

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

**Appendix-B**

SI. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
1	Agreement Format	Foot note 3: Refers to the single entity or the lead member of the consortium/joint venture, which is the selected bidder under the RFP.	Footnote 3: Refers to the single entity or the consortium/ joint venture, which is the selected bidder under the RFP.
2	New Clause “1.2.1(y)”	--	(y) Asian Development Bank (ADB) is the financing institution which has provided funds toward a part of the cost of the Project. Payments by the ADB will be made only at the request of the Recipient (Ministry of Road Transport and Highways, Government of India) of the funds and upon approval by the ADB in accordance with the terms and conditions of the financing agreement (Loan Agreement) and will be subject in all respects to the terms and conditions of that Loan Agreement. No party other than the Recipient shall derive any rights from the Loan Agreement or have claim to any funds.
3.	Clause 1.4.1 (b)		<b>Please insert the following as additional sub-paragraph for clarity.</b> “Provided that Addendum to MoRTH EPC (Engineering Procurement and Construction) Agreement (the Addendum) as attached herewith shall be an integral part of the Agreement and the concerned provisions of the Agreement shall stand modified /amended/added in terms of the Addendum. In the event of any conflict between the Agreement and the Addendum, the Addendum shall prevail over the Agreement.”
4.	Clause 1.5		Please replace all references to “Consortium” with “Joint Venture”.
5	Clause 3.1.4	3.1.4 The Contractor shall remedy any and all loss or damage to the Project Highway from the Appointed Date until the end of the Construction Period at the Contractor's cost, save and except to the extent that any such loss or damage	3.1.4 The Contractor shall remedy any and all loss or damage to the Project Highway from the Appointed Date until the end of the Construction Period at the Contractor's cost, save and except to the extent that any such loss or damage

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		shall have arisen from any default or neglect of the Authority.	shall have arisen from any default or neglect of the Authority or from the effect of Force Majeure events as specified in Clause 21.6
6	Clause 3.1.6	The Contractor shall remedy any and all loss or damage to the Project Highway during the Maintenance Period at the Contractor's cost, including those stated in Clause 14.1.2, save and except to the extent that any such loss or damage shall have arisen on account of any default or neglect of the Authority or on account of a Force Majeure Event.	The Contractor shall remedy any and all loss or damage to the Project Highway during the Maintenance Period at the Contractor's cost, including those stated in Clause 14.1.2, save and except to the extent that any such loss or damage shall have arisen on account of any default or neglect of the Authority or on account of a Force Majeure Event as specified in Clause 21.6.
7	New Clause “3.1.9”	--	<p><b>3.1.9 Inspections and Audit by the ADB</b></p> <p>The Contractor shall permit, and shall cause its Subcontractors and sub-consultants to permit, the ADB and/or persons appointed by the ADB to inspect the Site and all accounts and records relating to the performance of the Contract and the submission of the bid, and to have such accounts and records audited by auditors appointed by the ADB if requested by the ADB. The Contractor's and its Subcontractors' and sub-consultants' attention is drawn to Clause 3.9 [Corrupt or Fraudulent Practices] which provides, inter alia, that acts intended to materially impede the exercise of the Bank's inspection and audit rights provided for under Clause 11.6.1 constitute a prohibited practice subject to contract termination (as well as to a determination of ineligibility pursuant to the ADB's prevailing sanctions procedures).</p>
8	New Clause “3.9”	Clause does not exist	<p>3.9 Corrupt or Fraudulent Practices</p> <p>ADB's Anticorruption Policy requires Borrowers (including beneficiaries of ADB-financed activity), as well as Contractors, Subcontractors, manufacturers, and Consultants</p>

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			<p>under ADB-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, ADB</p> <p>(a) defines, for the purposes of this provision, the terms set forth below as follows:</p> <p>(i) “corrupt practice” means the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party;</p> <p>(ii) “fraudulent practice” means any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation;</p> <p>(iii) “coercive practice” means impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;</p> <p>(iv) “collusive practice” means an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party;</p> <p>(v) “obstructive practice” means (a) deliberately destroying, falsifying, altering, or concealing of evidence material to an ADB investigation; (b) making false statements to investigators in order to materially impede an ADB investigation; (c) failing to comply with requests to provide information, documents, or records in connection with an Office of Anticorruption and Integrity (OAI) investigation; (d) threatening, harassing, or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or</p>

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			<p>from pursuing the investigation, or (e) materially impeding ADB's contractual rights of audit or access to information; and</p> <p>(vi) "integrity violation" is any act which violates ADB's Anticorruption Policy, including (i) to (v) above and the following: abuse, conflict of interest, violations of ADB sanctions, retaliation against whistleblowers or witnesses, and other violations of ADB's Anticorruption Policy, including failure to adhere to the highest ethical standard.</p> <p>(b) will reject a proposal for award if it determines that the Bidder recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive, or obstructive practices or other integrity violations in competing for the Contract;</p> <p>(c) will cancel the portion of the financing allocated to a contract if it determines at any time that representatives of the borrower or of a beneficiary of ADB-financing engaged in corrupt, fraudulent, collusive, coercive, or obstructive practices or other integrity violations during the procurement or the execution of that contract, without the borrower having taken timely and appropriate action satisfactory to ADB to remedy the situation; and</p> <p>will impose remedial actions on a firm or an individual, at any time, in accordance with ADB's Anticorruption Policy and Integrity Principles and Guidelines (both as amended from time to time), including declaring ineligible, either indefinitely or for a stated period of time, to participate<sup>1</sup> in ADB-financed,</p>

<sup>1</sup> Whether as a Contractor, Nominated Subcontractor, Consultant, Manufacturer or Supplier, or Service Provider; or in any other capacity (different names are used depending on the particular Bidding Document). A Nominated Subcontractor is one which either has been (i) included by the Bidder in its prequalification application or bid because it brings specific and critical experience and know-how that are accounted for in the evaluation of the bidder's prequalification application or the bid, or (ii) appointed by the Employer.

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			-administered, or -supported activities or to benefit from an ADB-financed, -administered, or -supported contract, financially or otherwise, if it at any time determines that the firm or individual has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive, or obstructive practices or other integrity violations.
9	New Clause 3.10	Clause does not exist	<p>The Contractor shall comply with all applicable national, provincial and local environmental laws regulations. The Contractor shall (a) establish an operational system for managing environmental impacts (b) carry out all of the monitoring and mitigation measures set forth in the Environmental Impact Assessment and Prepare updated Environmental Management Plan (EMP) including the action plan and checklist. The Contractor shall allocate the budget required to ensure that such measures are carried out and submit quarterly/semi annual reports on carrying out of such measures to the Authority.</p> <p>More particularly, the Contractor shall comply with (i) the measures and requirements set forth in the environmental management plan attached here to as Appendix A11 of Volume III ; and (ii) any corrective or preventive actions set out in safeguards monitoring reports that the Authority will prepare from time to time to monitor implementation of the Environmental Management Plan.</p> <p>The Contractor shall allocate a budget for compliance with these measures, requirements and actions.</p>
10	New Cl 3.11	Clause does not exist	<p>The Contractor shall provide the Engineer with a written notice of any unanticipated environmental or resettlement or indigenous peoples risks or impacts that arise during construction, implementation or operation of the Works, which were not considered in the Environmental Impact Assessment, the environmental management plan, the resettlement plan or the indigenous peoples plan.</p>

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
11	New Cl 3.12	Clause does not exist	The Contractor shall not make employment decisions based upon personal characteristics unrelated to job requirements. The Contractor shall base the employment relationship upon equal opportunity and fair treatment and shall not discriminate with respect to aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment or retirement and discipline. The contractor shall (a) provide equal wages and benefits to men and women for equal value for equal value or type, (b) ensure that at least 30% of women are employed in Construction and maintenance.
12	New Cl 3.13	Clause does not exist	The Contractor shall (a)(i) carry out HIV/AIDS awareness programs through implementation support consultants for labor and disseminate information at worksites on risks of sexually transmitted disease and HIV/AIDS as part of health and safety measures to those employed during construction; and in Project influenced areas (ii) follow and implement all statutory provisions on labor (including equal pay for equal work), health safety, welfare, sanitation and working conditions; and (b) encourage increased employment of women and local poor and disadvantaged persons for construction purposes, provided that the requirements for efficiency are adequately met. Breach of this provision shall be cause for termination of the Contract.
13	New Cl.3.14	Clause does not exist	The Contractor shall not employ any child to perform any work, including work that is economically exploitative, or is likely to be hazardous to, or interfere with, the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. "Child" means a child below the statutory minimum age specified under applicable national law.
14	Clause 5.1 (a)	(a) it is duly organised and validly existing under the laws of India, and has full power and authority to	" (a) It is duly organized and validity existing under the laws of the country of its incorporation/origin, and has full power

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;	and authority to execute and perform its obligations under this Agreement and to carry out the transactions contemplated hereby;”
15	Clause 7.1.1	<p>The Contractor shall, for the performance of its obligations hereunder during the Construction Period, provide to the Authority, within 10 (ten) days of the date of this Agreement, an irrevocable and unconditional guarantee from a Bank in the form set forth in Schedule-G (the “Performance Security”) for an amount equal to 5% (five percent) of the Contract Price. The Performance Security shall be valid until 60 (sixty) days after the Defects Liability Period. Until such time the Performance Security is provided by the Contractor pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security, the Authority shall release the Bid Security to the Contractor.</p> <p>The Contractor shall alongwith the Performance Security provide to the Authority an irrevocable and unconditional guarantee from a Bank for a sum equivalent to Rs. .... crore( Rupees .... crore) in the form set forth in Schedule-G (the "Additional Performance Security"), to be modified, mutatis mutandis, for this purpose as security to the Authority if the Bid Price offered by the Contractor is lower by more than 10% with respect to the Estimated Project Cost. Additional Performance Security shall be calculated as under:</p> <p>(i) If the bid price offered by the Contractor is lower than 10% but upto 20% of the Estimated Project Cost, then the Additional Performance Security shall be calculated @20% of</p>	<p>The Contractor shall, for the performance of its obligations hereunder during the Construction Period, provide to the Authority, within 10 (ten) days of the date of this Agreement, an irrevocable and unconditional guarantee from a Bank in the form set forth in Schedule-G (the “Performance Security”) for an amount equal to 5% (five percent) of the Contract Price. The Performance Security shall be valid until 60 (sixty) days after the Defects Liability Period. The Contractor shall ensure that the Performance Security is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects. If the Terms of the Performance Security specify its expiry date and the Contractor has not become entitled to receive the Performance Security by the date 28days prior to the expiry date, the Contractor shall extend the validity of the Performance Security until the Works have been completed and any defects have been remedied and Performance certificate issued as per clause 17.7. Until such time the Performance Security is provided by the Contractor pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security, the Authority shall release the Bid Security to the Contractor.</p>

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		<p>the difference in the (a) Estimated Project Cost (as mentioned in RFP)-10% of the Estimated Project Cost and (b) the Bid Price offered by the selected Bidder.</p> <p>(ii) If the bid price offered by the Contractor is lower than 20% of the Estimated Project Cost, then the Additional Performance Security shall be calculated @30% of the difference in the (a) Estimated Project Cost (as mentioned in RFP)-10% of the Estimated Project Cost and (b) the Bid Price offered by the selected Bidder.</p> <p>(iii) The Additional Performance Security shall be valid until 28 (twenty eight) days after the issue of Completion Certificate under Article 12 of this Agreement.</p> <p>(iv) The Additional Performance Security shall not be treated as part of Performance Security.</p>	
16	Clause 7.2	The Contractor may initially provide the Performance Security for a period of 2 (two) years; provided that it shall procure the extension of the validity of the Performance Security, as necessary, at least 2 (two) months prior to the date of expiry thereof. Upon the Contractor providing an extended Performance Security, the previous Performance Security shall be deemed to be released and the Authority shall return the same to the Contractor within a period of 7 (seven) business days from the date of submission of the extended Performance Security.	Deleted
17	Clause 7.4	The Authority shall return the Performance Security to the Contractor within 60 (sixty) days of the later of the expiry of the Maintenance Period or the Defects Liability Period under this Agreement. Notwithstanding the aforesaid, the Parties agree that the Authority shall not be obliged to release the Performance Security until all Defects identified during the	The Authority shall return the Performance Security to the Contractor within 60 (sixty) days of the later of the expiry of the Defects Liability Period under this Agreement. Notwithstanding the aforesaid, the Parties agree that the Authority shall not be obliged to release the Performance Security until all Defects identified during the Defects Liability Period have been rectified



Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		<p>Defects Liability Period have been rectified.</p> <p>7.4.2 The Authority shall return the Additional Performance Security to the Contractor within 28 (twenty eight) days from the date of issue of Completion Certificate under Article 12 of this Agreement.</p>	
18	Clause 7.5.2	Upon occurrence of a Contractor's Default, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Retention Money as Damages for such Contractor's Default.	Upon occurrence of a Contractor's Default, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Retention Money towards any losses, delays and cost of completing the Works and Maintenance, if any for such Contractor's Default.
19	Clause 7.5.4	Within 15 (fifteen) days of the date of issue of the Completion Certificate, the Authority shall discharge the bank guarantees furnished by the Contractor under the provisions of Clause 7.5.3 and refund the balance of Retention Money remaining with the Authority after adjusting the amounts appropriated under the provisions of Clause 7.5.2 and the amounts refunded under the provisions of Clause 7.5.3.	<p>Within 15 (fifteen) days of the date of issue of the Completion Certificate, one half of the Retention Money (or Bank guarantee, which replaced Retention Money) shall be certified by the Authority's Engineer for payment after adjusting amounts, if any, due to Authority (or release of Bank Guarantee) to the Contractor. The Contractor may substitute the remaining retention money with an on-demand bank guarantee in a form and from a source acceptable to the Authority.</p> <p>Upon the expiration of the Defects Liability Period for the Works or final payment by the Authority pursuant to Clauses 17 and 19.15, whichever is earlier, the other half of the Retention Money (or Bank Guarantee which replaced Retention Money) shall be certified by the Authority's Engineer for payment or release of bank Guarantee to the Contractor</p>
20	Clause 8.5	<p><b>8.5 Protection of Site from encroachments</b></p> <p>On and after signing the memorandum and/or subsequent</p>	<p><b>8.5 Protection of Site from encroachments</b></p> <p>On and after signing the memorandum and/or subsequent memorandum referred to in Clause 8.2.1, and until the issue</p>

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		memorandum referred to in Clause 8.2.1, and until the issue of the Completion Certificate, the Contractor shall maintain a round-the-clock vigil over the Site and shall ensure and procure that no encroachment thereon takes place. During the Construction Period, the Contractor shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Sub-contractor or other person claiming through or under the Agreement to place or create any Encumbrance or security threat over all or any part of the Site or the Project Assets, or on any rights of the Contractor therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement. In the event of any encroachment or occupation on any part of the Site, the Contractor shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its own cost and expenses.	of the Completion Certificate, the Contractor shall maintain a round-the-clock vigil over the Site and shall ensure and procure that no encroachment thereon takes place. During the Construction Period and until the issue of the Completion Certificate, the Contractor shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Sub-contractor or other person claiming through or under the Agreement to place or create any Encumbrance or security threat over all or any part of the Site or the Project Assets, or on any rights of the Contractor therein or under this Agreement, save and except as otherwise expressly set forth in this Agreement. In the event of any encroachment or occupation on any part of the Site, the Contractor shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its own cost and expenses.
21	Clause 8.8	-	Add the following paragraph to Clause 8.8  In the event that the above cause disruption to work or access to site for more than 15 days and certified by the Authority's Engineer, the Contractor shall, subject to the provisions of Clause 10.5, be entitled to Time Extension equal to the period for which the disruption to work has occurred and certified by the Authority's Engineer.
22	New Cl 8.9	Clause does not exist	The Contractor shall comply with (i) the measures and requirements set forth in the resettlement plan and indigenous peoples plan attached here to as Appendix A13 of Volume III, to the extent it concerns impacts on affected people during construction; and (ii) any corrective or preventive actions set out in safeguards monitoring reports that the Authority will prepare from time to time to monitor

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			implementation of the resettlement plan. The Contractor shall allocate a budget for compliance with these measures, requirements and actions.
23	New Sub clause 10.1.1 (e)	Clause does not exist.	Sub clause 10.1.1(e) The Contractor shall adequately record the Condition of roads, agricultural land and other infrastructure prior to the start of transporting materials, goods and equipment and construction.
24	New Clause 10.1.1 (f)	Clause does not exist	(f) Prepare construction zone safety checklist.
25	10.2.4 (c)	(c) within 15 (fifteen) days of the receipt of the Drawings, the Authority's Engineer shall review the same and convey its observations to the Contractor with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Contractor shall not be obliged to await the observations of the Authority's Engineer on the Drawings submitted pursuant hereto beyond the said period of 15 (fifteen) days and may begin or continue Works at its own discretion and risk; Provided, however that in case of a Major Bridge or Structure, the aforesaid period of 15 (fifteen) days may be extended upto 30 (thirty) days;	(c) within 15 (fifteen) days of the receipt of the Drawings, the Authority's Engineer shall review the same and convey its observations to the Contractor with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Contractor shall not be obliged to await the observations of the Authority's Engineer on the Drawings submitted pursuant hereto beyond the said period of 15 (fifteen) days and may begin or continue Works at its own discretion and risk; Provided, however that in case of a Major Bridge or Structure, therefore said period of 15 (Fifteen) days may be extended up to 30(Thirty) days by Authority's Engineer in writing to the Contractor within 15 (Fifteen) days of the receipt of the Drawings;
26	10.2.4 (d)	(d) if the aforesaid observations of the Authority's Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Contractor in conformity with the provisions of this Agreement and resubmitted to the Authority's Engineer for review. The Authority's Engineer shall give its observations, if any, within	(d) if the aforesaid observations of the Authority's Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Contractor in conformity with the provisions of this Agreement and resubmitted to the Authority's Engineer for review. The Authority's Engineer shall give its observations, if any, within 10 (ten) days of receipt of

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		10 (ten) days of receipt of the revised Drawings. In the event the Contractor fails to revise and resubmit such Drawings to the Authority's Engineer for review as aforesaid, the Authority's Engineer may withhold the payment for the affected works in accordance with the provisions of Clause 19.5.4. If the Contractor disputes any decision, direction or determination of the Authority's Engineer hereunder, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure;	the revised Drawings. The Contractor shall not be obliged to await the observations of the Authority's Engineer on the Drawings submitted pursuant hereto beyond the said period of 10 (ten) days and may begin or continue Works at its own discretion and risk. In the event the Contractor fails to revise and resubmit such Drawings to the Authority's Engineer for review as aforesaid, the Authority's Engineer may withhold the payment for the affected works in accordance with the provisions of Clause 19.5.4. If the Contractor disputes any decision, direction or determination of the Authority's Engineer hereunder, the Dispute shall be resolved in accordance with the Dispute Resolution Procedure;
27	Clause 10.5.1 (d)	(d) any delay, impediment or prevention caused by or attributable to the Authority, the Authority's personnel or the Authority's other contractors on the Site; and	(d) any delay, impediment or prevention caused by or attributable to the Authority, the Authority 's personnel including the Authority's Engineer and staff or the Authority's other contractors on the Site; and
28	11.7	<b>11.7 Monthly progress reports</b>  During the Construction Period, the Contractor shall, no later than 10 (ten) days after the close of each month, furnish to the Authority and the Authority's Engineer a monthly report on progress of the Works and shall promptly give such other relevant information as may be required by the Authority's Engineer.	<b>11.7 Monthly progress reports</b> During the Construction Period, the Contractor shall, no later than 10 (ten) days after the close of each month, furnish to the Authority and the Authority's Engineer a monthly report on progress of the Works and shall promptly give such other relevant information as may be required by the Authority's Engineer.  The monthly progress reports shall include safety statistics, including details of any hazardous incidents and activities relating to environmental, resettlement and other obligations under Clauses 3.10 to 3.14 and Clause 8.9.
29	12.2.2	Upon issue of Provisional Certificate, the provisions of Articles 14 and 17 shall apply to the completed parts of the Project Highway and the property and ownership of all such completed Works shall vest in the Authority.	“Upon issue of Provisional Certificate, the provisions of Articles 14 and 17 shall apply to the completed parts of the Project Highway”
30	12.4.2	12.4.2 Upon receiving the Completion Certificate, the Contractor shall remove its equipment, materials, debris and	12.4.2 Upon receiving the Completion Certificate, the Contractor shall remove its equipment, materials, debris and

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		temporary works from the Site within a period of 30 (thirty) days thereof, failing which the Authority may remove or cause to be removed, such equipment, materials, debris and temporary works and recover from the Contractor an amount equal to 120% (one hundred and twenty per cent) of the actual cost of removal incurred by the Authority.	temporary works from the Site within a period of 30 (thirty) days thereof, failing which the Authority may remove or cause to be removed, such equipment, materials, debris and temporary works and recover from the Contractor an amount equal to 120% (one hundred and twenty per cent) of the actual cost of removal incurred by the Authority.  Upon completion of construction, the Contractor shall fully reinstate pathways, other local infrastructure and agricultural land to at least their pre project conditions s recorded by the Contractor in consonance with its obligation in Clause 10.1.1 (e)
31	Clause 14.1.1	The Contractor shall maintain the Project Highway for a period of 4 (four) years commencing from the date of the Provisional Certificate (the “ <b>Maintenance Period</b> ”). For the performance of its Maintenance obligations, the contractor shall be paid 0.5% of the Contract Price for the first year and 1%, 1.5%, 2% of the Contract Price for the second, third and fourth year respectively in case of road projects. But in case of stand alone Bridge / structure work, the contractor shall be paid 0.25%, 0.5%, 0.5% and 0.5% of the Contract Price for the first, second, third and fourth year respectively. Amount shall be, inclusive of all taxes. The amount payable for maintenance shall be adjusted to reflect any increase or decrease arising out of variation in WPI to be determined in accordance with the provisions of Clause 19.12. For the avoidance of doubt, it is agreed that in the event no Provisional Certificate is issued, the Maintenance Period shall commence from the date of the Completion Certificate. It is further agreed that the Contract Price hereunder shall be reckoned with reference to the amount specified in Clause 19.1.1, which shall be adjusted to the extent of Change of Scope and the works withdrawn under the provisions of Clause 8.3.3, but shall not include any price adjustments in	The Contractor shall maintain the Project Highway for a period of <b>5 (five) years</b> commencing from the date of the Provisional Certificate (the “Maintenance Period”). For the performance of its Maintenance obligation, the Contractor shall be paid a total amount equal to 0.5% (one-half per cent) for the first year, 1% (one percent) for the second year, 1.5% (one and one-half percent) for the third year, 2% (two percent) for the fourth year and 2.5% (two and one-half per cent) for the fifth year of the Contract Price during the Maintenance Period, inclusive of all taxes. The amount payable for maintenance shall be adjusted to reflect any increase or decrease arising out of variation in WPI to be determined in accordance with the provisions of Clause 19.12. For the avoidance of doubt, it is agreed that in the event no Provisional Certificate is issued, the Maintenance Period shall commence from the date of the Completion Certificate. It is further agreed that the Contract Price hereunder shall be reckoned with reference to the amount specified in Clause 19.1.1, which shall be adjusted to the extent of Change of Scope and the works withdrawn under the provisions of Clause 8.3.3, but shall not include any price adjustments in pursuance of Clause 19.10.

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		pursuance of Clause 19.10.	
32	New Clause 14.10	Clause does not exist.	<p><b>14.10 Authority's Taking Over</b></p> <p>The Maintenance Requirements set forth in Schedule-E having been duly carried out, Maintenance Period as set forth in Clause 14.1.1 having been expired and Authority's Engineer determining the Test on Completion of Maintenance to be successful in accordance with Schedule-Q, the Authority will issue Taking Over Certificate to the Contractor substantially in the format set forth in Schedule-R.</p>
33	Clause 17.1.1	The Contractor shall be responsible for all the Defects and deficiencies, except usual wear and tear in the Project Highway or any Section thereof, till the expiry of a period of 4 (four) years commencing from the date of Provisional Certificate (the “ <b>Defects Liability Period</b> ”). Provided that the Defects Liability Period shall in no case be less than <b>42 (forty two)</b> months from the date of Completion Certificate for and in respect of works for which Time Extension was granted. Provided further that in the event no Provisional Certificate is issued, the Defects Liability Period shall commence from the date of the Completion Certificate. For the avoidance of doubt, any repairs or restoration on account of usual wear or tear in the Project Highway or any Section thereof shall form a part of the Maintenance obligations of the Contractor as specified in Article 14.	The Contractor shall be responsible for all the Defects and deficiencies, except usual wear and tear in the Project Highway or any Section thereof, till the expiry of a period of 5 (five) years commencing from the date of Provisional Certificate (the “ <b>Defects Liability Period</b> ”). Provided that the Defects Liability Period shall in no case be less than <b>54 (fifty four) months</b> from the date of Completion Certificate for and in respect of works for which Time Extension was granted. Provided further that in the event no Provisional Certificate is issued, the Defects Liability Period shall commence from the date of the Completion Certificate. For the avoidance of doubt, any repairs or restoration on account of usual wear or tear in the Project Highway or any Section thereof shall form a part of the Maintenance obligations of the Contractor as specified in Article 14.
34	New Clause 17.7	Clause does not exist.	<p><b>17.7 Performance Certificate</b></p> <p>17.7.1 Performance of the Contractor's obligations shall not be considered to have been completed until the Authority's Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed its obligations with regard to any remedial or other work required as a result of any defect in the Works, as identified under Clause 17.1, to the satisfaction of the</p>

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			<p>Authority's Engineer.</p> <p>17.7.2 The Authority's Engineer shall issue the Performance Certificate substantially in the format set forth in Schedule-S within 28 days after the latest of the expiry dates of the Defects Liability Period, or as soon thereafter as the Contractor has supplied all the Contractor's documents, completed and tested all the Works, including remedying any defects.</p>
35	Clause 18.2.1 (d)	any other matter which is not specified in (a), (b) or (c) above and which creates an obligation or liability on either Party for a sum exceeding Rs. 5,000,000 (Rs. fifty lakh).	Any other matter which is not specified in (a), (b) or (c) above and which creates an obligation or liability on either Party for a sum exceeding 0.2% of Contract price.
36	Clause 19.1.6	All payments under this Agreement shall be made in Indian Rupees.	The Contract Price shall be paid in the currency or currencies named in the Schedule-T of this Agreement. The proportions or amounts of the Local and Foreign Currencies, and the fixed rates of exchange to be used for calculating the payments, shall be as stated in Schedule-T. Payments for Change of Scope, Damages by the Authority and any other requirements as per this Agreement shall be paid in Indian Rupees. All deductions under this Agreement, payment of Damages by the Contractor and repayment of Advance by the Contractor shall be made in Indian Rupees.
37	New Sub-Clause 23.1.1 (s)	---	<p>(s) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:</p> <p>(i) for doing or forbearing to do any action in relation to the Contract, or</p> <p>(ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract,</p> <p>or if any of the Contractor's personnel, agents or subcontractors gives or offers to give (directly or indirectly)</p>

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			to any person any such inducement or reward as is described in this sub-paragraph (s). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination
38	New Clause 23.1.4	New Clause	<p>Clause 23.1.4</p> <p>If the Authority determines, based on reasonable evidence, that the Contractor has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the Contract as defined in Clause 3.9, then the Authority may, after giving 14 days notice to the Contractor, terminate the Contract and expel him from the Site, and the provisions of Article 23 shall apply as if such termination had been made under Clause 23.1</p> <p>Should any employee of the Contractor be determined, based on reasonable evidence, to have engaged in corrupt, fraudulent or coercive practice during the execution of the work then that employee shall be removed from the site or works. If appropriate, the Contractor shall then appoint (or cause to be appointed) a suitable replacement person.</p>
39	Clause 23.8		<p>Please insert the following sentence at the end of the paragraph.</p> <p>“ADB's right to inspect the Contractor's records and any of the documents relating to the Contract will survive even after contract termination.”</p>
40	Clause 26.2	In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the “ <b>Conciliator</b> ”) to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the	<p><b>26.2.1 Contractor's claims</b></p> <p>In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Authority's Engineer or without the intervention of the Authority's Engineer, either Party may</p>



Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
		Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business 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 26.1.1 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 26.3.	require such Dispute to be referred to the Managing Director of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) 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 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to Dispute Review Board in accordance with the provisions of Clause 26.3.
41	New Clause 26.2.2, 26.2.3, 26.2.4 and 26.2.5		<p><b>26.2.2 (a)</b> The Parties shall appoint a Dispute Review Board comprising of 3 (three) suitably qualified persons (the “DRB Members”) each of whom shall be fluent in english language with a professional experience in the matters with respect to contractual obligations in construction and operation of highways, within 3 months of signing of the Agreement, wherein each Party shall nominate one member for the approval of the other Party. The first two members shall recommend and the Parties shall agree upon the third member, who shall act as chairman.</p> <p>(b) The terms of the remuneration of each of the three members, including the remuneration of any expert whom the Dispute Review Board consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration. The other terms and</p>

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			<p>conditions of the appointment shall be substantially in the form appended to this Agreement as General Terms and Conditions of appointment and shall be appended to the appointment letter.</p> <p><b>26.2.3 (a)</b> If at any time the Parties so agree, they may jointly refer a matter to the Dispute Review Board for it to give its opinion. Neither Party shall consult the Dispute Review Board on any matter for an opinion without the agreement of the other Party.</p> <p>(b) If a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment, a replacement shall be appointed in the same manner as the DRB Members are appointed within 42 days of such death, disability, resignation or termination.</p> <p>(c) The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Authority or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the Dispute Review Board (including each member) shall expire on termination of this Agreement.</p> <p><b>26.2.4 (a)</b> If Dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Agreement, including any Dispute as to any certificate, determination, instruction, opinion or valuation of the Authority's Engineer, either Party may refer the Dispute in writing to the Dispute Review Board for its decision, with copies to the other Party and the Authority's. Such reference shall state that it is given under this Clause.</p> <p>(b) The Dispute Review Board shall be deemed to have received such reference on the date when it is received by the chairman of the Dispute Review Board. Both Parties shall promptly make available to the Dispute Review Board all such additional information, further access to the Site,</p>

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			<p>and appropriate facilities, as the Dispute Review Board may require for the purposes of making a decision on such Dispute. The Dispute Review Board shall be deemed to be not acting as arbitrators.</p> <p>(c) Within 84 (eighty four) days after receiving such reference, or within such other period not exceeding additional 30 (thirty) days as may be proposed by the Dispute Review Board and approved by both Parties, the Dispute Review Board shall give its decision, which shall be reasoned and shall state that it is given under this Clause 26.3.3. The decision shall be binding on both Parties, who shall promptly give effect to it, provided that the Contractor shall continue to proceed with the works/ perform its obligations in accordance with this Agreement.</p> <p><b>26.2.5</b> (a) If either Party is dissatisfied with the Dispute Review Board's decision, then either Party may, within 28 (twenty eight) days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration. If the Dispute Review Board fails to give its decision within the period of 84 (eighty four) days (or as otherwise approved) after receiving such reference, then either Party may, within 28 (twenty eight) days after this period has expired, give notice to the other Party of its dissatisfaction and intention to commence arbitration accordance with clause 26.4.</p> <p>(b) In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in Dispute and the reason(s) for dissatisfaction. If the Dispute Review Board has given its decision as to a matter in Dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the Dispute Review Board's decision, then</p>

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			the decision shall become final and binding upon both the Parties.
42	Clause 26.3	Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally finally settled by arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).	<p><b>26.3 Arbitration</b></p> <p>26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, and by Dispute Review Board, as provided in Clause 26.2, shall be finally decided by reference to arbitration by an arbitral tribunal constituted in accordance with Clause 26.3.2. 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 Act. The place of such arbitration shall be “New Delhi” and the language of arbitration proceedings shall be English. Notwithstanding the foregoing, in case Contractor or the Lead Member is registered outside India, such arbitration shall be held in accordance with UNCITRAL Rules, or such other rules as may be mutually agreed by the Parties. The place of said arbitration shall be “Neutral Venue” and the language of arbitration proceedings shall be English</p> <p>26.3.2 There shall be a Board 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.</p> <p>26.3.3 The arbitrators shall make a reasoned award (the “Award”). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.</p>

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
			<p>26.3.4 The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.</p> <p>26.3.5 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.</p>
43	Clause 27.7.2	27.7.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination.	27.7.2 All obligations surviving Termination shall only survive for a period of 3 (three) years following the date of such Termination subject to survival of obligations under clauses 23.8, 25.6 and 27.7.1.
44	27.13	(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 day following the date of its delivery.	(c) any notice or communication by a Party to the other Party, given in accordance herewith, 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 day following the date of its delivery. All notice periods will start from the earlier of deemed delivery dates provided here.
45	Clause 28.1 (new definition)		“ <b>ADB</b> ” means the Asian Development Bank;
			“ <b>Dispute Review Board</b> ” means and refers to the adjudication body for Dispute redressal constituted and appointed under Clause 26.2;
			“ <b>Environmental Management Plan</b> ” means the site specific plan set forth in Employer’s requirement (Section 6 of Part II) identifying the necessary measures required to be implemented in order to protect the environment and comply with the applicable environmental laws.
46	New	Clause does not exist.	This guarantee is subject to the Uniform Rules for Demand

Addendum to “MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
	Clause “12” after Clause “11” of Annex-I of Schedule-G		Guarantees (URDG) 2010 Revision, ICC Publication No. 758, except that the supporting statement under Article 15(a) is hereby excluded.
47	Footnote “\$” at the end of Annex-I of Schedule-G	Insert date being 2 (two) years from the date of issuance of this Guarantee (in accordance with Clause 7.2 of the Agreement).	Insert date being 60 days from the date of expiry of Defects Liability Period.
48	New Clause “12” after Clause “11” of Annex-III of Schedule-G	Clause does not exist.	This guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No. 758, except that the supporting statement under Article 15(a) is hereby excluded.
49	Clause 3.2 (d) of Annex I of Schedule-N	any other matter which is not specified in (a), (b) or (c) above and which creates an obligation or liability on either Party for a sum exceeding Rs. 5,000,000 (Rs. fifty lakh).	any other matter which is not specified in (a), (b) or (c) above and which creates an obligation or liability on either Party for a sum exceeding 0.2% of Contract price.
50	New Schedule-Q		Tests on Completion of Maintenance Period (Format Enclosed)
51	New Schedule-R		Taking Over Certificate (Format Enclosed)

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Sl. No.	Cl. No. / Reference	Model EPC Latest	Amended Provision
52	New Schedule-S		Performance Certificate (Format Enclosed)
53	New Schedule-T		Summary of Currencies of Payment Format (enclosed)

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

SCHEDULE-Q

(See Clause 14.10)

Tests on Completion of Maintenance Period

1. Riding Quality test:

Riding quality test: Riding quality of each lane of the carriageway shall be checked with the help of a calibrated bump integrator and the maximum permissible roughness for purposes of this Test shall be [2,200 (two thousand and two hundred)] mm for each kilometer.

2. Visual and physical test:

The Authority's Engineer shall conduct a visual and physical check of construction to determine that all works and equipment forming part thereof conform to the provisions of this Agreement. The physical tests shall include measurement of cracking, rutting, stripping and potholes and shall be as per the requirement of maintenance mentioned in Schedule-E.



Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

SCHEDULE-R

(See Clause 14.10)

Taking Over Certificate

I, ..... (Name and designation of the Authority's representative) under and in accordance with the Agreement dated ..... (the "**Agreement**"), for [construction of the \*\*\*\*section (km \*\* to km \*\*) of ..... (the "**Project Highway**") on Engineering, Procurement and Construction (EPC) basis through ..... (Name of Contractor), hereby certify that the Tests on completion of Maintenance Period in accordance with Article 14 of the Agreement have been successfully undertaken to determine compliance of the Project Highway with the provisions of the Agreement and I hereby certify that the Authority has taken over the Project highway from the Contractor on this day.....

SIGNED, SEALED AND DELIVERED

(Signature)

(Name and designation of Authority's Representative)

(Address)

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

SCHEDULE-S

(See Clause 17.7.2)

Performance Certificate

I, ..... (Name and designation of the Authority's representative) under and in accordance with the Agreement dated ..... (the "**Agreement**"), for [construction of the \*\*\*\*section (km \*\* to km \*\*) of .....(the "**Project Highway**") on Engineering, Procurement and Construction (EPC) basis through ..... (Name of Contractor), hereby certify that the Contractor has discharged all its obligations under the Agreement and in accordance with Article 17 of the Agreement I hereby issue Performance Certificate to the Contractor on this day.....

SIGNED, SEALED AND DELIVERED

(Signature)

(Name and designation of Authority's Representative)

(Address)

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

SCHEDULE-T

(Clause 19.1.6)

Summary of Currencies of Payment

Name of Currency	A Amount of currency	B Rate of exchange(local currency per unit of foreign)	C Local currency equivalent  $C=A \times B$	D Percentage of Net Bid Price(NTP) $(100 \times C)/NTP$
Local Currency				
Foreign Currency				
Net Bid Price				100.00

Note:

1. Change in scope would require agreement between parties on currency
2. Regarding damages by the Authority, financing charges for a payment delays will be in corresponding currency amounts
3. Delay damages will be recovered in currencies in proportion which in which contract price is payable.

## **APPENDIX**

### **[Refer Clause 26.2.2(b)]**

#### **General Conditions of Dispute Board Agreement**

##### **1. Definitions**

Each "Dispute Board Agreement" is a tripartite agreement by and between:

- (a) the "Employer";
- (b) the "Contractor"; and
- (c) the "Member" who is defined in the Dispute Board Agreement as being:
  - (i) the sole member of the "DB" and, where this is the case, all references to the "Other Members" do not apply, or
  - (ii) one of the three persons who are jointly called the "DB" (or "dispute board") and, where this is the case, the other two persons are called the "Other Members."

The Employer and the Contractor have entered (or intend to enter) into a contract, which is called the "Contract" and is defined in the Dispute Board Agreement, which incorporates this Appendix. In the Dispute Board Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

##### **2. General Provisions**

Unless otherwise stated in the Dispute Board Agreement, it shall take effect on the latest of the following dates:

- (a) the Commencement Date defined in the Contract,
- (b) when the Employer, the Contractor, and the Member have each signed the Dispute Board Agreement, or
- (c) when the Employer, the Contractor and each of the Other Members (if

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

any) have respectively each signed a dispute board agreement.

This employment of the Member is a personal appointment. At any time, the Member may give not less than 70 days' notice of resignation to the Employer and to the Contractor, and the Dispute Agreement shall terminate upon the expiry of this period.

**3. Warranties**

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor, and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance, which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is

- (a) experienced in the work, which the Contractor is to carry out under the Contract;
- (b) experienced in the interpretation of contract documentation; and
- (c) fluent in the language for communications defined in the Contract.

**4. General  
Obligations of the  
Member**

The Member shall

- (a) have no interest, financial or otherwise, in the Employer, the Contractor or Engineer, nor any financial interest in the Contract except for payment under the Dispute Board Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Employer, the Contractor, or the Engineer, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Board Agreement;
- (c) have disclosed in writing to the Employer, the Contractor, and the Other Members (if any), before entering into the Dispute Board Agreement and

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

to his/her best knowledge and recollection, any professional or personal relationships with any director, officer, or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the Contract forms part;

- (d) not, for the duration of the Dispute Board Agreement, be employed as a consultant or otherwise by the Employer, the Contractor, or the Engineer, except as may be agreed in writing by the Employer, the Contractor, and the Other Members (if any);
- (e) comply with the annexed procedural rules and with Subclause 20.4 of the Conditions of Contract;
- (f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;
- (g) not, while a Member, enter into discussions or make any agreement with the Employer, the Contractor, or the Engineer regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Board Agreement;
- (h) ensure his/her availability for all site visits and hearings as are necessary;
- (i) become conversant with the Contract and with the progress of the Works (and of any other parts of the project of which the Contract forms part) by studying all documents received, which shall be maintained in a current working file;
- (j) treat the details of the Contract and all the Dispute Board's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor, and the Other Members (if any); and
- (k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any).

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

**5. General  
Obligations of the  
Employer and the  
Contractor**

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the Dispute Board's activities under the Contract and the Dispute Board Agreement. The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member, and the Other Members (if any),

- (a) be appointed as an arbitrator in any arbitration under the Contract;
- (b) be called as a witness to give evidence concerning any dispute before arbitrator(s) appointed for any arbitration under the Contract; or
- (c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and hold the Member harmless against and from claims from which he is relieved from liability under the preceding paragraph.

Whenever the Employer or the Contractor refers a dispute to the Dispute Board under Subclause 20.4 of the Conditions of Contract, which will require the Member to make a site visit and attend a hearing, the Employer or the Contractor shall provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the Member. No account shall be taken of any other payments due or paid to the Member.

**6. Payment**

The Member shall be paid as follows, in the currency named in the Dispute

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Board Agreement:

- (a) a retainer fee per calendar month, which shall be considered as payment in full for
  - (i) being available on 28 days' notice for all site visits and hearings;
  - (ii) becoming and remaining conversant with all project developments and maintaining relevant files;
  - (iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and
  - (iv) all services performed hereunder except those referred to in subparagraphs (b) and (c) of this Clause.

The retainer fee shall be paid with effect from the last day of the calendar month in which the Dispute Board Agreement becomes effective; until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works.

With effect from the first day of the calendar month following the month in which the Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by one third. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Board Agreement is otherwise terminated.

- (b) a daily fee, which shall be considered as payment in full, for
  - (i) each day or part of a day up to a maximum of 2 days' travel time in each direction for the journey between the Member's home and the site, or another location of a meeting with the Other Members (if any);
  - (ii) each working day on Site visits, hearings, or preparing decisions; and
  - (iii) each day spent reading submissions in preparation for a hearing.



Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

- (c) all reasonable expenses, including necessary travel expenses (air fare in less than first class, hotel and subsistence, and other direct travel expenses) incurred in connection with the Member's duties, as well as the cost of telephone calls, courier charges, faxes and telexes: a receipt shall be required for each item in excess of five percent (5%) of the daily fee referred to in sub-paragraph (b) of this Clause;
- (d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The retainer and daily fees shall be as specified in the Dispute Board Agreement. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months, and shall thereafter be adjusted by agreement between the Employer, the Contractor, and the Member, at each anniversary of the date on which the Dispute Board Agreement became effective.

If the parties fail to agree on the retainer fee or the daily fee, the appointing entity or official named in the Contract Data shall determine the amount of the fees to be used.

The Member shall submit invoices for payment of the monthly retainer and air fares quarterly in advance. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

The Contractor shall pay each of the Member's invoices in full within 56 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Board Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the Dispute Board; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Subclause 19.9 of the EPC Agreement.

If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under Clause 7.

**7. Termination**

At any time, (i) the Employer and the Contractor may jointly terminate the Dispute Board Agreement by giving 42 days' notice to the Member; or (ii) the Member may resign as provided for in Clause 2.

If the Member fails to comply with the Dispute Board Agreement, the Employer and the Contractor may, without prejudice to their other rights, terminate it by notice to the Member. The notice shall take effect when received by the Member.

If the Employer or the Contractor fails to comply with the Dispute Board Agreement, the Member may, without prejudice to his other rights, terminate it by notice to the Employer and the Contractor. The notice shall take effect when received by them both.

Any such notice, resignation and termination shall be final and binding on the Employer, the Contractor, and the Member. However, a notice by the

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

Employer or the Contractor, but not by both, shall be of no effect.

**8. Default of the Member**

If the Member fails to comply with any of his obligations under Clause 4 (a)-(d) above, he shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the Dispute Board which are rendered void or ineffective by the said failure to comply.

If the Member fails to comply with any of his obligations under Clause 4 (e) - (k) above, he shall not be entitled to any fees or expenses hereunder from the date and to the extent of the noncompliance and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses already received by the Member, for proceedings or decisions (if any) of the Dispute Board, which are rendered void or ineffective by the said failure to comply.

**9. Disputes**

Any dispute or claim arising out of or in connection with this Dispute Board Agreement, or the breach, termination, or invalidity thereof, shall be finally settled by institutional arbitration. If no other arbitration institute is agreed, the arbitration shall be conducted under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with these Rules of Arbitration.

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

**Procedural Rules**

Unless otherwise agreed by the Employer and the Contractor, the Dispute Board shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor. Unless otherwise agreed by the Employer, the Contractor, and the Dispute Board, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.

The timing of and agenda for each site visit shall be as agreed jointly by the Dispute Board, the Employer, and the Contractor, or in the absence of agreement, shall be decided by the Dispute Board. The purpose of site visits is to enable the Dispute Board to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and, as far as reasonable, to endeavor to prevent potential problems or claims from becoming disputes.

Site visits shall be attended by the Employer, the Contractor, and the Engineer and shall be coordinated by the Employer in cooperation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services. At the conclusion of each site visit and before leaving the site, the Dispute Board shall prepare a report on its activities during the visit and shall send copies to the Employer and the Contractor.

The Employer and the Contractor shall furnish to the Dispute Board one copy of all documents which the Dispute Board may request, including Contract documents, progress reports, variation instructions, certificates, and other documents pertinent to the performance of the Contract. All communications between the DB and the Employer or the Contractor shall be copied to the other Party. If the Dispute Board comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.

If any dispute is referred to the Dispute Board in accordance with Subclause 26.2 of the EPC Agreement, the Dispute Board shall proceed in accordance with Subclause 26.2 and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the Dispute Board shall

- (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case; and
- (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

The Dispute Board may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.

Except as otherwise agreed in writing by the Employer and the Contractor, the Dispute Board shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor, and the Engineer, and to proceed in the absence of any party who the Dispute Board is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.

The Employer and the Contractor empower the Dispute Board, among other things, to

- (a) establish the procedure to be applied in deciding a dispute;
- (b) decide upon the Dispute Board's own jurisdiction, and as to the scope of any dispute referred to it;
- (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Guidelines;
- (d) take the initiative in ascertaining the facts and matters required for a decision;
- (e) make use of its own specialist knowledge, if any;
- (f) decide upon the payment of financing charges in accordance with the Contract;
- (g) decide upon any provisional relief such as interim or conservatory measures; and
- (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.

The Dispute Board shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the Dispute Board shall make and give its decision in accordance with Subclause 26.2, or as otherwise agreed by the Employer and the Contractor in writing. If the Dispute Board comprises three persons:

- (a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

- (b) it shall endeavour to reach a unanimous decision: if this proves impossible, the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
- (c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless
  - (i) either the Employer or the Contractor does not agree that they do so, or
  - (ii) the absent Member is the chairman and he/she instructs the other Members to not make a decision.

Addendum to "MORTH EPC (ENGINEERING PROCUREMENT AND CONSTRUCTION) Agreement for Construction of Mechi Bridge and Approaches on India-Nepal border linking Kakarvitta in Nepal and Panitanki in India under Engineering Procurement and Construction (EPC) Mode

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