



Berhampur Municipal Corporation

No.- _____/E-III/16/14

Dt. DD/MM/YY

Updated dates for the bid process for the proposal for appointment of Independent Engineer for SWM Project in Berhampur

Berhampur Municipal Corporation has initiated a SWM project to finance, construct, operate and maintain a landfill and processing facility for waste collection, transportation, disposal and treatment through PPP mode for which the Corporation has executed a concession agreement with UPL Environmental Engineers Limited.

BeMC now invites proposals from intending firms to participate in bidding process for appointment of independent Engineer for integrated SWM project.

The RFP includes the detail term and condition for qualification of bidders, bid submission and selection of bidder, as well as the draft concession agreement to enter in BeMC etc. All those interested in obtaining the RFP may download it from BeMC website (www.berhampur.gov.in)

The updated dates for the bid process are as follows:

Launch of the RFP – 2.6.14

Pre-Bid queries-27.6.14

Response to pre-bid queries-4.7.14

Bid due date-17.7.14

For further information contact:

Municipal Commissioner, Berhampur, Ganjam, Odisha, 760 001

Ph No. :0680 2250290

Email:ber_municipality@rediffmail.com

(Signature)

Berhampur Municipal Commissioner
Berhampur Municipal Corporation



Agreement

Providing Independent Engineering Consultancy Services

For

Integrated SWM Project in Berhampur, Odisha

Berhampur Municipal Corporation

Berhampur, Odisha

April 2014

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Agreement

(To be executed on appropriate stamp papers)

Independent Engineer for the Project - Integrated SWM Project in Berhampur, Odisha

Agreement No

This Agreement (hereinafter called the “**Agreement**”) is made on the ___ day of the [month] of 2012,

Between

1. **Berhampur Municipal Corporation**, established vide Housing and Urban Development Department Notification No. S.R.O No. 642/2008/dated 29 December 2008 and operating under Orissa Municipal Corporation Act of 2003 and having its offices at Berhampur Municipal Corporation, Berhampur- 760001, Odisha, Berhampur, Odisha, acting through the municipal commissioner (hereinafter called the “**Corporation**”);

And

2. M/s _____, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at _____ (hereinafter called the “**Independent Engineer**” or “**IE**” shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of the Other Part.

WHEREAS

- (A) The Corporation vide its Request for Proposal for providing consultancy services as Independent Engineer (hereinafter called the “**Consultancy**”) for independent monitoring of the progress of the Project of Integrated Solid Waste Management in the City of Berhampur;
- (B) the IE submitted its proposal for the aforesaid work, whereby the IE represented to the Corporation that it had the required professional skills, and in the said proposals the IE also agreed to provide the Services to the Corporation on the terms and conditions as set forth in the RFP and this Agreement; and
- (C) the Corporation, on acceptance of the aforesaid proposal of the IE, awarded the Consultancy to the IE 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) **“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;
- c) **“Confidential Information”** shall have the meaning set forth in Clause 3.3;
- d) **“Conflict of Interest”** shall have the meaning set forth in Clause 3.2 read with the provisions of RFP;
- e) **“Dispute”** shall have the meaning set forth in Clause 9.2.1;
- f) **“Effective Date”** means the date on which this Agreement comes into force and effect pursuant to Clause 2.1;
- g) **“Expatriate Personnel”** means such persons who at the time of being so hired had their domicile outside India;
- h) **“Government”** means the Government of India ;
- i) **“INR, Re. or Rs.”** means Indian Rupees;
- j) **“Member”**, in case the IE consists of a joint venture or consortium of more than one entity, means any of these entities, and **“Members”** means all of these entities;
- k) **“Party”** means the Corporation or the IE, as the case may be, and **Parties** means both of them;
- l) **“Personnel”** means persons hired by the IE as employees and assigned to the performance of the Services or any part thereof;
- m) **“Resident Personnel”** means such persons who at the time of being so hired had their domicile inside India;
- n) **“RFP”** means the Request for Proposal document in response to which the IE’s proposal for providing Services was accepted;
- o) **“Services”** means the work to be performed by the IE as an Independent Engineer pursuant to this Agreement, as described in the Terms of Reference (TOR) hereto;
- p) **“Third Party”** means any person or entity other than the Government, the Corporation or the IE.

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

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) RFP; 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 Corporation and the IE. The IE shall, subject to this Agreement, have complete charge of Personnel 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 Corporation and the IE shall be as set forth in the Agreement, in particular:

- a) the IE shall carry out the Services in accordance with the provisions of the Agreement; and
- b) the Corporation shall make payments to the IE 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 the courts at Odisha 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 tables 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 and shall:

- a) in the case of the IE, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the IE’s Representative set out below in Clause 1.9 or to such other person as the IE may from time to time designate by notice to the Corporation; p
- b) in the case of the Corporation, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the Corporation with a copy delivered to the Corporation’s Representative set out below in Clause 1.9 or to such other person as the Corporation may from time to time designate by notice to the IE; provided that if the IE does not have an office in Odisha 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.

1.8 Location

The Services shall be performed at the site of the Project .i.e. Berhampur in accordance with the provisions of RFP and at such locations as are incidental thereto, including the offices of the IE.

1.9 Authorized Representatives

1.9.1 Any action required or permitted to be taken, and any document required or permitted to be executed, under this Agreement by the Corporation or the IE, as the case may be, may be taken or executed by the officials specified in this Clause 1.9.

1.9.2 The Corporation may, from time to time, designate one of its officials as the Corporation’s Representative. Unless otherwise notified, the Corporation’s Representative shall be:

Chief Health Officer, Berhampur Municipal Corporation

Berhampur - 760 001

Phone: +916802250241

Email: ber_municipality@rediffmail.com;

1.9.3 The IE may designate one of its employees as IE’s Representative. Unless otherwise notified, the IE’s Representative shall be:

Tel: -----

Mobile: -----

Fax: -----

Email: -----

1.10 Taxes and duties

Unless otherwise specified in the Agreement, the IE shall pay all such taxes, duties, fees and other impositions as may be levied under the Applicable Laws and the Corporation 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 date of this Agreement (**the “Effective Date”**).

2.2 Commencement of Services

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

2.4 Expiration of Agreement

Unless terminated earlier pursuant to Clauses 2.3 or 2.9 hereof, this Agreement shall, unless extended by the Parties by mutual consent, expire upon the expiry of 60 (sixty) months from the Effective Date. Upon Termination, the Corporation shall make payments of all amounts due to the IE hereunder.

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 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 IE arising out of the provisions of the RFP 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 RFP 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 4.2.2 and 6.1.3 hereof, however, each Party shall give due consideration to any proposals for modification made by the other Party. Moreover, the Independent Engineer shall not replace more than 1 personnel mentioned in its proposal before commencement of the services and subsequently for the next 3 months. Also, no substitution of the team leader shall be allowed between the award and 3 months from the commencement of the services.

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 as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, earthquake, fire, explosion, storm, cyclone, 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 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.
- c) 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 fulfill any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement in so far 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 fulfill 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 minimize 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 Consultation

Not later than 30 (thirty) days after the IE 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 circumstances.

2.8 Suspension of Agreement

The Corporation may, by written notice of suspension to the IE, suspend all payments to the IE hereunder if the IE 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, and (ii) shall provide an opportunity to the IE to remedy such breach or failure within a period not exceeding 30 (thirty) days after receipt by the IE of such notice of suspension.

2.9 Termination of Agreement

2.9.1 By the Corporation

The Corporation may, by not less than 30 (thirty) days' written notice of termination to the IE, 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 IE fails to remedy any breach hereof or any failure in the performance of its obligations hereunder, as specified in a notice of suspension pursuant to Clause 2.8 hereinabove, within 30 (thirty) days of receipt of such notice of suspension or within such further period as the Corporation may have subsequently granted in writing;
- b) the IE 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;
- c) the IE fails to comply with any final decision reached as a result of arbitration proceedings pursuant to Section 9 hereof;
- d) the IE submits to the Corporation a statement which has a material effect on the rights, obligations or interests of the Corporation and which the IE knows to be false;
- e) any document, information, data or statement submitted by the IE in its Proposals, based on which the IE was considered eligible or successful, is found to be false, incorrect or misleading;

- f) as the result of Force Majeure, the IE is unable to perform a material portion of the Services for a period of not less than 60 (sixty) days; or
- g) the Corporation, in its sole discretion and for any reason whatsoever, decides to terminate this Agreement.
- h) In the event of dispute between IE and Concessionaire and upon complaint against functioning of IE and upon examination by the Corporation, the complaint is found to be with substantial merit.

2.9.2 By the IE

The IE may, by not less than 30 (thirty) days' written notice to the Corporation, 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 Corporation fails to pay any money due to the IE pursuant to this Agreement and not subject to dispute pursuant to Section 9 hereof within 60 (sixty) days after receiving written notice from the IE that such payment is overdue;
- b) the Corporation is in material breach of its obligations pursuant to this Agreement and has not remedied the same within 60 (sixty) days (or such longer period as the IE may have subsequently granted in writing) following the receipt by the Corporation of the IE's notice specifying such breach;
- c) as the result of Force Majeure, the IE is unable to perform a material portion of the Services for a period of not less than 60 (sixty) days; or
- d) the Corporation fails to comply with any final decision reached as a result of arbitration pursuant to Section 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 IE'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 IE'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 IE 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. With respect to documents prepared by the IE and equipment and materials

furnished by the Corporation, the IE shall proceed as provided respectively by Clauses 3.9 or 3.10 hereof.

2.9.5 Payment upon Termination

- a. Upon termination of this Agreement pursuant to Clauses 2.9.1 or 2.9.2 hereof, the Corporation shall forfeit the Performance security of the Independent Engineer.
- b. The Corporation shall make the payments for Fees pursuant to Clause 6 hereof for Services satisfactorily performed prior to the date of termination after offsetting against these payments any amount that may be due from the IE to the Corporation.

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 IE

3.1 General

3.1.1 Standards of Performance

The IE 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 IE shall always act in the interest of the Project and legitimate interests of the corporation

3.1.2 Terms of Reference

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

3.1.3 Applicable Laws

The IE shall perform the Services in accordance with the Applicable Laws and shall take all practicable steps to ensure that the Personnel and agents of the IE comply with the Applicable Laws.

3.2 Conflict of Interest

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

3.2.2 IE and Affiliates not to be otherwise interested in the Project

The IE agrees that, during the term of this Agreement and after its termination, the IE or any Associate thereof and any entity affiliated with the IE, 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 Corporation in continuation of this Consultancy or to any subsequent consultancy/ advisory services provided to the Corporation in accordance with the rules of the Corporation. For the avoidance of doubt, an entity affiliated with the IE shall include a partner in the IE’s firm or a person who holds more than 5% (five per cent) of the subscribed and paid up share capital of the IE, as the case may be, and any Associate thereof.

3.2.3 Prohibition of conflicting activities

Neither the IE nor its Personnel 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 RFP as Conflict of Interest.

3.2.4 IE not to benefit from commissions discounts, etc.

The fees of the IE pursuant to Section 6 hereof shall constitute the IE's sole fees in connection with this Agreement or the Services and the IE 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 IE shall use its best efforts to ensure that the Personnel and agents, similarly shall not receive any such additional fees.

3.2.5 The IE 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 Corporation shall be entitled to terminate this Agreement forthwith by a communication in writing to the IE, without being liable in any manner whatsoever to the IE, if it determines that the IE has, directly or indirectly or through an agent, engaged in any Prohibited Practices in the Selection Process or before or after entering into of this Agreement. In such an event, the Corporation shall forfeit and appropriate the Performance Security, if any, as mutually agreed genuine pre-estimated compensation and damages payable to the Corporation towards, inter alia, the time, cost and effort of the Corporation, without prejudice to the Corporation's any other rights or remedy hereunder or in law.

3.2.6 Without prejudice to the rights of the Corporation under Clause 3.2.5 above and the other rights and remedies which the Corporation may have under this Agreement, if the IE is found by the Corporation to have directly or indirectly or through an agent, engaged or indulged in any Prohibited Practices, during the Selection Process or before or after the execution of this Agreement, the IE shall not be eligible to participate in any tender or RFP issued during a period of -5 (five) years from the date the IE is found by the Corporation 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 Selection Process (for removal of doubt, offering of employment or employing or engaging in any manner whatsoever, directly or indirectly, any official of the Corporation who is or has been associated in any manner, directly or indirectly with

Selection 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 Corporation, shall be deemed to constitute influencing the actions of a person connected with the Selection Process); or (ii) engaging in any manner whatsoever, whether during the Selection 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 Corporation 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 Selection 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 Selection Process or the exercise of its rights or performance of its obligations by the Corporation under this Agreement;
- d) **“undesirable practice”** means (i) establishing contact with any person connected with or employed or engaged by the Corporation with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Selection 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 Selection Process.

3.3 Confidentiality

The IE and its Personnel 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 Corporation to the IE and its Personnel; any information provided by or relating to the Corporation, its technology, technical processes, business affairs or finances or any information relating to the Corporation’s employees, officers or other professionals or suppliers, customers, or contractors of the Corporation; and any other information which the IE 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 Corporation.

Notwithstanding the aforesaid, the IE and its Personnel may disclose Confidential Information to the extent that such Confidential Information:

- (i) was in the public domain prior to its delivery to the IE and its Personnel or becomes a part of the public knowledge from a source other than the IE and its Personnel;

- (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 IE and its Personnel shall give the Corporation, 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 IE or its Personnel, as is reasonable under the circumstances; provided, however, that the IE or its Personnel, 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.

3.4 Liability of the IE

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

3.4.2 IE's liability towards the Corporation

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

3.4.3 The Parties hereto agree that in case of negligence or willful misconduct on the part of the IE or on the part of any person or firm acting on behalf of the IE in carrying out the Services, the IE, with respect to damage caused to the Corporation's property, shall not be liable to the Corporation:

- (i) for any indirect or consequential loss or damage; and
- (ii) for any direct loss or damage that exceeds (a) (12 months*5 years) times the monthly quoted fee by the Independent engineer set forth in Clause 6.1.1 of this Agreement, or (b) the proceeds the IE may be entitled to receive from any insurance maintained by the IE to cover such a liability in accordance with Clause 3.5.1, whichever of (a) or (b) is higher.

3.4.4 This limitation of liability specified in Clause 3.4.3 shall not affect the IE's liability, if any, for damage to Third Parties caused by the IE or any person or firm acting on behalf of the IE in carrying out the Services.

3.5 Insurance to be taken out by the IE

- a) The IE shall, for the duration of this Agreement, take out and maintain, , at own cost, but on terms and conditions approved by the Corporation, insurance against the risks, and for the coverage, as specified in the Agreement and in accordance with good industry practice.

- b) Within 15 (fifteen) days of receiving any insurance policy certificate in respect of insurances required to be obtained and maintained under this clause, the IE shall furnish to the Corporation, 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.
- c) If the IE fails to effect and keep in force the aforesaid insurances for which it is responsible pursuant hereto, the Corporation shall, apart from having other recourse available under this Agreement, have the option, without prejudice to the obligations of the IE, to take out the aforesaid insurance, to keep in force any such insurances, and pay such premium and recover the costs thereof from the IE, and the IE shall be liable to pay such amounts on demand by the Corporation.
- d) Except in case of Third Party liabilities, the insurance policies so procured shall mention the Corporation as the beneficiary of the IE and the IE shall procure an undertaking from the insurance company to this effect; provided that in the event the IE 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 Corporation as the sole beneficiary of the IE or require an undertaking to that effect.

3.5.1 The Parties agree that the risks and coverage shall include but not be limited to the following:

- a) Third Party liability insurance as required under Applicable Laws, with a minimum coverage of (2*12 months*5 years) times the monthly quoted fee by the Independent engineer;
- b) employer's liability and workers' compensation insurance in respect of the Personnel of the IE in accordance with Applicable Laws; and
- c) Professional liability insurance for an amount no less than 60 times the monthly quoted fee.

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 Clause **6.1.1** of the Agreement.

3.6 Accounting, inspection and auditing

The IE 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 IE's costs and charges); and
- b) Permit the Corporation 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 Corporation.

3.7 IE's actions requiring the Corporation's prior approval

The IE shall obtain the Corporation'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 the agreement.
- b) any other action that is specified in this Agreement.

3.8 Reporting obligations

The IE shall submit to the Corporation 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 IE to be property of the Corporation

3.9.1 All plans, drawings, specifications, designs, reports and other documents (collectively referred to as "**Consultancy Documents**") prepared by the IE (or by any Third Party) in performing the Services shall become and remain the property of the Corporation, and all intellectual property rights in such Consultancy Documents shall vest with the Corporation. Any Consultancy Document, of which the ownership or the intellectual property rights do not vest with the Corporation under law, shall automatically stand assigned to the Corporation as and when such Consultancy Document is created and the IE agrees to execute all papers and to perform such other acts as the Corporation may deem necessary to secure its rights herein assigned by the IE.

3.9.2 The IE shall, not later than termination or expiration of this Agreement, deliver all Consultancy Documents to the Corporation, together with a detailed inventory thereof. The IE may retain a copy of such Consultancy Documents. The IE or a Third Party shall not use these Consultancy Documents for purposes unrelated to this Agreement without the prior written approval of the Corporation.

3.9.3 The IE shall hold the Corporation 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 unauthorized use of such Consultancy Documents, or due to any breach or failure on part of the IE or a Third Party to perform any of its duties or obligations in relation to securing the aforementioned rights of the Corporation.

3.9.4 The IE shall have no objection to third-party audit of the Consultancy Documents prepared and submitted by the IE and construction activities related to this assignment. The IE shall facilitate the execution of such third-party audit by provision of relevant data as required. The cost of such third-party audit shall be borne by the Corporation.

3.10 Equipment and materials furnished by the Corporation

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

3.11 Providing access to Project Office and Personnel

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

3.12 Accuracy of Documents

The IE 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 Corporation 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 IE or arises out of its failure to conform to good industry practice. The IE shall also be responsible for promptly correcting, at its own cost and risk, the drawings including any re-survey / investigations.

4. IE’S PERSONNEL

4.1 General

The IE 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 IE’s Personnel are attached as per the proposal submitted by the IE. The fees are specified in Annex-2 of this Agreement.

4.2.2 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 Annexes of the Agreement may be increased by agreement in writing between the Corporation and the IE, provided that any such increase shall not, except as otherwise agreed, cause payments under this Agreement to exceed the (12 months*5 years) times the monthly quoted fee by the Independent engineer set forth in Clause 6.1.1.

4.2.3 The Independent Engineer should ensure that the key personnel spend at least a minimum stipulated days at the project site:

Key personnel	Phase	Period of Deployment
Team Leader	Construction and operation	10 days per quarter
Environmental Engineer	Construction and operation	5 days per month
Civil Engineer	Construction Phase	5 days per month
	Operation Phase	Need basis

4.3 Approval of Personnel

4.3.1 The Professional Personnel listed in the proposal of the IE are hereby approved by the Corporation. No other Professional Personnel shall be engaged without prior approval of the Corporation.

4.3.2 If the IE hereafter proposes to engage any person as Professional Personnel, it shall submit to the Corporation its proposal along with a CV of such person in the form provided at Appendix-I (Form-12) of the RFP. The Corporation may approve or reject such proposal within 14 (fourteen) days of receipt thereof. In case the proposal is rejected, the IE may propose an alternative person for the Corporation’s consideration. In the event the Corporation 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 Corporation.

4.4 Substitution of Key Personnel

The Corporation expects all the Key Personnel specified in the Proposal to be available during implementation of the Agreement. The Corporation will not consider any substitution of Key Personnel except under compelling circumstances beyond the control of the IE and the concerned Key Personnel. Such substitution shall be limited to not more than two Key Personnel subject to equally or better qualified and experienced personnel being provided to the satisfaction of the Corporation. In case of absence of one Key Personnel during the course of the assignment due to substitution, there will be a reduction of fees equal to 20% (twenty per cent) of the total monthly fees to be payable to the IE for that particular month and every subsequent month till the time a suitable replacement is made.. In case of absence due to second substitution, such reduction shall be equal to 50% (fifty per cent) of the total monthly fees specified.

4.5 Working hours, overtime, leave, etc.

The Personnel shall not be entitled to be paid for overtime nor to take paid sick leave or vacation leave except as specified in the Agreement, and the IE's fees shall be deemed to cover these items. Any taking of leave by any Personnel shall be subject to the prior approval of the Corporation, and the IE shall ensure that any absence on leave will not delay the progress and quality of the Services.

4.6 Resident Team Leader and Project Manager

The person designated as the Team Leader of the IE's Personnel shall be responsible for the coordinated, timely and efficient functioning of the Personnel. In addition, the IE shall designate a suitable person as Project Manager (**the "Project Manager"**) who shall be responsible for day to day performance of the Services. The Civil Engineer shall be the project manager during the construction phase, while the Team leader will take over the role of the Project Manager during the operation phase.

5. OBLIGATIONS OF THE CORPORATION

5.1 Assistance in clearances etc.

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

- a) provide the IE and its Personnel with work permits and such other documents as may be necessary to enable the IE and its 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 Corporation warrants that the IE 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 IE 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 IE as a result thereof pursuant to Clause 6.1.3.

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 and expenses incurred by the IE in performing the Services, by an amount exceeding 2% (two per cent) of the (12 months*5 years) times the monthly quoted fee by the Independent engineer specified in Clause 6.1.1, then the fee otherwise payable to the IE under this Agreement shall be increased or decreased accordingly by agreement between the Parties hereto, and corresponding adjustments shall be made to the aforesaid (12 months*5 years) times the monthly quoted fee by the Independent engineer.

5.4 Payment

In consideration of the Services performed by the IE under this Agreement, the Corporation shall make to the IE such payments and in such manner as is provided in Clause 6 of this Agreement.

6. PAYMENT TO THE IE

6.1 Cost estimates and

6.1.1 Except as may be otherwise agreed under Clause 2.6 and subject to Clause 6.1.3, the payments under this Agreement shall not exceed the fees quoted by the Independent Engineer and escalated as per the provisions as per this agreement.

6.1.2 The monthly fee shall be escalated by a flat escalation of 5% p.a. for every year of service. Detailed calculation can be found in Annexure-2.

6.1.3 Notwithstanding anything to the contrary contained in Clause **Error! Reference source not found.** and Clause 6.1.1, if pursuant to the provisions of Clauses 2.6 and 2.7, the Parties agree that additional payments shall be made to the IE in order to cover any additional expenditures not envisaged in the fee mentioned in Annexure-2, the monthly quoted fee by the Independent engineer set forth in Clause 6.1.1 above shall be increased by the amount or amounts, as the case may be, of any such additional payments.

6.2 Currency of payment

All payments shall be made in Indian Rupees. The IE shall be free to convert Rupees into any foreign currency as per Applicable Laws.

6.3 Mode of billing and payment

Billing and payments in respect of the Services shall be made as follows:-

- a) The IE shall be paid for its services as per the Payment Schedule at Annex-2 of this Agreement, subject to the IE fulfilling the following conditions:
 - (i) No payment shall be due for the next stage till the IE completes, to the satisfaction of the Corporation, the work pertaining to the preceding stage.
 - (ii) The Corporation shall pay to the IE, only the undisputed amount.
- b) The Corporation shall cause the payment due to the IE to be made within 30 (thirty) days after the receipt by the Corporation of duly completed bills with necessary particulars (**the "Due Date"**). Interest at the rate of 10% (ten per cent) per annum shall become payable as from the Due Date on any amount due by, but not paid on or before, such Due Date. Any amount which the Corporation has paid or caused to be paid in excess of the amounts actually payable in accordance with the provisions of this Agreement shall be deducted by the Corporation from the next payment due to the IE.
- c) The final payment under this Clause shall be made only after the final report at the end of the 5 years and a final statement, identified as such, shall have been submitted by the IE and approved as satisfactory by the Corporation. The Services shall be deemed completed and finally accepted by the Corporation and the final deliverable shall be deemed approved by the Corporation as satisfactory upon expiry of 90 (ninety) days after receipt of the final deliverable by the Corporation unless the Corporation, within

such 90 (ninety) day period, gives written notice to the IE specifying in detail, the deficiencies in the Services. The IE shall thereupon promptly make any necessary corrections and/or additions, and upon completion of such corrections or additions, the foregoing process shall be repeated. The Corporation shall make the final payment upon acceptance or deemed acceptance of the final deliverable by the Corporation.

- d) Any amount which the Corporation has paid or caused to be paid in excess of the amounts actually payable in accordance with the provisions of this Agreement shall be reimbursed by the IE to the Corporation within 30 (thirty) days after receipt by the IE of notice thereof. Any such claim by the Corporation for reimbursement must be made within 1 (one) year after receipt by the Corporation of a final report and a final statement in accordance with Clause 6.3 (d). Any delay by the IE in reimbursement by the due date shall attract simple interest @ 10% (ten per cent) per annum.
- e) All payments under this Agreement shall be made to the account of the IE as may be notified to the Corporation by the IE.

7. LIQUIDATED DAMAGES AND PENALTIES

7.1 Performance Security

7.1.1 The Performance Security will be provided by the IE to the Corporation as on Date of this Agreement.

7.1.2 The Corporation shall have the right to invoke and appropriate the proceeds of the Performance Security, in whole or in part, without notice to the IE in the event of breach of this Agreement or for recovery of liquidated damages specified in this Clause 7.2. If any amount is recovered through an appropriation from the Performance Security as per the provisions of this agreement then the same shall be replenished by the IE within 5 (five) days failing which the balance amount of the Performance Security will be appropriated by the Corporation and the IE will need to provide the entire quantum of the Performance Security within 5 (five) working days, failure to do so shall lead to be Termination of this Agreement and the process mentioned in Clause 2.9 will apply.

7.2 Liquidated Damages

7.2.1 Liquidated Damages for error/variation

In case any error or variation is detected in the reports submitted by the IE and such error or variation is the result of negligence or lack of due diligence on the part of the IE, the consequential damages thereof shall be quantified by the Corporation in a reasonable manner and recovered from the Corporation by way of deemed liquidated damages, subject to a maximum of 50% (fifty per cent) of the monthly quoted fee. In case such penalty is levied more than 2 (two) times in a span of 12 consecutive months and more than 4 (four) times during the tenure of the IE Agreement, then the same shall lead to Termination of the Agreement as per process laid down in Clause 2.9 and encashment of the Performance Security.

7.2.2 Liquidated Damages for delay

In case of delay in completion of Services, liquidated damages not exceeding an amount equal to 2% (two per cent) of the Monthly Fee per day, subject to a maximum of 20% (twenty per cent) of the Monthly Fee will be imposed and shall be recovered by appropriation from the Performance Security or otherwise. However, in case of delay due to reasons beyond the control of the IE, suitable extension of time shall be granted.

7.2.3 Encashment and appropriation of Performance Security

The Corporation shall have the right to invoke and appropriate the proceeds of the Performance Security, in whole or in part, without notice to the IE in the event of breach of this Agreement or for recovery of liquidated damages specified in this Clause 7.2.

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 IE 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 Corporation, such as poor quality of audits, surveys and tests, inadequate assessment of reports and the tipping fee statement submitted by the Concessionaire and failure to deploy personnel as required by the contract, other penal action including debarring for a specified period may also be initiated as per policy of the Corporation.

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 realization of the objectives of this Agreement.

8.2 Operation of the Agreement

The Parties recognize 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 Section 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 The Municipal Commissioner, Berhampur Municipal Corporation, and the Chairman of the Board of Directors of the IE 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 Berhampur 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 Section 9 shall be final and binding on the Parties as from the date it is made, and the IE and the Corporation agree and undertake to carry out such Award without delay.

9.4.4 The IE and the Corporation agree that an Award may be enforced against the IE and/or the Corporation, 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.

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

IE: Corporation

(Signature)

(Signature) (Name)

(Name) (Designation)

(Designation) (Address) (Address) (Fax No.) (Fax No.)

In the presence of:

1.

2.

Annex -1 – Terms of Reference

1. Scope

- 1.1 These Terms of Reference for the IE (the "TOR") are, being specified pursuant to the Concession Agreement dated 30th August 2013 (the "Agreement"), which has been entered into between the Berhampur Municipal Corporation and UPL Environmental Engineers Limited (as representative of a consortium comprising UPL Environmental Engineers Limited and RAM Engineering and Construction Company) (the "Concessionaire") for Development of Integrated SWM project at Berhampur, Odisha (the "Project"), and a copy of which is annexed hereto and marked as Annex-A to form part of this TOR.
- 1.2 This TOR shall apply to construction, operation and maintenance of the Project. Whereas the TOR details out the scope of the IE, it is hereby clarified that the Concession Agreement shall govern the scope of the IE. In the event of any deviation in the scope of the IE in the TOR and the Concession Agreement, the scope of the IE as per the Concession Agreement shall be considered.

2. Definitions and interpretation

- 2.1 The words and expressions beginning with or in capital letters used in this TOR and not defined herein but defined in the Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Agreement.
- 2.2 References to Articles, Clauses and Schedules in this TOR shall, except where the context otherwise requires, be deemed to be references to the Articles, Clauses and Schedules of the Agreement, and references to Paragraphs shall be deemed to be references to Paragraphs of this TOR.
- 2.3 The rules of interpretation stated in Clauses 1.1 and 1.2 of the Concession Agreement shall apply, mutatis mutandis, to this TOR.

3. Role and functions of the IE

- 3.1 The role and functions of the IE shall include the following:
- (a) review and approval prior to the Commencement Date of the following documents submitted by the Concessionaire:
- i. Project drawings;
 - ii. completion schedule;
 - iii. environmental and social management plan (ESMP) ;
 - iv. project drawings, supporting data and other documents like technical specifications, manuals, standards of equipment;

- v. O&M plan; and
 - vi. map showing suggested locations of the Secondary Collection Points;
- (b) review, inspection and monitoring of the Landfill and Processing Facility Construction Works;
 - (c) conduct of tests on the completion of the Landfill and Processing Facility Construction Works and issuance of a Completion Certificate;
 - (d) review, inspection and monitoring of the O&M activities;
 - (e) review, inspect and monitor the environmental, health and safety performance of the project through the project's lifecycle as per the ESMP;
 - (f) monitor adherence to Environmental and social impact assessment (ESIA) for both the Old Site and the New Site and ESMP;
 - (g) undertaking all other duties and functions in accordance with the Agreement.
- 3.2 The IE shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.
- 3.3 The Independent Engineer shall ensure that the Concessionaire fulfills all its obligations in accordance with this Agreement and Good Industry Practice.

4. Development Period

- 4.1 Prior to the Commencement Date, the Independent Engineer shall undertake a detailed review of the drawings submitted by the Concessionaire along with supporting data. The Independent Engineer shall complete such review and send its comments/observations to the Concessionaire within fifteen (15) days of receipt of such drawings. In particular, such comments shall specify the conformity or otherwise of such drawings with the specifications and standards described in the Schedules. The Independent Engineer shall review any modified drawings or supporting documents sent by the Concessionaire and furnish its comments within seven (7) days of receiving such drawings or documents.
- 4.2 The Independent Engineer shall undertake a detailed review of the construction milestones defined and submitted by the Concessionaire and send its comments/observations to the Concessionaire within fifteen (15) days of receipt.

5. Construction Period

- 5.1 The Independent Engineer shall review the monthly progress report furnished by the Concessionaire and send its comments to the Contracting Authority and the Concessionaire within seven (7) days of receipt.
- 5.2 The Independent Engineer shall inspect the Landfill and the Processing Facility once every month, preferably after receipt of the monthly progress report from the Concessionaire, but before the twentieth (20th) day of each month in any case, and make out a report of such inspection setting forth an overview of the status, progress, quality and safety of the construction, including the work methodology adopted, the materials used and their sources,

and conformity of the construction works with the Agreement and the specifications and standards.

- 5.3 The Independent Engineer may inspect the Landfill and the Processing Facility more than once in a month if any lapses, defects or deficiencies require such inspections.
- 5.4 For determining that the construction conforms to construction requirements, the Independent Engineer shall require the Concessionaire to carry out, or cause to be carried out, tests on a sample basis, to be specified by the Independent Engineer in accordance with Good Industry Practice for quality assurance.
- 5.5 In the event the Concessionaire fails to achieve any of the Project milestones, the Independent Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Independent Engineer determines that completion of the Landfill and Process Facility Construction Works is not feasible within the time specified in the Agreement, it shall require the Concessionaire to indicate within fifteen (15) days the steps proposed to be taken to expedite the progress, and the period within which the construction would be completed. Upon receipt of a report from the Concessionaire, the Independent Engineer shall review the same and send its comments to the Contracting Authority and the Concessionaire forthwith.

6. Commissioning of the Landfill and the Processing Facility

- 6.1 The Independent Engineer shall inspect the Landfill and the Processing Facility to see if they satisfy the requirements of the Agreement. If the Landfill and the Processing Facility meet the requirements of the Agreement, the Independent Engineer shall issue a Completion Certificate within five (5) Business Days following the inspection date. If the Landfill and the Processing Facility do not meet the requirements of this Agreement, the Independent Engineer shall notify its refusal to issue a Completion Certificate within five (5) Business Days following the inspection date. This refusal shall include a list of defaults that should be remedied by the Concessionaire. The Independent Engineer shall re-inspect the Landfill and the Processing Facility later following the same process.
- 6.2 The Completion Certificate shall be deemed issued if (i) the Independent Engineer does not attend directly or through a representative the inspection despite the notice from the Concessionaire; or (ii) the Independent Engineer does not notify the Completion Certificate or its refusal within five (5) Business Days following the said inspection.

7. Operation Period

- 7.1 The Independent Engineer shall review the monthly report furnished by the Concessionaire, and shall submit its comments on the same to the Contracting Authority and to the Concessionaire within seven (7) days of the receipt of the report.
- 7.2 The Independent Engineer shall inspect the Landfill and the Processing Facility once a month and carry out tests as might be deemed necessary and furnish the observations of the inspection to the Concessionaire and to the Contracting Authority within seven (7) days of such inspection.

- 7.3 The Independent Engineer is authorized to conduct surprise inspections on the Landfill and the Processing Facility to ensure that they comply with the specifications, standards and Good Industry Practice. The Independent Engineer shall report the results of such inspections to the Contracting Authority within seven (7) days of such inspections.
- 7.4 The Independent Engineer is authorized to require the Concessionaire to carry out tests/ arrange to carry out such tests as it deems necessary and present the results to the Contracting Authority.
- 7.5 In case any deficiency in the operation and maintenance is observed by the Independent Engineer during the inspection or tests carried out, it shall report the same to the Contracting Authority.
- 7.6 The Independent Engineer shall audit and certify the weighbridges located at the Old Site and the New Site at least once a month and submit the results of such review to the Contracting Authority and the Concessionaire.
- 7.7 The Independent Engineer shall audit the MSW quantity supply data recorded at the entry to the Landfill and Processing Facility to ensure that the data reported by the Concessionaire for charging Tipping Fee is accurate and that the provisions of this Agreement are complied with. The Independent Engineer is authorized to conduct surprise checks and tests for this purpose.
- 7.8 The Independent Engineer shall certify the records issued by the Concessionaire and used for the Tipping Fee Statements.

8. Transfer

- 8.1 The Independent Engineer shall approve the training program delivered by the Concessionaire for the Contracting Authority's personnel to perform the Waste Collection, Transportation, Disposal and Treatment Services.
- 8.2 The Independent Engineer shall, no less than six (6) months prior to the Transfer Date, prepare and deliver to the Parties a report that will delineate repairs, replacements, and/or modifications and their estimated costs, if any, required to bring the Landfill, the Processing Facility and the Waste Collection Assets in compliance with the requirements of this Agreement.

9. Determination of costs and time

- 9.1 The IE shall determine the costs, and/or their reasonableness that are required to be determined by it under the Agreement.
- 9.2 The IE shall determine the period, or any extension thereof that is required to be determined by it under the Agreement.

10. Assistance in Dispute resolution

- 10.1 The Independent Engineer can act as a mediator in case of Dispute between the Concessionaire and Other Local Bodies regarding the supply of MSW to find an amicable settlement.
- 10.2 In case of Dispute between the Concessionaire and the Contracting Authority relating to the nature of the MSW collected by the Concessionaire and the nature and extent of processing of MSW carried out by the Concessionaire, the Independent Engineer shall be involved and his decision shall be final.
- 10.3 In the event of any disagreement between the Parties regarding the meaning, scope and nature of Good Industry Practice, as set forth in any provision of the Agreement, the IE shall specify such meaning, scope and nature by issuing a reasoned written statement relying on good industry practice and authentic literature.

11. Other duties and functions

The IE shall perform all other duties and functions specified in the Agreement.

12. Miscellaneous

- 12.1 The IE shall notify its programme of inspection to the Corporation and to the Concessionaire, who may, in their discretion, depute their respective representatives to be present during the inspection
- 12.2 A copy of all communications, comments, and instructions, Drawings or Documents sent by the IE to the Concessionaire pursuant to this TOR, and a copy of all the test results with comments of the IE thereon shall be furnished by the IE to the Corporation forthwith.
- 12.3 The IE shall obtain, and the Concessionaire shall furnish in two copies thereof, all communications and reports required to be submitted, under this Agreement, by the Concessionaire to the IE, whereupon the IE shall send one of the copies to the Corporation along with its comments thereon.
- 12.4 The IE shall retain at least one copy each of all Drawings and Documents received by it, including 'as-built' Drawings, and keep them in its safe custody.

Upon completion of its assignment hereunder, the IE shall duly classify and list all Drawings, Documents, results of tests and other relevant records, and hand them over to the Government or such other person as the Corporation may specify, and obtain written receipt thereof Two copies of the said document shall also be furnished in micro film form or in such other medium as may be acceptable to the Corporation.

13. Performance clause

- 13.1 IEs shall be expected to fully comply with all the provisions of the “Terms of Reference”, and shall be fully responsible for supervising the Designs, Construction and maintenance and operation of the facility takes place in accordance with the provisions of the Concession Agreement and other schedules. Any failure of the IE in notifying to the Corporation and the Concessionaire on non-compliance of the provisions of the Concession Agreement and other schedules by the Concessionaire, non-adherence to the provision of TOR and non- adherence to the time schedule prescribed under TOR shall amount to non- performance.
- 13.2 The IE shall appoint its authorized representative, who shall issue on behalf of the IE, the Provisional Completion Certification and Completion Certificate along with the Team Leader and shall carry out any such task as may be decided by the Corporation. The Completion Certificate shall be deemed issued if (i) the Independent Engineer does not attend directly or through a representative the inspection despite the notice from the Concessionaire; or (ii) the Independent Engineer does not notify the Completion Certificate or its refusal within five (5) Business Days following the said inspection. The Completion Certificate shall be deemed issued on the date of the inspection of the Landfill and the Processing Facility. The proposal submitted shall also include the name of the authorized representative along with the authorization letter and power of attorney.
- 14. Period of Service**
- 14.1 The services of the IE would be availed for a period of 5 years. The appointment period may be extended further on mutual agreement on the same terms and conditions at the discretion of the Corporation.

Annex -2- Payment

Milestone	Professional fee including out of pocket expenses and all taxes
On Submission of Monthly Inspection Report at the end of 1 st Month from the Commencement Date to be paid every month for the first year of services	-

The above payment shall get revised every 12 months based at a flat escalation of 5%.

For example - If the services started in October 2013, then the monthly fee shall be escalated from the year starting October 2014 and the fees shall be $(10000 \times 1.05) = 10,500/\text{month}$. This monthly fee shall apply till September 2014 and the same shall be further escalated by 5% every subsequent year till the completion of the contract period.

Annex -3- Bank Guarantee for Performance Security

To

Municipal Commissioner,
Berhampur Municipal Corporation
Berhampur - 760 001

In consideration of The Municipal Commissioner, acting on behalf of the Berhampur Municipal Corporation, (hereinafter referred as the "Corporation", which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators and assigns) having awarded to M/s, having its office at..... (Hereinafter referred as the "Independent Engineer" or "IE" which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns), vide the Corporation's Agreement no. dated valued at Rs. (Rupees.....), (hereinafter referred to as the "**Agreement**") a consultancy services for Appointment of Independent Engineer for Integrated SWM Project in Berhampur, Odisha by The Berhampur Municipal Corporation, and the Independent Engineer having agreed to furnish a Bank Guarantee amounting to Rs..... (Rupees) to the Corporation for performance of the said Agreement.

1. We, (hereinafter referred to as the "**Bank**") at the request of the IE do hereby undertake to pay to the Corporation an amount not exceeding Rs. (Rupees) against any loss or damage caused to or suffered or would be caused to or suffered by the Corporation by reason of any breach by the said Independent Engineer of any of the terms or conditions contained in the said Agreement.
2. We, (indicate the name of the Bank) do hereby undertake to pay the amounts due and payable under this Guarantee without any demur, merely on a demand from the Corporation stating that the amount/claimed is due by way of loss or damage caused to or would be caused to or suffered by the Corporation by reason of breach by the said Independent Engineer of any of the terms or conditions contained in the said Agreement or by reason of the Independent Engineer's failure to perform the said Agreement. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs. (Rupees).
3. We, (indicate the name of Bank) undertake to pay to the Corporation any money so demanded notwithstanding any dispute or disputes raised by the Independent Engineer in any suit or proceeding pending before any court or tribunal relating thereto, our liability under this present being absolute and unequivocal. The payment so made by us under this bond shall be a valid discharge of our liability for payment thereunder and the Independent Engineer shall have no claim against us for making such payment.
4. We, (indicate the name of Bank) further agree that the Guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said Agreement and that it shall continue to be enforceable till all the dues of the Corporation under or by virtue of the said Agreement have been fully paid and its claims satisfied

or discharged or till the Corporation certifies that the terms and conditions of the said Agreement have been fully and properly carried out by the said Independent Engineer and accordingly discharges this Guarantee. Unless a demand or claim under this Guarantee is made on us in writing on or before a period of one year from the date of this Guarantee, we shall be discharged from all liability under this Guarantee thereafter.

5. We, (indicate the name of Bank) further agree with the Corporation that the Corporation shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said Agreement or to extend time of performance by the said Independent Engineer from time to time or to postpone for any time or from time to time any of the powers exercisable by the Corporation against the said Independent Engineer and to forbear or enforce any of the terms and conditions relating to the said Agreement and we shall not be relieved from our liability by reason of any such variation, or extension being granted to the said Independent Engineer or for any forbearance, act or omission on the part of the Corporation or any indulgence by the Corporation to the said Independent Engineer or any such matter or thing whatsoever which under the law relating to sureties would, but for this provision, have the effect of so relieving us.
6. This Guarantee will not be discharged due to the change in the constitution of the Bank or the Independent Engineer(s).
7. We, (indicate the name of Bank) lastly undertake not to revoke this Guarantee during its currency except with the previous consent of the Corporation in writing.
8. For the avoidance of doubt, the Bank's liability under this Guarantee shall be restricted to Rs. *** (Rupees *****) only. The Bank shall be liable to pay the said amount or any part thereof only if the Corporation serves a written claim on the Bank in accordance with paragraph 2 hereof, on or before *** (indicate date falling 180 days after the period mentioned in clause 7.1 of this agreement).

Dated, the day of 20

For (Name of Bank)

(Signature, name and designation of the authorised signatory)

Seal of the Bank:

NOTES:

- (i) The Bank Guarantee should contain the name, designation and code number of the officer(s) signing the Guarantee.
- (ii) The address, telephone no. 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.