

## **10 Other duties and functions**

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

## **11 Miscellaneous**

- 11.1 The Independent Engineer shall notify its programme of inspection to the MOPIT and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection.

- 11.2 A copy of all communications, comments, instructions, Drawings or Documents sent by the Independent Engineer to the Concessionaire pursuant to this TOR, and a copy of all the test results with comments of the Independent Engineer thereon shall be furnished by the Independent Engineer to the MOPIT forthwith.
- 11.3 The Independent Engineer shall obtain, and the Concessionaire shall furnish in two copies thereof, all communications and reports required to be submitted, under this Agreement, by the Concessionaire to the Independent Engineer, whereupon the Independent Engineer shall send one of the copies to the MOPIT along with its comments thereon.
- 11.4 The Independent Engineer shall retain at least one copy each of all Drawings and Documents received by it, including 'as-built' Drawings, and keep them in its safe custody.
- 11.5 Upon completion of its assignment hereunder, the Independent Engineer shall duly classify and list all Drawings, Documents, results of tests and other relevant records, and hand them over to the MOPIT or such other person as the MOPIT may specify, and obtain written receipt thereof.

**SCHEDULE - R**  
(See Clause 27.1.1)

**FEE NOTIFICATION**

- (a) The Notification shall specify the Fee payable for each category of vehicles using the Kathmandu - Nijgadh Expressway. The Fee shall be based on the following base rates as per the bidder' quote established in the evaluated Financial Proposal for the Project:

	Motor Cycle	Car	Light Bus	Medium Bus	Heavy Bus	Light Truck	Medium Truck	Heavy Truck
One way Toll rate per vehicle per trip, Rs.								
In words,, Rupees								

- (b) Vehicles will be categorised for the purpose of levy and collection of Fee as Motor Cycle, Car, Light Bus, Medium Bus, Heavy Bus, Light Truck, Medium Truck, and Heavy Truck. A fixed amount of Fee shall be levied for each category of vehicles.
- (c) Discounted Fee rates for frequent Users shall be specified in the Notification.
- (d) Additional charge for evasion of Fee shall be specified in the Notification.
- (e) Additional Fee for over-loaded vehicles shall be specified in the Notification.
- (h) Fee exemption for Local Traffic and Exempted Vehicles shall be specified in the Notification.
- (i) The Notification shall specify that in the event of construction of service lanes for free use by Local Traffic, such traffic shall be liable to pay Fee at the notified rates for the respective category of vehicles in case it uses the main carriageway.

- (j) The Notification shall provide that all slow- moving vehicles including tractors,, three-wheelers, bullock-carts, rickshaws and bicycles shall not be entitled to ply on the main carriageway.
- (k) The Notification may provide for a differential fee structure for peak and off-peak hours based on prior approval of the MOPIT.
- (l) The Notification shall specify that it would be valid and operative for the periods indicated in the Concession Agreement;

The Fee Notification shall constitute Schedule-R of the Agreement.

## SCHEDULE - S ESCROW AGREEMENT

(See Clause 31.1.2)

THIS ESCROW AGREEMENT is entered into on this the \*\*\* day of \*\*\* 200\*.

### AMONGST

- 1 [\*\*\*\* **LIMITED**], a company incorporated under the provisions of the Companies Act, 2006 and having its registered office at \*\*\*\* (hereinafter referred to as the “**Concessionaire**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
- 2 \*\*\*\*[name and particulars of Lenders’ Representative] and having its registered office at \*\*\* acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
- 3 \*\*\*\*[name and particulars of the Escrow Bank] and having its registered office at \*\*\*\*(hereinafter referred to as the “**Escrow Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
- 4 The MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT, Government of Nepal, or its successor represented (hereinafter referred to as the “**MOPIT**”) which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).

### WHEREAS:

- 1.3 (A) The MOPIT has entered into a Concession Agreement dated \*\*\* with the Concessionaire (the “**Concession Agreement**”) for the construction and operation of four lane Kathmandu - Nijgadh Expressway and construction of a additional two lane (making four lane in total) Nijgadh-Pathlaiya Expressway in Nepal on build, operate and transfer (BOT) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.

- (B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (C) The Concession Agreement requires the Concessionaire to establish an Escrow Account, *inter alia*, on the terms and conditions stated therein.

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

## **1 DEFINITIONS AND INTERPRETATION**

### **1.1 Definitions**

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

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

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

**“Cure Period”** means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the Concessionaire, and shall commence from the date on which a notice is delivered by the MOPIT or the Lenders’ Representative, as the case may be, to the Concessionaire asking the latter to cure the breach or default specified in such notice;

**“Escrow Account”** means an escrow account established in terms of and under this Agreement, and shall include the Sub-Accounts;

**“Escrow Default”** shall have the meaning ascribed thereto in Clause 6.1;

**“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;

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

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

“**Sub-Accounts**” means the respective Sub-Accounts of the Escrow Account, into which the monies specified in Clause 4.1 would be credited every month and paid out if due, and if not due in a month then appropriated proportionately in such month and retained in the respective Sub Accounts and paid out therefrom on the Payment Date(s).

## **1.2 Interpretation**

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

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

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

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

## **2 ESCROW ACCOUNT**

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

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

2.1.2 The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the MOPIT, the Lenders’ Representative and the Concessionaire, and applied in

accordance with the terms of this Agreement. No person other than the MOPIT, the Lenders' Representative and the Concessionaire shall have any rights hereunder as the beneficiaries of, or as third party beneficiaries under this Agreement.

## **2.2 Acceptance of Escrow Bank**

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

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

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

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

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

## **2.4 Escrow Bank's fee**

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

## **2.5 Rights of the parties**

The rights of the MOPIT, the Lenders' Representative and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the MOPIT, the Lenders' Representative and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

## **2.6 Substitution of the Concessionaire**

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

## **3 DEPOSITS INTO ESCROW ACCOUNT**

### **3.1 Deposits by the Concessionaire**

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

- (a) all monies received in relation to the Project from any source, including the Senior Lenders, lenders of Subordinated Debt and the MOPIT;
- (b) all funds received by the Concessionaire from its share-holders, in any manner or form;
- (c) all Fee levied and collected by the Concessionaire;

- (d) any other revenues from or in respect of the Project Expressway; and
- (e) all proceeds received pursuant to any insurance claims.

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

### **3.2 Deposits by the MOPIT**

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

- (a) Grant and any other monies disbursed by the MOPIT to the Concessionaire;
- (b) Revenue Shortfall Loan;
- (c) all Fee collected by the MOPIT in exercise of its rights under the Concession Agreement; and
- (d) Termination Payments:

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

### **3.3 Deposits by Senior Lenders**

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

### **3.4 Interest on deposits**

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account; provided that

the Escrow Bank shall be entitled to appropriate therefrom the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit

the balance remaining to the Escrow Account.

## **4 WITHDRAWALS FROM ESCROW ACCOUNT**

### **4.1 Withdrawals during Concession Period**

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

- (a) all taxes due and payable by the Concessionaire;
- (b) all payments relating to construction of the Project Expressway, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (d) O&M Expenses incurred by the MOPIT, provided it certifies to the Escrow Bank that it had incurred such expenses in accordance with the provisions of the Concession Agreement and that the amounts claimed are due to it from the Concessionaire;
- (e) Concession Fee due and payable to the MOPIT;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- [(g) Premium due and payable to the MOPIT;
- (h) all payments and Damages certified by the MOPIT as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including repayment of Revenue Shortfall Loan;
- i) debt service payments in respect of Subordinated Debt;
- (j) any reserve requirements set forth in the Financing Agreements; and

- (k) balance, if any, in accordance with the instructions of the Concessionaire.
- 4.1.2 Not later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

#### **4.2 Withdrawals upon Termination**

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

- (a) all taxes due and payable by the Concessionaire;
- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) outstanding Concession Fee;
- (d) all payments and Damages certified by the MOPIT as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including [Premium,] repayment of Revenue Shortfall Loan and any claims in connection with or arising out of Termination;
- (e) retention and payments arising out of, or in relation to, liability for defects and deficiencies set forth in Article 39 of the Concession Agreement;
- (f) outstanding Debt Service including the balance of Debt Due;
- (g) outstanding Subordinated Debt;
- (h) incurred or accrued O&M Expenses;
- (i) any other payments required to be made under the Concession Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire:

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

#### **4.3 Application of insufficient funds**

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

#### **4.4 Application of insurance proceeds**

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

#### **4.5 Withdrawals during Suspension**

Notwithstanding anything to the contrary contained in this Agreement, the MOPIT may exercise all or any of the rights of the Concessionaire during the period of Suspension under Article 36 of the Concession Agreement. Any instructions given by the MOPIT to the Escrow Bank during such period shall be complied with as if such instructions were given by the Concessionaire under this Agreement and all actions of the MOPIT hereunder shall be deemed to have been taken for and on behalf of the Concessionaire.

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

#### **5.1 Segregation of funds**

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

#### **5.2 Notification of balances**

7 (seven) business days prior to each Payment Date (and for this purpose the Escrow Bank shall be entitled to rely on an affirmation by the

Concessionaire and/or the Lenders' Representative as to the relevant Payment Dates), the Escrow Bank shall notify the Lenders' Representative of the balances in the Escrow Account and Sub-Accounts as at the close of business on the immediately preceding business day.

### **5.3 Communications and notices**

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

- (a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by or on behalf of the Concessionaire;
- (b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;
- (c) shall, within 5 (five) business days after receipt, deliver a copy to the Lenders' Representative of any notice or document received by it in its capacity as the Escrow Bank from the Concessionaire or any other person hereunder or in connection herewith; and
- (d) shall, within 5 (five) business days after receipt, deliver a copy to the Concessionaire of any notice or document received by it from the Lenders' Representative in connection herewith.

### **5.4 No set off**

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

### **5.5 Regulatory approvals**

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the

Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

## **6 ESCROW DEFAULT**

### **6.1 Escrow Default**

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

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

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

## **7 TERMINATION OF ESCROW AGREEMENT**

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

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

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

The Concessionaire may, by not less than 45 (forty five) days prior notice to

the Escrow Bank, the MOPIT and the Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders' Representative and arrangements are made satisfactory to the Lenders' Representative for transfer of amounts deposited in the Escrow Account to a new Escrow Account established with the successor Escrow Bank. The termination of this Agreement shall take effect only upon coming into force of an Escrow Agreement with the substitute Escrow Bank.

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

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

## **8 SUPPLEMENTARY ESCROW AGREEMENT**

### **8.1 Supplementary escrow agreement**

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

## **9 INDEMNITY**

### **9.1 General indemnity**

- 9.1.1 The Concessionaire will indemnify, defend and hold the MOPIT, Escrow Bank and the Senior Lenders, acting through the Lenders' Representative, harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.
- 9.1.2 The MOPIT will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the MOPIT to fulfil any of its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful functions by the MOPIT, its officers, servants and agents.
- 9.1.3 The Escrow Bank will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfil its obligations under this Agreement materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Escrow Bank, its officers, servants and agents.

## 9.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 9.1 or in respect of which it is entitled to reimbursement (the "**Indemnified Party**"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

## 10 DISPUTE RESOLUTION

## 10.1 Dispute resolution

- 10.1.1 Any dispute, difference or claim arising out of or in connection with this Agreement, which is not resolved amicably, shall be decided finally by reference to arbitration to a Board of Arbitrators comprising one nominee of each Party to the dispute, and where the number of such nominees is an even number, the nominees shall elect another person to such Board. Such arbitration shall be held in accordance with the Rules of Arbitration of the Nepal Council of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.
- 10.1.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be Delhi and the language of arbitration shall be English.

## 11 MISCELLANEOUS PROVISIONS

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

### 11.2 Waiver of sovereign immunity

The MOPIT unconditionally and irrevocably:

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

### **11.3 Priority of agreements**

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

### **11.4 Alteration of terms**

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

### **11.5 Waiver**

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

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

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

### **11.6 No third party beneficiaries**

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

### **11.7 Survival**

11.7.1 **Termination of this Agreement:**

- (a) shall not relieve the Parties of any obligations hereunder which

expressly or by implication survive termination hereof; and

- (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

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

## **11.8 Severability**

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10.1 of this Agreement or otherwise.

## **11.9 Successors and assigns**

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

## **11.10 Notices**

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile. The address for service of each Party and its facsimile number are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on a business day, or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile shall

promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

#### **11.11 Language**

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

#### **11.12 Authorised representatives**

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

### 11.13 Original Document

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

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

SIGNED, SEALED AND DELIVERED

For and on behalf of  
CONCESSIONAIRE by:

(Signature)  
(Name)  
(Designation)  
(Address)  
(Fax No.)

SIGNED, SEALED AND DELIVERED

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

(Signature)  
(Name)  
(Designation)  
(Address)  
(Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of  
ESCROW BANK by:

(Signature)  
(Name)  
(Designation)  
(Address)  
(Fax No.)

SIGNED, SEALED AND DELIVERED

For and on behalf of  
MINISTRY OF PHYSICAL  
INFRASTRUCTURE AND  
TRANSPORT

(Signature)  
(Name)  
(Designation)  
(Address)  
(Fax No.)

In the presence of:

1.

2.

## SCHEDULE - T PANEL OF CHARTERED ACCOUNTANTS

(See Clause 33.2.1)

### 1 Panel of Chartered Accountants

Pursuant to the provisions of Clause 33.2.1 of the Agreement, the MOPIT and the Concessionaire shall prepare a mutually agreed panel of 10 (ten) reputable firms of Chartered Accountants having their registered offices in Nepal (the “**Panel of Chartered Accountants**”). The criteria for preparing such Panel and the procedure to be adopted in this behalf shall be as set forth in this Schedule-T.

### 2 Invitation for empanelment

2.1 The MOPIT shall invite offers from all reputable firms of Chartered Accountants who fulfil the following eligibility criteria, namely:

- (a) the firm should have conducted statutory audit of the annual accounts of at least thirty companies registered under the Companies Act, 2006, of which at least five should have been public sector undertakings;
- (b) the firm should have at least three (3) practising Chartered Accountants on its rolls, each with a minimum experience of ten years in the profession;
- (c) the firm or any of its partners should not have been disqualified or black-listed by the Comptroller and Auditor General of Nepal or the MPPW; and

2.2 Interested firms meeting the eligibility criteria shall be required to submit a statement of their capability including the bio-data of all the practising Chartered Accountants on its rolls. In particular, each firm shall be required to furnish year-wise information relating to the names of all the companies with an annual turnover exceeding Rs. 100,000,000 (Rs. one hundred million) whose annual accounts were audited by such firm in any of the preceding 5 (five) Accounting Years.

### 3 Evaluation and selection

3.1 The information furnished by each firm shall be scrutinised and evaluated by the MOPIT and 1 (one) point shall be awarded for each annual audit of the companies specified in Paragraph 2.2 above. (For the avoidance of doubt, a firm which has conducted audit of the annual accounts of any such company for five years shall be

awarded five points).

- 3.2 The MOPIT shall prepare a list of all the eligible firms along with the points scored by each such firm and 10 (ten) firms scoring the highest points shall be identified and included in the draft Panel of Chartered Accountants.

#### **4 Consultation with the Concessionaire**

The MOPIT shall convey the aforesaid panel of firms to the Concessionaire for scrutiny and comments, if any. The Concessionaire shall be entitled to scrutinise the relevant records of the MOPIT to ascertain whether the selection of firms has been undertaken in accordance with the prescribed procedure and it shall send its comments, if any, to the MOPIT within 15 (fifteen) days of receiving the aforesaid panel.

#### **5 Mutually agreed panel**

- 5.1 The MOPIT shall, after considering all relevant factors including the comments, if any, of the Concessionaire, finalise and constitute a panel of 10 (ten) firms which shall be deemed to be the mutually agreed Panel of Chartered Accountants.
- 5.2 After completion of every five years from the date of preparing the mutually agreed Panel of Chartered Accountants, or such earlier period as may be agreed between the MOPIT and the Concessionaire, a new panel shall be prepared in accordance with the provisions of this Schedule - T.

## SCHEDULE - U.1 VESTING CERTIFICATE Nijgadh - Pathlaiya

Construction of a 18 km long additional two lane (making four lane in total) Expressway from Nijgadh to Pathlaiya as a part of the Kathmandu – Nijgadh – Pathlaiya Terai/Madhes Fast Track Road (Expressway) Project.

*(See Clause 38.3 and Clause 38.4)*

The Secretary, MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT (MOPIT), Government of Nepal (the “MOPIT”) refers to the Concession Agreement dated \*\*\* (the “Agreement”) entered into between the MOPIT and \*\*\*\* (the “Concessionaire”) for (i) design, engineering, financing, procurement, construction, operation, maintenance, and transfer of the about 76 km long Kathmandu to Nijgadh Expressway; and (ii) design, engineering, financing, procurement, construction and transfer to MOPIT of about 18 km long additional two-lanes (making four lanes in total) expressway in the existing two lanes (making four lane expressway in total) of the Nijgadh to Pathlaiya section of the East West Highway on Public Private Partnership/BOT basis within the provisions of the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)” ).

The MOPIT hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 38.1 of the Agreement on the basis that upon issue of this Vesting Certificate, for the design, engineering, financing, procurement, construction and transfer to MOPIT of about 18 km long two-lanes expressway in the Nijgadh to Pathlaiya section of the existing East West Highway, the MOPIT shall be deemed to have acquired, and all title and interest of the Concessionaire in or about the above stated Nijgadh - Pathlaiya two lanes expressway shall be deemed to have vested unto the MOPIT, free from any encumbrances, charges and liens whatsoever.

Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

Signed this \*\*\* day of \*\*\*, 200\* at Kathmandu

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

(Signature)  
(Name)  
Designation  
(Address)

In the presence of:

1.

SIGNED, SEALED AND DELIVERED  
For and on behalf of  
MINISTRY OF PHYSICAL INFRASTRUCTURE  
AND TRANSPORT, GOVERNMENT OF NEPAL  
by:

(Signature)  
(Name)  
Designation  
(Address)

2.

## SCHEDULE - U.2 VESTING CERTIFICATE - Kathmandu-Nijgadh

### Construction, Maintenance, Operation and Transfer of a four lane Fast Track Road (Expressway) from Kathmandu to Nijgadh as a part of the Kathmandu - Terai/Madhes Expressway

(See Clause 38.3 and Clause 38.4)

The Secretary, MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT (MOPIT), Government of Nepal (the “MOPIT”) refers to the Concession Agreement dated \*\*\* (the “Agreement”) entered into between the MOPIT and \*\*\*\* (the “Concessionaire”) for (i) design, engineering, financing, procurement, construction, operation, maintenance, and transfer of the about 76 km long Kathmandu to Nijgadh Expressway; and (ii) design, engineering, financing, procurement, construction and transfer to MOPIT of about 18 km long additional two-lanes (making four lane in total) expressway in the existing two lanes (making four lane expressway in total) of the Nijgadh to Pathlaiya section of the East West Highway on Public Private Partnership/BOT basis within the provisions of the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)” )

The MOPIT hereby acknowledges compliance and fulfilment by the Concessionaire of the Divestment Requirements set forth in Clause 38.1 of the Agreement on the basis that upon issue of this Vesting Certificate, for the design, engineering, financing, procurement, construction, operation, maintenance, and transfer of the about 76 km long Kathmandu to Nijgadh Expressway, the MOPIT shall be deemed to have acquired, and all title and interest of the Concessionaire in or about the Project Expressway shall be deemed to have vested unto the MOPIT, free from any encumbrances, charges and liens whatsoever.

Notwithstanding anything to the contrary contained hereinabove, it shall be a condition of this Vesting Certificate that nothing contained herein shall be construed or interpreted as waiving the obligation of the Concessionaire to rectify and remedy any defect or deficiency in any of the Divestment Requirements and/or relieving the Concessionaire in any manner of the same.

Signed this \*\*\* day of \*\*\*, 201\* at Kathmandu

AGREED, ACCEPTED AND SIGNED

For and on behalf of

CONCESSIONAIRE by:

(Signature)

(Name)

Designation

(Address)

In the presence of:

SIGNED, SEALED AND DELIVERED

For and on behalf of

MINISTRY OF PHYSICAL  
INFRASTRUCTURE AND TRANSPORT,  
GOVERNMENT OF NEPAL by:

(Signature)

(Name)

Designation

(Address)

## SCHEDULE - V SUBSTITUTION AGREEMENT

(See Clause 40.3.1)

THIS SUBSTITUTION AGREEMENT is entered into on this the \*\*\* day of \*\*\* 200\*.

### AMONGST

- 1 The MINISTRY OF PHYSICAL INFRASTRUCTURE AND TRANSPORT, Government of Nepal (hereinafter referred to as the “MOPIT” which expression shall unless repugnant to the context or meaning thereof include its administrators, successors and assigns);
- 2 [\*\*\*\* **LIMITED**]<sup>1</sup>, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at \*\*\*\*, (hereinafter referred to as the “**Concessionaire**” which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns and substitutes);
- 3 \*\*\*\* [name and particulars of Lenders’ Representative] and having its registered office at \*\*\*\*, acting for and on behalf of the Senior Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “**Lenders’ Representative**”, which expression shall unless repugnant to the context or meaning thereof include its successors and substitutes);

### WHEREAS:

- (A) The MOPIT has entered into a Concession Agreement dated \*\*\* with the Concessionaire (the “**Concession Agreement**”) for (i) design, engineering, financing, procurement, construction, operation, maintenance, and transfer of the about 76 km long Kathmandu to Nijgadh Expressway; and (ii) design, engineering, financing, procurement, construction and transfer to MOPIT of about 18 km long additional two-lanes (making four lane in total) expressway in the existing Nijgadh to Pathlaiya section of the East West Highway on Public Private Partnership/BOT basis within the provisions of the “Private Financing in Build and Operation of Infrastructure Act 2063 BS (2006)”, and a copy of which is annexed hereto and marked as Annex-A to

form part of this Agreement.

- (B) Senior Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- (C) Senior Lenders have requested the MOPIT to enter into this Substitution Agreement for securing their interests through assignment, transfer and substitution of the Concession to a Nominated Company in accordance with the provisions of this Agreement and the Concession Agreement.
- (D) In order to enable implementation of the Project including its financing, construction, operation and maintenance, the MOPIT has agreed and undertaken to transfer and assign the Concession to a Nominated Company in accordance with the terms and conditions set forth in this Agreement and the Concession Agreement.

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

## **1 DEFINITIONS AND INTERPRETATION**

### **1.1 Definitions**

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

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

**“Financial Default”** means occurrence of a material breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 3 (three) months;

**“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;

**“Nominated Company”** means a company, incorporated under the provisions of the Companies Act, 1956, selected by the Lenders’ Representative, on behalf of Senior Lenders, and proposed to the MOPIT for assignment/transfer of the Concession as provided in this Agreement;

**“Notice of Financial Default”** shall have the meaning ascribed thereto in Clause 3.2.1; and

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

## **1.2 Interpretation**

- 1.2.1 References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Senior Lenders.
- 1.2.2 References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.
- 1.2.3 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.
- 1.2.4 The rules of interpretation stated in Clauses 1.2, 1.3 and 1.4 of the Concession Agreement shall apply, *mutatis mutandis*, to this Agreement.

## **2 ASSIGNMENT**

### **2.1 Assignment of rights and title**

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

## **3 SUBSTITUTION OF THE CONCESSIONAIRE**

### **3.1 Rights of substitution**

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

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

### **3.2 Substitution upon occurrence of Financial Default**

3.2.1 Upon occurrence of a Financial Default, the Lenders' Representative may issue a notice to the Concessionaire (the “**Notice of Financial Default**”) along with particulars thereof, and send a copy to the MOPIT for its information and record. A Notice of Financial Default under this Clause 3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.

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

3.2.3 At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the MOPIT to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project Expressway in accordance with the provisions of Article 36 of the Concession Agreement, and upon receipt of such notice, the MOPIT shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the MOPIT may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders' Representative and the Concessionaire, the MOPIT may extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days.

### **3.3 Substitution upon occurrence of Concessionaire Default**

3.3.1 Upon occurrence of a Concessionaire Default, the MOPIT shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice

and grant 15 (fifteen) days time to the Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.

3.3.2 In the event that the Lenders' Representative makes a representation to the MOPIT within the period of 15 (fifteen) days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the MOPIT shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the MOPIT shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days.

### **3.4 Procedure for substitution**

3.4.1 The MOPIT and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the MOPIT under Clause 3.3.2, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the take over and transfer of the Project Expressway including the Concession to the Nominated Company upon such Nominated Company's assumption of the liabilities and obligations of the Concessionaire towards the MOPIT under the Concession Agreement and towards the Senior Lenders under the Financing Agreements.

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

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

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

3.4.4 If the MOPIT has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 7 (seven) days from the date of proposal made by the Lenders' Representative, give a reasoned order after hearing the Lenders' Representative. If no such objection is raised by the MOPIT, the Nominated Company shall be deemed to have been accepted. The MOPIT thereupon shall transfer and endorse the Concession within 7 (seven) days of its acceptance/deemed acceptance of the Nominated Company; provided that in the event of such objection by the MOPIT, the Lenders' Representative may propose another Nominated Company whereupon the procedure set forth in this Clause 3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire.

### **3.5 Selection to be binding**

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

Representative from effecting or causing the transfer by substitution and endorsement of the Concession as requested by the Lenders' Representative.

#### **4 PROJECT AGREEMENTS**

##### **4.1 Substitution of Nominated Company in Project Agreements**

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

#### **5 TERMINATION OF CONCESSION AGREEMENT**

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

At any time after issue of a Notice of Financial Default, the Lenders' Representative may by a notice in writing require the MOPIT to terminate the Concession Agreement forthwith, and upon receipt of such notice, the MOPIT shall undertake Termination under and in accordance with the provisions of Article 37 of the Concession Agreement.

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

In the event that no Nominated Company acceptable to the MOPIT is selected and recommended by the Lenders' Representative within the period of 180 (one hundred and eighty) days or any extension thereof as set forth in Clause 3.3.2, the MOPIT may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

##### **5.3 Realisation of Debt Due**

The MOPIT and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realisation of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Escrow Account in accordance with the provisions of the Concession Agreement and the Escrow Agreement.

## **6 DURATION OF THE AGREEMENT**

### **6.1 Duration of the Agreement**

6.1 This Agreement shall come into force from the date hereof and shall expire at the earliest to occur of the following events:

- (a) Termination of the Agreement; or
- (b) no sum remains to be advanced, or is outstanding to the Senior Lenders, under the Financing Agreements.

## **7 INDEMNITY**

### **7.1 General indemnity**

7.1.1 The Concessionaire will indemnify, defend and hold the MOPIT and the Lenders' Representative harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.

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

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

## 7.2 Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 7.1 or in respect of which it is entitled to reimbursement (the “**Indemnified Party**”), it shall notify the other Party responsible for indemnifying such claim hereunder (the “**Indemnifying Party**”) within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

## 8 DISPUTE RESOLUTION

### 8.1 Dispute resolution

8.1.1 Any dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably shall be decided by reference to arbitration to a Board of Arbitrators comprising one nominee each of the MOPIT, Concessionaire and the Lenders’ Representative. Such arbitration shall be held in accordance with the Rules of Arbitration of the Nepal Council of Arbitration and shall be subject to provisions of the Arbitration Act, 1999 of Nepal.

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

## 9 MISCELLANEOUS PROVISIONS

### 9.1 Governing law and jurisdiction

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

## **9.2 Waiver of sovereign immunity**

The MOPIT unconditionally and irrevocably:

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

## **9.3 Priority of agreements**

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

## **9.4 Alteration of terms**

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

## **9.5 Waiver**

### **9.5.1 Waiver by any Party of a default by another Party in the observance and**

performance of any provision of or obligations under this Agreement:

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

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

## **9.6 No third party beneficiaries**

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

## **9.7 Survival**

9.7.1 Termination of this Agreement:

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

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

## **9.8 Severability**

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 8 of this Agreement or otherwise.

## **9.9 Successors and assigns**

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

## **9.10 Notices**

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile. The address for service of each Party and its facsimile number are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on any day, or on a day that is a public holiday, the notice shall be deemed to be received on the first working day following the date of actual receipt. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

## **9.11 Language**

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

## **9.12 Authorised representatives**

Each of the Parties shall by notice in writing designate their respective authorised representatives through whom only all communications shall be made. A Party

hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

### 9.13 Original Document

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

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

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

(Signature)

(Name)

(Designation)

(Address)

(Fax)

SIGNED, SEALED AND  
DELIVERED

For and on behalf of  
MINISTRY OF PHYSICAL  
GOVERNMENT OF NEPAL by:

(Signature)

(Name)

(Designation)

(Address)

(Fax)

SIGNED, SEALED AND DELIVERED

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

(Signature)

(Name)

(Designation)

(Address)

(Fax)

In the presence of:

1.

2.