

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

The Chief Engineer,
Mumbai Port Trust,
Mumbai - 400 001.

WHEREAS:

(A) [..... (the “**Concessionaire / Contractor**”)] and the Mumbai Port Trust (the “**Authority**”) have entered into a [Concession Agreement /Construction Contract / Engineering Procurement Commissioning Contract] dated (the “**Agreement**”) whereby the Authority has agreed to the [Concessionaire / Contractor] undertaking [name of the work] on [build, operate and transfer/design, build, finance, operate and transfer]¹ [(“**DBFOT**”)]² basis (the “**Project**”), subject to and in accordance with the provisions of the Agreement.

¹Name of the Project to be included

²Type of project development model to be included

³Details of the claims to be inserted

⁴Amount in Figures and words to be inserted

⁵Date of Arbitral award to be inserted

⁶To be inserted, in case applicable

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

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

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

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

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

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

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

⁹To be inserted, in case applicable

(G) The Arbitral Award Escrow Agreement requires the Concessionaire to furnish a Bank Guarantee to the Authority in a sum of Rs ***** (Rupees ***** only) (the “**Guarantee Amount**”) as security for the

amount to be deposited by the Authority in the Arbitral Award Escrow Account and for due and faithful performance of its obligations under and in accordance with Arbitral Award Escrow Agreement.

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

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

1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the [Concessionaire’s / Contractor’s] obligations under and in accordance with the Arbitral Award Escrow Agreement , and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the [Concessionaire / Contractor], such sum or sums upto an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.
2. A letter from the Authority, under the hand of an Officer not below the rank of General Manager in the Authority, that the Court has decided the appeal in favor of the Authority and the [Concessionaire / Contractor] needs to repay the Guaranteed Amount or that there has been an Arbitral Award Escrow Default by the [Concessionaire / Contractor] as per the provisions of Arbitral Award Escrow Agreement, shall be conclusive, final and binding on the Bank and the Bank shall immediately release the Guaranteed Amount to the Authority. The Bank further agrees that the Authority’s letter in this regard shall be final and binding on the Bank, notwithstanding any differences between the Authority and the [Concessionaire / Contractor].
3. In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank is the principal debtor and any change in the constitution of the [Concessionaire / Contractor] and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the [Concessionaire / Contractor] before presenting to the Bank its demand under this Guarantee.
5. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Arbitral Award Escrow Agreement or to extend the time or period for the compliance with, fulfilment and/ or performance of all or any of the obligations of the [Concessionaire / Contractor] contained in Arbitral Award Escrow Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the [Concessionaire / Contractor], and either to enforce or forbear from enforcing any of the terms and conditions contained in Arbitral Award Escrow Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the [Concessionaire / Contractor] or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.
6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Arbitral Award Escrow Agreement or for the fulfillment, compliance and/or performance of all or any of the obligations of the [Concessionaire / Contractor] under the Arbitral Award Escrow Agreement
7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount. This Bank Guarantee shall come in force from the date on which the Authority deposits an amount equal to 75% of the Arbitral Award awarded to the [Concessionaire / Contractor] and shall remain in force

until, the earlier of the [1 (one) year] from the date of such deposits or two (2) months from the date of the Court deciding the Appeal in favor of the [Concessionaire / Contractor].

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

9. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.

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

11. Notwithstanding anything contained herein:

- (a) our liability under this Bank Guarantee shall not exceed (in words)
- (b) this Bank Guarantee shall be valid upto; and
- (c) we are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if the Authority serve upon us a written claim or demand on or before

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

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

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

NOTES:

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