

# 1. Substitution Agreement

THIS SUBSTITUTION AGREEMENT is entered into on this the .....dayof..... 2021

AMONGST

1. The HRCSWMS (Haldwani Rudrapur Cluster Solid Waste Management Society) established under the \_\_\_\_\_ Act 1974, represented by its Secretary Haldwani Rudrapur Cluster Solid Waste Management Society and having its principal offices at [Nagar Nigam Haldwani Nainital Road, Haldwani -263229, Uttarakhand.] (hereinafter referred to as the "HRCSWMS" which expression shall unless repugnant to the context or meaning thereof include its administrators, successors and assigns);
2. .... LIMITED, a company incorporated under the provisions of the Companies Act, 1956/ 2013 and having its registered office at ....., (hereinafter referred to as the "Concessionaire" which expression shall unless repugnant to the context or meaning thereof include its successors and permitted assigns and substitutes);
3. name and particulars of Lenders' Representative and having its registered office at ....., acting for and on behalf of the Lenders as their duly authorised agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the "Lenders' Representative", which expression shall unless repugnant to the context or meaning thereof include its successors and substitutes);

WHEREAS:

- A. The HRCSWMS has entered into a Concession Agreement dated ..... with the Concessionaire (the "Concession Agreement") for the Project on design, build, finance, operate and transfer basis (DBFOT), and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.
- B. Lenders have agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.
- C. Lenders have requested the HRCSWMS to enter into this Substitution Agreement for securing their interests through assignment, transfer and substitution of the Concession to a Nominated Company in accordance with the provisions of this Agreement and the Concession Agreement.
- D. In order to enable implementation of the Project including its financing, construction, operation and maintenance, the HRCSWMS has agreed and undertaken to transfer and assign the Concession to a Nominated Company in accordance with the terms and conditions set forth in this Agreement and the Concession Agreement.

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

## Definitions and Interpretation

### Definitions

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

**“Agreement”** means this Substitution Agreement and any amendment thereto made in accordance with the provisions contained in this Agreement;

**“Financial Default”** means occurrence of any breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 3 (three) months;

**“Lenders’ Representative”** means the person referred to as the Lenders’ Representative in the foregoing Recitals;

**“Nominated Company”** means a company, incorporated under the provisions of the Companies Act, 1956/ 2013, selected by the Lenders’ Representative, on behalf of Lenders, and proposed to the HRCSWMS for assignment/transfer of the Concession as provided in this Agreement;

**“Notice of Financial Default”** shall have the meaning ascribed thereto in Sub-clause 18.3.2(a) of Clause 18.3.2; and

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

### Interpretation

- (a) References to Lenders’ Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders’ Representative, acting for and on behalf of Lenders.
- (b) References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.
- (c) The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.
- (d) The rules of interpretation stated in Clauses 0, 1.3 and 1.4 of the Concession Agreement shall apply, mutatis mutandis, to this Agreement.

## Assignment

### 18.2.1 Assignment of rights and title

The Concessionaire hereby agrees to assign the rights, title and interest in the Concession to, and in favour of, the Lenders' Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Lenders under the Financing Agreements.

## Substitution of the Concessionaire

### Rights of substitution

- (a) Pursuant to the rights, title and interest assigned under Clause 18.2.1, the Lenders' Representative shall be entitled to substitute the Concessionaire by a Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.
- (b) The HRCSWMS hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Nominated Company selected by the Lenders' Representative in accordance with this Agreement. (For the avoidance of doubt, the Lenders or the Lenders' Representative shall not be entitled to operate and maintain the Project as Concessionaire either individually or collectively).

### Substitution upon occurrence of Financial Default

- (a) Upon occurrence of a Financial Default, the Lenders' Representative may issue a notice to the Concessionaire (the "**Notice of Financial Default**") along with particulars thereof, and send a copy to the HRCSWMS for its information and record. A Notice of Financial Default under this Clause 18.3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purposes of this Agreement.
- (b) Upon issue of a Notice of Financial Default thereunder, the Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Agreements, substitute the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement.
- (c) At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the HRCSWMS to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project in accordance with the provisions of Article 27 of the Concession Agreement, and upon receipt of such notice, the HRCSWMS shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid

Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the HRCSWMS may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders' Representative and the Concessionaire, the HRCSWMS may extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days. For the avoidance of doubt, the HRCSWMS expressly agrees and undertakes to terminate the Concession Agreement forthwith, upon receipt of a written request from the Lenders' Representative at any time after 240 (two hundred and forty) days from the date of Suspension hereunder.

#### Substitution upon occurrence of Concessionaire Event of Default

- (a) Upon occurrence of a Concessionaire Event of Default, the HRCSWMS shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days' time to the Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.
- (b) In the event that the Lenders' Representative makes a representation to the HRCSWMS within the period of 15 (fifteen) days specified in Sub-clause (a) of Clause 18.3.3, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders' Representatives shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the HRCSWMS shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the HRCSWMS shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days.

#### Procedure for substitution

- (a) The HRCSWMS and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the HRCSWMS under Sub-clause 18.3.3(b) of Clause 18.3.3, as the case may be, the Lenders' Representative may, without prejudice to any of the other rights or remedies of the Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the takeover and transfer of the Project including the Concession to the Nominated Company upon such Nominated Company's assumption of the liabilities and obligations of the Concessionaire toward the

HRCSWMS under the Concession Agreement and towards the Lenders under the Financing Agreements.

- (b) To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfil the eligibility criteria that were laid down by the HRCSWMS for shortlisting the bidders for award of the Concession; provided that the Lenders' Representative may represent to the HRCSWMS that all or any of such criteria may be waived in the interest of the Project, and if the HRCSWMS determines that such waiver shall not have any material adverse effect on the Project, it may waive all or any of such eligibility criteria.
- (c) Upon selection of a Nominated Company, the Lenders' Representative shall request the HRCSWMS to:
  - (i) accede to transfer to the Nominated Company the right to construct, operate and maintain the Project in accordance with the provisions of the Concession Agreement;
  - (ii) endorse and transfer the Concession to the Nominated Company, on the same terms and conditions, for the residual Concession Period; and
  - (iii) enter into a Substitution Agreement with the Lenders' Representative and the Nominated Company on the same terms as are contained in this Agreement.
- (d) If the HRCSWMS has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 15 (fifteen) days from the date of proposal made by the Lenders' Representative, give a reasoned order after hearing the Lenders' Representative. If no such objection is raised by the HRCSWMS, the Nominated Company shall be deemed to have been accepted. The HRCSWMS thereupon shall transfer and endorse the Concession within 15 (fifteen) days of its acceptance/deemed acceptance of the Nominated Company; provided that in the event of such objection by the HRCSWMS, the Lenders' Representative may propose another Nominated Company whereupon the procedure set forth in this Clause 18.3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire.

#### Selection to be binding

The decision of the Lenders' Representative and the HRCSWMS in selection of the Nominated Company shall be final and binding on the Concessionaire. The Concessionaire irrevocably agrees and waives any right to challenge the actions of the Lenders' Representative or the Lenders or the HRCSWMS taken pursuant to this Agreement including the transfer/assignment of the Concession in favour of the Nominated Company. The

Concessionaire agrees and confirms that it shall not have any right to seek revaluation of assetsoftheProjectortheConcessionaire'sshares.ItisherebyacknowledgedbytheParties that the rights of the Lenders' Representative are irrevocable and shall not be contested in any proceedings before any court or HRCSWMS and the Concessionaire shall have no right or remedy to prevent, obstruct or restrain the HRCSWMS or the Lenders' Representative fromeffectingorcausingthetransferbysubstitutionandendorsementoftheConcessionas requested by the Lenders'Representative.

## **ProjectAgreements**

### **18.4.1 Substitution of Nominated Company in ProjectAgreements**

The Concessionaire shall ensure and procure that each Project Agreement contains provisions that entitle the Nominated Company to step into such Project Agreement, in its discretion, in place and substitution of the Concessionaire in the event of such Nominated Company's assumption of the liabilities and obligations of the Concessionaire under the Concession Agreement.

## **Termination of ConcessionAgreement**

### **Termination upon occurrence of FinancialDefault**

At any time after issue of a Notice of Financial Default, the Lenders' Representative may by a noticeinwritingrequiretheHRCSWMS toterminatetheConcessionAgreementforthwith, and upon receipt of such notice, the HRCSWMS shall undertake Termination under and in accordance with the provisions of Article 28 of the ConcessionAgreement.

### **Termination when no Nominated Company isselected**

In the event that no Nominated Company acceptable to the HRCSWMS is selected and recommended by the Lenders' Representative within the period of 180 (one hundred and eighty) days or any extension thereof as set forth in Sub-clause 18.3.3(b) of Clause 18.3.3, the HRCSWMS may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

### **Realisation of DebtDue**

The HRCSWMS and the Concessionaire hereby acknowledge and agree that, without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realisation of the Debt Due, the Lenders' Representative shall be entitled to make its claim in accordance with the provisions of the Concession Agreement.

## **Duration of the Agreement**

### Duration of the Agreement

This Agreement shall come into force from the date hereof and shall expire at the earliest to occur of the following events:

- (a) Termination of the Agreement; or
- (b) no sum remains to be advanced, or is outstanding to the Lenders, under the Financing Agreements.

## **Indemnity**

### General indemnity

- (a) The Concessionaire will indemnify, defend and hold the Participating ULBs and the Lenders' Representative harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense of whatever kind and nature arising out of any breach by the Concessionaire of any of its obligations under this Agreement or on account of failure of the Concessionaire to comply with Applicable Laws and Applicable Permits.
- (b) The Participating ULBs will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Participating ULBs to fulfil any of its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement or this Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Participating ULBs, its officers, servants and agents.
- (c) The Lenders' Representative will indemnify, defend and hold the Concessionaire harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Lenders' Representative to fulfil its obligations under this Agreement, materially and adversely affecting the performance of the Concessionaire's obligations under the Concession Agreement, other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lenders' Representative, its officers, servants and agents.

### Notice and contest of claims

In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under Clause 18.7.1 or in respect of which it is entitled to reimbursement (the "Indemnified Party"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "Indemnifying Party") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

### **DisputeResolution**

Disputeresolution

- (a) Anydispute,differenceorclaimarisingoutoforinconnectionwiththisAgreement which is not resolved amicably shall be decided by reference to arbitration to a Board of Arbitrators comprising one nominee each of the Participating ULBs, Concessionaire and the Lenders' Representative. Such arbitration shall be held in accordancewiththeRulesofArbitrationoftheInternationalCentreforAlternative DisputeResolution,NewDelhi(the"Rules")orsuchotherrulesasmaybemutually agreed by the Parties, and shall be subject to provisions of the Arbitration and Conciliation Act,1996.
- (b) The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be [Name of the Place] and the language of arbitration shall beEnglish.

### **MiscellaneousProvisions**

Governing law andjurisdiction

ThisAgreementshallbeconstruedandinterpretedinaccordancewithandgovernedbythe laws of India, and the Courts at [Nainital] shall have jurisdiction over all matters arising out of or relating to thisAgreement.

Waiver of sovereignimmunity

The Participating ULBs unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercialpurpose;



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

#### Priority of agreements

In the event of any conflict between the Concession Agreement and this Agreement, the provisions contained in the Concession Agreement shall prevail over this Agreement.

#### Alteration of terms

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly Authorized Representatives of the Parties.

#### Waiver

- (a) Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:
  - (i) shall not operate or be construed as a waiver of any other or subsequent default thereof or of other provisions of or obligations under this Agreement;
  - (ii) shall not be effective unless it is in writing and executed by a duly Authorized Representative of the Party; and
  - (iii) shall not affect the validity or enforceability of this Agreement in any manner.
- (b) Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by a Party to another Party shall

be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

#### No third party beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

#### Survival

(a) Termination of this Agreement:

- (i) shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and
- (ii) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

(b) All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

#### Severability

If for any reason whatever any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 18.8 of this Agreement or otherwise.

#### Successors and assigns

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

#### Notices

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an

additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and e-mail address are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on any day, or on a day that is a public holiday, the notice shall be deemed to be received on the first working day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

#### Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

#### Authorized Representatives

Each of the Parties shall by notice in writing designate their respective Authorized Representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such Authorized Representative by similar notice.

#### Original Document

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

**IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.**

SIGNED SEALED AND DELIVERED

For and on behalf of  
HRCSWMSby:

(Signature)

(Name)

(Designation)

(Address)

(Fax No.)

(e-mail address)

SIGNED SEALED AND DELIVERED