

THIS BUILD OWN OPERATE AND TRANSFER AGREEMENT hereinafter referred to as "this Agreement" is made this 11<sup>th</sup> day of May 2006.

BETWEEN

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA, represented by the Honourable Minister of Transport (hereinafter referred to as "the Grantor", which expression shall wherever the context so admits include its successors-in-title and assigns) of the one part;

AND

DALA INLAND DRY PORT NIGERIA LIMITED, a limited liability company duly incorporated under the Laws of the Federal Republic of Nigeria, having its registered office situate at 18 A ZARIA ROAD, GYADI-GYADI, KANO, (hereinafter referred to as "the Operator" which expression shall wherever the context so admits include its successors-in-title and assigns) of the other part.

WHEREAS:

1. The Grantor desirous of:
  - (a) Easing the difficulties and problems faced by shippers of goods to and from Nigeria,
  - (b) Providing quick and safe access to port facilities from inland transport networks,
  - (c) Decongesting the sea ports by increasing storage facilities,
  - (d) Facilitating door to door delivery of cargo to and from importers and exporters, and
  - (e) Facilitating transport development through the hinterland of Nigeria;

has approved the creation, establishment, implementation and operation of Inland Container Depots (ICDs) and Container Freight Stations (CFSs) in designated locations in Nigeria.

Kano State

Kano ICD

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2. In accordance with the foregoing objectives, acting through the Inland Container Depot Implementation Committee (ICD-IC) a body set up by it, the Grantor requested for proposals from prospective Operators with cognate experience, technical capabilities and expertise in the design, construction, management and operations of ICD facilities who are interested in designing, constructing, owning, operating, maintaining and transferring ICDs.
3. In response to the Grantor's request, the Operators on the basis of their qualifications and competence submitted to the Grantor through the ICD-IC, a proposal to design, construct, manage, own maintain and operate the Depot on Build, Own, Operate and Transfer (BOOT) terms and conditions set out in this Agreement.
4. The Grantor has accepted the proposal on the conditions that the Operator shall design, construct/build, own, maintain and operate the Depot within the Operation Period and at the expiry of the Operation Period, transfer the Depot to the Grantor or its assigns on the terms and conditions set out herein.

NOW THEREFORE, in consideration of the mutual assurances, guarantees, covenants and undertakings herein contained, the parties hereby agree as follows:

**PART A**  
**DEFINITIONS AND OPERATIONS**  
**ARTICLE 1**  
**DEFINITIONS**

**1.1 Definitions**

In this Agreement, unless the subject or context otherwise requires, the following words or expressions shall have the following meanings:

**"Access Roads"** means the roads and related facilities providing access to the Site.

**"Approved Design"** means the outline architectural, structural, electrical, mechanical, engineering drawings and specifications for the Construction Works approved by the Federal Ministry of Transport or its nominee; prepared in accordance with the standard of the specifications incorporated in the proposal documents and as approved by the Federal Ministry of Transport or its nominee.

**"Appropriate Authority"** means the Grantor or the Federal Government Agency authorized or empowered in that respect;

**"Associated Facilities"** means the facilities reserved in the Depot for the Users thereof and shall include all such additional developments appurtenant to the Depot and incidental to its efficient operation and management;

**"Business Day"** means any day on which banks are generally open for business in Nigeria.

**"Certificate of Final Completion"** means the certificate issued or deemed issued in accordance with Article 7.4.4 of this Agreement.

**"Certificate of Preliminary Completion"** means the certificate issued or deemed issued in accordance with Article 7.4.3 of the Agreement.

**"Construction Commencement Date"** means the        day of 2006.

**"Construction Completion Date"** means the day upon which the Grantor issues or is deemed to have issued the Certificate of Final Completion certifying that the construction of the Depot has been successfully completed, tested and commissioned; and is available for use pursuant to Article 7.4.4.

**"Construction Contract"** means the agreement or agreements between the Operator and the Construction Contractor and approved by the Grantor for the design, engineering, procurement, construction, completion, installation, testing and commissioning of the Depot

**"Construction Contractor"** means the contractor or contractors hired by the Operator and approved by the Grantor to perform the Construction Works in accordance with the Construction Contract and this Agreement and their respective successors and permitted assignees

**"Construction Facilities"** means those facilities on the Site and, as the case may be, on the land which the Operator requires for construction.

**"Construction Period"** shall be a period of 30 months from Construction Commencement Date or such longer period as may be granted by the Grantor pursuant to Article 6.1.1.(c).

**"Construction Works"** means the engineering design, procurement, construction, installation, completion and commissioning of the Depot and its facilities and equipments in accordance with Article 6 and Annexure A.

**"Construction Work Programme"** means the work programme referred to in Article 6.10.1 and contained in Annexure B;

**"Consultation Period"** has the meaning set forth in Article 16.3.1.

**"Default"** means a failure by a party to perform any of its obligations under this Agreement, which is not excused by an act or omission of the other party in breach of this Agreement, Force Majeure or by an event as to which the other party bears the risk.

**"Depot"** means an Inland Container Depot (ICD), stacking area, container warehouse, freight station, rail sidings, interchange complex, customs and ICD administrative building complex, including other depot buildings, car parks, fence, boreholes and water treatment house, fire fighting facilities, sewage treatment and pumping plant, power house, communication facilities and all other appurtenances thereto.

**"Detailed Design"** means the second phase of the design to be provided by the Operator pursuant to Article 5.

**"Environmental Contamination"** means any contamination or pollution of the air, ground, or water, above, under, or surrounding the Depot or any part thereof that is not permitted by or consistent with the environmental Acts/ Laws, Regulations and Bye-Laws of any Relevant Authority.

**"Equipment"** means the tools, components and equipments to be used for the Construction Works, and such other appliances, gadgets, machinery, materials that will be installed by the Operator for the effective operation, management and maintenance of the Depot;

**"Facility Agent"** means the financial institution designated by Lenders to represent them for the purposes of the Financing Agreements and/or the Security Agreement;

**"Final Completion"** means that (i) the Depot has already reached Preliminary Completion; (ii) the Construction Works in relation to the Depot have been fully completed in accordance with this Agreement, and (iii) a Certificate of Final Completion for the Depot has been issued or is deemed to have been issued;

**"Final Completion Date"** means the date on which the Certificate of Final Completion for the Depot is issued or is deemed to have been issued in accordance with Article 7.4.4;

**"Final Maintenance Overhaul"** has the meaning specified in Article 12.2;

**"Financial Closing"** means the execution and delivery of such Financial Agreements as may be required (including the satisfaction or waiver of each of the conditions precedent to the initial availability of funds under such Financing Agreement) to evidence the consummation of all transactions necessary for the Operator to obtain debt financing for the Construction Works and Commissioning of the Depot, together with the receipt of such equity commitments and contributions as may be required by this Agreement and the Financing Agreements;

**"Financing Agreements"** means any agreement entered into between the Operator and any domestic and or international lender or consortium of lenders evidencing the grant and or disbursement of credit facility to the Operator for the implementation of the Project;

**"Force Majeure"** means the events specified in Article 15.1 hereof;

**"Grantor's Event of Default"** shall be the Grantor's failure and/or inability to perform an obligation imposed hereunder which may cause the Operator to issue a Notice of Intention to Terminate this Agreement;

**"Gross Misconduct"** means an act or omission of a party constituting either failure to pay due regard to serious consequences which a conscientious and reasonable contractor would normally foresee as likely to ensure, or a deliberate disregard of any consequences of such act or omission;

**"Inland Container Depot – Implementation Committee (ICD-IC)"** means the committee set up by the Federal Ministry of Transport or any other body, agency or parastatal that may be set up in its place by the Federal Government to ensure detailed consideration of all the salient implementation issues and tasks and also constituted in respect of the regulations and oversight functions over the ICDs/CFS;

**"Grantor"** means a Government Agency approved by the Federal Government to implement, co-ordinate and supervise all ICD projects in the country in accordance with the provisions of Article 3.1. hereof;

**"Improper Draw"** means any draw on bonds in breach of the terms and conditions of this Agreement.

**"Independent Auditor"** means a reputable firm of chartered accountants who are members of or recognized by the Institute of Chartered Accountants of Nigeria and appointed by the Grantor to audit and verify the books of accounts of the Operator for the purpose of determining the Operator's turnover and the Operational Fee payable therefrom.

**"Lender"** means any entity or institution that has granted credit facility to the Operator in connection with the financing of the Project;

**"Maintenance Bond"** means the bond provided by the Operator pursuant to Article 9.5.

**"Milestone Dates"** means any date set in this agreement for the completion of a task or fulfillment of an obligation created under this agreement.

**"Monthly Performance Certificate"** means a certificate issued by the Grantor certifying that the Operator has met performance criteria in accordance with the Construction Work Programme;

**"Notice of Intention to Terminate"** means a notice issued in accordance with Article 16.3.1 hereof;

**"Notice of Termination"** means a notice issued in accordance with Article 16.3.2 hereof;

**"Operation and Maintenance Contractor"** ("O&M Contractor") means the Operator or a contractor hired by the Operator and approved by the Grantor to manage, operate, maintain and repair the Units and the Depot together with its associated facilities during the operating period in accordance with the O&M Contract and this Agreement and its successors and permitted assignees.

**"Operation and Maintenance Agreement"** (O&M Agreement) means where applicable the agreement entered into between the Operator and the O&M Contractor for the operation, management and maintenance of the Depot;

**"Operation and Maintenance Manual"** means the manual specifying standards and procedures for the effective operation, management and maintenance of the Depot as set out in **Annexure D** hereto;

**"Operational"** means the decision made by the Grantor to grant the rights and impose on the Operator, the obligations specified in this Agreement;

**"Operational Period"** shall be **(25) Twenty Five years** effective from the completion of Construction Date or such longer period as may be extended from time to time pursuant to the terms hereof;

**"Operational Rights"** means all the right conferred and obligations imposed on the Operator pursuant to this Agreement;

**"Operator's Event of Default"** means an event of default specified herein which may entitle the Grantor to issue a Notice of Intention to terminate this Agreement

**"Operating Parameters"** means the operating parameters of the Depot as may be agreed between the Grantor and the Operator.

**"Panel of Mediators"** means the panel of experts appointed in accordance with Article 22.2.1

**"Preliminary Completion"** means that: (i) the Depot has been tested by the Grantor in accordance with the approved designs, drawings and technical specifications of the Project; (ii) no further Construction Works is required with respect to the Depot to enable the safe operation of the Depot; (iii) a Certificate of Preliminary Completion for the Depot has been issued or is deemed to have been issued.

**"Preliminary Completion Date"** means the date on which the Certificate of Preliminary Completion for the Depot is issued or is deemed to have been issued in accordance with Article 7.4.3.

**"Project"** means the financing, designing, construction, equipping, completion, testing, commissioning, operation, management and maintenance of the Depot;

**"Project Implementation Schedule"** means the Schedule set forth in Article 6.10.1

**"Project Scope of Works"** means the scope of the Construction Works and equipping of the Depot specified in **Annexure A** hereto;

**"Prudent Industry Practice"** means the standard of practice attained by exercising that degree of skill, care, diligence, prudence and foresight which would reasonably be expected from a skilled and experienced contractor/operator engaged in the same type of undertaking under the same or similar circumstances. With respect to the Depot, Prudent Industry Practice shall include, but not limited to –

- (a) compliance with the rules, regulations, guidelines, directives and standards of the Grantor which may be made, modified or reviewed from time to time;
- (b) procurement of adequate materials, resources and supplies, to meet the Depot's needs under normal conditions and reasonably anticipated abnormal conditions;
- (c) provision of sufficient, adequately experienced and trained operating personnel to operate the Depot properly, efficiently and within the equipment manufacturers' guidelines and specifications and who are capable of responding to emergency conditions;
- (d) performance of preventive routine and non-routine maintenance and repairs on a basis that ensures reliable long-term and safe operation, and carried out by

- knowledgeable, trained and experienced personnel utilizing proper equipment, tools and procedures;
- (e) undertaking appropriate monitoring and testing of equipment to ensure equipment is functioning as designed and to provide assurance that equipment will function properly under both normal and emergency conditions; and
  - (f) operation of equipment in a safe manner and in a manner safe to workers, the general public and the environment.

**"Relevant Authority"** means any Ministry (whether Federal or State), governmental department, agency, public authority, directorate, or body having jurisdiction in Nigeria;

**"Security Agreement"** means an agreement entered into by the Operator and approved by the Grantor and granting to the Lenders in accordance with Nigerian law any pledge, mortgage, encumbrance or other security interest in the Secured Property or in any property, ownership rights or other rights and interests granted by the Grantor to the Operator pursuant to this Agreement;

**"Secured Property"** means the Operational Rights, Construction Works, the Depot, and any other property or asset of the Operator which is situated on the Site or in the Federal Republic of Nigeria and which is and can be the subject of any Security Agreement under the laws of the Federal Republic of Nigeria;

**"Site"** means the parcel of land the subject of the Certificate of Occupancy to be subsequently issued by the appropriate authority and measuring approximately 35 hectares (subject to precise survey) and the appurtenances thereto situate at Zawachiki village (Kano-Zaria Road) Kano State. The dimensions and abuttal of which are specifically described and delineated on the Site Plan attached hereto as Annexure D, including the rights of way, way leave and rights of passage delivered to the Operator by the Grantor in accordance with the provisions hereof, for the construction of the Depot and its associated facilities;

**"Start Date"** means a date 14 days after the Construction Completion Date or 21 days after the Construction Period whichever occurs earlier;

**"Target Final Completion Date"** means the Milestone Date set forth in Annexure C pursuant to Article 6.10.1 representing the intended Final Completion Date for the Depot as such date may be modified in accordance with the terms of this Agreement;

**"Target Preliminary Completion Date"** means the Milestone Date set forth in Annexure C pursuant to Article 6.10.1 representing the intended Preliminary Completion Date for the Depot as such date may be modified in accordance with the terms of this Agreement;

**"Technical Proposal"** means the technical proposal contained in the Operator's tender for the Project submitted to the Grantor on 13<sup>th</sup> April 2004 as amended and improved by agreement and other technical changes and improvements on which the Grantor and the Operator have reached agreement;

**"TEU"** means twenty-foot equivalent container unit. Containers are sized in standard of twenty feet. Container vessel capacity and port throughput capacity are frequently referred to in TEUs;

**"Transfer Committee"** means the committee established in accordance with Article 12.12;

**"Transfer Date"** means the Business Day following the last day of the Operational Period;

**"Users"** shall include exporters, importers, freight forwarders, consolidators and persons that use the Depot and associated facilities thereat;

**"Utilities"** shall include water, electricity, gas, sewerages, diesel, and telecommunications.

## 1.2 Interpretation

- (1) The Annexures to this Agreement shall form an integral part hereof and references to Annexures shall be reference to Annexures hereto, unless otherwise indicated.
- (2) The words "include", "includes" and "including" shall at all times be construed as if followed by the words "without limitation to" or "but not limited to".
- (3) Wordings importing the Singular shall include the plural and vice versa and words importing persons shall include bodies corporate, unincorporated associations and partnerships.
- (4) Reference herein to statutes, legislation and the like shall include amendments, modifications and re-enactment of such statutes or legislation;

- (5) Approvals and notices required to be given hereunder shall be in writing.
- (6) In the event that the provisions of this Agreement become inconsistent with the provisions of any other Agreement relating to the project herein, the provisions of this Agreement shall prevail

## ARTICLE 2

### THE OPERATION

#### **2.1 Grant of the Operational Rights**

The Grantor hereby grants to the Operator the right to design, develop, finance, construct, complete, test, commission, operate, manage, maintain and transfer the Depot in accordance with the terms of this Agreement. The Operator shall have all the rights and obligations herein reserved under this Agreement and shall transfer the Depot to the Grantor at the end of the Operational Period.

#### **2.2 Exclusivity of the Operational Rights**

Save as otherwise provided in Articles 16.4 and 20.2 the operational rights granted to the Operator pursuant to this Agreement are exclusive. The Grantor shall ensure that no part of this Operation shall be granted to any other party unless the Operator is in breach of any of its obligations under this Agreement that would give rise to a right of termination by the Grantor under Article 16 of this Agreement.

#### **2.3 Duration**

This Agreement shall take effect from the date it is executed by the parties and shall be valid till the end of the operational period.

#### **2.4 Transfer**

At the end of the Operational Period, the Operator shall transfer the Depot to the Grantor or any person designated by the Grantor in accordance with the provisions of Article 12 of this Agreement.

#### **2.5 Extension of the Operational Period**

In case of:

- (a) any Default by the Grantor which results in delay in the Commencement of the Operational Period; or
- (b) Force Majeure which results in unavoidable delay in the Commencement of Operational Period or which falls under this Agreement,

the Operational Period may be mutually extended so as to place the Operator in substantially the same economic position as it was prior to the

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occurrence of such event provided that the costs, losses, damages or expenses resulting there from to the Operator are not otherwise compensated by the Grantor or by any proceeds to which the Operator is or should have been entitled to had it maintained insurance in accordance with Article 14.12.5.

### 2.6 Licensing Fee

- a. On the execution of this Agreement, the Operator shall pay the Nigerian Currency equivalent of the sum of **US\$ 25,000.00 [Twenty Five Thousand US Dollars]** at the prevailing Central Bank of Nigeria Foreign Exchange rate at the time of payment to the Grantor as the Licensing Fee.

### 2.7 Royalty

- a. Upon the commencement of the Start Date, the Operator shall pay 10% of its annual turnover or the Nigerian Currency equivalent of an initial \$10 (at the prevailing Central Bank of Nigeria Foreign Exchange rate at the time of payment) per TEU (in the case of containerized cargo), and 10% of the total charge levied on non-containerized cargo, handled by the Depot, to the Grantor, as royalty. The royalty shall be payable quarterly within 30 days from the end of each quarter and shall be collected by the Grantor.

The amount of the royalty shall be negotiated with the Grantor every three (3) years.

- b. The Operator hereby covenants that as from the commencement of the Start Date, it shall promptly render quarterly and annual returns to the Grantor in respect of the Operator's operations and revenues for each quarter and financial year and shall afford the Grantor, its authorized employees, agents and or Independent Auditor access to all books of accounts as may be necessary for the verification of the Royalty payable herein.

### 2.8 Ownership and Right to Operate the Depot during the Operational Period

#### 2.8.1 Right to Own and Operate the Depot

Save as otherwise provided in Article 5, the Operator shall have the right to own, maintain and operate all assets, equipment and facilities constituting the Depot during the Operational Period.

### **2.8.2 Transfer and Mortgage**

The Operator shall be allowed to mortgage or transfer the assets, facilities and equipment of the Depot for the purpose of financing in accordance with Article 20.2. Such mortgage or transfer shall be consented to in writing by the Grantor, such consent not to be unreasonably withheld, and shall have no adverse effect on the rights or interests of the Grantor. In the case of a proposed refinancing the Grantor shall have an absolute right to grant or withhold consent.

Save as provided in Articles 16.6.2 and 20.2 the Operator shall not mortgage or transfer the assets, facilities and equipment of the Depot for any purpose other than the financing and refinancing of the Depot.

### **2.9 Operator's Principal Obligations during the Operational Period**

The Operator shall be responsible for the performance of the Construction Works and operation and maintenance of the Depot during the Operating Period at the Operator's own cost and risk.

### **ARTICLE 3**

## **PROJECT IMPLEMENTATION**

### **3.1 PROJECT IMPLEMENTATION**

- (1) The Operator shall strictly and unreservedly conform with and adhere to the specifications of designs, construction work, quality of construction work, implementation schedule, testing and completion, operation and maintenance, managements, payment of tariffs and charges, transfer procedure and requirement, and all other stipulations and obligations herein specified under this agreement.
- (2) The Operator hereby undertakes to grant the Grantor such access to the site, the construction work and any other place or information relating to the project as it may reasonably require. The aforesaid undertaking shall survive the termination of this Agreement.
- (3) The Grantor shall monitor and enforce the construction/operational standards of infrastructure, equipment, facilities and services at the Inland Container Depot and Cargo Freight Stations.
- (4) The Grantor may delegate some or all its powers under this agreement to any Government Organ or Agency and this shall be conveyed to the Operator.
- (5) The Grantor may designate any of its competent professional staff or competent staff of any other appropriate Government agency to supervise and ensure the quality of construction works as herein specified in this Agreement and such appointment shall be conveyed to the operator.



**PART B**

**CONSTRUCTION OF THE DEPOT**

**ARTICLE 4**

**RIGHT TO LAND**

**Title to Land**

The Grantor shall be responsible for:

- (1) Facilitating and procuring a valid title of the Site for the Operator;
- (2) Securing access and right of way to the Site to the Operator for the construction of Access Roads and Rail Siding; and
- (3) Keeping the Site and Right-of-Way free from all liens and encumbrances so that the Operator has the right to the free use thereof for the Operational Period for the purposes of the Project.

The Grantor shall grant an extension of the right of the Operator for the free and exclusive use of the Site, Access Road and Rail Siding in case of extension of the Operational Period in accordance with the provisions of this Agreement.

**Restrictions on Site Use**

The Site is for the special use as a Depot and shall not be used by the Operator for any other purpose.

**Suitability and Conditions of Site**

The Operator acknowledges that it has inspected and investigated the Site prior to the Construction Commencement Date.

Except for the provisions of Article 4.1, Grantor makes no representation and gives no warranty to the Operator in respect of the condition of the Site. The Operator shall accept the Site in its present condition and subject to all defects including subsurface soil conditions.

## **ARTICLE 5**

### **DESIGN**

#### **5.1 Design Requirements**

The Operator shall be responsible for the preparation of the Preliminary Design in compliance with the requirements in **Annexure A**, the Technical Proposal, and the principles agreed between the Operator and Grantor.

#### **5.2 Review of Criteria for Preliminary Design**

The Operator acknowledges that it has reviewed the criteria for preliminary design and technical specifications set out in Annexure A and has clarified any errors, inconsistencies, ambiguities or omissions therein. The consequences and costs resulting from any errors, inconsistencies, ambiguities or omissions in the provisions of **Annexure A** shall be borne by the Operator.

#### **5.3 The Grantor's Review and Approval of Preliminary Design**

The Operator shall from time to time submit to the Grantor the Preliminary Design for review and approval.

#### **5.4 Operator's Right to Change Preliminary Design**

##### ***5.4.1 Conditions for Change of Preliminary Design***

At any time during the Construction Works, the Operator may, by notice to the Grantor, propose changes to the approved Preliminary Design, if the changes shall:

- (a) Expedite the construction, or
- (b) Reduce the cost of construction or maintenance (provided the same does not negatively affect the quality of the Project), or
- (c) Improve the quality of the Project.

##### ***5.4.2 Approval of Proposed Changes***

The Operator shall present to the Grantor all the necessary documents to support and justify any design changes proposed after the approval of the Preliminary Design.

Subject to the procedures set forth in **Annexure A**, the Grantor shall inform the Operator not later than thirty (30) days after its

receipt of the proposed changes whether the changes are approved. If the Grantor has not objected in writing to the proposed changes within the applicable time period, the Grantor shall be deemed to have approved such proposed changes. The Operator shall not make any such changes without the written or deemed approval of the Grantor and shall respond to any question or request for clarification raised by the Grantor.

#### **5.5 The Grantor's Review and Verification of Detailed Design**

The Operator shall prepare the Detailed Design for the Project in accordance with the Preliminary Design and the technical specifications applicable to the Project listed in Annexure A. The Operator shall submit on or prior to the Milestone Date applicable thereto to the Grantor the Detailed Design for review and approval.

#### **5.6 Operator's Right to Change Detailed Design**

At any time during the Construction Works, the Operator may, by notice to the Grantor, propose changes to the Detailed Design. The Operator shall present to the Grantor all the necessary documents to support and justify the proposed changes to the Detailed Design.

The Grantor shall notify the Operator, within twenty (20) days following receipt by the Grantor of notice of any such proposal from the Operator of its approval or rejection of the proposed changes. The proposed changes shall be deemed approved if the Grantor does not respond within twenty (20) day period. The Operator shall not make any such changes without written or deemed approval of the Grantor and shall respond to any question or request for clarification raised by the Grantor. Any written or deemed approval of a change in the Design shall not result in any delay of the Construction Completion Date or extension of the Operational Period.

#### **5.7 Responsibility of the Operator**

The Operator shall be solely responsible for any deficiency in the design of the Project provided such deficiency does not result from a change in the Preliminary Design imposed in writing on the Operator by the Grantor that is not in compliance with the criteria for Preliminary Design. The failure of the Grantor to object to any design, design drawing or specification or any change thereto shall not be construed as a waiver by the Grantor of any of its rights under this Agreement or in any way relieve the Operator of its obligation thereunder. In furtherance of the foregoing, the Operator:

- (a) accepts that any engineering review conducted by the Grantor is solely for the Grantor's own information and that, by conducting such review the Grantor undertakes no responsibility as to the

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quality of engineering or construction of the Depot or any component thereof.

- (b) shall in no way represent to any third party that, as a result of any review by the Grantor, the Grantor is responsible for the engineering or construction soundness of the Depot or any component thereof; and
- (c) shall be solely responsible for the technical feasibility, operational capability, economy and reliability of the Depot and any component thereof.

## ARTICLE 6

### CONSTRUCTION WORKS

#### **6.1 Obligations of Operator**

6.1.1 The Operator shall carry out the construction works on this 20,000 TEU depot in three developmental stages, that is:

Phase 1	first 5,000 TEUs
Phase 2	next 5,000 TEUs
Phase 3	next 10,000 TEUs

- (a) The Operator shall commence the construction of a new phase in accordance with the work schedule approved by the Grantor immediately upon the capacity utilization of the previous phase reaching 75% of its installed capacity;
- (b) If the Operator fails to commence construction in accordance with the provision of this article, then the Operator shall be deemed to have abandoned the construction of the depot and being an event of default on the part of the Operator, the provisions of Article 16.1 of this Agreement shall apply.
- (c) Subject to the power of the Grantor to extend the construction period, the construction period shall be thirty (30) months. The Grantor shall however, have the power to grant an extension of the construction period beyond (30) thirty months. Provided that such extension shall be based on reasonable grounds and shall not exceed 6 months.

6.1.2 The Operator shall be responsible for all Construction Works and shall assume all costs and all risks for the Construction Works in accordance with this Agreement. Without limiting the generality of the immediately preceding sentence, the responsibilities of the Operator shall include the following:

- (a) Commencing the Construction Works on or prior to the applicable Milestone Date;
- (b) Performing the Construction Works in accordance with the Design requirements, the quality requirements set forth in Article 6.4 and in accordance with the relevant laws and regulations of the Federal Republic of Nigeria.

- (c) Giving priority to safety in its construction approach and activities in order to protect life, health, property and the environment;
- (d) Taking all reasonable measures to minimize disruption and other inconvenience to the public and area residents and businesses during construction.
- (e) Applying for and obtaining in a timely manner and thereafter maintaining the Approvals for the Project required to be obtained from any Relevant Authority and paying all applicable fees and costs for such Approvals.
- (f) Applying for and obtaining, in a timely manner, all visas and work permits for foreign personnel and recruiting local labour, including paying all applicable fees and cost relating thereto.
- (g) Completing the Construction Works on or prior to the applicable Milestone Dates.
- (h) And any other obligation that may be specified in this Agreement.
- (i) Obtaining the necessary safety certificates for its equipment and ensuring the maintenance of the validity of such safety certificates.

## **6.2 Obligations of the Grantor**

The responsibilities of the Grantor shall include the following:

- (a) delivery of the Site in accordance with Article 4.1;
- (b) facilitating all dealings with the Relevant government agencies during the construction period;
- (c) appointing representatives to the Inland Container Depot – Implementation Committee (ICD-IC).
- (d) Supervision and monitoring the design, construction and operation of the project in accordance with this Agreement.

## **6.3 Preparation of the Site**

The Operator shall at its own cost prepare the Site and the Construction Facilities in accordance with all requirements of this Agreement.

## **6.4. Quality of Construction Works**

The Operator shall ensure that the Construction Works are performed in accordance with all requirements set forth in this Agreement, including:

- (a) The Preliminary Design and the Detailed Design as set out in Article 5; and

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- (b) The standards and technical specifications and requirements set out in **Annexure A**; and
- (c) When not so specified, in a proper and workmanlike manner using new and first quality materials and equipment.

## **6.5 Quality Assurance and Quality Control**

### **6.5.1 Operator's Quality Assurance and Control**

Prior to the Construction Commencement Date, the Operator shall with the approval of the Grantor, establish a quality assurance and quality control program, to be followed by the Operator and the Construction Contractor. The Operator shall make available to the Grantor, on a continuing basis complete documentation of quality control results for the relevant aspects of Construction Works completed or in progress.

### **6.5.2 The Grantor's Right to Control Quality Requirements**

Without affecting the Operator's obligations hereunder, the Grantor shall have the right within working hours to attend or examine the Operator's and any Construction Contractor's quality control inspections and methods to confirm that the Construction Works in question comply with the quality requirements in Article 7.4. The Operator shall assist in the performance of such checks.

### **X 6.5.3 Failure to Comply with Quality and Safety Requirements**

If the Construction Works or any component thereof does not conform in a material way with the quality or safety requirements of this Agreement, the Grantor may give notice to the Operator of such failure. If the Operator fails or refuses to correct the lack of conformity within thirty (30) days after the Grantor's notice, then the Grantor, shall be entitled to carry out the necessary corrective work itself or to engage a third party to do so at the risk and expense of the Operator. In such case, the Operator shall allow the employees, agents or contractors of the Grantor access to the Depot and to the land used for Construction Works for such purpose.

## **6.6 Construction Personnel**

The Operator shall provide, or ensure that the Construction Contractor provides, all necessary personnel with adequate skills and any required certificates for the performance of the Construction Works. Prior to the Construction Commencement Date, the Operator shall submit to the Grantor a list of all supervisory personnel of the Operator and the Construction Contractor, its quality supervisory personnel to be assigned to the Project, together with a summary of their qualifications.

## **6.7 Equipment and Materials**

The Operator shall provide or cause to be provided at its own cost all equipment, materials and other items whether of temporary or permanent nature, required for the performance of the Construction Works.

## **6.8 Selection of Construction Contractor**

### **6.8.1 Selection of Construction Contractor**

In order to carry out its obligations under this Article, the Operator shall select a reputable construction company as approved by Grantor to serve as the Construction Contractor to perform the Construction Works. The Construction Contractor shall undertake the Construction Works on the basis of the Construction Contract approved by the Grantor which approval shall not be unreasonably withheld.

### **6.8.2 Replacement of the Construction Contractor**

The Operator shall have the right to terminate the Construction Contract and to replace the Construction Contractor. Replacement of the Construction Contractor and the Construction Contract shall be subject to Grantor's prior written approval in accordance with Article 21.

### **6.8.3 Operator's responsibility for the Construction Contractor**

- (a) The appointment and approval of the Construction Contractor shall not relieve the Operator of any of its obligations under this Agreement. The Operator shall be fully responsible to Grantor for any acts or omissions of the Construction Contractor, its agents or any person either directly or indirectly employed by it as if such acts or omissions were the acts or omissions of the Operator.
- (b) The construction Contract entered into with the Construction Contractor shall contain those articles of this Agreement which are necessary to enable the Operator to fulfill its obligations under this Agreement.

### **6.8.4. Operator's rights in pursuance of its construction obligations**

In pursuance of its construction obligations hereunder, the Operator shall have the right to –

- (a) Award contracts with or without tender;

- (b) Purchase equipment and machinery to be installed in the Depot;
- (c) Enter into contracts for the supply of materials and services;
- (d) Appoint, organize and direct staff to supervise and manage the Project; and
- (e) Do all things that are necessary or desirable, and lawful for the completion of the Depot.

Nothing contained in this Article shall in any way affect the obligation of the Operator to obtain the approval of the Grantor or affect the right of the Grantor to grant such approval as may be required in other provisions of this Agreement.

#### **6.9 As-Built Drawings and Technical Details**

Within one (1) month after the Final Completion Date of the Depot, the Operator shall furnish the Grantor with ten (10) copies and computerized version of all construction and "as built" design drawings of the Depot and technical documents including:

- (a) ten (10) copies and computerized version of all equipment plans, instructions, warranties, installation records, testing reports, quality supervision and acceptance records; and
- (b) ten (10) copies and computerized version of other technical documents or information relating to the Project.

#### **6.10 Project Implementation Schedule; Milestone Dates**

##### **6.10.1 Project Implementation Schedule**

The Operator shall perform its obligations in respect of the Construction Works in accordance with the Project Implementation Schedule established by the Operator and approved by the Grantor as contained in **Annexure B**.

##### **6.10.2 Extension of Milestone Dates**

Where as a result of Force Majeure or the Default of the Grantor, the Operator is unable to attain a Milestone Date, the Operator shall be entitled to an extension of the Milestone Date pursuant to Article 6.10.1 only if:

- (a) the Operator gives the Grantor a written claim for an extension of time within seven (7) days of the delay occurring which states the likely effect of the Force Majeure or Default on the relevant Milestone Date; and

(b) the Operator reasonably satisfies the Grantor that:

- (i) completion of the Milestone Date has actually been delayed; and
- (ii) the Operator has taken all reasonable steps to minimize the delay

The Grantor shall promptly after receiving the Operator's claim under this Article give the Operator notice of any extension of time which is granted or, if no extension is given, notice of that decision.

## **6.11 Progress Reports**

### ***6.11.1 Submission of Monthly Progress Reports***

The Operator shall submit to the Grantor a monthly report of the progress of the Construction Works which report shall describe in reasonable detail the Construction Works completed and in progress and such other matters as the Grantor may reasonably request. The progress reports are in addition to the information concerning the quality control program to be made available to the Grantor by the Operator pursuant to Article 6.5.

### ***6.11.2 Contents of Monthly Progress Reports***

Without prejudice to the generality of the foregoing, each report shall include:

- (a) charts and detailed description of progress, including each stage of procurement, delivery to Site, construction and erection;
- (b) photographs showing the status and progress of construction on the Site;
- (c) manufacturing details of plant, machinery, equipment and materials, such as the name of the manufacturing location, and the actual or expected date of:
  - (i) commencement of manufacture;
  - (ii) Operator's inspection;
  - (iii) tests; and
  - (iv) shipment and arrival at the Site.
- (d) copies of quality assurance documents and tests results;
- (e) safety statistics, including details of any hazardous incidents and activities relating to environmental matters; and
- (g) comparison of actual and planned progress, with details of any events or circumstances, which may jeopardize construction completion, and the measures being (or to be) adopted to overcome delays.

## **6.12 Monitoring and Inspection by the Grantor**

### **6.12.1 *Monitoring and Inspection of the Construction Works***

The Grantor shall be entitled to monitor the Construction Works and carry out reasonable inspection in the presence of an Operator's representative. Such monitoring and inspection by the Grantor shall not interfere with the progress of construction.

### **6.12.2 *Cost of Monitoring and Inspection***

All Costs of such monitoring and inspection shall be borne by the Grantor. However, if the results of such monitoring and inspection reveal any material defects in the construction Works or materials all costs of such monitoring and inspection shall be compensated by the Operator.

### **6.12.3 *Notice of Monitoring and Inspection***

The Operator shall be advised by reasonable prior notice of any inspection to be carried out by the Grantor. The Operator shall afford and shall cause the Construction Contractor to afford such access to the Site (including temporary office facilities for representatives of the Grantor), assistance and equipment as may be reasonably required by the Grantor to carry out monitoring and testing of the Construction Works with any resulting costs to be borne as provided above.

The Operator shall make available and shall cause the Construction Contractor to make available for inspection at the Site by the Grantor or its duly authorized representatives and agents copies of all plans and designs, any relevant document and information relevant to the purpose of the particular inspection. Any such inspection of confidential or proprietary information shall be subject to the confidentiality of provisions of Article 15.3.

## **6.13 Rejection of Work**

At any time prior to the Final Completion Date of the Depot, the Grantor shall be entitled to reject in writing any work, materials or equipment which is not substantially in accordance with this Agreement and to require the Operator to correct the work or substitute proper materials and equipment, provided that the Grantor simultaneously provides the Operator with the basis for its rejection(s). The Operator shall be responsible for any increase in costs and delay resulting there from.

**6.14 Non-waiver**

6.14.1 The Grantor shall use its best efforts to notify the Operator of any objection under Article 6.13 that it expects the Operator to remedy as soon as possible after it discovers such a defect with the goal of minimizing the costs of such remedy.

6.14.2 The failure of the Grantor to monitor, inspect or reject any part of the Construction Works shall not be construed as a waiver of any of the rights of the Grantor hereunder and shall not release the Operator from any of its obligations under this Agreement.

**6.15 Clearance of the Site after Completion of the Construction Works**

On completion of Construction Works, the Operator shall clear away and remove all surplus materials, rubbish and temporary work so as to leave the Site in a clean and usable condition within six (6) months following the Final Completion Date of the Depot.

## ARTICLE 7

### TESTING AND COMPLETION

#### **7.1 Testing**

The parties shall carry out the program of tests within the time limits and according to the requirements set forth in **Annexure A** to confirm that the Project meets the design standards and specifications set forth in this Agreement, and applicable Nigerian laws and regulations.

#### **7.2 Attendance at Testing**

The Grantor shall be entitled to have its agents and experts present at any testing at the Site; provided written notice of the testing program has been given pursuant to Article 7.3. If the Grantor declined in writing to attend the testing or failed to make any comments on the testing program, tests may be conducted at the notified times in the absence of representatives of the Grantor.

#### **7.3 Notice of Testing Program**

No less than twenty (20) days prior to starting the testing program, or such shorter period as the parties may agree, the Operator shall give the Grantor written notice of the testing program and of the date it proposes to commence testing at the Site. Such testing program shall indicate the items, date and time proposed for performing testing and shall otherwise be in compliance with the requirements of Annexure A.

The Operator shall perform all tests at the time and place stated in the testing program. In the event that the Operator intends to carry out any testing at the Site otherwise than as set out in the testing program the Operator shall give no less than twenty (20) days, or such shorter period as the parties may agree, written notice to the Grantor of the items date, time and place of the relevant test.

#### **7.4 Certification of Testing and Completion**

##### **7.4.1 *Completion of Building and Erection Work***

The Operator, , shall notify the Grantor in writing as soon as the Operator considers that, with respect to the Depot, no further Construction Works are required in accordance with this Agreement. The Operator and the Grantor shall conduct within seven (7) days after receipt of such notice a joint inspection and the Grantor shall promptly thereafter confirm that no further Construction Works are required or will notify the Operator in writing of works to be completed to finish the Construction Works.

If the Grantor fails to conduct the inspection or to issue such notice within seven (7) days after receipt of the notice from the Operator it shall be deemed, on the eight (8) day after delivery of the notice from the Operator, that no further Construction Works are required.

#### **7.4.2 Certificate of Testing**

On the completion of each test the Operator shall promptly certify that the test has been completed and shall provide the Grantor with a copy of such certificate which shall set forth in reasonable detail the test procedures and the results of each test. The Grantor shall advise the Operator in writing within fourteen (14) days of its comments on the results of such testing.

#### **7.4.3 Preliminary Completion**

Provided that the Construction Works have been completed to the extent required to enable the safe operation of the Depot, the Operator shall perform tests in accordance with the requisite requirements. Upon the delivery to the Grantor of the copy of the certificate relating to the completion of the last of such tests, the Operator shall notify the Grantor in writing that the Operator considers that the Depot has reached Preliminary Completion in accordance with this Agreement but for the issue of the Certificate of Preliminary Completion.

Within Fourteen (14) days after receipt of such notice the Grantor shall advise the Operator of its comments on such final test and shall issue a certificate (the "Certificate of Preliminary Completion") or give notice to the Operator of the reasons why a Certificate of Preliminary Completion cannot be issued. If the Grantor fails to advise the Operator of its comments on the results on such final test or fails to issue such certificate or notice within that time, the Certificate of Preliminary Completion shall be deemed issued on the fifteenth (15<sup>th</sup>) day after the provision by the Operator of the notice together with the copy of the final test certificate.

#### **7.4.4 Final Completion**

Within 30 days of the final test and when all the Construction Works have been fully completed in accordance with this Agreement, the Operator shall give written notice of such fact to the Grantor, and on receipt of the same the Grantor shall within 14 days of such receipt issue a certificate that the Depot has been finally completed (a "Certificate of Final Completion") or give notice to the Operator of the reasons why a Certificate of Final Completion

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cannot be issued. If the Grantor fails to issue such Certificate of Final Completion or notice within fourteen (14) days after receipt of the Operator's notice, the Certificate of Final Completion shall be deemed issued on the Fifteenth (15<sup>th</sup>) day after receipt of such notice.

#### 7.5 No Waiver

The Grantor's inspection and acceptance of the Construction Works and the issuance of any Certificate of Preliminary Completion or Certificate of Final Completion shall not relieve the Operator of liability of any type for defects or delay in the design or construction of the Project.

**ARTICLE 8**  
**DELAY IN COMPLETION AND ABANDONMENT**

**8.1 Delayed Completion Due to the Grantor**

If there is any delay in the Construction Commencement Date due to Default of the Grantor

- (a) the Milestone Dates shall be appropriately extended under Article 6.10.2.
- (b) the Operator shall be entitled to a day for a day extension of the Operational Period corresponding to the delay; and

**8.2.1 Final Completion**

Subject to Article 8.3, in the event that, due to the Default of the Operator, the Operator fails to bring about Final Completion of the Depot by the Target Final Completion Date, the Operator shall pay to the Grantor liquidated damages for delay occurring after the Target Final Completion Date:

- (a) an amount of Five Hundred Thousand Naira (₦ 500,000.00) for the first thirty (30) days period.
- (b) an amount of One Million Naira (₦ 1,000,000.00) for the following thirty (30) day period
- (c) One Million, Five Hundred Thousand Naira (₦ 1,500,000.00) for each thirty (30) day period thereafter.

**8.2.2 Operator's Limitation of Liability for Delays**

The Grantor's entitlement to liquidated damages shall be without prejudice to the right to terminate under Article 16.

**8.3 Abandonment**

The Operator shall not be entitled to the refund of the licensing fee paid in the event of his abandoning the construction works

**8.4 Deemed Abandonment**

The construction of the Depot shall be deemed to have been abandoned if the Operator

- (a) notifies the Grantor in writing that it has terminated the Construction Works and does not intend to recommence construction.

- (b) fails to commence Construction Works on the Site within thirty (30) days from the Milestone Date applicable to the Construction Commencement Date other than by reason of an event of Force Majeure or a Default of the Grantor.
- (c) fails to resume Construction Works within fourteen (14) days after the end of any Force Majeure, other than by reason of Force Majeure or a Default of the Grantor.
- (d) for any other reason, the Operator ceases Construction Works or withdraws either directly or through action by the Construction Contractor, all, or substantially all personnel from the Site prior to the Final Completion Date of the Depot other than by reason of
  - (i) the occurrence of Force Majeure,
  - (ii) the appointment of a replacement Construction Contractor within sixty (60) days from the date when the Construction Works ceased; or
  - (iii) a Default of the Grantor; or
- (e) the Operator fails to bring about Final Completion of the Depot within sixty (60) days after the Target Preliminary Completion Date of the Depot as such date may be extended in accordance with Article 6.10.2

#### **8.5 Exception to the Operator's Limitation of Liability**

The limitation of the Operator's liability for delay in completion of the Construction Works and for abandonment or deemed abandonment as specified in Article 8.4 does not apply if the Operator's behaviour amounts to Gross Misconduct.

**PART C**

**OPERATION AND MAINTENANCE OF THE DEPOT**

**ARTICLE 9**

**OPERATION AND MAINTENANCE**

**9.1 Obligations of the Operator**

The Operator shall be responsible for the management, operation and maintenance of the Depot throughout the Operational Period at its own cost and risk and in accordance with Prudent Industry Practice and the provisions of this Agreement.

**9.2 Obligations of the Operator**

The Operator shall ensure that throughout the Operational Period the Depot is at all times:

- (a) suitable for use;
- (b) operated in accordance with Prudent Industry Practice and the Operation and Maintenance Manual provided for in **Annexure B**, and
- (c) maintained in good operating condition and capable of providing services for Users in a safe and stable manner.

**9.3 Safety and Technical Guidelines**

Not later than ninety (90) days prior to the Target Preliminary Completion Date and thereafter from time to time, the grantor shall specify the coordination of safety, security and technical guidelines required by Nigerian laws and regulations, standards and guidelines to be implemented in connection with the operation of the Depot within the Operations and Maintenance Manual and the Grantor's requirements and otherwise in accordance with Prudent Industry Practice. The Operator shall operate the Depot in accordance with such safety and technical guidelines once they are established.

**9.4 Manual for Inspection and Maintenance**

The Operator shall prepare a manual (the "Manual") for inspection and maintenance of the Depot based on the Operating Parameters which shall include procedures and schedules for carrying out periodical and annual inspections, routine maintenance, major repair maintenance and annual maintenance and for adjusting and improving the inspection and maintenance program.

The Operator shall permit the Grantor to have access to and to examine the manual.

## **9.5 Maintenance Bond**

### **9.5.1 Amount of Maintenance Bond**

The Operator shall provide the Maintenance Bond in the form of a first demand bank guarantee as set out in any form acceptable to the Grantor that covers the value of the depot at the material time at least six months prior to the transfer date to secure the performance of all of the Operator's obligations under this Agreement including compliance with its warranty under Article 12.4.

### **Restoration of Maintenance Bond**

In the event that any draw down has been made on the Maintenance Bond during its Validity Period, the Operator shall ensure that the amount of the Maintenance Bond is restored to its original value at the Transfer Date.

### **Validity Period**

The Maintenance Bond shall remain in force until twelve (12) months after the Transfer Date.

### **Liability for Maintenance**

The right of the Grantor to draw upon the Maintenance Bond may be exercised without prejudice to any other rights of the Grantor under this Agreement and shall not relieve the Operator from any further liability or responsibility to the Grantor for failure to maintain the Depot.

## **9.6 Failure to Maintain**

### ***Corrective Maintenance by the Operator***

If the Operator is in breach of its obligations to maintain the Depot in accordance with Article 9.1, through no Default of the Grantor, the Grantor may give written notice of such breach to the Operator. On receipt of such notice, the Operator shall either perform the necessary corrective maintenance or may notify the Grantor that it disputes the content of the notice from the Grantor. In case of a dispute, the dispute shall be resolved in accordance with Article 22.

***Corrective Maintenance by the Grantor***

If in the course of implementing the procedure under Article 23, the Grantor or its designated Agents decides that the Operator has failed to maintain the Depot in accordance with Article 9.1 and if the Operator does not remedy that failure within the time period set forth in the decision made either by the Grantor or its designated Agents then the Grantor may itself, carry out the maintenance at the risk and expense of the Operator.

**9.7 Public Safety**

If the Project or any part thereof breaches the applicable safety standards and regulations of the Federal Republic of Nigeria, the Grantor shall notify the Operator of such breach and may restrict access to the Depot until the Grantor is satisfied in its reasonable opinion that the Depot is safe and shall notify the Operator immediately. The Grantor may direct the Operator to make the Project safe within the time specified in its notice. The Operator shall not be entitled to any compensation whatsoever for such restriction of access or operations.

**9.8 The Grantor's Right of Access**

The Grantor and its accredited representatives shall have access to the Depot at all times to monitor operation and maintenance provided that the Grantor shall not interfere with, delay or disturb the Operator and/or the O&M Contractor in performing their respective obligations under this Agreement and/or the O&M Contract.

**9.9 O&M Contractor**

**9.9.1 *Selection of O&M Contractor***

In order to carry out its obligations under this Article 9, the Operator, where the maintenance of the Depot is not being undertaken by it, shall select an operation and maintenance company (the "O&M Contractor") to be approved by the Grantor to manage, operate, maintain and repair the Depot.

The Operator shall deliver to the Grantor within nine (9) months of the Construction Commencement Date an Operation and Maintenance Agreement entered into with the "O&M Contractor" wherein the terms and conditions upon which the Depot will be operated, managed and maintained throughout the Operational Period are specified.

The O&M Contractor shall undertake the management, operation and maintenance of the Depot on the basis of the O&M Agreement approved by the Grantor within nine (9) months of the Construction Completion Date

#### ***9.9.2 Replacement of O&M Contractor***

The Operator, where the maintenance of the Depot is not being undertaken satisfactorily by the OM Contractor/Operator it, shall have the right to terminate the O&M Contract and to replace the O&M Contractor. Replacement of the O&M Contractor and the O&M Contract shall be subject to the Grantor's prior written approval in accordance with Article 21, which approval shall not be unreasonably withheld or delayed.

#### ***9.9.3 Operator's Responsibility for the O&M Contractor***

- (a) The appointment and approval of the O&M Contractor, where the maintenance of the Depot is not being undertaken by it, shall not relieve the Operator of any of its obligations under this Agreement. The Operator shall be fully responsible to the Grantor for any acts or omissions of the O&M Contractor, its agent or any person either directly or indirectly employed by it, as if such acts or omissions were the acts or omissions of the Operator.
- (b) The O&M Contract entered into with the O&M Contractor shall contain those Articles of this Agreement which are necessary to enable the Operator to fulfill its obligations under this Agreement.

#### **9.10 Supervision of the Operation and Maintenance of the Depot by the Grantor**

The supervision of the operation and maintenance of the Depot by the Grantor shall not release or reduce the responsibilities of the Operator for operation and maintenance of the Depot under this Agreement.

#### **9.11 Security and Fire Services**

The Operator shall ensure that the Depot is fitted with appropriate security and fire equipment and apparatus to conform with international standards. The Operator shall prior to the Commencement Date procure the services of well trained security and fire personnel to provide a level of safety and law enforcement in the Depot.

## **9.12 Inspection and Maintenance**

### **9.12.1 *Inspection and Maintenance Manual***

Prior to the Start Date, the Operator shall prepare an inspection and maintenance manual. The manual shall specify the procedure and schedule for carrying out periodic and annual inspections, effecting routine maintenance, heavy repair maintenance and annual maintenance at the Depot, and also for adjusting and improving the inspection and maintenance programme.

### **9.12.2 *Modifications to Inspection and Maintenance Manual***

A copy of the inspection and maintenance manual shall be delivered to the Grantor and same shall have their respective reasonable comments and suggested modifications and amendments incorporated therein. Thereafter, the Operator shall not modify the manual without the Grantor's prior approval, such approval not to be unreasonably withheld.

### **9.12.3 *Non Compliance with Inspection and Maintenance Manual***

If upon undertaking any scheduled periodic inspection, the Grantor discovers that the Depot is not being maintained in accordance with the manual, the Grantor shall notify the Operator specifying:

- (a) the maintenance works required; and
- (b) a reasonable period of time (having regard to the nature and the extent of works required) within which the Operator shall ensure that remedial maintenance work is effected.

## **9.13 Safety and Control Systems**

The Operator shall install and maintain conventional safety and security control systems at the Depot throughout the Operational Period.

## **9.14 Depot Usage**

Following the Construction Completion Date of the Depot, the Operator shall ensure that the Depot is convenient, suitable and safe for use at all times. The Operator shall not be considered in breach of its obligations hereunder to the extent that the Depot is not available for use as a result of a

- (a) Force Majeure;
- (b) Default of the Grantor;
- (c) Breach of this Agreement by the Grantor; and
- (d) Measures taken in accordance with this Agreement to ensure the

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safe use of the Depot (including maintenance or compliance with a request of the Grantor and or any Relevant Authority), the effect of which is to close the Depot.

**9.15 Operating Reports**

Every Quarter, the Operator undertakes to submit to the Grantor an operating report regarding the operation of the Depot.

**9.16 The Grantor and or any Relevant Authority Bye Laws regulating use of Depot**

- (a) The Operator shall display in conspicuous parts of the Depot, existing By-Laws made by the Grantor and or any Relevant Authority prescribing the rules and regulations for maintaining law and order and smooth operation of the Depot.
- (b) The Operator shall also make copies of the By-Laws available to Users of the Depot, at their request.

## **ARTICLE 10**

### **REVENUE GENERATED FROM THE OPERATION AND MANAGEMENT OF THE DEPOT**

#### **10.1 Operator's Entitlement to Collect Revenue**

The Operator shall throughout the Operational Period be entitled to collect from Users of the Depot and retain for its benefit, all revenue accruing from specified sources of income ceded to the Operator by the Grantor, subject to the provisions of Article 2.7 of this Agreement.

#### **10.2 Sources of Income**

The charges and tariffs collectible by the Operator from Users of the Depot during the Operational Period will be derivable from the following sources approved by the Grantor.

#### **10.3 Tariffs and Charges**

The Operator shall, in consultation with the Grantor and other Relevant Authority, determine the tariffs, rents, fees and other charges collectible from Users of the depot throughout the Operational Period.

#### **10.4 Charge/Tariff Collection**

The Operator may put in place a suitable tariff/charge collection mechanism or system as it may deem expedient, and may engage any person or entity to collect the said tariff/charges on its behalf.

#### **10.5 Payment of Tariffs and Charges**

The charges, fees and tariffs collectible by the Operator during the Operational Period shall be in Nigerian Currency.

#### **10.6 Operational Expenditure**

The Operator shall bear all expenses incidental to the effective and efficient operation, maintenance and management of the Depot

**ARTICLE 11**  
**FINANCING OF THE PROJECT AND FINANCIAL**  
**MANAGEMENT**

**11.1 Operator's Obligations**

The Operator shall be solely responsible for obtaining all the finance, both equity and debt, necessary to design, construct, operate and maintain the Depot for the duration of the Operational Period.

**11.2 Conversion of Project Income into Foreign Currency**

The Operator shall, subject to applicable Nigerian law, have the right to convert income from the Project from Naira to foreign currency in order to pay for Project expenses and debt service, if any.

**PART D**

**TRANSFER OF THE DEPOT**

**ARTICLE 12**

**TRANSFER DATE PROCEDURE AND REQUIREMENTS**

**12.1 General Scope of Transfer**

On the Transfer Date, the Operator shall transfer to the Grantor or any person designated by the Grantor, free of charge:

- (a) all of the Operator's rights, title and interest in and to the Depot including:
  - (i) the facilities of the Depot;
  - (ii) the fittings and spare parts;
  - (iii) the workshops and equipment;which shall be well maintained and in good working order;
- (b) all of its right to use the Site; and
- (c) such operating manuals, operation summaries, transfer notes, design drawings and other information as may reasonably be required by the Grantor, and which have not been delivered previously by the Operator in accordance with this Agreement to enable it to continue the operation of the Depot either directly or by any person designated by the Grantor.

The Depot and the right to use the Site shall be transferred to the Grantor free of charge and free and clear of all debts, liens, encumbrances, mortgages, security interests created by the Operator, Environmental Contamination attributable to the construction, operation and maintenance of the Depot and caused by the Operator and claims of whatever kind or nature.

**12.2 Final Maintenance Overhaul and Operational Test**

**12.2.1 *Final Maintenance Overhaul***

The Operator shall carry out a Final Maintenance Overhaul of the Depot not earlier than six (6) months prior to the Transfer Date provided that the same shall be completed not later than three (3) months prior to the Transfer Date. The precise time and contents of the Final Maintenance Overhaul shall be checked and approved by the Grantor twelve (12) months prior to the Transfer Date.

The Final Maintenance Overhaul shall include:

- (a) review of the standard items listed in the O&M Manual for machinery and equipment installed in the Depot;
- (b) elimination of existing defects;
- (c) inspection and repair, crack detection, test and replacement of worn and defective parts; and
- (d) such other items reasonably requested by the Grantor as are more particularly described in **Annexure A**. The Operator shall be responsible for including those items reasonably proposed by the Grantor into the Final Maintenance Overhaul schedule.

If the Operator fails to carry out the Final Maintenance Overhaul pursuant to this Article 12.2.1, the Grantor may do so itself at the risk and expense of the Operator. The Grantor shall be entitled to draw on the Maintenance Bond to cover the costs of the Final Maintenance Overhaul in such circumstances provided it has furnished the Operator with a detailed record of the costs incurred.

#### 12.2.2 Performance Test

- (a) After the Final Maintenance Overhaul and prior to the Transfer Date, the Operator shall carry out a performance test of the Depot in the presence of a representative of the Grantor. The tested performance parameters shall be in conformity with the **Annexure A** and the Technical Proposal.
- (b) In the event of a failure to meet the said parameters, the Operator shall correct any such defects to the Depot and repeat the performance test. If the Operator fails to correct any such defect within a reasonable period, the Grantor may do so itself at the risk and expense of the Operator. The Grantor shall be entitled to draw on the Maintenance Bond to cover the costs of correcting such defects provided it has furnished the Operator with a detailed record of the costs incurred.

### 12.3 Spare Parts

#### 12.3.1 Spare Parts to be Transferred

At the Transfer Date, the Operator shall transfer to the Grantor or any person designated by the Grantor, free of charge, a supply of the minimum spare parts adequate to meet the normal needs of the Depot as set out in the technical proposal. The spare parts for repair of breakdowns shall be supplied at the same level as the

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spare parts obtained by the Operator on the delivery of the equipment from the manufacturer.

**12.3.2      *Transfer Procedure***

The Grantor shall agree upon the detailed list of spare parts to be transferred and the detailed procedures for transfer in accordance with this Article six (6) months prior to the Transfer Date.

**12.3.3      *Purchase of Additional Spare Parts***

Prior to the Transfer Date, the Grantor may provide the Operator with a list of spare parts for the Depot which it requires in addition to those transferred under Article 12.3.1. The Operator shall use its best efforts to transfer such spare parts to the Grantor in return for payment by the Grantor at the same preferential prices as offered by the manufacturers to the Operator.

**12.4      *Warranties***

**12.4.1      *Condition of the Depot on the Transfer Date***

On the Transfer Date, the Operator shall warrant that the Depot:

- (a) is in good operational condition and well maintained (ordinary wear and tear excepted); and
- (b) meets all safety and environmental standards required by this Agreement; and
- (c) meets the standards set out in Annexure A and the Technical Proposal

**12.4.2      *Defects Liability Period***

- (a) The Operator further warrants that it will correct any defects in or damage to any part of the Depot which may appear or occur within a period of twelve (12) months after the Transfer Date due to defective material, workmanship or design, or from any Default of the Operator during the Operational Period (ordinary wear and tear excepted)
- (b) the Grantor shall give the Operator notice promptly after having discovered any such defect or damage. Such notice must, in any case, have been given at the latest before the expiration of the twelve (12) months warranty period. Upon receipt of such notice, the Operator shall correct the defect as soon as possible at its own cost. If the Operator fails or refuses to correct a defect within a reasonable time after the Grantor's notification, then the Grantor shall be entitled to correct the defect itself or to engage a third party to do so. In such a case the Operator shall pay the reasonable and necessary costs of the correction and the Grantor shall be entitled to draw on the Maintenance Bond to cover such costs.

- (c) except in case of Gross Misconduct of the Operator, the liability of the Operator to the Grantor pursuant to this Article 12.4.2 shall be limited to the Maintenance Bond.

#### **12.4.3 Compensation for Failure to Repair Defects or Damage**

In case it is impossible or unreasonably burdensome or expensive to repair any defects or damage to the Depot so as to meet the standards set out in **Annexure A** and the Technical Proposal, the Grantor shall be entitled to compensation reflecting the reduced performance of the Depot. The Grantor shall be entitled to draw on the Maintenance Bond to cover such compensation.

#### **12.5 Transfer of Insurance and Contractor Warranties**

On the transfer date, the Operator shall assign to the Grantor or any person designated by the Grantor at the time of transfer all unexpired guarantees and warranties, free of charge, by contractors and suppliers, and all insurance policies, binders and endorsements. Insurance premium for the insurance period after such transfer shall be paid or refunded by the Grantor to the Operator.

#### **12.6 Technology Transfer**

At the Transfer Date, the Operator shall transfer and assign including by way of licence or sub-licence, to the Grantor or any person designated by the Grantor, free of charge, all technology and know-how used at the time of transfer and required to operate and maintain the Depot.

#### **12.7 Personnel**

- (a) Six (6) months prior to the end of the Operational period, the Operator shall submit a list of the personnel currently employed by the Operator at the Depot giving details of the qualifications, position and income of each employee.
- (b) The Operator shall also indicate which employees will be available for employment by the Grantor after the Transfer Date.
- (c) The Operator shall grant the Grantor reasonable access to the Depot to interview and assess such personnel. The Grantor shall select the personnel it wishes to employ to operate and maintain the Depot after the Transfer Date at its sole discretion and shall not be obliged to employ all or any of the personnel previously employed by the Operator.

## **12.8 Cancellation of Contracts and Assignments**

Subject to Articles 12.5 and 12.6, if required by the Grantor, the O&M Agreement, equipment contracts, supply contracts and all other contracts entered into by the Operator and subsisting at the time of the transfer shall be canceled by the Operator. The Grantor shall not be liable for any cancellation costs arising thereby and shall be indemnified and held harmless by the Operator in respect of the same. Otherwise the Operator shall endeavour to assign such contracts to the Grantor or any person designated by the Grantor.

## **12.9 Removal of Objects Owned by the Operator**

The Operator shall at its own cost remove all objects owned by the Operator from the Site within thirty (30) days after the Transfer Date unless otherwise mutually agreed by the parties. The objects to be removed shall be limited to the personal items of the Operator's employees and articles having nothing to do with the operation and maintenance of the Depot and shall not include the equipment, tools, spare parts, design drawings and technical information of the Depot listed in the inventories to be transferred or otherwise necessary for the operation and maintenance of the Depot. If the Operator fails to remove such objects within the said time the Grantor may remove and transport the same, after giving the Operator notice of its intention, to a suitable location for safe storage. The Operator shall bear the reasonable cost and the risk of such removal, transportation and storage.

## **12.10 Passing of Risk**

Until the Transfer Date, all risks shall lie with the Operator for loss of or damage to the whole or any part of the Depot, unless the loss or damage is due to a Default of the Grantor.

## **12.11 Transfer Costs and Approvals**

- (a) Except as provided in Article 12.5, the transfers and assignments of the Depot and related contractor warranties, technology and supply contracts to the Grantor or any person designated by the Grantor pursuant to Articles 12.1 through 12.6 shall be without the payment of any compensation or purchase price by the Grantor to the Operator.
- (b) The Operator and the Grantor shall each be responsible for its own costs and expenses, incurred in connection with the transfers and assignments to the Grantor or any person designated by the Grantor. The Grantor shall at its own cost

obtain or effect all Approvals and take such other action as may be necessary for such transfers and assignments and shall pay all stamp duties, taxes, charges and the like payable in respect of such transfer and assignments.

- (c) If the Operator fails to transfer in compliance with the required scope and contents of this Article 12, the Grantor shall be entitled to draw upon the Maintenance Bond in respect of the expenses or loss incurred thereby.

#### **12.12 Transfer Procedure**

The Grantor and the operator shall agree on detailed procedures for the transfer of the Depot, a Final Maintenance Overhaul program, tests after the Final Maintenance Overhaul, a detailed list of the structures, equipment, facilities, items and spare parts to be transferred and measures to be taken to publicize the transfer to third parties. At the time of such meeting, the Operator shall submit the names of its representatives in charge of the transfer, and the Grantor shall inform the Operator of the names of its representatives in charge of the transfer.

#### **12.13 Effect of Transfer on this Agreement**

From the Transfer Date the obligations and the rights of the Operator under this Agreement shall terminate, except as otherwise provided in this Agreement, and the Grantor or any person designated by the Grantor shall take over the operation of the Depot and any other rights or obligations arising out of the terms of this Agreement which either expressly or implicitly survive termination of this Agreement.

#### **12.14 Release of the Maintenance Bond**

The Grantor shall release all or so much of the Maintenance Bond as shall remain outstanding within seven (7) days after twelve (12) months from the Transfer Date.

- 12.15.** Upon the operator's written application, 12 months before the expiry of the operational period, and if there has been a satisfactory performance by the operator under this Agreement, the operator shall have the right to first refusal to be granted a fresh concession on terms and conditions to be determined by the Grantor.

- 12.16.** Should the Grantor approve the said application and grant to the operator a new operational period, the clauses applicable to transfer in clause 12 and in this Agreement shall not apply until the expiration of the new operational period, if need be.

**PART E**

**GENERAL OBLICATIONS OF THE PARTIES**

**ARTICLE 13**

**GENERAL OBLIGATIONS OF THE GRANTOR**

**13.1 Compliance with Laws and Regulations**

The Grantor shall at all times observe and comply with the provisions of all relevant laws and regulations published by any Relevant Authority.

**13.2 Tax Preference**

The Grantor shall assist the Operator obtain and enjoy tax preferences it may be entitled to in accordance with the laws and regulations of the Federal Republic of Nigeria or any component thereof. The Grantor shall assist the Operator to obtain permissions for other tax preferences in relation to the performance of this Agreement to the extent permitted at any time by Nigerian tax laws, regulations and by the relevant Nigerian taxation authority..

**13.3 Obtaining and Maintaining Approvals**

**13.3.1 *Assistance with Approvals***

The Grantor, upon proper and timely request from the Operator shall use its best endeavours to assist the Operator in obtaining, maintaining and renewing all Approvals from Relevant Authorities.

**13.3.2 *Approvals to be Obtained from the Grantor***

Provided that the Operator has properly submitted the relevant applications, requests and documentation for obtaining and maintaining Approval(s) from the Grantor in a timely manner and the relevant conditions and requirements for obtaining such Approval(s) are complied with, the Grantor shall, at no extra cost to the Operator offer reasonable assistance to the Operator in obtaining and/or renewing all requisite approvals and permits, the Operator may require in connection with the project.

**13.5 The Grantor's Responsibility**

The Grantor shall be responsible for the acts, commissions and omissions of the officials and employees under its control or supervision.

### **13.6 Non-Interference**

Provided that all specifications in the Annexures are followed, the Grantor shall not unnecessarily interfere in the design, construction, operation and maintenance of the Depot save as may be necessary to protect public health and safety and for the discharge of its statutory duties. At the request of the Operator, the Grantor shall use its best efforts to alleviate any interference with the Project by third parties which may arise.

### **13.7 No Interruption by the Grantor**

- (a) Subject to the provisions of this Agreement, the Grantor undertakes not to do, and to ensure that no other Relevant Authority does any act which would prevent or adversely affect the Construction Works, the operation and management of the Depot or the Operator or its nominee's collection of approved charges from Users of the Depot, save as may be necessary on grounds of national security or public safety.
- (b) If any operation or action is to be carried out at the Depot by any Relevant Authority on the ground of national security or public safety, which said action will prevent or adversely affect the Construction Works or the operation and management of the Depot or impede the Operator and or its nominee's collection of approved charges from Users of the Depot, the Grantor shall give the Operator reasonable written notice to enable the Operator to discuss and agree with the particular Relevant Authority the methods for carrying out such operation or action with the least possible disruption to the Construction Works, operation and management of the Depot, provided that the obligation to give notice to the Operator by the Grantor is predicated on the Grantor having prior knowledge or notice of such operation or action.
- (c) If any operation, action or interruption by the Grantor and or any Relevant Authority delays completion of the Construction Works, or impedes the Operator's operation of the Depot the Grantor shall determine the appropriate time period by which the Construction Completion and or the Operational Period shall be extended.

#### **14.4 Approvals**

Subject to the provisions of Article 13.3, the Operator shall at its own cost obtain and maintain all Approvals as may be necessary for the construction, operation and maintenance of the Depot and which are required to be or can be obtained in the name of the Operator.

#### **14.5 Protection of Archaeological and Historical Objects**

The Operator shall take effective measures to protect archaeological relics, fossils, antique tombs and sites, historical pieces of art and any other objects of archaeological, geological and historical interest discovered during the construction, operation and maintenance of the Depot. The Operator shall, promptly following any such discovery, give notice to the Grantor of the discovery and the protective measures taken or proposed. Upon receipt of such notice, the Grantor shall within seven (7) days approve the protective measures taken or proposed by the Operator or give written instructions of further measures requested. The Operator shall implement such requested measures with all due diligence.

All costs arising from such protective measures shall be borne by the Grantor including the costs of any unavoidable delay to the Construction Works. Any delaying effects on the Project Implementation Schedule caused by such measures shall be compensated by an appropriate extension of the Construction Period or the Operational Period or both.

#### **14.6 Nigerian Services and Goods**

##### **14.6.1 Use**

The Operator shall use Nigerian services and goods whenever they are competitive in terms of quality, warranty, service, relevant expertise, procurement, delivery schedule and price and shall ensure that its contractors and sub-contractors observe this provision.

##### **14.6.2 Competitive Bidding**

The Operator shall include Nigerian contractors in invitations for competitive bidding for contracts if they produce services and goods of the kind and quality required and shall require their contractors to do the same with respect to sub-contracts. When evaluating bids for contracts generally, the Operator shall take into account the extent to which the bidders use Nigeria services and goods. The Operator shall be responsible for the observance of these provisions by its contractors and their subcontractors.

##### **14.6.3 Future Concessions**

## ARTICLE 14

### GENERAL OBLIGATIONS OF THE OPERATOR

#### **14.1 Compliance with Law and Regulations**

The Operator shall at all times in the performance of its obligations under this Agreement observe and comply with the provisions of all relevant laws, regulations and guidelines published by Relevant Authorities. The Operator shall obtain on a current basis, published and publicly available law, regulations and guidelines applicable to the Project and shall be deemed at all times to have full knowledge thereof.

#### **14.2 Safety Standards**

- (a) The Operator shall observe and comply with health and safety standards set forth in this Agreement and laws, regulations and guidelines published by any Relevant Authority.
- (b) The Operator shall be deemed at all times to have full knowledge of such safety standards and practice.

#### **14.3 Environmental Protection**

##### **14.3.1 Operator's Responsibility**

The Operator shall keep the Site (including the soil, ground or surface water and air) and the surrounding environment free and clear of Environmental Contamination attributable to the construction, operation and maintenance of the Depot in compliance with the environmental requirements set forth in –

- (a) this Agreement; and
- (b) current laws, regulations and guidelines published by any Relevant Authority

The Operator shall be deemed at all times to have a full knowledge of such environmental standards

##### **14.3.2 Exceptions to the Operator's Responsibility**

- (a) The Operator shall not be responsible for any contamination or pollution of the air, ground or water (above, under or surrounding the Site):
  - (i) existing on or prior to the Effective Date;
  - (ii) attributable to any Default of the Grantor.
- (b) The Grantor agrees to indemnify the Operator for any damage caused to the Operator or any claims arising out of such pre-existing conditions or attributable to such Default.

When evaluating bids from the Operator or any affiliate of the Operator for future concessions, the Grantor may take into account the extent to which the Operator has complied with the provisions of this Article 14.7 in developing, constructing and operating the Depot.

#### **14.7 Use of Nigerian Labour**

Except to the extent not locally available, the Operator shall employ competent Nigerian labour for the construction, operation and maintenance of the Depot. The Operator shall be responsible for compliance with this provision by its contractors and their sub-contractors.

#### **14.8 Worker's Rights**

The Operator shall comply with the labour laws and regulations of the Federal Republic of Nigeria and respect the rights of the workers guaranteed therein, including the payment of social security insurance contributions for employees.

#### **14.9 Co-ordination of Project Documents**

The Operator shall ensure that the Financing Agreements, any agreement among the shareholders of the Operator, the Operator's Articles of Association, the insurance policies related to the Project and any other agreements entered into by the Operator in relation to the Project are consistent with the provisions of this Agreement.

#### **14.10 Customs Duty and Statutory Charges**

The Operator shall ensure the payment of all customs duties and other statutory charges in accordance with the applicable laws and regulations of the Federal Republic of Nigeria and any Relevant Authority Save for those Tax preferences reserved in Article 13.2.

#### **14.11 Insurance**

##### **14.11.1 *Obtaining and Maintenance of Insurance Policies***

The Operator, at its sole cost and expense, shall throughout the duration of this Agreement obtain and maintain with an insurance company(ies) to be approved by the Grantor the policies of insurance in the amounts set forth herein and during the periods mentioned herein; provided, however, that such amounts may be changed from time to time with the prior written consent of the Grantor.

##### **14.11.2 *Insurance during Construction***

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From the Construction Commencement Date until the Construction Completion Date, the Operator shall at its own expense, procure and maintain in force the following insurances:

- (a) Marine Insurance in respect of Equipment to be imported into Nigeria in connection with the Construction Works;
- (b) Contractor's All Risks' Insurance to cover the entire Construction Works from any and all kinds of damages arising out of any cause whatsoever;
- (c) Third Party Liability insurance to cover injury to or death of persons or damage to property caused by the Construction Works or by the Operator's Equipment or personnel including its subcontractors; and
- (d) Workmen's' Compensation Insurance as required under Nigerian Law.

**14.11.3 Insurance during Operational Period**

From the Start Date until the Transfer Date, the Operator shall at its own expense keep the Depot insured to the full value thereof against accidental damage from all normal risks and to a level normal for prudent Operators of facilities similar to the Depot. Provided always that the Grantor shall be named as "Loss payee" on the Insurance certificate.

**14.11.4 Market Practice**

The Operator shall maintain the aforementioned insurance with reputable insurers of adequate financial strength and experience to the extent that the insurance policies can be subscribed on reasonable economic terms and rates.

**14.11.5 Certificate of Insurance**

The Operator shall cause its insurers or agents to provide the Grantor with certificates of insurance evidencing the policies and endorsements obtained pursuant to Articles 14.12.1 and 14.12.2. Failure by the Operator to obtain the insurance coverage or certificates of insurance required by Articles 14.12.1 and 14.12.2 shall not in any way relieve or limit the Operator's obligations and liabilities under any provision of this Agreement.

If the Operator shall fail to procure or maintain any insurance required pursuant to this Articles 14.12, then the Grantor shall have the right to procure such insurance and shall be entitled to offset the premium paid for such insurance by drawing on the Maintenance Bond.

**14.11.6 Application of Insurance Monies**

The Operator and the Grantor shall be joint beneficiaries of the proceeds of insurance taken out pursuant to Article 14.12.2(b) and 14.12.3 hereof. It is further agreed that the proceeds of the insurance policies taken out under Article 14.12.2(b) and 14.12.3 shall be applied to the reinstatement or restoration of the Depot.

**14.11.7 Insurance Reports**

The Operator shall provide the Grantor with copies of any underwriter's reports or other reports received by Operator from any insurer, provided that the Grantor shall not disclose such reports to any other person except as necessary in connection with administration and enforcement of this Agreement; or as may be required by any Relevant Authority and shall use and internally

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distribute such reports only as necessary in connection with the administration and enforcement of this Agreement.

**14.12 Responsibility for Contractors and their Employees and Agents**

**14.12.1 Operator's Contractors**

The Operator's employment of contractors including but not limited to Construction Contractor, equipment suppliers and O&M Contractor shall not relieve the Operator from any of its obligations under this Agreement and the Operator shall be fully responsible to the Grantor for any acts or omissions of the contractors, their agents or any person either directly or indirectly employed by them as if such acts or omissions were the acts or omissions of the Operator.

**14.12.2 Contracts with Contractors**

Any contract entered into with contractors shall contain those Articles of this Agreement which are necessary to enable the Operator to fulfill its obligations under this Agreement.

**14.13 Provision in Financing Agreements**

The Operator shall use its best effort to include the following provisions in the Financing Agreements:

- (a) a binding commitment from the Lenders to the Grantor in a manner legally enforceable by the Grantor that, so long as this Agreement is in effect and so long as the Grantor shall not have committed an Event of Default which is continuing, the Lenders will take no action (except pursuant to rights granted to the Operator under this Agreement) to disturb, affect or impair the rights of the Grantor under this Agreement, including its rights to have the Depot constructed, operated and maintained and
- (b) a binding commitment by the Lenders:
  - (i) to give notice to the Grantor of any Default by the Operator under the Financing Agreements;
  - (ii) to afford the Grantor the right to cure any such Default within ninety (90) days after it receives notice of such Default;
  - (iii) to forbear from exercising any right or remedy available to the Lenders in respect of such Default during such cure period; and
  - (iv) not to withhold unreasonably any consent or approval required to be obtained from the Lenders or the Facility Agent pursuant to this Agreement.

**14.14 Negative Covenant**

The Operator shall not grant any pledge, mortgage, encumbrance or other security interest in any of its property, ownership rights or other rights

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and interest under this Agreement to any person other than the Lenders  
save as expressly approved by the Grantor.

## ARTICLE 15

### OBLIGATIONS AND RIGHTS COMMON TO THE GRANTOR AND THE OPERATOR

#### 15.1 Force Majeure

##### 15.1.1 *Force Majeure Events*

Force Majeure shall mean any event or circumstance which is beyond the control of the party seeking to rely on such Force Majeure, which shall include:

- (a) lightning, drought, earthquake, volcanic eruption, landslide, flood, storm, typhoon or tornado;
- (b) act of war, invasion, armed conflict or act of foreign enemy, blockade, riot, terrorism or exercise of military power;
- (c) national, regional or industry-wide strike; or

and other events, which could not reasonably have been foreseen by that party at the date of this Agreement, the consequences of which could not reasonably have been avoided by that party. And which prevents that party from performing any of its obligations under this Agreement.

##### 15.1.2 *Exceptions applicable to the Operator*

The Operator shall not have the right to consider any of the following circumstances to be an event of Force Majeure that would suspend the performance or excuse the non-performance of its obligations under this Agreement.

- (a) any delay:
  - (i) in performance by any contractor or subcontractor of the Operator, including the Construction Contractor and the Operation and Maintenance Contractor or any direct or indirect subcontractor to either of them; or
  - (ii) in the delivery of equipment and machinery for the Depot;except and to the extent that such delay is itself caused by an event which satisfies the criteria set out in Article 15.1.1 in relation to both the Operator and relevant contractor or subcontractor;
- (b) any patent or latent defects in any materials, equipment, machinery and spare parts for the Depot; or

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(c)

breakdown or ordinary wear and tear of materials,  
equipment, machinery or parts of the Depot.

**15.1.3      *Exceptions Applicable to the Grantor***

The Grantor shall not have the right to consider the expropriation, requisition or nationalization of the Depot by any Relevant Authority to be an event of Force Majeure that would suspend the performance or excuse the non-performance of its obligations under this Agreement.

**15.1.4      *Notice of Force Majeure***

The party claiming to be affected by Force Majeure shall promptly, when it becomes aware of the Force Majeure give notice and describe in detail the Force Majeure occurrence and the effect of such Force Majeure to the other party in writing, including the dates of commencement and estimated cessation of such Force Majeure and its effects on the party's obligations under this Agreements. The party claiming Force Majeure shall also provide such evidence as the other party may reasonably request.

**15.1.5      *Suspension of Performance Due to Force Majeure and Costs***

Either party shall be entitled to suspend performance of all or part of its obligations under this Agreement (except for payment obligations) to the extent that such party is impeded, wholly or in part, in carrying out its obligations under this Agreement by Force Majeure, being an event:

- (i) - which it could not reasonably have foreseen at the time of entering into this Agreement, and
- (ii) which event and its consequences cannot be overcome and cannot be avoided by the party claiming Force Majeure

**15.1.6      *Extension Due to Force Majeure***

In the event that the Construction Completion Date is delayed due to an event of Force Majeure, and or the Operator is unable to perform its obligations during the Operational Period, the Grantor agrees to extend the Construction Completion Date and or the Operational Period by such period that the Force Majeure subsists.

**15.1.7      *Costs***

In case of Force Majeure, each party shall cover its own costs resulting from the Force Majeure.

**15.1.8      *Duty to Mitigate and Resume***

The parties in consultation with each other shall use reasonable efforts to mitigate the effects of any Force Majeure event. The

party claiming Force Majeure shall resume the performance of its obligations under this Agreement as soon as practicable after the Force Majeure no longer exists.

**15.1.9 Continuing Force Majeure**

If any event of Force Majeure continues for longer than 3 months, the Operator and the Grantor shall enter into discussions in order to agree on a mutually satisfactory solution. If the Operator and the Grantor fail to reach a mutually satisfactory solution within 30 days of the commencement of such discussions, the provisions of Article 22.3 shall apply prior to either party issuing a Notice of Intention to Terminate this Agreement.

In the event that this Agreement is terminated as a result of the Operator's inability to perform its obligations hereunder due to a continuing Force Majeure, and or the Grantor or the Panel of Experts, as the case may be, certifies that restoration is not feasible, or the Operator and the Grantor are unable to agree on terms on which to continue this Agreement, the Grantor shall pay the Operator such sums of money that aggregate the Operator's investment in the Project and subject to any claims of the Grantor or that of Lenders determinable by Grantor or the Panel of Experts with 30 days from the date the Notice of Termination is issued, depending on the nature of the Force Majeure and the length of time that it continues unabated.

**15.1.10 Force Majeure and Insurance**

To the extent that the consequences of an event of Force Majeure relied upon by the Operator fall within the terms of the insurance cover required by Article 14.12 the Operator shall forthwith make the appropriate claims thereunder and shall apply the proceeds as required by Article 14.12.6.

**15.1.11 Damage to the depot caused by force Majeure**

If an event of Force Majeure causes material damage to the Construction Works or the Depot and such damage is either not within the terms of the insurance cover required by Article 15.12 or the insurance proceeds available are less than 50 percent of the total costs of repairing such damage, the parties shall promptly obtain the opinion of the Grantor as to whether such repair is feasible and shall enter into discussions to reach a mutually satisfactory agreement.

**15.2 Rights to Documents**

*The Grantor's Documents*

Documents and computer programs provided by the Grantor (or representatives and agents of the Grantor) to the Operator, or which are developed mainly on the basis of such documents and computer programs, shall be the property of the Grantor. The same shall apply to all copies of such documents and computer programs. Such documents, computer programs or copies thereof shall not be used by the Operator other than for the purposes of the Project. Such documents, computer programs or copies thereof shall be returned to the Grantor at the expiry of the Operational Period, unless otherwise agreed upon between the Grantor and the Operator.

### ***Operator's Documents***

Documents and computer programs provided by the Operator, or which are developed mainly on the basis of such documents and computer programs, shall be the property of the Operator. The same shall apply to all copies of such documents and computer programs. Such documents and computer programs or copies thereof shall not be used by the Grantor other than for the purposes of the Project. The Grantor or any person designated by the Grantor shall be entitled to copies of, and a fully paid, royalty-free license to use, such documents, computer program and copies only in connection with the operation and maintenance of the Depot after transfer of the Depot to the Grantor or such person designated by the Grantor in accordance with the provisions of Article 12.6.

### ***Compliance***

The parties shall ensure that all those who have access to such documents, computer programs and copies thereof shall comply with the provisions of this Article 15.2 and with the confidentiality provisions of Article 15.3.

### **15.3 Confidentiality**

All information and documents (whether financial, technical or otherwise) obtained by either party or its employees, contractor, consultants or agents which are not published or otherwise publicly available shall be kept confidential and not disclosed to third parties or the public for a period of five (5) years from the last day of the Operational Period without the prior written approval of the other party except as required by laws of the Federal Republic of Nigeria.

This prohibition shall not prevent either party, with the consent of the other, from issuing press releases containing non-sensitive information in

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relation to the progress of the Project. This covenant shall survive termination of this Agreement.

#### **15.4 Obligation to Co-operate**

The parties shall mutually cooperate with each other in order to achieve the objectives of this Agreement. Whenever a consent or approval is required by one party from the other party, such consent or approval shall not be unreasonably withheld or delayed.

#### **Declaration Against Improper Payments**

##### **15.5.1 Declaration of the Operator**

The Operator represents, warrants, covenants and declares that:

neither it nor its representatives have offered any government official or official or employee of the Grantor or any other Relevant Authority any unlawful consideration or commission (in the form of a bribe or kick-back) for this Agreement nor has it or its representatives exerted or utilized any unlawful influence to secure or solicit this Agreement;

it shall not contract, or allow any of its contractors to subcontract, any portion of the work for the Project to any person known by it to be an official or employee of the Grantor or any other Relevant Authority or member of the immediate family (spouse, parent, child or sibling) of any such official or employee who is directly or indirectly involved in contract awards or supervision of the Project or to any company or enterprise in which any or such persons is an executive or officer or substantial owner without the prior written consent of the Grantor after full disclosure of the relevant facts; and

if any commission has been or will be paid by the Operator or any of its shareholders directly to any person, company or enterprise, whether resident in Nigeria or outside Nigeria, in connection with soliciting or securing this Agreement, the Operator shall disclose to the Grantor the identity of the payee, the amount paid, and the nature of the services rendered.

##### **Declaration of the Grantor**

The Grantor represents, warrants, covenants and declares that:

neither it nor its representatives have solicited or received nor will solicit or receive any unlawful consideration or commission (in the form of a bribe or kick-back) nor has it or its representatives exerted or utilized any unlawful influence in

connection with awarding this Agreement to the Operator,  
and

it shall not knowingly permit, solicit or procure any work related to the Project to be contracted to any of its officials or employees, or any member of the immediate family (spouse, parent, child or sibling) of any such official or employee, who is directly or indirectly involved in contract awards or supervision of the Project or to any company or enterprise in which any of such persons is an executive officer or substantial owner without the prior written consent of the Grantor after full disclosure of the relevant facts.

**PART F**

**REMEDIES FOR BREACH OF CONTRACT**

**ARTICLE 16**

**TERMINATION**

**Termination by the Grantor**

Each of the following, to the extent that it is not caused by a Default of the Grantor or by Force Majeure, shall, if not cured within the time period permitted (if any), be an Operator Event of Default and shall entitle the Grantor to issue a Notice of Intention to Terminate immediately:

- (a) the Operator fails to pay the Operational Fee as required under Article 2.5.
- (b) the Operator abandons or is deemed to have abandoned the construction of the Depot as provided in Articles 8.5 and 8.6
- (c) the Operator or the O&M Contractor abandons the operation of the Depot for a period of seven consecutive (7) days without the prior written consent of the Grantor.
- (d) the Operator fails to provide the Maintenance Bond as required under Article 9.5.
- (e) The Operator goes into liquidation or becomes insolvent under the laws of the Federal Republic of Nigeria.
- (f) The Lenders declare a default under any Financing Agreements and commence the exercise of their remedies thereunder.
- (g) any representation and warranty made by the Operator in Article 19.1 proves to have been materially incorrect when made, such that the Operator's ability to perform its obligations under this Agreement is materially adversely affected.
- (h) any failure of the Operator to manage, operate and maintain the Depot in accordance with this Agreement which substantially adversely affects the service provided by the Grantor, directly to Users of the Depot, or
- (i) failure of the Operator to perform any other of its obligations under this Agreement amounting to a material breach of this Agreement and the Operator fails to remedy such breach within thirty (30) days of receipt of written notice from the

Grantor specifying such breach and requiring the Operator to remedy the same.

### **Termination by the Operator**

Each of the following, to the extent it is not caused by a Default of the Operator or Force Majeure, shall, if not cured within the time period permitted (if any), be a Grantor's Event of Default and shall entitle the Operator to issue a Notice of Intention to Terminate immediately:

any representation and warranty made by the Grantor in Articles 4 and 19.2 proves to have been materially incorrect when made such that the Grantor's ability to perform its obligations under this Agreement is materially adversely affected; or  
the failure of the Grantor to perform any other of its obligations under this Agreement which amounts to material breach of this Agreement and the Grantor fails to remedy such material breach within thirty (30) days of receipt of written notice from the Operator specifying such breach and requiring the Grantor to remedy the same.

### **Notice of Intention to Terminate and Notice of Termination**

#### **16.3.1 *Notice of Intention to Terminate***

Any notice of intention to terminate by either party shall specify, in reasonable detail, the Event of Default giving rise to such notice.

The party issuing a Notice of Intention to Terminate shall at the same time deliver a copy to the Facility Agent. Following the issuing of a Notice of Intention to Terminate the parties shall consult for a period (the "Consultation Period") of:

in the case of the Operator's failure to bring about the Final Completion Date of the Depot within sixty (60) days of the Target Preliminary Completion Date (as such date may be extended in accordance with Article 6.10.2), twenty-one (21) days provided that, during this period, the Operator continues to use all reasonable efforts to procure Final Completion of the Depot as promptly as possible; and

in all other cases, seven (7) days, or such longer period as the parties may agree in writing.

As to what steps shall be taken with a view to preventing termination of this Agreement. If the Operator and the Grantor do agree on such steps to be taken and/or the Operator or the Grantor (as the case may be) remedies the Event of Default within the

relevant Consultation Period or such longer period as may be agreed by the parties, then the Notice of Intention to Terminate shall immediately and automatically cease to have any effect.

#### **16.3.2      *Notice of Termination***

Subject to Article 16.4, upon expiration of the Consultation Period and unless

the parties shall have agreed otherwise; or

the failure giving rise to the Notice of Intention to Terminate has been remedied,

the party having given the Notice of Intention to Terminate may terminate this Agreement by delivering a notice to this effect to the other party and the Facility Agent (a "Notice of Termination"), whereupon this Agreement shall immediately terminate.

### **16.4    Rights of Lenders**

#### **16.4.1      *Restriction on Termination***

Notwithstanding any provision in this Agreement to the contrary, from and after Financial Closing and for so long as the Financing Agreements remain in effect, the Grantor shall not be entitled to issue a Notice of Termination for an Operator's Event of Default unless the Grantor has first issued a Notice of Intention to Terminate in accordance with Article 16.3.1 and

- (a) a period commencing on the date of receipt by the Facility Agent of the Notice of Intention to Terminate and expiring twenty-one (21) days after expiry of the Consultation Period under Article 16.3.1 (the "Suspension Period") shall have expired and the Facility Agent has not given a Step-in Notice as contained in Article 16.4.2 or a Substitution Notice in accordance with Article 16.4.5 to the Grantor; or
- (b) the Facility Agent has issued a Step-in Notice during the Suspension Period but no Step-in Undertaking as contained in Article 16.4.3 has entered into effect on or prior to the Step-in Date specified in the Step-in Notice; or
- (c) the Grantor is entitled to terminate this Agreement in accordance with Article 16.4.3(c); or
- (d) the Facility Agent has issued a Substitution Notice but no Substitution Effective Date has occurred within sixty (60) days of the date of the Substitution Notice; or
- (e) the Grantor is entitled to terminate this Agreement in accordance with Article 16.4.5(g); or
- (f) the Step-in Period ends and no Substitution Effective Date has occurred; or

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(g)

the Grantor purchases the Depot for the amount determined pursuant to Article 16.5.2

**16.4.2**

***Step-in Rights***

- (a) At any time during the Suspension Period, the Facility Agent may on behalf of the Lenders give notice (a "Step-in Notice") to the Grantor stating that it intends that an Additional Obligor shall issue an undertaking in the terms set out in Article 16.4.3 (a "Step-in Undertaking") and specifying a date (the "Step-in Date"), being not later than ninety (90) days after the expiry of the Consultation Period under Article 16.3.1 on which such Step-in Undertaking is proposed to become effective:
- (b) For the purposes of this Article 16.4.2 the "Additional Obligor" shall be
  - (i) the Facility Agent; or
  - (ii) A "bank's Entity", being a company that is wholly owned by the Facility Agent on behalf of the Lenders or by one or more of the Lenders.
- (c) The issue of a Step-in Notice shall not impose any legal obligation on the Additional Obligor, the Facility Agent or any Lender, to issue (or procure the issue of) a Step-in Undertaking pursuant to Article 16.4.3.
- (d) Within twenty-one (21) days of a Step-in Notice, the Grantor shall give notice to the Facility Agent of any sums which it is aware are then due and payable to the Grantor by the Operator under this Agreement as at the date of the Step-in Notice and any accrued liabilities pursuant hereto, including any outstanding performance obligations of the Operator as at the date of the Step-in Notice of which it is aware, and shall provide the Facility Agent with such additional information as the Facility Agent may reasonably request from time to time.
- (e) the Grantor shall not be entitled to make any claim against the Facility Agent or the Lenders in respect of any liability of the Operator which has resulted in the Grantor incurring loss or damage before the date of the Notice given by the Grantor under Article 16.4.2(d) and which is not mentioned in such notice.
- (f) The Grantor shall inform the Facility Agent of any liabilities of the Operator to the Grantor arising or resulting in the Grantor incurring loss or damage after the date of the notice given by Grantor under Articles 16.4.2(d).



**16.4.3**

***Step-in Undertaking***

- (a) Prior to the Step-in Date, which may be extended at the request of the Facility Agent and with the consent of the Grantor, the Facility Agent may on behalf of the Lenders deliver to the Grantor a Step-in Undertaking, which shall take effect in accordance with its terms.
- (b) The Additional Obligor shall agree on behalf of the Lenders in the Step-in Undertaking with effect from Step-in Date and until the Step-out Date (the "Step-in Period"):
  - (i) to pay to the Grantor on the Step-in Date any sums notified by the Grantor under Article 16.4.2(d);
  - (ii) to procure the performance of any outstanding performance obligations of the Operator under this Agreement which have arisen prior to the Step-in Date;
  - (iii) to pay, within fourteen (14) days of the demand by the Grantor any sum due and payable pursuant to Article 16.4.2(f); but unpaid by the Operator to the Grantor under this Agreement prior to the Step-in Date;
  - (iv) to pay promptly to the Grantor any sum becoming due and payable by the Operator to the Grantor under this Agreement on or after the Step-in Date;
  - (v) to procure the proper and timely performance of any and all obligations and liabilities expressed to be owed by the Operator to the Grantor under this Agreement which arise on or after the Step-in Date.

The Step-in Undertaking shall provide for interest to accrue on late payments by the Additional Obligor at the Default Rate, save that there will not be double counting of default interest accruing on amounts owed by the Additional Obligor as well as by the Operator.

- (c) Following the entry into effect of a Step-in Undertaking, the Grantor shall be entitled to terminate this Agreement by issuing a Notice of Termination immediately if:
  - (i) the Additional Obligor is in breach of the terms of the Step-in Date Undertaking, or
  - (ii) any Operator Event Default occurring prior to the Step-in Date Continues for a period of more than:
    - (A) thirty (30) days in respect of an outstanding payment obligation; or

- (B) such period as may be reasonably necessary to effect a remedy using due diligence, in respect of an outstanding performance obligation;
- (iii) a further Operator Event of Default occurs on or after the Step-in Date which is not remedied within the time period, if any, permitted under Article 16.1 or, in the case of a further Operator Event of Default under Article 16.1 (e), within thirty (30) days of notice from the Grantor to the Additional Obligor specifying such Operator Event of Default and requiring the Additional Obligor to remedy the same, in which case the Facility Agent shall not be entitled to issue any further Step-in Notice or Substitution Notice (and nor shall the Lenders).
- (d) Following the entry into effect of a Step-in Undertaking, the Additional Obligor shall have the right, amongst others, but (subject to Article 16.4.3(b)) shall not be obliged, to take possession of the Depot and prior to the Commencement of the Operational Period, complete construction of the Depot and operate the same and, after the Commencement of the Operational Period, operate the Depot provided that the Additional Obligor obtains, at its own cost, all necessary Approvals required by Nigerian law. The Grantor shall use its best efforts to assist the Additional Obligor in obtaining such Approvals.

#### **16.4.4 Step-Out**

- (a) The Step-in Period shall expire on the (the "Step-Out Date") being the earliest of:
  - (i) the date twenty four (24) months from the Step-in Date; or
  - (ii) when the Additional Obligor gives the Grantor not less than thirty (30) days prior written notice of termination of the Step-in Period, on expiry of such notice; or
  - (iii) the date when the Grantor issues a Notice of Termination in accordance with Article 16.4.1.
- (b) with the effect from the Step-out Date, provided that all sums due under the Step-in Undertaking have been paid and all other obligations and liabilities under the Step-in Undertaking have been performed and discharged (provided that those obligations are reasonably capable of

performance in the circumstances), the Facility Agent, each Lender and any additional Obligor shall be released from all obligations, liabilities and duties under the Step-in Undertaking.

**16.4.5 Substitution**

- (a) At any time during the Suspension Period or during the Step-in Period and subject to the performance by the Additional Obligor of its obligations under the Step-in Undertaking (if any), the Facility Agent shall be entitled to give notice (a "Substitution Notice") to the Grantor on behalf of the Lenders that it wishes to substitute an Operator (the "Nominated Operator") for the Operator under this Agreement in accordance with this Article 16.4.5. The Substitution Notice shall specify a date, which shall not be later than thirty (30) days after the date of the Substitution Notice, on which the substitution of the Nominated Operator is to become effective (which, if such substitution shall become effective, shall be known as the "Substitution Effective Date").
- (b) A substitution under this Article 16.4.5 may only become effective if the Grantor consents to such substitution in writing (subject to Article 16.4.5(d)). The Facility Agent shall indicate in the Substitution Notice the name and registered address of the Nominated Operator, as well as details of its shareholders and the share capital held by each of them, and give details of its technical qualifications and experience and financial capacity (or the technical qualifications and experience of any of its key designated subcontractors). The Facility Agent shall further provide such other information about the Nominated Operator as the Grantor may reasonably request.
- (c) The issue of a Substitution Notice shall not impose any legal obligation on the Facility Agent or any Lender (including, without limitation any obligation to procure the transfer of this Agreement to the Nominated Operator or any other entity).
- (d) The Grantor shall
  - (i) not withhold consent to the substitution of the Nominated Operator if the Nominated Operator:
    - (A) has the technical competence and financial standing, and the available technical and financial resources, sufficient to perform the

obligations of the Operator under this Agreement and is a suitably experienced Depot Operator or has agreed to engage the services of a person who is an experienced Depot Operator and/or constructor,

- (B) shall have paid all amounts, if any, then due and payable to the Grantor under this Agreement;
  - (C) shall have expressly assumed in writing for the benefit of the Grantor the obligations of the Operator under this Agreement; and
  - (D) subject to obtaining the necessary Approvals, has the legal capacity, power and authority to become a party to and perform the obligations of the Operator under this Agreement and either is duly organised, operated and registered as a wholly foreign owned enterprise or has taken all appropriate steps to become so established and registered in accordance with Nigerian law for this purpose; or
- (ii) notify the Facility Agent within thirty (30) days of the date, of receipt of the Substitution Notice and receipt of all information required under Article 16.4.5(b) whether or not it consents to the substitution of the Nominated Operator;
  - (iii) be deemed to have given its approval if it does not provide any written notice of its decision within such thirty (30) days from the date of receipt of the Substitution Notice and receipt of all information required under Article 16.4.5(b);
  - (iv) upon request of the Nominated Operator, use its best efforts to assist the Nominated Operator in obtaining, at the Nominated Operator's own cost, all necessary Approvals if the Grantor consents or is deemed to consent to the substitution of the Nominated Operator.
- (e) If the Grantor notifies the Facility Agent under Article 16.4.5(d)(ii) that it does not consent to the substitution of the Nominated Operator, this shall not prejudice the right of the Facility Agent to give one or more subsequent Substitution Notices in accordance with Article 16.4.5(a) containing changed particulars relating to the same

Nominated Operator or particulars relating to another Nominated Operator which the Facility Agent, on behalf of the Lenders, has good cause to believe would be acceptable to the Grantor, provided that only one Substitution Notice may be outstanding at any one time. For the avoidance of doubt, if a Substitution Notice is served during the Step-in Period, the decision by the Grantor not to consent to the substitution of a Nominated Operator shall not itself terminate the Step-in Period.

- (f) If the Grantor consents or is deemed to consent to the substitution of the Nominated Operator, then on the Substitution Effective Date:
  - (i) the Nominated Operator shall become a party to this Agreement in place of the Operator and thereafter shall be treated as if it was named a party hereto in place of the Operator;
  - (i) the Grantor, the Operator and the Nominated Operator shall execute transfers of the Operational Agreement and all other documentation required to effect the transfer, on terms mutually acceptable to the Facility Agent and the Grantor of all the rights and obligations of the Operator under the Project Documents and in connection with the Project to the Nominated Operator (whether actual, accrued, contingent or otherwise and whether arising on, before or after the Substitution Effective Date), provided that the Grantor shall not be in breach of any of its obligations hereunder if the Nominated Operator or the Operator fails to execute such transfers or other documentations;
  - (ii) the Grantor shall owe its obligations under this Agreement arising on and after the Substitution Effective Date to the Nominated Operator and the receipt, acknowledgment or acquiescence of the Nominated Operator shall be an effective discharge.
- (g) After the occurrence of a Substitution Effective Date, the Grantor shall be entitled to terminate this Agreement by issuing a Notice of Termination immediately, if
  - (i) any Operator Event of Default occurring prior to the Substitution Effective Date continues for a period after the Substitution Effective Date of more than

- (A) thirty (30) days in respect of an outstanding payment obligation; or
- (B) such period as may be reasonably necessary to effect a remedy using due diligence; in respect of an outstanding performance obligation;
- (ii) a further Operator Event of Default occurs on or after the Substitution Effective Date which is not remedied by the Operator within the time period, if any, permitted under Article 16.1, or in the case of a further Operator Event of Default under Article 16.1(e), within thirty (30) days of notice from the Grantor to the Nominated Operator specifying such Operator Event of Default and requiring the Nominated Operator to remedy the same.

in which case the Facility Agent shall not be entitled to issue any further Step-in Notice or substitution Notice (and nor shall the Lenders).

## 16.5 Rights of the Grantor

### 16.5.1 *The Grantor's (or any person designated by the Grantor) Right to Operate the Depot*

Subject to the rights of the Lenders under Articles 16.4.1 to 16.4.5-

- (a) upon the occurrence and continuance of an Operator Event of Default which materially adversely affects the Operator's ability to operate and maintain the Depot in accordance with this Agreement, after the issue by the Grantor of a Notice of Intention to Terminate and unless and until either
  - (i) the construction and/or operation and maintenance of the Depot is assumed by an Additional Obligor or the Nominated Operator, or
  - (ii) a Notice of Termination is issued, the Grantor or any person designated by the Grantor shall have the right, but under no circumstance the obligation, to take over the operation of Depot in place of the Operator in order to continue the operation of the Depot or complete any necessary repairs so as to assure uninterrupted availability of the Depot for the use of the public. In such case, the Operator shall undertake to cooperate with the Grantor and shall cause the Lenders to give an undertaking to the same effect in the Financing Agreements;

- (b) in no event shall the Grantor's election to operate the Depot be deemed to be a transfer of title or a transfer of the Operator's obligations as owner thereof;
- (c) during any period when the Grantor or any person designated by the Grantor is operating the Depot, the Operator shall not be liable to pay for the operating costs incurred by the Grantor or any person designated by the Grantor after the date when the Grantor or any person designated by the Grantor took over the operation of the Depot. The Grantor shall not be liable to make any payment to the Operator or the Additional Obligor or the Nominated Operator after the occurrence of an Operator/Event of Default until the same is remedied by the Operator, the Additional Obligor or the Nominated Operator as the case may be and the Operator, the Additional Obligor or the Nominated Operator has resumed or assumed the operation of the Depot; and
- (d) the Grantor shall have the right at any time to withdraw from the Operation of the Depot in which case the Operator shall resume full operational responsibility therefore until either party issues a Notice of Termination, subject to the provisions of Articles 16.4.1 to 16.4.5.

#### **16.5.2      *The Grantor's Right at Any Time***

The Grantor may, at any time after the issue by it of a Notice of Intention to Terminate following an Operator/Event of Default, terminate this Agreement by issuing a Notice of Termination, provided that it purchases the Depot for the amount to be mutually agreed by the parties being an amount equivalent to the market value of the Depot discounted by any part of the Operational Period already spent and the Operator's reasonable profit.

### **16.6 Consequences of Termination in General**

#### **16.6.1      *End of Rights and Obligations***

On termination of this Agreement, the parties shall have no further obligations hereunder subject to any rights and obligations which accrued prior to the termination and those which expressly survive termination or relate to dispute resolution.

#### **16.6.2      *Transfer of Rights and Assets***

Forthwith on termination of this Agreement –

- (a) The Operator shall relinquish any right to use, possess or have access to the Site or the rights of way, except the parts

thereof over which it might have a subsisting leasehold interests;

- (b) If termination occurs prior to Construction Completion Date, the Operator shall transfer to the Grantor such parts of the Construction Works that have been completed and such materials on the Site necessary for the purposes of completing the Construction Works at a value to be mutually agreed by the parties discounted by the cost of awarding a new Contract.
- (c) If the Grantor so elects, Grantor may purchase from the Operator at its book value, assets, materials, plant, machinery, equipment, vehicles, spare parts and other movable property procured by the Operator in connection with the Construction Works or the operation of the Depot; and
- (d) The Operator shall deliver to the Grantor all ass-built drawings, operation and maintenance manuals and quality assurance manuals relating to the Depot.

**16.6.3 Compensation Payments**

- (a) Any compensation amount payable by the Grantor to the Operator shall be payable at least 30 days after the date of termination of this Agreement, or after the amount of the compensation has been agreed or determined, where this Agreement is continuing.
- (b) Any compensation payment due pursuant to the preceding paragraph (a) shall be paid directly to the Lender(s), if any, and as may have been notified to the Grantor under any Financing Agreement(s).

**16.7 Liability and Indemnification**

The parties hereto undertake and agree to hold harmless and indemnify each other in full from and against all liabilities, damages, losses and expenses incurred as a consequence of third party claims, to the extent that a third party claim is not caused by the negligence, default or omission of a party hereto in the performance of its obligations under this Agreement.

**16.8 Use of Certain Insurance Proceeds**

Whenever this Agreement is terminated pursuant to Article 15.1.11 following a Force Majeure, and the Grantor is obligated to pay compensation to the Operator pursuant to Article 16.6.3 and insurance proceeds are available in connection with the insurance policies to which the Operator is entitled or should be entitled pursuant to this Agreement with respect to the Depot, such proceeds shall, if not used to effect a

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restoration or make repairs to the Depot, be used to pay the following items in the following order of priority:

- (a) to the payment of all indebtedness secured by the Lenders;
- (b) to reduce the compensation amount, if any, payable by the Grantor to the Operator.
- (c) to the Operator

#### **16.9 Other Remedies**

The right of a party to terminate this Agreement, as provided herein, does not preclude that party from exercising other remedies that are provided herein or are available at law. Remedies are cumulative, and the exercise of, or failure to exercise, one or more remedies by a party shall not limit or preclude the exercise of, or constitute a waiver of, other remedies by that party.

#### **16.10 Survival**

The provisions of this Article 16 shall survive the termination of this Agreement.

## **ARTICLE 17**

### **COMPENSATION FOR BREACH OF THIS AGREEMENT**

#### **17.1 Compensation**

Subject to the other provisions of this Agreement, each party shall be entitled to compensation, payable by the party breaching this Agreement, for any loss, costs and expenses which a party has suffered as a result of this Agreement not being observed in whole or in part by the party breaching this Agreement.

#### **17.2 Exemptions**

A party shall not be liable for a failure to perform any of its obligations if it proves that the failure was due to Force Majeure in accordance with Article 16 or to any other event as to which the aggrieved party bears the risk.

#### **17.3 Measures to Mitigate the Loss**

A party suffering or threatened with loss as a result of a breach of this Agreement by other party shall take such actions as are reasonable to mitigate or minimize the loss resulting from the breach. If a party fails to take such measures, the party in breach may claim a reduction in the compensation in the amount by which such loss should have been mitigated or minimized.

#### **17.4 Loss Due in Part to the Aggrieved Party**

Where the loss is due in part to an act or omission of the aggrieved party or to another event as to which the aggrieved party bears the risk, the amount of compensation shall be reduced to the extent that these factors have contributed to the loss.

#### **17.5 No Consequential Damages**

Unless otherwise provided in this Agreement, neither party shall be liable to the other party for any indirect, special, incidental, consequential or punitive damages with respect to any claim arising out of, under or in connection with this Agreement, whether based upon contract, tort including negligence, strict liability or otherwise unless a party's behavior amounts to Gross Misconduct.

## **ARTICLE 18**

### **LIABILITY AND INDEMNIFICATION**

#### **18.1 Cross Indemnity**

Each party shall indemnify, defend and hold harmless the other party from and against all liabilities, damages, losses, expenses and claims of any nature whatsoever for death, personal injury and for damage to or loss of any property arising out of or in any way connected with the indemnifying party's Default in the performance of this Agreement except to the extent that such death, personal injury, damage or loss is attributable to a negligent or intentional act or omission of the party seeking to be indemnified.

#### **18.2 Environmental Contamination**

The Operator shall be liable for, and shall defend, indemnify and hold the Grantor harmless from and against, all liabilities, damages, losses, expenses and claims from Environmental Contamination caused by the construction, operation and maintenance of the Depot, except when such liabilities, damages, loss, expenses or claims are solely attributable to the Default of the Grantor.

#### **18.3 Survival of Obligations**

The obligations of the parties under Article 18.1 and 18.2 shall survive the expiration or termination of this Agreement in respect of any act, omission, deed, matter or thing happening before such expiration or termination.

#### **18.4 Joint Responsibility**

Except as otherwise provided in this Agreement, in the event that any loss or damage referred to in Article 19.1 and 19.2 is caused only in part by the Default of the Grantor and in part by the Default of the Operator, each party shall; be liable to the other only in proportion to its relative degree of responsibility.

#### **18.5 Defence of Claims**

The party entitled to indemnification in respect of any claim brought against it shall promptly give notice to the other party that such claim has been brought. The indemnifying party may give notice to the other party accepting liability to indemnify and giving reasonable instructions as to how and by which party the claim is to be defended. Until receipt of such notice the indemnified party may take all reasonable steps in defense of

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the claim. Upon receipt of such notice, if any, the indemnified party shall follow the instructions given by the indemnifying party.

**ARTICLE 19**

**REPRESENTATIONS, WARRANTIES AND  
CONDITIONS PRECEDENT**

**19.1 Operator's Representations and Warranties**

The Operator hereby represents and warrants that:

- (a) the Operator has been duly established and registered under the laws of the Federal Republic of Nigeria and has the corporate power and authority to execute and carry out the terms and conditions of this Agreement as further warranted in the legal opinion of the counsel for the Operator set forth in Annexure I
- (b) the Operator has:
  - (i) obtained all required Approvals and documentation prior to the Effective Date; and
  - (ii) submitted all requisite applications, requests and documentation for obtaining any other Approval that is necessary to commence the Construction Works; and
  - (iii) submitted the Preliminary design to the Grantor (,) for approval in conformity with the criteria set out in Annexure A

**19.2 The Grantor's Representations and Warranties**

The Grantor hereby represents and warrants that:

- (a) it has the power to enter into this Agreement and is capable of performing its obligations hereunder; and
- (b) the Operational Rights granted under this Agreement are valid and neither it nor any Relevant Authority has issued (nor are obliged to issue) to any person, any rights or privileges that are inconsistent with or conflict with or would limit or interfere with the exercise and enjoyment by the Operator of the Operational Rights.

**PART G**

**ASSIGNMENT AND APPROVAL OF CONTRACTS**

**ARTICLE 20**

**ASSIGNMENT OF THE AGREEMENT**

**20.1 Assignment by the Grantor**

The Grantor shall not assign or transfer all or any part of its rights or obligations under this Agreement without appropriate notification to the Operator and the Facility Agent.

It is hereby declared that this Article 20.1 shall not prevent the Grantor from merging or consolidating with any other governmental ministry, parastatal, department, authority or agency of the Federal Republic of Nigeria or any administrative subdivision of the Federal Republic of Nigeria provided that the surviving entity --

- (a) is demonstrably of equal financial strength; and
- (b) has the capability and authority to assume all rights, obligations and responsibilities assumed by the Grantor; and
- (c) assumes and becomes fully liable to perform the Grantor's obligations under this Agreement.

**20.2 Assignment by the Operator**

- (a) The Operator shall not, without the prior written consent of the Grantor, transfer all, or any of its obligations
- (b) It is hereby declared that for the purpose of arranging financing for the Project, the Operator shall have the right to assign to the Lenders its rights and interests under or pursuant to this Agreement and any other agreement pertaining to or in respect of the Project and to create a security interest in favour of the Lenders in relation to the Depot, the Site, the moveable, immovable and intellectual property of the Operator, the revenues of the Operator and any other rights of the Operator (including rights in relation to its bank accounts).
- (c) The Operator shall not create or allow to be created any other security interest, lien, mortgage or encumbrance in respect of its rights and interests under this Agreement or any other Project Document or in the Depot without the prior written consent of the Grantor.

## ARTICLE 21

### APPROVAL OF CERTAIN CONTRACTS

#### **21.1 Approval of Certain Contracts**

The Operator shall not enter into any contract or commitment whatsoever requiring payments or granting any right in relation with the Project which may produce any effect after the end of the Operational Period, without the prior written approval of the Grantor.

#### **21.2 Approval Procedure**

The Operator's request for approval of contracts shall include relevant information on the proposed contractors, the subject matter of the contract, the draft of the proposed contract, the method applied for selecting the proposed contractor and the use of Nigerian labour, service and goods in accordance with Articles 14.8 and 14.9. The Grantor shall notify the Operator of its decision within, thirty (30) days after its receipt of the Operator's request. If the Grantor fails to act within such thirty (30) day period, the request shall be deemed to be approved.

#### **Effect of Contract Approval**

Approval by the Grantor of a contract shall not relieve the Operator of any obligation or liability under this Agreement.

**PART H**  
**DISPUTE RESOLUTION**  
**ARTICLE 22**  
**DISPUTE RESOLUTION**

**22.1 Amicable Settlement by the Minister**

In the event that any dispute, controversy or claim arises between the parties out of, under or in connection with this Agreement or in the interpretation of any of its provisions, including any question regarding its existence, validity or termination, the Grantor shall meet promptly on the request of any member thereof, in an effort to resolve such dispute, controversy or claim by discussion. All such disputes shall be amicably settled through discussion with the representatives of the Grantor. In the event that a settlement is not reached pursuant to this Article 22.1 within thirty (30) days of the said request then the provisions of Article 22.2 shall apply.

**22.2 Mediation by Panel of Mediators**

**22.2.1 *Appointment***

In the event that the parties are unable to resolve a dispute, controversy or claim in accordance with Article 22.1 then either party may refer the dispute, controversy or claim to a Panel of Mediators to be appointed by the parties. Within fifteen (15) days of the issue of a notice of intention to refer to a Panel of Experts, the parties shall either agree on the appointment of one person to act as Mediator or, failing agreement, appoint one Mediator each and those Mediators shall, within seven (7) days of their appointment, designate a third person to act as chief Mediator.

**22.2.2 Statement of Claim**

The party who initially issued the notice of intention to refer the matter to the Panel of Mediators shall submit to the Panel and the other party the following written documents –

- (a) a description of the dispute;
- (b) a statement of that party's position; and
- (c) copies of relevant documentary evidence in support.

**22.2.3      *Reply***

Within ten (10) days of receipt of the above documents, the other party shall submit –

- (a) a statement of that party's position and or counter dispute; and
- (b) copies of relevant documentary evidence in support.

**22.2.4      *Further Evidence***

The Panel of Mediators may call for such further documentary evidence and/or interview such persons as they deem necessary in order to reach their decision.

**22.2.5      *Decision***

The Panel of Mediators shall reach a majority decision and give notice to the parties of their decision within thirty (30) days of receipt of the documents provided under Article 22.2.3. The decision of the Panel of Mediators shall be binding unless one party issues a notice of intention within thirty (30) days of the decision to refer the matter to arbitration in accordance with Article 22.3. In such case the Panel of Mediators decision shall remain binding until final resolution by the arbitration or until an interim decision of the tribunal reversing or amending the Panel of Mediators' decision.

**22.2.6      *Costs***

The costs of engaging the Panel of Mediators shall be borne equally by the parties, and each party bears its own costs of preparing the materials for and making presentations to the Panel of Mediators.

**22.3      *Arbitration***

In the event that the parties are unable to resolve any dispute, controversy, or claim in accordance with Articles 22.1 or 22.2 and in case of challenge to any decision of the Panel of Mediators under Article 22.2.5, such dispute, controversy or claim shall be finally settled by referring same to a panel of Arbitrators in Nigeria in accordance with the Arbitration and Conciliation Act Chapter 19, Laws of the Federation of Nigeria, 1990, or any statutory modification or re-enactment of it for the time being in force.

- a. One (1) of the panel of Arbitrators shall be selected by each party and the third shall be selected jointly by both parties or selected Arbitrators. On the receipt by one party of the nomination in writing

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of the other party's arbitrators, that party shall appoint their arbitrator within fourteen (14) days.

#### BOOT Agreement

- b. The Arbitral Panel's findings and decisions shall be final and binding on the parties and on any persons claiming under or through them.
- c. There shall be no recourse to Court by any of the parties for the settlement of any such disputes and any process filed or step taken in Court by any party contrary to this clause shall be null and void and of no effect whatsoever.
- d. The Arbitral Tribunal shall deliver the award not later than six (6) months after its acceptance of its appointment.
- e. The Arbitration shall be held in Abuja, Nigeria and the dispute, difference or claim shall be decided in accordance with Nigeria Law.

#### 22.4 **Multiparty Dispute Resolution – Consolidation of Arbitration Proceedings**

The parties shall agree to join any dispute resolution procedure under this Agreement with any other dispute resolution procedure pending in respect of any other Project Document relating to substantially the same matter, subject to the terms of the arbitration provisions in respect of any dispute that has been referred to arbitration.

#### 22.5 **Performance During Dispute Resolution**

Pending the submission of a dispute, controversy or claim to the Grantor, the Panel of Mediators and/or arbitration and thereafter until the final decisions of the Panel of Mediators and/or the arbitration tribunal, the parties shall continue to perform all of their obligations under this Agreement and shall benefit from all their rights without prejudice to a final adjustment in accordance with such decision.

#### 22.6 **Survival**

The dispute resolution provisions contained in this Article 22 shall survive the termination of this Agreement.

**PART I**

**MISCELLANEOUS**

**ARTICLE 23**

**CONTRACT DOCUMENTS AND ENTIRE AGREEMENT**

**23.2 Contract Documents**

This Agreement includes Annexures A to F and each of which shall be deemed to be incorporated herein.

**23.2 Entire Agreement**

This Agreement constitutes the entire understanding between the parties regarding the Project and supersedes all previous written and oral representations, agreements or arrangements regarding the Project.

**23.3 Amendments and Variations**

Should there at any time arise any circumstance(s) warranting an amendment, variation or addition to this agreement for the purpose of facilitating or attaining its objectives any party may call for such amendment, variation or addition and such amendment, variation or addition shall be valid and binding provided only that it is done in writing and signed by the authorized representatives of both parties.

**23.4 Separability**

If any part or parts of this Agreement shall be declared invalid by any competent arbitration tribunal or court, the other parts shall remain valid and enforceable.

**ARTICLE 24**  
**MISCELLANEOUS**

**24.1 Several Obligations**

The duties, obligations and liabilities of the parties under this Agreement are intended to be several and not joint or collective. Nothing contained in this Agreement shall be construed to create an association, trust, partnership or joint venture among the parties. Each party shall be liable individually and severally for its own obligations under this Agreement.

**24.2 Notices**

Unless otherwise stated, notices to be given under this Agreement shall be in writing and shall be given by hand delivery, recognized courier, mail, telex or facsimile transmission and delivered or transmitted to the parties at their respective addresses set forth below:

**The Grantor:**

The Honourable Minister of Transport  
Federal Ministry of Transport  
Bukar Dipcharima House,  
Central Business District  
Abuja, FCT.  
Fax No:.....  
E-mail: .....

**The Operator:**

The Managing Director,  
Dala Inland Dry Port Nigeria Limited  
18 A Zaria Road  
Gyedi-Gyedi, Kano  
Attention: Alhaji Ahmed Rabi  
Fax No: 234-064-668760

Or such other address, telex number or facsimile number as may be notified by that party to the other party from time to time, and shall be deemed to have been made or delivered -

- (a) in the case of any communication made by letter, when delivered by hand, by recognized courier or by mail (registered, return receipt requested) at that address and
- (b) in the case of any communication made by telex or facsimile, when transmitted properly addressed to such telex number or facsimile number.

In case that a party changes its address and/or attention, it shall notify the other party in writing prior to adoption of the new address and/or attention.

#### **24.3 Costs and Expenses**

Unless otherwise provided in this Agreement or otherwise agreed by the parties, each party shall bear its own costs incurred in connection with the negotiation, completion and performance of this Agreement.

#### **24.4 Non-waiver**

None of the provisions of this Agreement shall be deemed waived by either party except when such waiver is given in writing. The failure by either party to insist upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future.

#### **24.5 Governing Law**

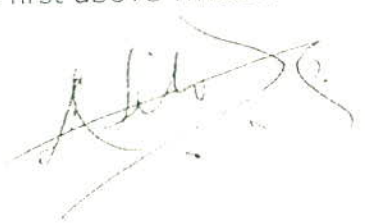
This Agreement shall be governed by and construed in accordance with the laws of the Federal Republic of Nigeria.

BOOT Agreement

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be signed by their duly authorised representatives on the date first above written.

**SIGNED, SEALED AND DELIVERED**

**BY THE HONOURABLE MINISTER OF TRANSPORT**



For and on behalf of

**THE GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA**

In the presence of:

Name: DR. M. BABANGIDA ALIYU


Address: FMDT

Occupation: CIVIL SERVANT

Signature: B. Aliyu

The Common Seal of DALA INLAND DRY PORT NIGERIA LIMITED  
was affixed in the presence of:

  
\_\_\_\_\_  
DIRECTOR

  
\_\_\_\_\_  
SECRETARY  
16 May 06

## ANNEXURE A

### SCOPE OF WORKS

The project scope of works involves the architectural drawings and structural, electrical and mechanical engineering designs and drawing evolved from the conceptual architectural design & operational layout of the ICD enclosed with the RFP, to the actual construction of the ICD as detailed in **Annexure C – PROJECT IMPLEMENTATION SCHEDULE**. From these designs and drawings, the detailed Bills of Quantities for the construction works of the depot will be obtained.

- Standard pavement for heavy-duty equipment for use in the operational and stacking area of the depot.
- Office building for the ICD, Custom offices and user agencies equipped with basic facilities
- Warehousing facility and long-term storage of bonded cargo.
- Gate complex with separate entry and exit
- Adequate parking space for vehicles awaiting entry to the depot.
- Boundary wall according to standards specified by Customs.
- Internal roads for service and circulating areas.
- Access road from federal highway to depot.
- Rail link and siding from the nearest NRC line to depot
- Electricity supply from the nearest 33KVA station to the depot.
- Electronic weighbridge
- Computerized processing of documents with capability of being linked to EDI.

## ANNEXURE B PROJECT IMPLEMENTATION SCHEDULE

The Operator shall carry out the construction works on this 20,000 TEU depot in three developmental stages, that is:

Phase 1	first 5,000TEUs
Phase 2	5,000 TEUs
Phase 3	Last 10,000 TEUs

The Operator shall commence the construction of a new phase immediately upon the capacity utilization of the previous phase reaching 75% of its installed capacity, that is:

Phase 1	3,750 TEUs
Phase 2	7,500 TEUs

### MILESTONES DATE

The Operator shall perform its obligations in respect of the Construction Works for Phase 1 in accordance with this Project Implementation Schedule established by the Operator and approved by the Grantor, as contained in the underlisted milestones properly scheduled in the attached Project Works Program. These Project Implementation Milestones for Phases 2 & 3 will be established upon the capacity utilization of the previous phase reaching 75% of its installed capacity:

- Construction Commencement Date
- Site Preparation (Turning of Sod)
- Precise Survey and Demarcation of Site within Land Grant
- Submission of Preliminary Design
- Submission of Detailed Design
- Commencement of Physical Construction Works
- Preliminary Completion
- Final Completion
- Commencement of Maintenance Period

## ANNEXURE C

### OPERATION AND SECURITY MANUALS

### OPERATIONAL GUIDELINES AND STANDARDS

#### 1.0 **Functions of the ICD**

The basic functions of the ICD are as follows:

- Receipt and dispatch/delivery of cargo.
- Stuffing and stripping of containers.
- Transit operations by rail/road to and from serving ports.
- Customs clearance.
- Consolidation and desegregation of LCL cargo.
- Temporary storage of cargo and containers.
- Reworking of containers.
- Maintenance and repair of container units

#### 2.0 **Basic Activity Centres of the ICD**

The operations of the ICD revolve around the following activity centres:

- i. **Rail Siding**  
The place where container trains are received, dispatched and handled in a terminal. Similarly, the containers are loaded on and unloaded from rail wagons at the siding through overhead cranes and/or other lifting equipments.
- ii. **Container Yard**  
Container yard occupies the largest area in the ICD. It is stacking area where the export containers are aggregated prior to dispatch to port, import containers are stored till Customs clearance and where empties await onward movement. Likewise, some stacking areas are earmarked for keeping special containers such as refrigerated, hazardous, overweight/over-length, etc.
- iii. **Warehouse (Including Customs Examination Area)**  
A covered space where export cargo is received and import cargo stored/delivered; containers are stuffed/stripped or reworked; Less than Container Load (LCL) exports are consolidated and import LCLs are unpacked; and cargo is physical examined by Customs.

## BOOT Agreement

Export and import consignments are generally handled either at separate areas in a warehouse or in different nominated warehouses/sheds.

### iv. Gate Complex

That gate complex regulates the entry and exit of road vehicles carrying cargo and containers through the terminal. It is the place where documentation, security and container inspection procedures are undertaken

## 3.0 IT Strategy

The ICT strategy is a key success factor for the smooth operations of the ICD. The ICD Operator must have in place an Information Technology system that is easily accessible by its customers on a worldwide basis via the internet and is compatible with ASYCUDA and other systems in use by all stakeholders – (NPA, Customs, NRC, NSC)

## 4.0 Service Level Agreements

The various parties to the ICD scheme – namely the Nigerian Ports Authority, the Nigeria Railway Corporation, The Nigerian Customs Service and the Operator under the ICD scheme should sign a Memorandum of Understanding between each other to reflect the level of service expected from each other. For each MOU the following issues shall be addressed:

### i. NPA and ICD Operator

- Provision of transshipment facility dedicated to ICD operations within the sea ports
- Maximum length of stay of ICD designated containers at the designated transshipment facility
  - Documentation requirements
  - ICT protocol
  - Fee Structure

### ii ICD Operator and NRC/successor and concessionaire whichever is applicable

- Documentation requirements
- Maintenance of rail network and facilities within the ICD area.
- ICT Protocol

## BOOT Agreement

### iii. ICD Operator and Customs

- Location of Point of Duty Collection within the ICD facility
- Timing of Custom Services
- Accommodation for all Customs services
- ICT Protocol

### 5.0 **Tariff Structure**

The ICD Operator is expected to formulate an appropriate cost based tariff structure and agree on this with the regulatory agency.

### 6.0 **Monitoring Requirements**

For the purpose of monitoring, the ICD Operator is expected to submit to the regulatory agency information as may be required from time to time.

## **SECURITY GUIDELINES AND STANDARDS**

### 1.0 **PREAMBLE**

These guidelines set out the minimum security guidelines which the Operator shall comply with. The Operator however is at liberty to improve on the standards as set out hereunder.

The ICD depot will have a mixed complement of Security personnel that include the Nigerian Customs, Nigeria Police Force and the Security of the depot operator.

While the Nigerian Customs has responsibility for the security of ICD bound cargoes, the general maintenance of law and order at the depots and outlining areas lies with Nigeria Police Force in conjunction with the security of the ICD Operator.

This arrangement is envisaged to fall under the oversight responsibility of the Regulatory Authority which may be required from time to time to intervene to assess the level of compliance of the operator with the approved security guidelines.

The set of rules and regulations that would guide Security operatives in the discharge of their responsibilities for the security of cargo depot, assets as well as of lives in the depots are highlighted as follows:

- i. Security Guidelines in the Marshalling Yard;
- ii. Guidelines on Security on Transfer Route detail between Marshalling and the ICD;
- iii. Security Guidelines for Security Operatives for the ICD;
- iv. Security Requirements in Rail Transport;

## BOOT Agreement

- v. Security Requirement on Road Transport;
- vi. Security Requirements in the ICD and the Facilitation of Goods to and from the ICD;
- vii. Budgeting for Security Requirements for the ICD; and
- viii. Force level of Security Operatives at the ICD and on Escort.

### 2.0 SECURITY GUIDELINES AT THE MARSHALLING YARD

- 2.1 The Security force in control of Security in the marshalling yard where the containers have to be consolidated prior to movement should comprise the personnel of the Nigerian Customs Service and the Nigeria Police Force.
- 2.2 The appropriate force level required is to be determined by the relevant security agencies based on the volume of cargo and the security profile of the area. The overall responsibility of the security of cargo in the marshalling yard falls on the Nigerian Customs Service in collaboration with the Nigerian Railway Police Command.
- 2.3 The on-duty security operatives are to control and regulate access in and out of the marshalling yard.
- 2.4 All security operatives must report any unusual movement observed.
- 2.5 All on-duty security operatives must have on-duty identification badges.
- 2.6 Furthermore, the security coverage must be on 24-hours basis with security operatives not leaving their beats until properly relieved.
- 2.7 All incidents of security interest must be recorded through maintenance of Incident Register.

### 3.0 GUIDELINES FOR SECURITY ON TRANSFER ROUTE DETAIL BETWEEN MARSHALLING YARD AND THE ICD

- 3.1 Security operatives on transfer routes detail are to be equipped with current route plans.
- 3.2 Security operatives on escort duty must have adequate knowledge about the level and types of threats obtainable along the transfer route.
- 3.3 A copy of Transire should be lodged with the Security which should be checked before commencement of the journey and at destination.

## BOOT Agreement

- 3.4 Security operatives must ensure sanctity of the container seals before departure and at destination
- 3.5 A joint Escort Team is to be established and to be headed by the Nigerian Customs Service in collaboration with the Nigerian Railway Police.
- 3.6 Security operatives should ensure adequate security coverage of the entire cargo in-transit at all times including during stoppages.
- 3.7 Access to the cargo in-transit by unauthorized persons must be denied at all times including during stoppages.
- 3.8 In the event of un-usual security threat, provision should be made for an effective liaison system with sister forces for assistance which must be made known to the operatives.
- 3.9 Security detail must, prior to departure, ensure that equipment are inspected, tested and are found to be in good working order.
- 3.10 At the end of the exercise, a formal report on the operation must be submitted by the security operatives to the relevant authorities.

## 4.0 SECURITY GUIDELINES FOR OPERATIVES AT THE ICD

- 4.1 Security agents are to ensure proper screening of person and denial of access to all unauthorized persons.
- 4.2 All on-duty security agents at the ICD should be clearly distinguished through the use of identification badges, reflective jackets etc.
- 4.3 Customs and security personnel of the ICD Operators should jointly check cargoes exiting the ICD.
- 4.4 Security personnel of the ICD Operator are to undertake periodic patrols for effective monitoring of events at the depot.
- 4.5 Security operatives are to ensure effective traffic control within the depot and its approaches.
- 4.6 Security operatives are to prevent the introduction of illegal weapons, dangerous substances and devices into the depot area.

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- 4.7 Security coverage of the ICD should be on 24-hour basis. Consequently, all security operatives must not leave their duty post until properly relieved.
- 4.8 Records of all incidents must be maintained in the appropriate register.
- 4.9 In case of emergency situation, prompt action must be taken to alert relevant authorities for necessary response. To this end, the appropriate communication channels of the relevant authorities are to be known to the operatives.
- 4.10 In the event of recovery of cargo within the depot, security operatives are required to log the recovery and submit the recovered items to the Police while forwarding copy to the terminal Operator.

## 5.0 SECURITY REQUIREMENT IN RAIL TRANSPORT

- 5.1 Existing Security Measures on Rail: The system of moving goods by rail from the ports shall provide for:
  - i. Customs officials and armed Railway Policemen who accompany the goods to destination;
  - ii. Communication equipments that provides information on the general situation of all trains on the tracks. These include train-to-train, train-to-station and station-to-station communication equipments;
  - iii. Electronic gadget attached to the train to indicate location of trains at any particular time;
  - iv. Rail cars patrolling rail lines; and
  - v. Loading Containers on wagons face to face to prevent illegal access through the sealed doors.
- 5.2 The Operator shall take the following additional security measures:
  - i. Additional armed police personnel to accompany train;
  - ii. Provision of walkie-talkies and other relevant communication facilities to the Security Personnel enroute which should be linked to the Security Headquarters and the ICD;
  - iii. Special beefed-up security at every train stop enroute to the Depot;
  - iv. Adequate payment of allowances to the accompanying security personnel;

## BOOT Agreement

- v. Adequate provision of appropriate fire-arms for the armed escorts;  
and
- vi. Adequate provision of quick evacuation in case of breakdown of rolling stock.

## 6.0 SECURITY REQUIREMENT ON ROAD TRANSPORT

### 6.1 Existing Security Measures on Road

- i. The existing security measures for all trucks loaded with uncleared containers is that the customs provide armed escorts to such trucks to ensure safe passage to their destinations with a view to ensuring payment of required customs duties;
- ii. This measure is complemented by the police who are statutorily saddled with the responsibility of ensuring the safety of all road users and their property.

### 6.2 The Operator shall take the following additional security measures:

- i. Provision of police escorts on loaded trucks to complement the customs escorts;
- ii. Provision of effective and appropriate communication i.e. walkie-talkies/mobile phones to the escorts, thurayas, etc;
- iii. Provision for immediate evacuation of goods in case of any breakdown;
- iv. Routine inspection of vehicles to ascertain their roadworthiness before loading for haulage from the ports to the ICD;
- v. Registration of all trucks for haulage into and out of the depots to ensure the identity of the trucks and their owners with a view to ensuring the safety of goods;
- vi. Trucks carrying goods to ICD should preferably move in convoy for added effective security;
- vii. In addition, all persons entering the operational areas must be required to wear reflective jackets and protective helmets; and
- viii. The number of persons authorised to accompany trucks entering the operational area to evacuate cargo must be specified by policy and strictly enforced by the security operatives to minimize human traffic within the operational area.

## 7.0 SECURITY REQUIREMENT OF THE ICD AND THE FACILITATION OF GOODS TO AND FROM THE ICD

### 7.1 Security Requirement of the ICD

## BOOT Agreement

- i. The perimeter of the depot should be fenced with well-concretized walls and electric barbed wire to prevent illegal access;
- ii. Internal demarcation of stacking areas within the ICD should be with palisade steel bars that allows for unhindered view of the container stacking area, while at the same time, preventing unauthorized entry;
- iii. The Depot should be covered with powerful lights and close circuit cameras both within and outside the premises;
- iv. In addition, a well-fitted control room to which all the camera images and alarm signals are relayed must be installed and manned on 24 hours basis and backed up by highly mobile Quick Responses Team (QRT) of operatives;
- v. For effectiveness, the ICD should be carved into Electronic Surveillance Zones (ESZ) for easy identification of any threatened area;
- vi. Adequate fire protection should be provided with an additional fire post in the outskirts of the ICD premises;
- vii. In line with IMO requirement, clearly designated assembly areas and emergency evacuation points should be created in case of emergency;
- viii. The entry and exit points of the depot should be well protected and manned. Preferably, the electronic smart card gate control system is recommended;
- ix. The depot should be provided with power generating facilities to ensure 24 hours power supply. The generating plant should be located away from the cargo stacking area, for the safety of cargoes;
- x. For effective security control, all operational areas (stacking areas) should be clearly demarcated from administrative areas; and
- xi. All persons entering the operational areas of the depot must be cleared by security operatives and issued appropriate depot passes which must be worn and displayed at all times.

## 7.2 Facilitation of Goods To and From the ICD

- i. The ICD must be licensed by the Nigeria Customs Service;

#### BOOT Agreement

- ii. The Operator of the Depot should enter into a bond with the Nigerian Customs Service;
- iii. The goods must be duly insured;
- iv. The goods must be covered by a Transire from the port to the Depots;
- v. The Transire should be e-mailed to the ICD before the arrival of the goods;
- vi. The ICD bound containers should be appropriately cloused in the Bill of Lading (cargo manifest);
- vii. All trucks to be used for evacuation of goods in and out of Depot must be duly registered with the Depot for proper identification;
- viii. All trucks used for evacuation of goods from the Depot must meet the set minimum safety requirement and must be subjected to periodic safety inspections to ensure compliance with set standards. However, the Operator is at liberty to improve on the government set standards;
- ix. The Depot must be ASYCUDA compliant;
- x. There must be adequate provision of office accommodation outside the operational areas for relevant security and other agencies and administrative units;
- xi. Operator should be experts in the management of ICDs;
- xii. The Regulatory Authority would introduce a mechanism for bench marking the performance and safety standard of the ICD, the meeting of which should be made a critical element in determining renewal of concessions.

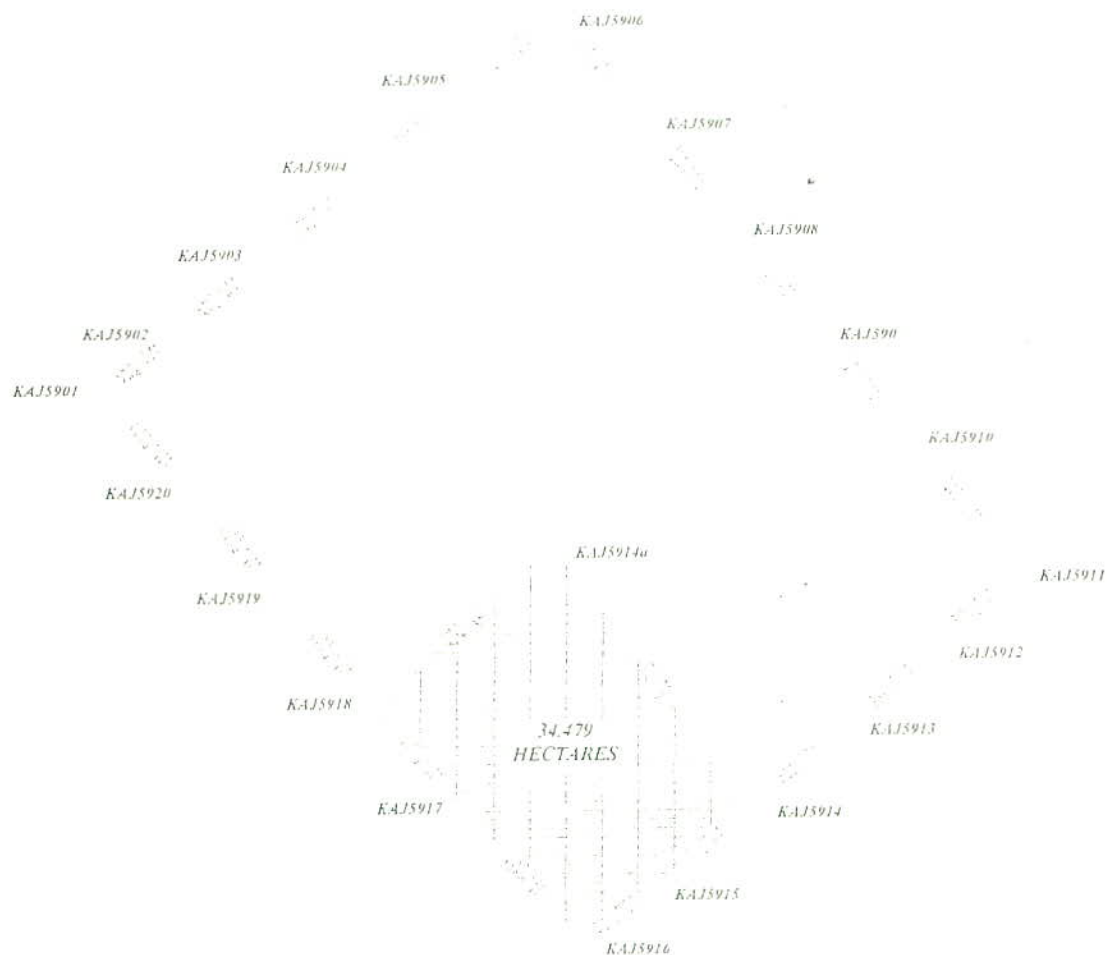


## 9.0 FORCE LEVEL OF SECURITY OPERATIVES AT THE ICD AND ON ESCORT

- i. The Nigeria Police should operate 3 shifts at the Depot and while on duty tour/escort
- ii. Six Police operatives of one Inspector and five NCOs are to cover 3,000 – 10,000 containers while 2 Inspectors and 10 NCOs are to cover 10001 to 20000 containers per shift; and
- iii. For routes escorts, one Inspector of Police and 4 NCCs and one appropriate Customs Officer of superior rank with 4 Customs NCOs are to escort per movement.

ANNEXURE D

SITE PLAN



REFER TO PLAN NO. GKN 2005; LAND SET ASIDE FOR  
INLAND CONTAINER DEPOT [DRY PORT], AT ZAWACHIKI  
KUNBOTSO DISTRICT, KUMBOTSO LOCAL GOVERNMENT  
KANO STATE

