

# **APPENDIX XI – Draft Consultancy Agreement**

**Tender No. MEED.05/2024**

**Undertaking Valuation & Determination of Fair Market Value of investment made at Slipway Nos. 3, 4 and 5 of Mumbai Port Workshop at Mazagaon, Mumbai**

## **Consultancy Agreement**

**For**

**Valuer services**

**For project –**

**Undertaking Valuation & Determination of Fair Market Value of investment made at Slipway Nos. 3, 4 and 5 of Mumbai Port Workshop at Mazagaon, Mumbai**

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## **AGREEMENT**

### **Undertaking Valuation & Determination of Fair Market Value of investment made at Slipway Nos. 3, 4 and 5 of Mumbai Port Workshop at Mazagaon, Mumbai.**

this AGREEMENT (hereinafter called the “**Agreement**”) is made on the \_\_\_\_\_ day of the month of \_\_\_\_\_ 2\*\*\*, between,

on the one hand, the Board of Mumbai Port Authority (hereinafter called the “**Authority**” which expression shall include their respective successors and permitted assigns, unless the context otherwise requires)

and, on the other hand, ..... (hereinafter called the “**Valuer**” which expression shall include their respective successors and permitted assigns).

#### **WHEREAS**

- (A) The Authority vide its Request for Proposal for “Undertaking Valuation & Determination of Fair Market Value of investment made at Slipway Nos. 3, 4 and 5 of Mumbai Port Workshop at Mazagaon, Mumbai.” (“**Project**”) invited proposals for such Project (hereinafter called the “**Valuer**”);
- (B) The Valuer submitted its proposals for the aforesaid work, whereby the Valuer represented to the Authority that it has the required professional skills, and in the said proposals the Valuer also agreed to provide the Services to the Authority on the terms and conditions as set forth in the TENDER and this Agreement; and
- (C) The Authority, on acceptance of the aforesaid proposals of the Valuer, awarded the Consultancy to the Valuer vide its Letter of Award dated \_\_\_\_\_ “LOA”); and
- (D) In pursuance of the LOA, the parties have agreed to enter into this Agreement.

**NOW, THEREFORE, the parties hereto hereby agree as follows:**

#### **1. GENERAL**

##### **1.1. Definitions and Interpretation**

- 1.1.1. The words and expressions beginning with capital letters and defined in this Agreement shall, unless the context otherwise requires, have the meaning hereinafter respectively assigned to them:
  - (a) “**Agreement**” means this Agreement, together with all the Annexes;
  - (b) “**Agreement Value**” means an amount that an authority agrees to pay to the valuer based on his quote in TENDER as may be applicable.
  - (c) “**Applicable Laws**” means the laws and any other instruments having the force of law in India as they may be issued and in force from time to time;

- (d) “Confidential Information” shall have the meaning set forth in Clause 3.3;
- (e) “Conflict of Interest” shall have the meaning set forth in Clause 3.2 read with the provisions of TENDER;
- (f) “Construction Works” means all works, equipment and things necessary to complete the Project and provide the Project Facilities and Services in accordance with this Agreement.
- (g) “Construction Standards” means the construction standards set out in the annexure to Appendix-4 of the Concession Agreement.
- (h) “Dispute” shall have the meaning set forth in Clause 9.2.1;
- (i) “Effective Date” means the date on which this Agreement comes into force and effect pursuant to Clause 2.1;
- (j) “INR, Re. or Rs.” means Indian Rupees;
- (k) “Member”, in case the Valuer consists of a joint venture or consortium of more than one entity, means any of these entities, and “Members” means all of these entities;
- (l) “Party” means the Authority or the Valuer, as the case may be, and Parties means both of them;
- (m) “Personnel” means persons hired by the Valuer or by any Sub-Consultant as employees and assigned to the performance of the Services or any part thereof;
- (n) “Project Facilities and Services” means the facilities and services as set out under the Project Requirements, to be provided by the Concession Agreement in accordance with the Concession Agreement;
- (o) “Project Requirements” means the minimum requirements as to the construction, operation and maintenance of the Project and provision of Project Facilities and Services set out in Appendix 4 of the Concession Agreement.
- (p) “Services” means the work to be performed by the Valuer pursuant to this Agreement, as described in the Terms of Reference hereto;
- (q) “Sub-Consultant” means any entity to which the Valuer subcontracts any part of the Services in accordance with the provisions of Clause 4.6;
- (r) “Tests” means the tests as are specified in Annex 1 – Terms of Reference that Valuer shall carry out to ensure that the Project meets with the Construction Standards;
- (s) “Third Party” means any person or entity other than the Government, the Authority, the Valuer or a Sub-Consultant.

All terms and words not defined herein shall, unless the context otherwise requires, have the meaning assigned to them in the TENDER.

- 1.1.2. The following documents along with all addenda issued thereto shall be deemed to form and be read and construed as integral parts of this Agreement and in case of any contradiction between or among them the priority in which a document would prevail over another would be as laid down below beginning from the highest priority to the lowest priority:
- (a) Agreement;
  - (b) Annexes of Agreement;
  - (c) TENDER; and
  - (d) Letter of Award.

## **1.2. Relation between the Parties**

Nothing contained herein shall be construed as establishing a relation of master and servant or of agent and principal as between the Authority and the Valuer. The Valuer shall, subject to this Agreement, have complete charge of Personnel and Sub-Consultant performing the Services and shall be fully responsible for the Services performed by them or on their behalf hereunder.

## **1.3. Rights and obligations**

The mutual rights and obligations of the Authority and the Valuer shall be as set forth in the Agreement, in particular:

- (a) the Valuer shall carry out the Services in accordance with the provisions of the Agreement; and
- (b) the Authority shall make payments to the Valuer in accordance with the provisions of the Agreement.

## **1.4. Governing law and jurisdiction**

this Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and subject to Clause 9 below (*Settlement of Disputes*), the courts at Mumbai shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

## **1.5. Language**

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.

## **1.6. Table of contents and headings**

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.

## **1.7. 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, copied to the Concessionaire (in all cases) and shall:

- (a) in the case of the Valuer, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the Valuer's Representative set out below in Clause 1.10 or to such other person as the Valuer may from time to time designate by notice to the Authority; provided that notices or other communications to be given to an address outside \*\*\*\*\* 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 Valuer may from time to time designate by notice to the Authority;
- (b) in the case of the Authority, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the Authority with a copy delivered to the Authority Representative set out below in Clause 1.10 or to such other person as the Authority may from time to time designate by notice to the Valuer; provided that if the Valuer does not have an office in

Mumbai/Navi Mumbai it may send such notice by facsimile or e-mail and by registered acknowledgement due, air mail or by courier; 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 days following the date of its delivery.

It shall be the duty of the Parties to copy all notices and communication under this Agreement or otherwise to the Concessionaire. .

### **1.8. Location**

The Services shall be performed at the site of the Project in accordance with the provisions of TENDER and at such locations as are incidental thereto, including the offices of the Valuer.

### **1.9. Authority of Member-in-charge**

Not applicable to this tender (Deleted).

### **1.10. Authorized Representatives**

1.10.1. Any action required or permitted to be taken, and any document required or permitted to be executed, under this Agreement by the Authority or the Valuer, as the case may be, may be taken or executed by the officials specified in this Clause 1.10.

1.10.2. The Authority may, from time to time, designate one of its officials as the Authority Representative. Unless otherwise notified, the Authority Representative shall be:

Chief Mechanical Engineer,  
Mechanical and Electrical Engineering Department  
Mumbai Port Authority  
cme@mumbaiport.gov.in

1.10.3. The Valuer may designate one of its employees as Valuer's Representative. Unless otherwise notified, the Valuer's Representative shall be:

\_\_\_\_\_

Tel: \_\_\_\_\_

Mobile: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

### **1.11. Taxes and duties**

Unless otherwise specified in the Agreement, the Valuer shall pay all such taxes, duties, fees and other impositions as may be levied under the Applicable Laws and the Authority shall perform such duties in regard to the deduction of such taxes as may be lawfully imposed on it.

## **2. COMMENCEMENT, COMPLETION AND TERMINATION OF AGREEMENT**

### **2.1. Effectiveness of Agreement**

This Agreement shall come into force and effect on the Appointed Date as set out under the Concession Agreement (the “**Effective Date**”). For the purposes of this Clause, Appointed Date shall be informed by the Authority to the IE on or before 2 days before the Appointed Date. In case the appointment of IE is after the Appointed Date, the date of signing of this Agreement shall be considered as Effective Date.

### **2.2. Commencement of Services**

The Valuer shall commence the Services within a period of 7 (seven) days from the Effective Date, unless otherwise agreed by the Parties.

### **2.3. Termination of Agreement for failure to commence Services**

If the Valuer does not commence the Services within the period specified in Clause 2.2 above, the Authority may, by not less than 2 (two) weeks notice to the Valuer, declare this Agreement to be null and void, and in the event of such a declaration, the Bid Security of the Valuer shall stand forfeited.

### **2.4. Expiration of Agreement**

Unless terminated earlier pursuant to Clauses 2.3 or 2.9 hereof, this Agreement shall expire upon the completion of 36 months period from Effective Date. If necessary, Authority may extend the Agreement period further for 6 months if it may be necessary for successful completion of the Project.

### **2.5. Entire Agreement**

2.5.1. This Agreement and the Annexes 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 the Concessionaire 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; provided, however, that the obligations of the Valuer arising out of the provisions of the TENDER shall continue to subsist and shall be deemed to form part of this Agreement.

2.5.2. Without prejudice to the generality of the provisions of Clause 2.5.1, on matters not covered by this Agreement, the provisions of TENDER shall apply.

### **2.6. Modification of Agreement**

Modification of the terms and conditions of this Agreement, including any modification of the scope of the Services, may only be made by written agreement between the Parties. Pursuant to Clauses 4.2.3 and Annexure-3 hereof, however, each Party shall give due consideration to any proposals for modification made by the other Party.



Notwithstanding any other provision, the written consent of the client shall be obtained prior to carrying out any amendment or modification to this Agreement and at least 30(thirty) days' notice shall be provided to the MbPA for the purposes of providing its comments, objections and / or approval.

## **2.7. Force Majeure**

### **2.7.1. Definition**

(a) For the purposes of this Agreement, "Force Majeure" means an event which is beyond the reasonable control of a Party, and which makes a Party's performance of its obligations hereunder impossible or so impractical, despite exercise of due care and diligence, as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the Party invoking Force Majeure to prevent), confiscation or any other action by government agencies.

(b) Force Majeure shall not include (i) any event which is caused by the negligence or intentional action of a Party or such Party's Sub-Consultant or Personnel or agents or employees, nor (ii) any event which a diligent Party could reasonably have been expected to both

(A) take into account at the time of the conclusion of this Agreement, and

(B) avoid or overcome in the carrying out of its obligations hereunder.

Force Majeure shall not include insufficiency of funds or failure to make any payment required hereunder.

### **2.7.2. No breach of Agreement**

The failure of a Party to fulfil any of its obligations hereunder shall not be considered to be a breach of or default under, this Agreement insofar as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.

### **2.7.3. Measures to be taken**

(a) A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party's inability to fulfil its obligations hereunder with a minimum of delay.

(b) A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, and in any event not later than 14 (fourteen) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible.

(c) The Parties shall take all reasonable measures to minimise the consequences of any event of Force Majeure.

#### **2.7.4. Extension of time**

Any period within which a Party shall, pursuant to this Agreement, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

#### **2.7.5. Payments**

The Valuer shall not be entitled to receive any payment for the period during which Force Majeure event continues to subsists provided that in the event any Services are performed by the Valuer during such period, then notwithstanding anything contrary contained in this Agreement, payment for such Services shall be made by the Authority to the IE on mutually acceptable terms and conditions.

#### **2.7.6. Consultation**

Not later than 30 (thirty) days after the Valuer has, as the result of an event of Force Majeure, become unable to perform a material portion of the Services, the Parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstance

### **2.8. Suspension of Agreement**

The Authority may, by written notice of suspension to the Valuer, suspend all payments to the Valuer hereunder if the Valuer shall be in breach of this Agreement or shall fail to perform any of its obligations under this Agreement, including the carrying out of the Services; provided that such notice of suspension (i) shall specify the nature of the breach or failure within a period not exceeding 30 (thirty) days after receipt by the Valuer of such notice of suspension.

### **2.9. Termination of Agreement**

#### **2.9.1. By the Authority**

The Authority may, by not less than 30 (thirty) days written notice of termination to the Valuer and copied to the Concessionaire, such notice to be given after the occurrence of any of the events specified in this Clause 2.9.1, terminate this Agreement if:

- (a) the Valuer fails to remedy any breach hereof or any failure in the performance of its obligations hereunder, as specified in the notice of termination within 30 (thirty) days of receipt of such notice of termination or within such further period as the Authority may have subsequently granted in writing;
- (b) the Authority by itself or on a report of the MbPA, has reason to believe that the Valuer has failed to discharge its duties in a fair, appropriate and diligent manner;
- (c) the Valuer becomes insolvent or bankrupt or enters into any agreement with its creditors for relief of debt or take advantage of any law for the benefit of debtors or goes into liquidation or receivership whether compulsory or voluntary;
- (d) the Valuer fails to comply with any final decision reached as a result of arbitration proceedings pursuant to Clause 9 hereof and as set out in Clause 9.4.6;
- (e) the Valuer submits to the Authority and/ or the Concessionaire, documents or a statement which has a material effect on the rights, obligations or interests of the Authority and / or the Concessionaire and which the Valuer knows to be false;

- (f) any document, information, data or statement submitted by the Valuer in its Proposals, based on which the Valuer was considered eligible or successful, is found to be false, incorrect or misleading;
- (g) as the result of Force Majeure, the Valuer is unable to perform a material portion of the Services for a period of not less than 60 (sixty) days; or
- (h) the Authority, in its sole discretion and for any reason whatsoever, decides to terminate this Agreement.

#### **2.9.2. By the Valuer**

The Valuer may, by not less than 30 (thirty) days written notice to the Authority and copied to the Concessionaire, such notice to be given after the occurrence of any of the events specified in this Clause 2.9.2, terminate this Agreement if:

- (a) the Authority fails to pay any money due to the Valuer pursuant to this Agreement and not subject to dispute pursuant to Clause 9 hereof within 45 (forty five) days after receiving written notice from the Valuer that such payment is overdue;
- (b) the Authority is in material breach of its obligations pursuant to this Agreement and has not remedied the same within 45 (forty five) days (or such longer period as the Valuer may have subsequently granted in writing) following the receipt by the Authority of the Valuer's notice specifying such breach;
- (c) as the result of Force Majeure, the Valuer is unable to perform a material portion of the Services for a period of not less than 60 (sixty) days; or
- (c) the Authority fails to comply with any final decision reached as a result of arbitration pursuant to Clause 9 hereof.

#### **2.9.3. Cessation of rights and obligations**

Upon termination of this Agreement pursuant to Clauses 2.3 or 2.9 hereof, or upon expiration of this Agreement pursuant to Clause 2.4 hereof, all rights and obligations of the Parties hereunder shall cease, except (i) such rights and obligations as may have accrued on the date of termination or expiration, or which expressly survive such Termination; (ii) the obligation of confidentiality set forth in Clause 3.3 hereof; (iii) the Valuer's obligation to permit inspection, copying and auditing of such of its accounts and records set forth in Clause 3.6, as relate to the Valuer's Services provided under this Agreement; and (iv) any right or remedy which a Party may have under this Agreement or the Applicable Law.

#### **2.9.4. Cessation of Services**

Upon termination of this Agreement by notice of either Party to the other pursuant to Clauses 2.9.1 or 2.9.2 hereof, the Valuer shall, immediately upon dispatch or receipt of such notice, take all necessary steps to bring the Services to a close in a prompt and orderly manner at its own cost. With respect to documents prepared by the Valuer and equipment and materials furnished by the Authority, the Valuer shall proceed as provided respectively by Clauses 3.9 or 3.10 hereof.

#### **2.9.5. Payment upon Termination**

Upon termination of this Agreement pursuant to Clauses 2.9.1 or 2.9.2 hereof, the Authority shall make the following payments to the Valuer (after offsetting against these payments any amount that may be due from the Valuer to the Authority):

- i) remuneration pursuant to Clause 6 hereof for Services satisfactorily performed prior to the date of termination;

#### **2.9.6. Disputes about Events of Termination**

If either Party disputes whether an event specified in Clause 2.9.1 or in Clause 2.9.2 hereof has occurred, such Party may, within 30 (thirty) days after receipt of notice of termination from the other Party, refer the matter to arbitration pursuant to Clause 9 hereof, and this Agreement shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award.

### **3. OBLIGATIONS OF THE VALUER**

#### **3.1. General**

##### **3.1.1. Standards of Performance**

The Valuer shall perform the Services and carry out its obligations hereunder with all due diligence, efficiency and economy, in accordance with generally accepted professional techniques and practices, and shall observe sound management practices, and employ appropriate advanced technology and safe and effective equipment, machinery, materials and methods. The Valuer shall always act, in respect of any matter relating to this Agreement or to the Services, as a faithful adviser to the Authority, and shall at all times support and safeguard the Authority's legitimate interests in any dealings with Sub-Consultants or Third Parties.

##### **3.1.2. Terms of Reference**

The scope of services to be performed by the Valuer is specified in the Terms of Reference (the "TOR") at Annex-1 of this Agreement. The Valuer shall provide the Deliverables specified therein in conformity with the time schedule stated therein.

##### **3.1.3. Applicable Laws**

The Valuer shall perform the Services in accordance with the Applicable Laws and shall take all practicable steps to ensure that any Sub-Consultant, as well as the Personnel and agents of the Valuer and any Sub-Consultant, comply with the Applicable Laws.

#### **3.2. Conflict of Interest**

3.2.1. The Valuer shall not have a Conflict of Interest and any breach hereof shall constitute a breach of the Agreement.

3.2.2. Valuer and Affiliates not to be otherwise interested in the Project

The Valuer agrees that, during the term of this Agreement and after its termination, the Valuer or any Associate thereof and any entity affiliated with the Valuer, as well as any Sub-Consultant and any entity affiliated with such Sub-Consultant, shall be disqualified from providing goods, works, services, loans or equity for any project resulting from or closely

related to the Services and any breach of this obligation shall amount to a Conflict of Interest; provided that the restriction herein shall not apply after a period of five years from the completion of this assignment or to consulting assignments granted by banks/ lenders at any time; provided further that this restriction shall not apply to Consultancy/ advisory services provided to the Authority in continuation of this Consultancy or to any subsequent Consultancy/ advisory services provided to the Authority in accordance with the rules of the Authority. For the avoidance of doubt, an entity affiliated with the Valuer shall include a partner in the Valuer's firm or a person who holds more than 5% (five per cent) of the subscribed and paid up share capital of the Valuer, as the case may be, and any Associate thereof.

**3.2.3. Prohibition of conflicting activities**

Neither the Valuer nor its Sub-Consultant nor the Personnel of either of them shall engage, either directly or indirectly, in any of the following activities:

- (a) during the term of this Agreement, any business or professional activities which would conflict with the activities assigned to them under this Agreement;
- (b) after the termination of this Agreement, such other activities as may be specified in the Agreement; or
- (c) at any time, such other activities as have been specified in the TENDER as Conflict of Interest.

**3.2.4. Valuer not to benefit from commissions, discounts, etc.**

The remuneration of the Valuer pursuant to Clause 6 hereof shall constitute the Valuer's sole remuneration in connection with this Agreement or the Services and the Valuer shall not accept for its own benefit any trade commission, discount or similar payment in connection with activities pursuant to this Agreement or to the Services or in the discharge of its obligations hereunder, and the Valuer shall use its best efforts to ensure that any Sub-Consultant, as well as the Personnel and agents of either of them, similarly shall not receive any such additional remuneration.

**3.2.5. The Valuer and its Personnel shall observe the highest standards of ethics and shall not have engaged in and shall not hereafter engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice (collectively the "Prohibited Practices").** Notwithstanding anything to the contrary contained in this Agreement, the Authority shall be entitled to terminate this Agreement forthwith by a communication in writing to the Valuer, without being liable in any manner whatsoever to the Valuer, if it determines that the Valuer has, directly or indirectly or through an agent, engaged in any Prohibited Practices in the Bid Process or before or after entering into of this Agreement. In such an event, the Authority shall forfeit and appropriate the performance security, if any, as mutually agreed genuine pre-estimated compensation and damages payable to the Authority towards, inter alia, the time, cost and effort of the Authority, without prejudice to the Authority's any other rights or remedy hereunder or in law.

- 3.2.6. Without prejudice to the rights of the Authority under Clause 3.2.5 above and the other rights and remedies which the Authority may have under this Agreement, if the Valuer is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any Prohibited Practices, during the Bid Process or before or after the execution of this Agreement, the Valuer shall not be eligible to participate in any tender or TENDER issued during a period of 2 (two) years from the date the Valuer is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any Prohibited Practices.
- 3.2.7. For the purposes of Clauses 3.2.5 and 3.2.6, the following terms shall have the meaning hereinafter respectively assigned to them:
- (a) “corrupt practice” means the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bid Process (for removal of doubt, offering of employment or employing or engaging in any manner whatsoever, directly or indirectly, any official of the Authority who is or has been associated in any manner, directly or indirectly with Bid Process or LOA or dealing with matters concerning the Agreement before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the Authority, shall be deemed to constitute influencing the actions of a person connected with the Bid Process); or (ii) engaging in any manner whatsoever, whether during the Bid Process or after the issue of LOA or after the execution of the Agreement, as the case may be, any person in respect of any matter relating to the Project or the LOA or the Agreement, who at any time has been or is a legal, financial or technical adviser the Authority in relation to any matter concerning the Project;
  - (b) “fraudulent practice” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bid Process;
  - (c) “coercive practice” means impairing or harming, or threatening to impair or harm, directly or indirectly, any person or property to influence any person’s participation or action in the Bid Process or the exercise of its rights or performance of its obligations by the Authority under this Agreement;
  - (d) “undesirable practice” means (i) establishing contact with any person connected with or employed or engaged by the Authority with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bid Process; or (ii) having a Conflict of Interest; and
  - (e) “restrictive practice” means forming a cartel or arriving at any understanding or arrangement among Applicants with the objective of restricting or manipulating a full and fair competition in the Bid Process.

### **3.3. Confidentiality**

The Valuer, its Sub-Consultants and the Personnel or either of them shall not, either during the term or within two years after the expiration or termination of this Agreement disclose any proprietary information, including information relating to reports, data, drawings, design software or other material, whether written or oral, in electronic or magnetic format, and the contents thereof; and any reports, digests or summaries created or derived from any of the

foregoing that is provided by the Authority and/ or the Concessionaire to the Valuer, its Sub-Consultants and the Personnel; any information provided by or relating to the Authority, the Concessionaire, their technology, technical processes, business affairs or finances or any information relating to the Authority's and the Concessionaire's employees, officers or other professionals or suppliers, customers, or contractors of the Authority; and any other information which the Valuer is under an obligation to keep confidential in relation to the Project, the Services or this Agreement ("Confidential Information"), without the prior written consent of the Authority.

Notwithstanding the aforesaid, the Valuer, its Sub-Consultants and the Personnel of either of them may disclose Confidential Information to the extent that such Confidential Information:

- i) was in the public domain prior to its delivery to the Valuer, its Sub-Consultants and the Personnel of either of them or becomes a part of the public knowledge from a source other than the Valuer, its Sub-Consultants and the Personnel of either of them;
- ii) was obtained from a third party with no known duty to maintain its confidentiality;
- iii) is required to be disclosed by Applicable Laws or judicial or administrative or arbitral process or by any governmental instrumentalities, provided that for any such disclosure, the Valuer, its Sub-Consultants and the Personnel of either of them shall give the Authority, prompt written notice, and use reasonable efforts to ensure that such disclosure is accorded confidential treatment; and
- iv) is provided to the professional advisers, agents, auditors or representatives of the Valuer or its Sub-Consultants or Personnel of either of them, as is reasonable under the circumstances; provided, however, that the Valuer or its Sub-Consultants or Personnel of either of them, as the case may be, shall require their professional advisers, agents, auditors or its representatives, to undertake in writing to keep such Confidential Information, confidential and shall use its best efforts to ensure compliance with such undertaking.
- v) is provided to the Concessionaire and its employees, contractors etc. for the purposes of the Project.

### **3.4. Liability of the Valuer**

3.4.1. The Valuer's liability under this Agreement shall be determined by the Applicable Laws and the provisions hereof.

3.4.2. Valuer's liability towards the Authority

The Valuer shall, subject to the limitation specified in Clause 3.4.3, be liable to the Authority for any direct loss or damage accrued or likely to accrue due to deficiency in Services rendered by it.

3.4.3. Except as set out hereunder, the Parties hereto agree that in case of negligence or willful misconduct on the part of the Valuer or on the part of any person or firm acting on behalf of the Valuer in carrying out the Services, the Valuer, with respect to damage caused to the Authority's property, shall not be liable to the Authority:

- i) for any indirect or consequential loss or damage; and
- ii) for any direct loss or damage that exceeds (a) the Agreement Value set forth in Annexure-3 of this Agreement, or (b) the proceeds the Valuer may be entitled to receive from any

insurance maintained by the Valuer to cover such a liability in accordance with Clause 3.5.2, whichever of (a) or (b) is higher.

- 3.4.4. This limitation of liability specified in Clause 3.4.3 shall not affect the Valuer's liability, if any, (i) for damage to Third Parties caused by the Valuer or any person or firm acting on behalf of the Valuer in carrying out the Services subject, however, to a limit equal to 3 (three) times the Agreement Value; and (ii) Liquidated Damages as set out in this Agreement.

**3.5. — Insurance to be taken out by the Valuer**

~~3.5.1 — The Valuer shall, for the duration of this Agreement, take out and maintain, and shall cause any Sub-Consultant to take out and maintain, at its (or the Sub-Valuer's, as the case may be) own cost, but on terms and conditions approved by the Authority, insurance against the risks, and for the coverages, as specified in the Agreement and in accordance with good industry practice.~~

~~(a) Within 15 (fifteen) days of receiving any insurance policy certificate in respect of insurances required to be obtained and maintained under this clause, the Valuer shall furnish to the Authority, copies of such policy certificates, copies of the insurance policies and evidence that the insurance premium have been paid in respect of such insurance. No insurance shall be cancelled, modified or allowed to expire or lapse during the term of this Agreement.~~

~~(b) If the Valuer fails to effect and keep in force the aforesaid insurances for which it is responsible pursuant hereto, the Authority shall, apart from having other recourse available under this Agreement, have the option, without prejudice to the obligations of the Valuer, to take out the aforesaid insurance, to keep in force any such insurances, and pay such premia and recover the costs thereof from the Valuer, and the Valuer shall be liable to pay such amounts on demand by the Authority.~~

~~(c) — Except in case of Third Party liabilities, the insurance policies so procured shall mention the Authority as the beneficiary of the Valuer and the Valuer shall procure an undertaking from the insurance company to this effect; provided that in the event the Valuer has a general insurance policy that covers the risks specified in this Agreement and the amount of insurance cover is equivalent to 3 (three) times the cover required hereunder, such insurance policy may not mention the Authority as the sole beneficiary of the Valuer or require an undertaking to that effect.~~

~~3.5.2. — The Parties agree that the risks and coverage's shall include but not be limited to the following:~~

~~(a) Third Party liability insurance as required under Applicable Laws, with a minimum coverage of Rs. 1,00,00,000 (Rupees one crore);~~

~~(b) Authority's liability and workers' compensation insurance in respect of the Personnel of the Valuer and of any Sub-Consultant, in accordance with Applicable Laws; and~~

~~(c) Professional liability insurance for an amount no less than the Agreement Value.~~

~~The indemnity limit in terms of "Any One Accident" (AOA) and "Aggregate limit on the policy period" (AOP) should not be less than the amount stated in Annexure 3 of the Agreement.~~



### **3.6. Accounting, inspection and auditing**

The Valuer shall:

- (a) keep accurate and systematic accounts and records in respect of the Services provided under this Agreement, in accordance with internationally accepted accounting principles and in such form and detail as will clearly identify all relevant time charges and cost, and the basis thereof (including the basis of the Valuer's costs and charges); and
- (b) permit the Authority or its designated representative periodically, and up to one year from the expiration or termination of this Agreement, to inspect the same and make copies thereof as well as to have them audited by auditors appointed by the Authority.

### **3.7. Valuer's actions requiring the Authority's prior approval**

The Valuer shall obtain the Authority's prior approval in writing before taking any of the following actions:

- (a) appointing such members of the Professional Personnel as are not listed in Annex-2.
- (b) entering into a subcontract for the performance of any part of the Services, it being understood (i) that the selection of the Sub-Consultant and the terms and conditions of the subcontract shall have been approved in writing by the Authority prior to the execution of the subcontract, and (ii) that the Valuer shall remain fully liable for the performance of the Services by the Sub-Consultant and its Personnel pursuant to this Agreement; or
- (c) any other action that is specified in this Agreement.

### **3.8. Reporting obligations**

The Valuer shall submit to the Authority and the Concessionaire the reports specified in the Agreement, in the form, in the numbers and within the time periods set forth therein.

### **3.9. Documents prepared by the Valuer to be property of the Authority**

- 3.9.1. All plans, drawings, specifications, designs, reports and/or other documents (collectively referred to as "Consultancy Documents") prepared by the Valuer (or by the Sub-Consultants or any Third Party) in performing the Services shall become and remain the property of the Authority, and all intellectual property rights in such Consultancy Documents shall vest with the Authority. Any Consultancy Document, of which the ownership or the intellectual property rights do not vest with the Authority under law, shall automatically stand assigned to the Authority as and when such Consultancy Document is created and the Valuer agrees to execute all papers and to perform such other acts as the Authority may deem necessary to secure its rights herein assigned by the Valuer.
- 3.9.2. The Valuer shall, not later than termination or expiration of this Agreement, deliver all Consultancy Documents to the Authority, together with a detailed inventory thereof. The Valuer may retain a copy of such Consultancy Documents. The Valuer, its Sub-Valuers or a Third Party shall not use these Consultancy Documents for purposes unrelated to this Agreement without the prior written approval of the Authority.
- 3.9.3. The Valuer shall hold the Authority harmless and indemnified for any losses, claims, damages, expenses (including all legal expenses), awards, penalties or injuries (collectively referred to as 'claims') which may arise from or due to any unauthorised use of such

Consultancy Documents, or due to any breach or failure on part of the Valuer or its Sub-Consultants or a Third Party to perform any of its duties or obligations in relation to securing the aforementioned rights of the Authority.

**3.10. Equipment and materials furnished by the Authority**

Equipment and materials made available to the Valuer by the Authority shall be the property of the Authority and shall be marked accordingly. Upon termination or expiration of this Agreement, the Valuer shall furnish forthwith to the Authority, an inventory of such equipment and materials and shall dispose of such equipment and materials in accordance with the instructions of the Authority. While in possession of such equipment and materials, the Valuer shall, unless otherwise instructed by the Authority in writing, insure them in an amount equal to their full replacement value.

**3.11. Providing access to Project Office and Personnel**

The Valuer shall ensure that the Authority, and officials of the Authority having authority from the Authority, are provided unrestricted access to the Project Office and to all Personnel during office hours. The Authority's official, who has been authorised by the Authority in this behalf, shall have the right to inspect the Services in progress, interact with Personnel of the Valuer and verify the records relating to the Services for his satisfaction.

**3.12. Accuracy of Documents**

The Valuer shall be responsible for accuracy of the data collected by it directly or procured from other agencies/authorities, the designs, drawings, estimates and all other details prepared by it as part of these services. Subject to the provisions of Clause 3.4, it shall indemnify the Authority against any inaccuracy in its work which might surface during implementation of the Project, if such inaccuracy is the result of any negligence or inadequate due diligence on part of the Valuer or arises out of its failure to conform to good industry practice. The Valuer shall also be responsible for promptly correcting, at its own cost and risk, the drawings including any re-survey / investigations.

**4. VALUER'S PERSONNEL AND SUB-CONSULTANTS**

**4.1. General**

The Valuer shall employ and provide such qualified and experienced Personnel as may be required to carry out the Services.

**4.2. Deployment of Personnel**

- 4.2.1. The designations, names and the estimated periods of engagement in carrying out the Services by each of the Valuer's Personnel are described in Annex-2 of this Agreement.
- 4.2.2. Adjustments with respect to the estimated periods of engagement of Personnel set forth in the aforementioned Annex-2 may be made by the Valuer by written notice to the Authority.
- 4.2.3. If additional work is required beyond the scope of the Services specified in the Terms of Reference, the estimated periods of engagement of Personnel, set forth in the Annexures of the Agreement may be increased by agreement in writing between the

Authority and the Valuer, provided that any such increase shall not, except as otherwise agreed, cause payments under this Agreement to exceed the Agreement Value set forth in Annexure-3.

#### **4.3. Approval of Personnel**

- 4.3.1. The Professional Personnel listed in Annex-2 of the Agreement are hereby approved by the Authority. No other Professional Personnel shall be engaged without prior approval of the Authority.
- 4.3.2. If the Valuer hereafter proposes to engage any person as Professional Personnel, it shall submit to the Authority its proposal along with a CV of such person in the form provided at Appendix-I (Form-12) of the TENDER. the Authority may approve or reject such proposal within 14 (fourteen) days of receipt thereof. In case the proposal is rejected, the Valuer may propose an alternative person for the Authority's consideration. In the event the Authority does not reject a proposal within 14 (fourteen) days of the date of receipt thereof under this Clause 4.3, it shall be deemed to have been approved by the Authority.

#### **4.4. Substitution of Key Valuer**

The Authority expects all the Key Personnel specified in the Proposal to be available with the firm during implementation of the Agreement. The Authority will not consider any substitution of Key Personnel except under compelling circumstances beyond the control of the Valuer. Such substitution shall be subject to equally or better qualified and experienced personnel being provided to the satisfaction of the Authority.

#### **4.5. Team Leader**

The person designated as the Team Leader of the Valuer's Personnel shall be responsible for the coordinated, timely and efficient functioning of the Personnel. In addition, the Valuer shall designate a suitable person as Project Manager (the "Project Manager") who shall be responsible for day to day performance of the Services.

#### **4.6. Sub-Consultants**

Not applicable to this tender (Deleted).

### **5. OBLIGATIONS OF THE AUTHORITY**

#### **5.1. Assistance in clearances etc.**

Unless otherwise specified in the Agreement, the Authority shall make best efforts to ensure that the Government shall:

- (a) provide the Valuer, its Sub-Consultants and Personnel with work permits and such other documents as may be necessary to enable the Valuer, its Sub-Consultants or Personnel to perform the Services;
- (b) facilitate prompt clearance through customs of any property required for the Services;  
and
- (c) issue to officials, agents and representatives of the Government all such instructions as may be necessary or appropriate for the prompt and effective implementation of the Services.

## 5.2. Access to land and property

The Authority warrants that the Valuer shall have, free of charge, unimpeded access to the site of the project in respect of which access is required for the performance of Services; provided that if such access shall not be made available to the Valuer as and when so required, the Parties shall agree on (i) the time extension, as may be appropriate, for the performance of Services, and (ii) the additional payments, if any, to be made to the Valuer as a result thereof pursuant to Annex-3.

## 5.3 Change in Applicable Law

If, after the date of this Agreement, there is any change in the Applicable Laws with respect to taxes and duties which increases or decreases the cost or reimbursable expenses incurred by the Valuer in performing the Services, by an amount exceeding 2% (two per cent) of the Agreement Value specified in Annex-3, then the remuneration and reimbursable expenses otherwise payable to the Valuer under this Agreement shall be increased or decreased accordingly by agreement between the Parties hereto after obtaining the prior written consent of the Concessionaire, and corresponding adjustments shall be made to the aforesaid Agreement Value.

## 6. SPECIAL CONDITIONS OF CONTRACT

Tender for “Undertaking Valuation & Determination of Fair Market Value of investment made at Slipway Nos. 3, 4 and 5 of Mumbai Port Workshop at Mazagaon, Mumbai.”

### Sequence of activities vis-à-vis Time of Completion

Sr. No.	Stages of Activity	Time of completion
1.	The Valuer shall prepare the Draft report for market valuation for the entire area including land and structures within the scope of work as mentioned above and shall submit the same in phases for examination by the officials of MbPA.	To be submitted by the Valuer in phases within 10 Days from the date of submission of Performance Security Deposit. The time taken by Mumbai Port for any approval/s will not be considered as contract period.
2.	MbPA shall examine the Draft report in consultation with the successful tenderer and intimate to them the modifications / amendments needed in the 1st draft report. The successful tenderer will thereafter incorporate the modifications / amendments and submit the Final draft report to MbPA.	Tentatively, this would require MbPA to complete the exercise within 10 days from the date of receipt of the last phase of the Draft report for MbPA.
3.	The Final report to be submitted by the successful tenderer shall be examined by the designated committees of MbPA. The successful tenderer, will be required to interact with such designated	The Valuer shall submit the Final draft report in phases within 5 days from the date of receipt of the last communication for

	committees at Mumbai and if required will make presentations on the Final report.	modification / addendum / amendment etc of the 1st draft report, from MbPA.
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## **7. LIQUIDATED DAMAGES AND PENALTIES**

### **7.1. Performance Security**

- 7.1.1. The Valuer shall provide to the Authority an unconditional and irrevocable bank guarantee in favour of the Authority en-cashable and enforceable at Mumbai within 30 days from the execution of this Agreement for due performance of its obligations under the Agreement (the “**Performance Security**”). The Performance Security for a sum equivalent to 3% (three per cent) of the Contract Value shall be provided to the Authority. The Performance Guarantee furnished under this provision shall be valid until expiry of 6 (six) months from the expiry of the term of this Agreement. Failure of the Valuer to provide a valid Performance Guarantee in accordance with this Clause shall entitle the Authority to terminate this Agreement in accordance with the terms hereof and also if relevant, to forfeit the Bid Security paid by the Valuer.
- 7.1.2. The Valuer may, in lieu of retention of the amounts as referred to in Clause 7.1.1 above, furnish a bank guarantee substantially in the form specified at Annex-4 of this Agreement.

### **7.2. Liquidated Damages**

- 7.2.1. In the event of delay attributable to the Valuer in completing the work, liquidated damage (LD) will be deducted as compensation @ 1 % per week or part thereof on the total order value, subject to a maximum of 10% of the total order value [in other words, total LD will not be more than 10% of the total order value]. If LD is to be deducted, the same will be deducted from the final bill after determining the net delay, if any. The net delay shall be the cumulative delay of all the stages after offsetting the gain in the No. of days for early completion, if any, at any stage.

### **7.3. Penalty for deficiency in Services**

In addition to the liquidated damages not amounting to penalty, as specified in Clause 7.2, warning may be issued to the Valuer for minor deficiencies on its part. In the case of significant deficiencies in Services causing adverse effect on the Project or on the reputation of the Authority, other penal action including debarring for a specified period may also be initiated as per policy of the Authority.

## **8. FAIRNESS AND GOOD FAITH**

### **8.1. Good Faith**

The Parties undertake to act in good faith with respect to each other’s rights under this Agreement and to adopt all reasonable measures to ensure the realisation of the objectives of this Agreement.

### **8.2. Operation of the Agreement**

The Parties recognise that it is impractical in this Agreement to provide for every contingency which may arise during the life of the Agreement, and the Parties hereby agree

that it is their intention that this Agreement shall operate fairly as between them, and without detriment to the interest of either of them, and that, if during the term of this Agreement either Party believes that this Agreement is operating unfairly, the Parties will use their best efforts to agree on such action as may be necessary to remove the cause or causes of such unfairness, but failure to agree on any action pursuant to this Clause shall not give rise to a dispute subject to arbitration in accordance with Clause 9 hereof.

## **9. SETTLEMENT OF DISPUTES**

### **9.1. Amicable settlement**

The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Agreement or the interpretation thereof.

### **9.2. Dispute resolution**

9.2.1. 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 9.3.

9.2.2. 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.

### **9.3. Conciliation**

In the event of any Dispute between the Parties, either Party may call upon Chairman of Mumbai Port and the Chairman of the Board of Directors of the Valuer or a substitute thereof for amicable settlement, and upon such reference, the said persons shall meet no later than 10 (ten) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 10 (ten) 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 9.2.1 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 9.4.

### **9.4. Arbitration**

9.4.1. Any Dispute which is not resolved amicably by conciliation, as provided in Clause 9.3, shall be finally decided by reference to arbitration by an Arbitral Tribunal appointed in accordance with Clause 9.4.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the

provisions of the Arbitration and Conciliation Act, 1996. The venue of such arbitration shall be Mumbai and the language of arbitration proceedings shall be English.

- 9.4.2. There shall be an Arbitral Tribunal of three arbitrators, of whom each Party shall select one, and the third 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 Rules.
- 9.4.3. The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Clause 9 shall be final and binding on the Parties as from the date it is made, and the Valuer and the Authority agree and undertake to carry out such Award without delay.
- 9.4.4. The Valuer and the Authority agree that an Award may be enforced against the Valuer and/or the Authority, as the case may be, and their respective assets wherever situated.
- 9.4.5. 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.
- 9.4.6. Notwithstanding anything contrary, it is hereby agreed between the Parties that if either the Authority and / or the Concessionaire disputes any advice, instruction or decision of the Valuer and the same is submitted for dispute resolution in accordance with Article 5.1(e) of the Concession Agreement, then the outcome of such dispute resolution shall be binding on the IE and such subject matter shall not be submitted to dispute resolution under this Agreement.

**IN WITNESS WHEREOF**, the Parties hereto have caused this Agreement to be signed in their respective names as of the day and year first above written.

SIGNED, SEALED AND DELIVERED

SIGNED, SEALED AND DELIVERED

For and on behalf of

For and on behalf of

Valuer:

Authority

(Signature)

(Signature)

(Name)

(Name)

(Designation)

(Designation)

(Address)

(Address)

(Fax No.)

(Fax No.)

In the presence of:

1.

2.