

Annexure-3 to Appendix-1

(A sample Format of Escrow Agreement to be suitably modified as per package specific requirement)

(To be executed on Non- Judicial Stamp Paper of Appropriate Value)

ESCROW AGREEMENT

ESCROW AGREEMENT (hereinafter referred to as this “**Agreement**”) is entered into on this the ___ day of _____ 20__ at _____.

BETWEEN:

M/S _____ a Company incorporated under the laws of _____ and having its principal place of business at _____ (hereinafter referred to as the “**Employer**”, which expression shall, unless it is repugnant to the subject or context thereof, include its successors and assigns) of the **FIRST PART**;

AND

M/S _____ a Company incorporated under the laws of _____ and having its principal place of business at _____ (hereinafter referred to as the “**Contractor**”, which expression shall, unless it is repugnant to the subject or context thereof, include its successors, transferees and permitted assigns) of the **SECOND PART**;

AND

M/S _____, a body corporate incorporated under the laws of India and a banking company within the meaning of Section 5 (c) of the Banking Regulation Act, 1949 (10 of 1949) and having its registered office at _____ in its capacity as the Escrow Agent for the Contractor (hereinafter referred to as the “**Escrow Bank**”, which expression shall, unless it be repugnant to the subject or context thereof, include its successors and permitted assigns) of the **THIRD PART**.

The Employer, the Contractor and the Escrow Bank are individually referred to as “**Party**” and collectively as “**Parties**”.

WHEREAS:

A. The Employer vide IFB No. _____ dated _____ (“**Tender**”) had invited bids for _____ (“**Package**”) for _____ (“**Project**”).

B. Accordingly, the said “Contractor”, submitted its bid in response to the above mentioned NIT.

C. Pursuant to the IFB and the bid submitted by the Successful Bidder / Contractor, the Employer issued the Notification of Award dated - _____ bearing no. _____ (“**Notification of Award**”) and executed Contract Agreement Reference No. _____ dated _____ (hereinafter called Contract).

D. In terms of Clause _____ of the Contract/ General Conditions of Contract/ Special Conditions of Contract, the Contractor is required to open and maintain separately an Escrow Account with the Escrow Bank.

E. The Contractor have approached _____ Bank to act as an escrow agent and the _____ Bank has agreed to act as the Escrow Bank under this Escrow Agreement; and

F. Accordingly Parties are desirous of executing this Escrow Agreement to set out the manner and procedure for operation of the escrow account and other matters in connection therewith.

G. *All payments due under the Contract related to Erection/Civil/Structural works will be released by the Employer to the Contractor in the Escrow Account. The Contractor is required to make payment to suppliers of goods and services, statutory authorities, establishment expenses etc as may be required in the successful performance of the Contract.

or

*Additional Advance related to Ex works/Installation Services (including Civil Works) under the Contract will be released by the Employer to the

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Contractor in the Escrow Account. The Contractor is required to make payment to suppliers of goods and services, statutory authorities, establishment expenses etc as may be required in the successful performance of the Contract.

- H. The Contractor is required to utilise the money collected in the Escrow Account in accordance with the waterfall mechanism set out in this Agreement.
- I. In view of the aforesaid, the mutual covenants, and understandings set forth herein, the Parties wish to enter into this Agreement for setting out the terms and conditions to deal with all payments in accordance with the requirements set out in the Bid Document.

***Strike-off whichever is not applicable. Second para is to be used only in case of Additional Advance related to Ex works/Installation Services.**

NOW, THEREFORE, in consideration of the premises herein set forth and other good and valid consideration, the receipt and adequacy of which are hereby expressly acknowledged, the Parties with the intent to be legally bound hereby agree as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 DEFINITIONS

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

Applicable Law means all applicable statutes, laws, by – laws, rules, regulations, orders, ordinances, protocols, codes, guidelines, policies, notices, directions, judgments, decrees or other requirements or official directive of any

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governmental authority or court or other law, rule or regulation, approval from the relevant governmental authority, government resolution, directive, or other government restriction or any similar form of decision of, or determination by, or any interpretation or adjudication having the force of law in India.

Business Day means a day other than a Sunday or a bank holiday on which banks are normally open for business during banking business hours in Delhi, India.

Contractor shall have the meaning as ascribed to it in Second Part

Employer shall have the meaning as ascribed to it in First Part.

Escrow Account shall mean the account in the name and style of “_____” opened and maintained by the Contractor in terms of Clause_____ of the Contract/ General Conditions of Contract/ Special Conditions of Contract with the Escrow Bank and operated in terms of this Escrow Agreement.

Escrow Agreement shall mean this agreement, together with the schedules hereto, as may be amended, modified or supplemented from time to time, in accordance with its terms.

Escrow Bank shall have the meaning as ascribed to it in Third Part.

Notification of Award shall have the meaning as ascribed to it in Recital C.

Package shall have the meaning as ascribed to it in Recital A.

Project shall have the meaning as ascribed to it in Recital A.

Tender shall have the meaning as ascribed to it in Recital A.

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1.2 PRINCIPLE OF CONSTRUCTIONS

In this Agreement, unless the context otherwise requires:

- (a) reference to an Account includes a reference to any sub – account of that Account;
- (b) reference to an "amendment" includes a supplement, modification, novation, replacement or re-enactment and "amended" is to be construed accordingly;
- (c) a reference to "authorization" includes an authorization, consent, clearance, approval, permission, resolution, license, exemption, filing and registration;
- (d) a reference to "control" includes the power to direct by contract or otherwise;
- (e) unless the context otherwise requires, the singular includes the plural and vice versa;
- (f) a reference to a Schedule is, unless indicated to the contrary, a reference to a schedule to this Agreement;
- (g) the words "other", "or otherwise" and "whatsoever" shall not be construed *ejusdem generis* or be construed as any limitation upon the generality of any preceding words or matters specifically referred to;
- (h) references to the word "includes" or "including" are to be construed without limitation;
- (n) all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;

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- (o) any reference to a public organization shall be deemed to include any successor to such public organization or any organization or functions or responsibilities of such public organization;
- (p) "year" "month" and "day" wherever used in this Agreement imply that of English calendar;
- (q) words and abbreviations, which have, well known technical or trade / commercial meanings are used in the Agreement in accordance with such meanings;
- (r) A reference to times and dates in this Escrow Agreement are references to times and dates in India.
- (s) Any date or period as set out in any clause of this Escrow Agreement may be extended with the written consent of the Parties.
- (t) The Schedules form an integral and operative part of this Escrow Agreement and references to this Escrow Agreement shall include references to the Schedules.

2. APPOINTMENT OF ESCROW BANK

Each of the parties acknowledges that the Escrow Bank has been appointed under this Escrow Agreement and that it shall discharge its functions in accordance with the terms of this Escrow Agreement. Escrow Bank hereby accepts the escrow arrangement hereby declared and provided upon the terms and conditions set forth in this Escrow Agreement.

3. ESTABLISHMENT OF THE ACCOUNTS

The Contractor has established with the Escrow Bank an account with its branch, the details of which are provided in **Schedule – II** hereto, titled the "_____Account". The Contractor acknowledges and

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agrees that it shall maintain the Escrow Account.

4. OPERATING PROCEDURES

The Employer, the Contractor and Escrow Bank, have prior to execution of this Agreement agreed on the detailed terms and conditions and Operating Procedures for the Escrow Account (as set out in **Schedule – III**), provided however, in the event of any inconsistency between this Agreement and such mandates, terms and conditions or procedures, this Agreement shall prevail.

Based on the request from the Contractor, the Employer will approve the list of suppliers of goods and services, statutory authorities, establishment expenses etc. to whom payments could be made and the same shall be shared with the Escrow Bank from time to time.

All transfers and payments pursuant to this Agreement shall be in a manner consistent with the operating procedures.

The Escrow Bank shall submit to the Employer the usage of monies withdrawn from the Escrow Account together with a monthly statement from the Escrow Bank evidencing receipt and withdrawal of funds into and from the Escrow Account.

The Employer shall be entitled to verify the usage of funds withdrawn from the Escrow Account.

At any time the Employer is entitled to seek an account statement from the Escrow Bank and such evidence of usage of funds by the Contractor from the Escrow Account as required by the Employer.

5. OBLIGATIONS OF THE CONTRACTOR

Nothing contained in this Agreement shall affect the obligations of the Contractor under the Bid Documents or Contract Agreement as set out above.

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The Contractor shall simultaneously deliver a copy to the Employer of any notice or document delivered to the Escrow Bank pursuant to this Agreement.

6. ESCROW BANK SERVICE CHARGES AND EXPENSES

The Contractor shall pay, on demand, all the usual and customary service charges, transfer fees, account maintenance, account acceptance, statement, investigation, funds transfer and any other charges as are levied by the Escrow Bank as mutually agreed and such other out of pocket expenses as are claimed by the Escrow Bank (collectively, the "**charges**") in connection with the Escrow Account. In addition the Contractor has agreed to pay one-time bank escrow service charges of Rs. _____ plus applicable Goods and Service Tax. Contractor shall deposit the one- time bank escrow service charges in to the Escrow Account within three Business Days of the opening of the Escrow Account and/ or shall deposit the charges from time to time of such demand by the Escrow Bank. In the event Contractor fails to make the timely payment to the Escrow Bank of the one-time bank escrow service charges and/or the charges, the Escrow Bank shall have the right to withdraw such amounts from the Escrow Account as is necessary for the payment of the one-time bank escrow service charges and charges, in which case Contractor shall replenish the Escrow Account with such amounts equivalent to the amounts withdrawn by the Escrow Bank within ____ Business Days of such withdrawal.

7. ESCROW BANKS'S DUTIES AND LIABILITIES

7.1 The Escrow Bank shall have only those duties, obligations and responsibilities expressly specified in this Escrow Agreement and shall have no duties, obligations or responsibilities which are implied or inferred by law or otherwise.

7.2 The duties of the Escrow Bank under this Escrow Agreement are purely ministerial, administrative and non-discretionary in nature. Neither Escrow Bank nor any of its directors, officers, agents and employees shall, by reason

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of anything contained in this Escrow Agreement, be deemed to be a trustee for or have any fiduciary relationship with the parties. Where the Escrow Bank has acted in accordance with this Escrow Agreement, it shall be deemed to have acted as if instructed to do so by the Employer

- 7.3** The Escrow Bank shall not be required to expend or risk any of its own funds or otherwise incur any liability, financial or otherwise, in the performance of any of its duties under this Escrow Agreement.
- 7.4** The Escrow Bank shall not be precluded by virtue of this Escrow Agreement (and neither shall any of its directors, officers, agents and employees or any company or persons in any other way associated with it be precluded) from entering into or being otherwise interested in any banking, commercial, financial or business contacts or in any other transactions or arrangements with the parties or any of their affiliates provided such transactions or arrangements are not contrary to the provisions of this Escrow Agreement.
- 7.5** The Escrow Bank shall not be bound or affected, in its capacity as Escrow Bank, in any way by the Agreement or any agreement or contract between Parties to which the Escrow Agent is not a party. The Escrow Bank, in its capacity as an escrow bank, is deemed not to have any knowledge of any provision of the Agreement or any other document unless the substance of such provisions is explicitly set forth in this Escrow Agreement. The Escrow Bank shall not in any way be required to determine whether or not the terms and conditions of the Agreement or any other agreement or contract between the Parties to which the Escrow Bank is not a party have been complied with. Furthermore, the Escrow Bank is deemed not to have any knowledge or notice of any fact or circumstance not specifically set forth in this Escrow Agreement.
- 7.6** The Escrow Bank may, in good faith, accept and rely on any notice, instruction or other document received by it under this Escrow Agreement as conclusive evidence of the facts and of the validity of the instructions stated in it and as having been duly authorised, executed and delivered and need not make any further enquiry in relation to it. The Escrow Bank may act in conclusive reliance upon any instrument or signature believed by it, acting reasonably, to be genuine and may assume, acting reasonably, that any person purporting to give receipt, instruction or advice, make any statement, or execute any

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document in connection with the provisions of this Escrow Agreement has been duly authorised to do so. The Escrow Bank shall be under no duty to inquire into or investigate the validity, accuracy or content of any such document.

7.7 The Escrow Bank shall not be liable to any person for any losses arising out of or in connection with the performance or non-performance of its obligations under this Escrow Agreement, except to the extent directly resulting from the wilful default or gross negligence of the Escrow Bank.

7.8 The Escrow Bank may execute any of its powers and perform any of its duties under this Escrow Agreement directly or through appointed agents or attorneys.

7.9 ‘Force Majeure Event’ means any event (including but not limited to an act of God, fire, epidemics, natural calamities; riots, civil commotion or unrest, terrorism, war, strikes or lockouts; expropriation or other governmental actions; any changes in applicable law or regulation including changes in market rules, currency restrictions, devaluations or fluctuations; market conditions affecting the execution or settlement of transactions or the value of assets; and breakdown, failure or malfunction of any telecommunication and information technology systems beyond the control of any Party which restricts or prohibits the performance of the obligations of such Party contemplated by this Agreement.

The Escrow Bank shall not be held liable for any loss or damage or failure to perform its obligations hereunder, or for any delay in complying with any duty or obligation, under or pursuant to this Agreement arising as a direct or indirect result of any Force Majeure Event.

7.10 The Escrow Bank may at its cost, consult with, and obtain advice from its lawyers or professional advisers over any question in relation to, and its duties under this Escrow Agreement. The Escrow Bank shall not incur any liability for taking any action or omitting any action in accordance with such advice.

7.11 The Escrow Bank does not have any proprietary or other interest in the Escrow Account, but is to serve as escrow holder only and having only possession

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thereof.

- 7.12** The Escrow Bank shall not be liable or responsible for obtaining any regulatory or governmental or other approval in connection with or in relation to the transactions contemplated herein and shall not be in any manner obliged to inquire or consider whether any regulatory or governmental approvals have been obtained.
- 7.13** The Escrow Bank shall not be obliged to supervise, control or perform any acts or responsibilities of the First Party or the Second Party or any other third party.
- 7.14** Any act to be done by the Escrow Bank shall be done only on a Business Day, during banking business hours, at _____, India and in the event that any day on which the Escrow Bank is required to do an act, under the terms of this Escrow Agreement, is a day on which banking business is not, or cannot for any reason be conducted, then the Escrow Bank shall do those acts on the next succeeding Business Day.
- 7.15** The Escrow Bank is under no duty to ensure that funds withdrawn from the Escrow Account are actually applied for the purpose for which they were withdrawn; neither the Escrow Bank nor any of its officers, employees or agents shall be required to make any distribution to the extent that the Escrow Amount is insufficient and shall incur no liability whatsoever from any non-distribution in such circumstances.
- 7.16** The Parties agree that the Escrow Bank shall not be, in any way, responsible or liable to the other Parties or any third person whosoever, for deduction or withholding of any taxes in relation to the transaction for which the Escrow Account has been established pursuant hereto and the contractor acknowledge and confirm that they shall be solely and absolutely liable for any and all deductions or withholdings and payments of taxes, levies, cesses and all other statutory dues in relation thereto. The Contractors confirm that they shall be, jointly and severally, liable for payment of all stamp duties payable in relation to this Agreement as well as any other instruments executed pursuant hereto

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and the Escrow Bank shall not be responsible or liable for the same, under any circumstances.

7.17 The Parties agree that Escrow Bank is acting in its capacity as an escrow agent only and shall not be deemed to act as an investment, legal or tax adviser to the Parties in the performance of its obligations under the Escrow Agreement.

7.18 Notwithstanding what is stated herein, in no event shall the Escrow Bank be liable for incidental, indirect, special, punitive or consequential damages caused to the Parties.

8. NOTICE OF BREACH

The Escrow Bank to the best of its knowledge undertakes to the Employer that it shall notify the Employer of any breach by the Contractor of any of the provisions of this Agreement.

9. INDEMNITY

The Contractor shall indemnify and keep indemnified the Parties for any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses, claims or disbursements of any kind or nature whatsoever which may be imposed upon, incurred by or asserted against the Parties in any way in connection with or arising out of the negotiation, preservation or enforcement of any rights under, or in carrying out its duties under this Agreement, other than those arising as a result of the Escrow Bank's gross negligence or willful default.

The Contractor shall indemnify and keep indemnified the Escrow Bank for any and all liabilities, obligations, losses, damages,

(a) acting upon any request sent by facsimile, if such facsimile was found to be sent in an unauthorized manner; or

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(b) not acting upon any request if such facsimile was sent but not received by the concerned person of the Account Bank.

The obligations of the Contractor under this Agreement to indemnify and keep indemnified the parties shall survive the satisfaction, discharge or other termination of this Agreement and the resignation or removal of the Escrow Bank under this Agreement.

10. CONFIDENTIALITY

No Party may except as permitted by this Escrow Agreement, make public or disclose to any person any information about this Escrow Agreement.

The Obligations under this clause shall survive the termination or expiry of this agreement.

11. ASSIGNMENT

Save as provided in Clause __ of the General Conditions of the Contract of the Employer, the Contractor shall not assign or transfer any part of their respective rights or obligations under this Agreement without the prior consent of the Employer, provided that this shall not prevent Employer from assigning or transferring its rights under this Agreement.

Nothing in this Agreement shall give to any other Person (other than the Parties hereto and their successors and permitted assigns) any benefit or any legal or equitable right or remedy under this Agreement.

This Agreement shall be binding on and shall inure to the benefit of the Parties hereto and the respective successors and permitted assigns.

12. NOTICES

All notices or other communications to be given under this agreement shall be made in writing to:

Employer	Contractor	Escrow Bank
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For the Employer:

(Name of the Employer)_____

Attention
Address

(Designation of Employee)_____

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Fax No.

Tel No.

For the Contractor:

(Name of the Contractor)_____

Attention
Address

(Designation of Employee)_____

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Fax No.

Tel No.

For the Escrow Bank:

(Name of the Escrow Bank)

Attention
Address

(Designation of Employee)_____

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Fax No.

Tel No.

Change of Address

Any Party may by notice change the addresses and / or addresses to which such notices and communications are to be delivered or mailed. Such change shall be effective when all the Parties have written notice of it.

14. WAIVER

No failure or delay on the part of the Employer in exercising any right, power or privilege hereunder or under Contract shall impair any such right, power or privilege or operate as a waiver the Employer would otherwise have. No notice to or demand on the Contractor in any case shall entitle the Contractor to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of the Employer to any other or further action in any circumstances without notice or demand.

15. SEVERABILITY

If any provision of this Agreement is held invalid, unenforceable or illegal, the offending provision shall be severed from this Agreement and the remaining parts of this Agreement shall remain in full force and effect.

16. AMENDMENTS

No amendment to this Agreement shall be binding unless in writing and signed by the Parties.

17. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with Indian laws.

18. DISPUTE RESOLUTION

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In the event of any difference or dispute arising out of the interpretation or application of the provisions of this Agreement, the Parties shall immediately consult each other with the view to expeditiously resolve such differences or disputes in a spirit of mutual understanding and co-operation. In case a dispute is not resolved amicably between the parties within a period of 30 days;

In case any of the party is not a Public Sector Enterprise or a Govt. Department:

The same shall be referred to arbitration of a Sole Arbitrator to be appointed by mutual consent from among the List of empanelled Arbitrators maintained by EMPLOYER. The Arbitration proceedings shall be conducted in accordance with Arbitration and Conciliation Act, 1996 and any amendment thereto. The Courts at Delhi, to the exclusion of all other courts in India, shall have exclusive jurisdiction to try any matter arising out of or connected with the said arbitration proceedings. The arbitration shall be in English and the venue of the arbitration proceedings shall be at New Delhi. Arbitration may commence prior to or after completion of the Contract.

In case the Parties are Public Sector Enterprise or a Government Department:

In case the parties are a Public Sector Enterprise or a Government Department, such disputes or difference shall be taken up by either party for resolution through Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD) as mentioned in DPE Office Memorandum No. 4(1)/2013- DPE(GM)/FTS-1835 dated 22.05.2018 issued by Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises, Government of India and its further clarifications, modifications and amendments, issued from time to time.

The Parties to the dispute will share equally the cost of arbitration as

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intimated by the Arbitrator.

19. JURISDICTION

The parties irrevocably submit to exclusive jurisdiction of the Courts of Delhi in all matters arising under this Agreement.

20. REGULATORY APPROVALS

The Contractor shall procure and shall thereafter maintain and comply with all regulatory approvals required for the establishment and operation of the Accounts and the making of any deposits, transfers or withdrawals and for the performance of its obligations under this Agreement.

21. NOTIFICATION OF BALANCES

Within ____ days following the end of each calendar month, the Escrow Bank shall notify the Employer of the balance in the Account and furnish a statement of the deposits into and payment out of the Accounts at the close of business of such calendar month.

22. COUNTERPARTS, ANNEXURES, SCHEDULES

This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

23. MISCELLENOUS

The Escrow Bank shall be responsible for maintaining a correct and complete record of all transactions, deposits, withdrawals or transfer of funds relating to the Accounts.

The Escrow Bank shall not make any transfer or withdrawal from the Escrow Account except as provided for in this Agreement.

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SCHEDULE – I

1. First Part Details:

2. Second Part Details;

3. Third Part Details;

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SCHEDULE – II

DETAILS OF ESCROW ACCOUNT

Particulars and Address of the Branch Office of the Escrow Bank for the Escrow Account	
IFSC Code	
Account Name and Account Number of Escrow Account	

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SCHEDULE – III

TERMS & CONDITIONS AND OPERATING PROCEDURES

Deposits into Escrow Account

- *All payments due under the Contract related to Erection/Civil/Structural works will be released by the Employer to the Contractor in the Escrow Account.
- *Additional advance Payments related to Ex works/Installation Services (including Civil Works) under the Contract will be released by the Employer to the Contractor in this Escrow Account as per the provisions agreed in the Contract.

***Strike-off whichever is not applicable. Second para is to be used only in case of Additional Advance related to Ex works/Installation Services.**

Release/ Withdrawal of Funds from the Escrow Account

- Based on the request from the Contractor, the Employer will approve the list of suppliers of goods and services, statutory authorities, establishment expenses etc. to whom payments could be made and the same shall be shared with the Escrow Bank from time to time for releasing the funds.

Note: Detailed Operating Procedure in this schedule, shall be finalised between Employer, Contractor & Escrow Bank at the time of signing of this Agreement.

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IN WITNESS WHEREOF the Contractor has caused its Common Seal to be affixed hereto on the date first above written, the Employer, and the Escrow Bank have caused the same and the said counterparts to be executed by the hand of an authorized official.

SIGNED AND DELIVERED BY

..... **(Name of Employer)**, the within named **EMPLOYER**, by the hand of _____ authorized representative of the Employer, who has been authorized to execute this Agreement.

THE COMMON SEAL OF

M/s _____

_____ the within named **CONTRACTOR**, has pursuant to the Resolutions of its Board of Directors passed in that behalf on _____

hereunto been affixed in the presence of MD and Company Secretary who has signed these presents in token thereof

SIGNED AND DELIVERED BY

_____ ,

Employer	Contractor	Escrow Bank

the within named **ESCROW BANK**,
by the hand of

.....

Its Authorised Representative.

Employer	Contractor	Escrow Bank
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