



RFP for supply and Implementation of ERP at KMRL

REQUEST FOR PROPOSAL (RFP)
FOR
Supply and Implementation of ERP Solution

RFP NO: [KMRL/IT/AE\(IT\)2013/971](#)

The Revised Contrat Terms

Date: July 17, 2014

ANNEXURE III- CONTRACT

AGREEMENT

Provision of Project Services for ERP Implementation for KMRL

AGREEMENT No. _____

This AGREEMENT (hereinafter called the “**Agreement**”) is made on the _____ day of the month of _____ 2***, between, on the one hand, the Kochi Metro Rail Limited (hereinafter called the “**KMRL**” which expression shall include their respective successors and permitted assigns, unless the context otherwise requires) and, on the other hand, _____ (hereinafter called the “**System Integrator**” which expression shall include their respective successors and permitted assigns).

WHEREAS

- A. The KMRL vide its Request for Proposal (RFP No.-----) for appointment of System Integrator (hereinafter called the “**SI**”) for Implementation of ERP Solution at Kochi Metro Rail Limited (hereinafter called the “**Project**”);
- B. The System Integrator submitted its proposals for the aforesaid work, whereby the System Integrator represented to the KMRL that it had the required professional skills, and in the said proposals the System Integrator also agreed to provide the Services to the KMRL on the terms and conditions as set forth in the RFP and this Agreement; and
- C. The KMRL, on acceptance of the aforesaid proposals of the System Integrator, awarded the Project to the System Integrator vide its Letter of Award dated _____ (the “**LOA**”); and
- D. In pursuance of the LOA, the parties have agreed to enter into this Agreement.

NOW, THEREFORE, the parties hereto hereby agree as follows:

1. GENERAL

1.1 Definitions and Interpretation

RFP for supply and Implementation of ERP at KMRL

1.1.1 The words and expressions beginning with capital letters and defined in this Agreement shall, unless the context otherwise requires, have the meaning hereinafter respectively assigned to them:

- (a) "Additional Costs" shall have the meaning set forth in Clause 6.1.2;
- (b) "Agreement" means this Agreement, together with all the Annexes;
- (c) "Agreement Value" shall have the meaning set forth in Clause 6.1.2;
- (d) "Applicable Laws" means the laws and any other instruments having the force of law in India as they may be issued and in force from time to time;
- (e) "Confidential Information" shall have the meaning set forth in Clause 3.3;
- (f) "Conflict of Interest" shall have the meaning set forth in Clause 3.2 read with the provisions of RFP;
- (g) "Dispute" shall have the meaning set forth in Clause 9.2.1;
- (h) "Effective Date" means the date on which this Agreement comes into force and effect pursuant to Clause 2.1;
- (i) "Expatriate Personnel" means such persons who at the time of being so hired had their domicile outside India;
- (j) "INR, Re. or Rs." means Indian Rupees;
- (k) "Member", in case the System Integrator consists of a consortium of more than one entity, means any of these entities, and "Members" means all of these entities;
- (m) "Party" means the KMRL or the System Integrator, as the case may be, and Parties means both of them;
- (n) "Personnel" means persons hired by the System Integrator or by any Sub-Contractors of the System integrator, as employees or retainers and assigned to the performance of the Services the Project or any part thereof;
- (o) "Resident Personnel" means such persons who at the time of being so hired had their domicile inside India;

RFP for supply and Implementation of ERP at KMRL

- (p) “RFP” means the Request for Proposal document in response to which the System Integrator’s proposal for providing Services was accepted;
- (q) “Services” means the work to be performed by the System Integrator pursuant to this Agreement, as described in the Terms of Reference hereto;
- (r) “Sub-Contractor” means any entity to which the System Integrator sub-contracts any part of the Services in accordance with the provisions of Clause 4.7; and
- (s) “Third Party” means any person or entity other than the Government, the KMRL, the System Integrator or a Sub-contractor of the System Integrator.

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

1.1.2 The following documents along with all addenda issued thereto shall be deemed to form and be read and construed as integral part of this Agreement and in case of any contradiction between or among them the priority in which a document would prevail over another would be as laid down below beginning from the highest priority to the lowest priority:

- (a) Agreement
- (b) Annexes of Agreement
- (c) Request for proposal
- (d) The responses or proposal submitted by the SI
- (e) Letter of Award

1.1.3 All documents forming part of the Agreement are to be taken as mutually explanatory of one another. In the event of any conflict, the terms of the Agreement (including the Schedules and appendices) shall prevail over any other document. In case of conflict between RFP (as may be amended) and the Proposal by the SI, the provisions mentioned in the RFP (including its annexures, addenda and pre-bid clarifications issued for the RFP) shall prevail over the Proposal.

1.2 Relation between the Parties

RFP for supply and Implementation of ERP at KMRL

Nothing contained herein shall be construed as establishing a relation of master and servant or of agent and principal as between the KMRL and the System Integrator. The System Integrator shall, subject to this Agreement, have complete charge of Personnel performing the Services and shall be fully responsible for the Services performed by them or on their behalf hereunder.

1.3 Rights and obligations

The mutual rights and obligations of the KMRL and the System Integrator shall be as set forth in the Agreement, in particular:

- (a) The System Integrator shall carry out the Services or the Project in accordance with the provisions of the Agreement; and
- (b) The KMRL shall make payments to the System Integrator in accordance with the provisions of the Agreement.

1.4 Governing law and jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts at Kochi / Ernakulam shall have exclusive jurisdiction over matters arising out of or relating to this Agreement.

1.5 Language

All notices required to be given by one Party to the other Party and all other communications, documentation and proceedings which are in any way relevant to this Agreement shall be in writing and in English language.

1.6 Table of contents and headings

The table of contents, headings or sub-headings in this Agreement are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of this Agreement.

1.7 Notices

RFP for supply and Implementation of ERP at KMRL

Any notice or other communication to be given by any Party to the other Party under or in connection with the matters contemplated by this Agreement shall be in writing and shall:

- (a) In the case of the System Integrator, be given by facsimile or e-mail and by letter delivered by hand to the address given and marked for attention of the System Integrator's Representative set out below in Clause 1.10 or to such other person as the System Integrator may from time to time designate by notice to the KMRL; provided that notices or other communications to be given to an address outside Kochi may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number/address as the System Integrator may from time to time specify by notice to the KMRL;
- (b) In the case of the KMRL, be given by facsimile or e-mail and by letter delivered by hand and be addressed to the KMRL with a copy delivered to the KMRL Representative set out below in Clause 1.10 or to such other person as the KMRL may from time to time designate by notice to the System Integrator; provided that if the System Integrator does not have an office in Kochi it may send such notice by facsimile or e-mail and by registered acknowledgement due, air mail or by courier; and
- (c) Any notice or communication by a Party to the other Party, given in accordance herewith, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date and time of delivery; provided that in the case of facsimile or email, it shall be deemed to have been delivered on the working days following the date of its delivery.

1.8 Location

- 1.8.1 The Services or the Project shall be performed at the offices of the KMRL in accordance with the provisions of RFP and at such locations as are incidental thereto, including the offices of the System Integrator.
- 1.8.2 The KMRL may require the personnel to spend the required man-hours at the offices of the KMRL and the System Integrator agrees and undertakes to provide such services on a best effort basis and without any unreasonable delay.

1.9 Authorised Representatives

RFP for supply and Implementation of ERP at KMRL

1.9.1 Any action required or permitted to be taken, and any document required or permitted to be executed, under this Agreement by the KMRL or the System Integrator, as the case may be, may be taken or executed by the officials specified in this Clause 1.10.

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

Tel: ***** Fax: ***** email: *****

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

Tel: -----

Mobile: -----

Fax: -----

E-mail: -----

1.10 Taxes and duties

Unless otherwise specified in the Agreement, the System Integrator shall pay all such taxes, duties, fees and other impositions as may be levied under the Applicable Laws and the KMRL shall perform such duties in regard to the deduction of such taxes as may be lawfully imposed on it.

2. COMMENCEMENT, COMPLETION AND TERMINATION OF AGREEMENT

RFP for supply and Implementation of ERP at KMRL

2.1 Effectiveness of Agreement

This Agreement shall come into force and effect on the date of this Agreement (the “Effective Date”).

2.2 Commencement of Services

The System Integrator shall commence the Services or the Project within a period of 15 (Fifteen) days from the Effective Date, unless otherwise agreed by the Parties.

2.3 Termination of Agreement for failure to commence Services

If the System Integrator does not commence the Services within the period specified in Clause 2.2 above, the KMRL may, by not less than 1 (one) weeks’ notice to the System Integrator, declare this Agreement to be null and void, and in the event of such a declaration, this Agreement shall stand terminated and the System Integrator shall be deemed to have accepted such termination.

2.4 Expiration of Agreement

Unless terminated earlier pursuant to Clauses 2.3 or 2.9 hereof, this Agreement shall, unless extended by the Parties by mutual consent, expire upon (i) expiry of a period of 60 (sixty) days after the completion of the support and maintenance services as per this agreement/RFP, ~~selection of the agency for implementation of project~~; (ii) the expiry of 4 (four) years from the Effective Date, whichever is earlier. Upon Expiration/Termination, the KMRL shall make payments of all amounts due to the System Integrator hereunder.

2.5 Entire Agreement

2.5.1 This Agreement and the Annexes together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn; provided, however, that the obligations of the System Integrator arising out of the provisions of the RFP shall continue to subsist and shall be deemed to form part of this Agreement.

RFP for supply and Implementation of ERP at KMRL

2.5.2 Without prejudice to the generality of the provisions of Clause 2.5.1, on matters not covered by this Agreement, the provisions of RFP shall apply.

2.6 Modification of Agreement

(a) Modification of the terms and conditions of this Agreement, including any modification of the scope of the Services, may only be made by written agreement between the Parties. Pursuant to Clauses 4.2.3 and 6.1.3 hereof, however, each Party shall give due consideration to any proposals for modification made by the other Party.

(b) Either party may request a change order (“Change Order”) in the event of actual or anticipated change(s) to the agreed scope, Services, Deliverables, schedule, or any other aspect of the Statement of Work. System Integrator will prepare a Change Order reflecting the proposed changes, including the impact on the Deliverables, schedule, and fee. Without a signed Change Order, System Integrator shall not be bound to perform any additional services. The parties agree to negotiate in good faith all Change Order proposals. No change order shall be effective unless accepted by KMRL in writing.

2.7 Force Majeure

2.7.1 Definition

(a) For the purposes of this Agreement, “Force Majeure” means an event which is beyond the reasonable control of a Party, and which makes a Party’s performance of its obligations hereunder impossible or so impractical as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the Party invoking Force Majeure to prevent), confiscation or any other action by government agencies.

(b) Force Majeure shall not include (i) any event which is caused by the negligence or intentional action of a Party or such Party’s Sub-Contractor or agents or employees, nor (ii) any event which a diligent Party could reasonably have been expected to both (A) take into account at the time of

RFP for supply and Implementation of ERP at KMRL

the conclusion of this Agreement, and (B) avoid or overcome in the carrying out of its obligations hereunder.

- (c) Force Majeure shall not include insufficiency of funds or failure to make any payment required hereunder.

2.7.2 No breach of Agreement

The failure of a Party to fulfil any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement insofar as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.

2.7.3 Measures to be taken

- (a) A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party's inability to fulfil its obligations hereunder with a minimum of delay.
- (b) A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, and in any event not later than 14 (fourteen) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible.
- (c) The Parties shall take all reasonable measures to minimise the consequences of any event of Force Majeure.

2.7.4 Extension of time

Any period within which a Party shall, pursuant to this Agreement, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

2.7.5 Payments

During the period of its inability to perform the Services as a result of an event of Force Majeure, the System Integrator shall be entitled to be reimbursed for additional costs reasonably and necessarily incurred by it during such period for the

RFP for supply and Implementation of ERP at KMRL

purposes of the Services and in reactivating the Services after the end of such period.

2.7.6 Consultation

Not later than 30 (thirty) days after the System Integrator has, as the result of an event of Force Majeure, become unable to perform a material portion of the Services, the Parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstances.

2.8 Suspension of Agreement

~~The KMRL may, by written notice of suspension to the System Integrator, suspend all payments to the System Integrator hereunder if the System Integrator shall be in breach of this Agreement or shall fail to perform any of its obligations under this Agreement, including the carrying out of the Services; provided that such notice of suspension (i) shall specify the nature of the breach or failure, and (ii) shall provide an opportunity to the System Integrator to remedy such breach or failure within a period not exceeding 15 (fifteen) days after receipt by the System Integrator of such notice of suspension.~~

2.9 Termination of Agreement

2.9.1 By the KMRL

The KMRL may, by not less than 90 (ninety) days' (which included notice period and remedy period) written notice of termination to the System Integrator, such notice to be given after the occurrence of any of the events specified in this Clause 2.9.1, terminate this Agreement if:

- (a) The System Integrator fails to remedy any breach hereof or any failure in the performance of its obligations hereunder, as specified in a notice of suspension pursuant to Clause 2.8 hereinabove, within 15 (fifteen) days of receipt of such notice of suspension or within such further period as the KMRL may have subsequently granted in writing;
- (b) The System Integrator becomes insolvent or bankrupt or enters into any agreement with its creditors for relief of debt or take advantage of any law for the benefit of debtors or goes into liquidation or receivership whether compulsory or voluntary;

RFP for supply and Implementation of ERP at KMRL

- (c) The System Integrator fails to comply with any final decision reached as a result of arbitration proceedings pursuant to Clause 9 hereof;
- (d) The System Integrator submits to the KMRL a statement which has a material effect on the rights, obligations or interests of the KMRL and which the System Integrator knows to be false;
- (e) Any document, information, data or statement submitted by the System Integrator in its Proposals, based on which the System Integrator was considered eligible or successful, is found to be false, incorrect or misleading;
- (f) As the result of Force Majeure, the System Integrator is unable to perform a material portion of the Services for a period of not less than 60 (sixty) days;
or
- ~~(g) The KMRL, in its sole discretion and for any reason whatsoever, decides to terminate this Agreement.~~

2.9.2 By the System Integrator

The System Integrator may, by not less than 30 (thirty) days' written notice to the KMRL, such notice to be given after the occurrence of any of the events specified in this Clause 2.9.2, terminate this Agreement if:

- (a) The KMRL fails to pay any money due to the System Integrator pursuant to this Agreement and not subject to dispute pursuant to Clause 9 hereof within 45 (forty five) days after receiving written notice from the System Integrator that such payment is overdue;
- (b) The KMRL is in material breach of its obligations pursuant to this Agreement and has not remedied the same within 45 (forty-five) days (or such longer period as the System Integrator may have subsequently granted in writing) following the receipt by the KMRL of the System Integrator's notice specifying such breach;
- (c) As the result of Force Majeure, the System Integrator is unable to perform a material portion of the Services for a period of not less than 60 (sixty) days; or
- (d) The KMRL fails to comply with any final decision reached as a result of arbitration pursuant to Clause 9 hereof.

RFP for supply and Implementation of ERP at KMRL

2.9.3 Cessation of rights and obligations

Upon termination of this Agreement pursuant to Clauses 2.3 or 2.9 hereof, or upon expiration of this Agreement pursuant to Clause 2.4 hereof, all rights and obligations of the Parties hereunder shall cease, except (i) such rights and obligations as may have accrued on the date of termination or expiration, or which expressly survives such Termination; (ii) the obligation of confidentiality set forth in Clause 3.3 hereof; (iii) the System Integrator's obligation to permit inspection, copying and auditing of such of its accounts and records set forth in Clause 3.5, as relate to the System Integrator's Services provided under this Agreement, and (iv) any right or remedy which a Party may have under this Agreement or the Applicable Laws.

2.9.4 Cessation of Services

Upon termination of this Agreement by notice of either Party to the other pursuant to Clauses 2.9.1 or 2.9.2 hereof, the System Integrator shall, immediately upon dispatch or receipt of such notice, take all necessary steps to bring the Services to a close in a prompt and orderly manner and shall make every reasonable effort to keep expenditures for this purpose to a minimum. With respect to documents prepared by the System Integrator and materials furnished by the KMRL, the System Integrator shall proceed as provided respectively by Clauses 3.8 or 3.9 hereof.

2.9.5 Payment upon Termination

Upon termination of this Agreement pursuant to Clauses 2.9.1 or 2.9.2 hereof, the KMRL shall make the following payments to the System Integrator (after offsetting against these payments any amount that may be due from the System Integrator to the KMRL):

- (a) Remuneration pursuant to Clause 6 hereof for Services satisfactorily performed prior to the date of termination;
- (b) Reimbursable expenditures pursuant to Clause 6 hereof for expenditures actually incurred prior to the date of termination; and
- (c) Except in the case of termination pursuant to Sub-clauses (a) through (e) of Clause 2.9.1 hereof, reimbursement of any reasonable cost incidental to the prompt and orderly termination of the Agreement including the cost of the

RFP for supply and Implementation of ERP at KMRL

return travel of the System Integrator's Key personnel (only), provided, proof of travel (Place. Air ticket, Fare etc.) is submitted to KMRL at the time of mobilization.

2.9.6 Disputes about Events of Termination

If either Party disputes whether an event specified in Clause 2.9.1 or in Clause 2.9.2 hereof has occurred, such Party may, within 30 (thirty) days after receipt of notice of termination from the other Party, refer the matter to arbitration pursuant to Clause 9 hereof, and this Agreement shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award.

2.9.7 KMRL shall be entitled to terminate the Contract, at any time for its convenience, by giving notice of such termination to the System Integrator. The termination shall take effect 30 days after the System Integrator receives this notice. KMRL shall not terminate the Contract under this sub-Clause in order to execute the Project/Services by itself or to arrange for the Project/Services to be executed by another System Integrator or to avoid a termination of the Contract by the System Integrator. After a notice of termination for convenience, the System Integrator shall promptly:

- (a) cease all further work with respect to the Project/Services, except for such activity as may have been instructed by KMRL for the protection of property or for the safety of the data
- (b) hand over all Documents for which the System Integrator has received payment. After a notice of termination for convenience, KMRL shall promptly pay the System Integrator any amounts due till the date of Termination.

3. OBLIGATIONS OF THE SYSTEM INTEGRATOR

3.1 General

3.1.1 Standards of Performance

The System Integrator shall perform the Services and carry out its obligations hereunder with all due diligence, efficiency and economy, in accordance with generally accepted professional techniques and practices, and shall observe sound management practices, and employ appropriate advanced technology and safe and effective equipment, machinery, materials and methods. The System Integrator shall

RFP for supply and Implementation of ERP at KMRL

always act, in respect of any matter relating to this Agreement or to the Services, as a faithful adviser to the KMRL, and shall at all times support and safeguard the KMRL's legitimate interests in any dealings with Sub-Contractor or Third Parties.

3.1.2 Terms of Reference or scope of work

The scope of Services or work to be performed by the System Integrator is specified in the Terms of Reference (the "TOR") at Annex-1 of this Agreement. The System Integrator shall provide the Deliverables specified therein in conformity with the time schedule stated therein.

3.2 Conflict of Interest

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

~~3.2.2 System Integrator and Affiliates not to be otherwise interested in the Project~~

~~The System Integrator agrees that, during the term of this Agreement and after its termination, the System Integrator or any Associate thereof, as well as any Sub-Contractor and any entity affiliated with such Sub-Contractor, shall be disqualified from providing goods, works, services, loans or equity for any project resulting from or closely related to the Services or the Project and any breach of this obligation shall amount to a Conflict of Interest; provided that the restriction herein shall not apply after a period of three years from the completion of this assignment or to consulting assignments or services granted by banks/ lenders at any time; provided further that this restriction shall not apply to consultancy/ advisory services provided to the KMRL in continuation of this Project or to any subsequent Project/ advisory services provided to the KMRL in accordance with the rules of the KMRL. For the avoidance of doubt, an entity affiliated with the System Integrator shall include a partner in the firm of the System Integrator or a person who holds more than 5% (five per cent) of the subscribed and paid up share capital of the System Integrator, as the case may be, and any Associate thereof.~~

~~3.2.3 Prohibition of conflicting activities~~

~~Neither the System Integrator nor its Sub-Contractor nor the Personnel of either of them shall engage, either directly or indirectly, in any of the following activities:~~

RFP for supply and Implementation of ERP at KMRL

- ~~(a) during the term of this Agreement, any business or professional activities which would conflict with the activities assigned to them under this Agreement;~~
- ~~(b) after the termination of this Agreement, such other activities as may be specified in the Agreement; or~~
- ~~(c) At any time, such other activities as have been specified in the RFP as Conflict of Interest.~~

3.2.4 System Integrator not to benefit from commissions discounts, etc.

The remuneration of the System Integrator pursuant to Clause 6 hereof shall constitute the System Integrator's sole remuneration in connection with this Agreement or the Services and the System Integrator shall not accept for its own benefit any trade commission, discount or similar payment in connection with activities pursuant to this Agreement or to the Services or in the discharge of its obligations hereunder, and the System Integrator shall use its best efforts to ensure that any Sub-Contractor, as well as the Personnel and agents of either of them, similarly shall not receive any such additional remuneration.

3.2.5 The System Integrator and its Personnel shall observe the highest standards of ethics and not have engaged in and shall not hereafter engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice (collectively the "**Prohibited Practices**"). Notwithstanding anything to the contrary contained in this Agreement, the KMRL shall be entitled to terminate this Agreement forthwith by a communication in writing to the System Integrator, without being liable in any manner whatsoever to the System Integrator, if it determines that the System Integrator has, directly or indirectly or through an agent, engaged in any Prohibited Practices in the Selection Process or before or after entering into of this Agreement. In such an event, the KMRL shall forfeit and appropriate the Performance Security, if any, as mutually agreed genuine pre-estimated compensation and damages payable to the KMRL towards, *inter alia*, time, cost and effort of the KMRL, without prejudice to the KMRL's any other rights or remedy hereunder or in law.

3.2.6 Without prejudice to the rights of the KMRL under Clause 3.2.5 above and the other rights and remedies which the KMRL may have under this Agreement, if the System Integrator is found by the KMRL to have directly or indirectly or through an agent,

RFP for supply and Implementation of ERP at KMRL

engaged or indulged in any Prohibited Practices, during the Selection Process or before or after the execution of this Agreement, the System Integrator shall not be eligible to participate in any tender or RFP issued during a period of 2 (two) years from the date the System Integrator is found by the KMRL to have directly or indirectly or through an agent, engaged or indulged in any Prohibited Practices.

3.2.7 For the purposes of Clauses 3.2.5 and 3.2.6, the following terms shall have the meaning hereinafter respectively assigned to them:

- (a) *“corrupt practice”* means the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Selection Process (for removal of doubt, offering of employment or employing or engaging in any manner whatsoever, directly or indirectly, any official of the KMRL who is or has been associated in any manner, directly or indirectly with Selection Process or LOA or dealing with matters concerning the Agreement before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the KMRL, shall be deemed to constitute influencing the actions of a person connected with the Selection Process); or (ii) engaging in any manner whatsoever, whether during the Selection Process or after the issue of LOA or after the execution of the Agreement, as the case may be, any person in respect of any matter relating to the Project or the LOA or the Agreement, who at any time has been or is a legal, financial or technical adviser the KMRL in relation to any matter concerning the Project;
- (b) **“fraudulent practice”** means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Selection Process;
- (c) **“coercive practice”** means impairing or harming, or threatening to impair or harm, directly or indirectly, any person or property to influence any person’s participation or action in the Selection Process or the exercise of its rights or performance of its obligations by the KMRL under this Agreement;
- (d) **“undesirable practice”** means (i) establishing contact with any person connected with or employed or engaged by the KMRL with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Selection Process; or (ii) having a Conflict of Interest; and

RFP for supply and Implementation of ERP at KMRL

- (e) **“restrictive practice”** means forming a cartel or arriving at any understanding or arrangement among Applicants with the objective of restricting or manipulating a full and fair competition in the Selection Process.

3.3 Confidentiality

- 1) The System Integrator, its Sub Contractor and the Personnel of either of them shall not, either during the term or within Three years after the expiration or termination of this Agreement disclose any proprietary information, including information relating to reports, data, drawings, design software or other material, whether written or oral, in electronic or magnetic format, and the contents thereof; and any reports, digests or summaries created or derived from any of the foregoing that is provided by the KMRL to the System Integrator, its Sub-Contractor and the Personnel; any information provided by or relating to the KMRL, its technology, technical processes, business affairs or finances or any information relating to the KMRL’s employees, officers or other professionals or suppliers, customers, or contractors of the KMRL; and any other information which the System Integrator is under an obligation to keep confidential in relation to the Project, the Services or this Agreement ("**Confidential Information**"), without the prior written consent of the KMRL.

- 2) The business strategies, plans and procedures, proprietary information, software, tools, processes, methodologies, data and trade secrets, and other confidential information and materials of the SYSTEM INTEGRATOR shall be treated as ‘SYSTEM INTEGRATOR Confidential Information’ and any ‘SYSTEM INTEGRATOR confidential information’ disclosed to KMRL in the performance of this agreement or applicable Statement of Work (SOW) shall not, without the written consent of the SYSTEM INTEGRATOR, be disclosed to any third Party, by KMRL, its affiliates, or their employees and in respect of ‘SYSTEM INTEGRATOR confidential information’ KMRL shall take the same care as it takes in respect of its own confidential information. Upon expiration or termination of this Agreement, KMRL shall, at SYSTEM INTEGRATOR’s option, promptly (i) return to SYSTEM INTEGRATOR all documentation and other materials containing SYSTEM INTEGRATOR Confidential Information, or (ii) certify to SYSTEM INTEGRATOR, pursuant to a certificate in form and substance reasonably satisfactory to SYSTEM INTEGRATOR, as to the destruction of all such documentation and materials.

RFP for supply and Implementation of ERP at KMRL

- 3) Notwithstanding the aforesaid, the System Integrator, its Sub-Contractor and the Personnel of either of them may disclose Confidential Information to the extent that such Confidential Information:
- (a) was in the public domain prior to its delivery to the System Integrator, its Sub-Contractor and the Personnel of either of them or becomes a part of the public knowledge from a source other than the System Integrator, its Sub-Contractor and the Personnel of either of them;
 - (b) was obtained from a third party with no known duty to maintain its confidentiality;
 - (c) is required to be disclosed by Applicable Laws or judicial or administrative or arbitral process or by any governmental instrumentalities, provided that for any such disclosure, the System Integrator, its Sub-Contractor and the Personnel of either of them shall give the KMRL, prompt, prior written notice to enable the KMRL to obtain an injunction against such disclosure, and use reasonable efforts to ensure that such disclosure is accorded confidential treatment; and
 - (d) is provided to the professional advisers, agents, auditors or representatives of the System Integrator or its Sub-Contractor or Personnel of either of them, as is reasonable under the circumstances; provided, however, that the System Integrator or its Sub-Contractors or Personnel of either of them, as the case may be, shall require their professional advisers, agents, auditors or its representatives, to undertake in writing to keep such Confidential Information, confidential and shall use its best efforts to ensure compliance with such undertaking.
 - (e) is independently developed by the receiving party without reference to or use of any confidential information of the disclosing party;

3.4 Liability of the System Integrator

- 3.4.1 Neither party shall be liable to the other for any special, indirect, incidental, consequential, exemplary or punitive damages whether in contract, tort or other theories of law, even if the party has been advised of the possibility of such damages. Other suggestion may not be accepted, however finance may decide.

RFP for supply and Implementation of ERP at KMRL

~~The System Integrator's liability under this Agreement shall be determined by the Applicable Laws and the provisions hereof.~~

- 3.4.2 The System Integrator shall, subject to the limitation specified in Clause 3.4.3, be liable to the KMRL for any direct loss or damage accrued or likely to accrue due to deficiency in Services rendered by it.
- 3.4.3 The Parties hereto agree that in case of negligence or wilful misconduct on the part of the System Integrator or on the part of any person or firm acting on behalf of the System Integrator in carrying out the Services, The Project, the System Integrator, with respect to damage caused to the KMRL's property, shall not be liable to the KMRL:
- i. For any indirect or consequential loss or damage; and
 - ii. For any direct loss or damage that exceeds the Agreement Value set forth in Clause 6.1.2 of this Agreement
- 3.4.4 Neither party shall be liable to the other for any special, indirect, incidental, consequential, exemplary or punitive damages whether in contract, tort or other theories of law, even if the party has been advised of the possibility of such damages.

~~**3.5 Accounting, inspection and auditing**~~

~~The System Integrator shall:~~

- ~~(a) Keep accurate and systematic accounts and records in respect of the Services provided under this Agreement, in accordance with internationally accepted accounting principles and standards such as Indian Accounting Standards, GAAP, etc and in such form and detail as will clearly identify all relevant time charges and cost, and the basis thereof (including the basis of the System Integrator's costs and charges); and~~
- ~~(b) In case required by the KMRL, the System Integrator shall provide copies of such records up to one year from the expiration or termination of this Agreement.~~

3.6 System Integrator's actions requiring the KMRL's prior approval

The System Integrator shall obtain the KMRL's prior approval in writing before taking any of the following actions:

RFP for supply and Implementation of ERP at KMRL

- (a) Appointing such members of the professional personnel as are not listed in Annex-2;
- (b) Changing, replacing or removing the key personnel of the project as listed in Annexure -2
- (c) Entering into a subcontract for the performance of any part of the Services, it being understood (i) that the selection of the Sub-Contractors and the terms and conditions of the subcontract shall have been approved in writing by the KMRL prior to the execution of the subcontract, and (ii) that the System Integrator shall remain fully liable for the performance of the Services by the Sub-Constructor and its Personnel pursuant to this Agreement; or
- (d) Any other action that is specified in this Agreement.

3.7 Reporting obligations

3.7.1 The System Integrator shall submit to the KMRL the reports and documents specified in the Agreement, in the form, in the numbers and within the time periods set forth therein.

3.8 Documents prepared by the System Integrator to be property of the KMRL

3.8.1 All reports and other documents (collectively referred to as “**Project Documents**”) prepared by the System Integrator (or by the Sub-Contractor or any Third Party) in performing the Services shall become and remain the property of the KMRL, and all intellectual property rights in such Project Documents shall vest with the KMRL. Any Project Document, of which the ownership or the intellectual property rights do not vest with the KMRL under law, shall automatically stand assigned to the KMRL as and when such project Document is created and the System Integrator agrees to execute all papers and to perform such other acts as the KMRL may deem necessary to secure its rights herein assigned by the System Integrator.

3.8.2 The System Integrator shall, not later than termination or expiration of this Agreement, deliver all Project Documents to the KMRL, together with a detailed inventory thereof. The System Integrator shall not retain any of such Project Documents. The System Integrator, its Sub-Contractor or a Third Party shall not use these Project Documents for purposes unrelated to this Agreement without the prior written approval of the KMRL. The System integrator shall be entitled to retain its working papers

RFP for supply and Implementation of ERP at KMRL

~~The System Integrator shall, not later than termination or expiration of this Agreement, deliver all Project Documents to the KMRL, together with a detailed inventory thereof. The System Integrator shall not retain any of such Project Documents. The System Integrator, its Sub-Contractor or a Third Party shall not use these Project Documents for purposes unrelated to this Agreement without the prior written approval of the KMRL.~~

- 3.8.3 The System Integrator shall hold the KMRL harmless and indemnified for any losses, claims, damages, expenses (including all legal expenses), awards, penalties or injuries (collectively referred to as “**Claims**”) which may arise from or due to any unauthorised use of such Project Documents, or due to any breach or failure on part of the System Integrator or its Sub-Contractor or a Third Party to perform any of its duties or obligations in relation to securing the aforementioned rights of the KMRL.
- 3.8.4 "Notwithstanding the above, it is agreed that nothing contained herein above shall be applicable to SI's pre-existing materials (i.e Materials owned by the SI which were created and developed prior to this Agreement without direct reference to the deliverables under this Agreement) which may now be incorporated by the SI into the final deliverables/reports or the like, supplied to the Client hereunder in the course of delivering the Services pursuant to this Agreement. However, in the event any such pre existing material is used in the deliverables/reports provided to the Client by the SI, the SI hereby agrees to grant the Client an irrevocable, transferable, non exclusive, paid-up, royalty free and perpetual license to use, modify and copy such preexisting material as it exists in the deliverable/ reports prepared by the SI as a part of this Agreement."

3.9 Materials furnished by the KMRL

Materials made available to the System Integrator by the KMRL shall be the property of the KMRL and shall be marked accordingly. Upon termination or expiration of this Agreement, the System Integrator shall furnish forthwith to the KMRL, an inventory of such materials and shall dispose of such materials in accordance with the instructions of the KMRL. KMRL will defend, indemnify and hold harmless the System Integrator, applicable System Integrator affiliates and System Integrator personnel (“System Integrator Indemnified Party”) from and against any third party suit, proceedings damages, judgments, cost and expenses (including reasonable attorney fees) relating to any infringement claim by a third party to the extent based on any content or other materials provided to System Integrator by or on behalf of KMRL or the access and use by System Integrator of any KMRL provided

RFP for supply and Implementation of ERP at KMRL

software or material in connection with System Integrator's performance of Services hereunder without breaching the terms of this Agreement.

3.10 Providing access to Project Office and Personnel

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

3.11 Accuracy of Documents

The System Integrator shall be responsible for accuracy of the documents drafted and/ or vetted and data collected by it directly or procured from other agencies/authorities, estimates and all other details prepared by it as part of these services. Subject to the provisions of Clause 3.4, it shall indemnify the KMRL against any inaccuracy in its work which might surface during implementation of the Project, if such inaccuracy is the result of any negligence or inadequate due diligence on part of the System Integrator or arises out of its failure to conform to good industry practice. The System Integrator shall also be responsible for promptly correcting, at its own cost and risk, the documents including any re-survey / investigations.

4. SYSTEM INTEGRATOR'S PERSONNEL AND SUB-CONTRACTOR

4.1 General

The System Integrator shall employ and provide such qualified and experienced Personnel as may be required to carry out the Services.

4.2 Deployment of Personnel

4.2.1 The designations, names and other particulars of each of the System Integrator's Key Personnel required in carrying out the Services are described in Annex-2 of this Agreement. The estimate of Personnel costs and manday rates are specified in Annex-3 of this Agreement.

4.2.2 Adjustments with respect to the estimated periods of engagement of Personnel set forth in the aforementioned Annex-3 may be made by the System Integrator by

RFP for supply and Implementation of ERP at KMRL

written notice to the KMRL, provided that (i) such adjustments shall not alter the originally estimated period of engagement of any individual by more than 30% (thirty per cent), and (ii) the aggregate of such adjustments shall not cause payments under the Agreement to exceed the Agreement Value set forth in Clause 6.1.2 of this Agreement by more than 25% (twenty five per cent) thereof. Any other adjustments shall only be made with the written approval of the KMRL.

- 4.2.3 If additional work is required beyond the scope of the Services or the Project specified in the Terms of Reference, the estimated periods of engagement of Personnel, set forth in the Annexes of the Agreement may be increased by agreement in writing between the KMRL and the System Integrator, provided that any such increase shall not, except as otherwise agreed, cause payments under this Agreement to exceed the Agreement Value set forth in Clause 6.1.2.

4.3 Approval of Personnel

- 4.3.1 The Key Personnel listed in Annex-2 of the Agreement are hereby approved by the KMRL. No other Key Personnel shall be engaged without prior approval of the KMRL.

- 4.3.2 If the System Integrator hereafter proposes to engage any person as Professional Personnel, it shall submit to the KMRL its proposal along with a CV of such person in the form provided at Appendix-I (Form-11) of the RFP. The KMRL may approve or reject such proposal within 14 (fourteen) days of receipt thereof. In case the proposal is rejected, the System Integrator may propose an alternative person for the KMRL's consideration. In the event the KMRL does not reject a proposal within 14 (fourteen) days of the date of receipt thereof under this Clause 4.3, it shall be deemed to have been approved by the KMRL.

4.4 Substitution of Key Personnel

The KMRL expects all the Key Personnel specified in the Proposal to be available during implementation of the Agreement. The KMRL will not consider any substitution of Key Personnel except under compelling circumstances beyond the control of the System Integrator and the concerned Key Personnel such as incapacity or due to health. Such substitution shall be ordinarily be limited to one, but in exceptional circumstances in the opinion of the KMRL, substitution limited to not more than two Key Personnel subject to equally or better qualified and experienced personnel being provided to the satisfaction of the KMRL.

4.5 Working hours, overtime, leave, etc.

RFP for supply and Implementation of ERP at KMRL

The Personnel shall not be entitled to be paid for overtime nor to take paid sick leave or vacation leave except as specified in the Agreement, and the System Integrator's remuneration shall be deemed to cover these items. All leave to be allowed to the Personnel is excluded from the man-days of service set forth in Annex-3. Any taking of leave by any Personnel for a period exceeding 7 days shall be subject to the prior approval of the KMRL, and the System Integrator shall ensure that any absence on leave will not delay the progress and quality of the Services.

4.6 Project Manager

The person designated as the Project Manager (the "**Project Manager**") of the System Integrator's Personnel shall be responsible for the coordinated, timely and efficient functioning of the Personnel. In addition, the System Integrator shall designate a suitable person as Project Management System Integrator who shall be responsible for day to day performance of the Services.

4.7 Sub-Contractors of the System Integrator

The System Integrator may, with prior written approval of the KMRL, engage additional Sub-Contractors or substitute existing Sub-Contractors. The hiring of Personnel by the Sub-contractors shall be subject to the same conditions as applicable to Personnel of the System Integrator under this Clause 4.

5. OBLIGATIONS OF THE KMRL

5.1 Assistance in clearances etc.

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

- (a) Provides the System Integrator, its Sub-Contractors and Personnel with work permits and such other documents as may be necessary to enable the System Integrator, its Sub-Contractors or Personnel to perform the Services;
- (b) Facilitates prompt clearance through customs of any property required for the Services; and
- (c) Issues to officials, agents and representatives of the Government all such instructions as may be necessary or appropriate for the prompt and effective implementation of the Services.

5.2 Access to land and property

The KMRL warrants that the System Integrator shall have, free of charge, unimpeded access to the site of the project in respect of which access is required for the performance of Services; provided that if such access shall not be made available to the System Integrator as and when so required, the Parties shall agree on (i) the time extension, as may be appropriate, for the performance of Services, and (ii) the additional payments, if any, to be made to the System Integrator as a result thereof pursuant to Clause 6.1.3.

5.3 Change in Applicable Law

If, after the date of this Agreement, there is any change in the Applicable Laws with respect to taxes and duties which increases or decreases the cost or reimbursable expenses incurred by the System Integrator in performing the Services, ~~by an amount exceeding 2% (two per cent) of the Agreement Value specified in Clause 6.1.2,~~ then the remuneration and reimbursable expenses otherwise payable to the System Integrator under this Agreement shall be increased or decreased accordingly by agreement between the Parties hereto, and corresponding adjustments shall be made to the aforesaid Agreement Value.

This is applicable to service tax and other taxes other than income tax, as may be applicable from time to time, on the payment of the professional fees to the System Integrator.

5.4 Payment

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

6. PAYMENT TO THE SYSTEM INTEGRATOR

6.1 Cost estimates and Agreement Value

6.1.1 An abstract of the cost of the Services payable to the System Integrator is set forth in Annex-5 of the Agreement.

6.1.2 Except as may be otherwise agreed under Clause 2.6 and subject to Clauses 4.2.2 and 6.1.3, the payments under this Agreement shall not exceed the agreement value specified herein (the **"Agreement Value"**). The Parties agree that the

RFP for supply and Implementation of ERP at KMRL

Agreement Value is Rs. (Rs.), which does not include the Optional Costs specified in Annex-5(the "Optional Costs").

6.1.3 Notwithstanding anything to the contrary contained in Clause 6.1.2, if pursuant to the provisions of Clause 2.6, the Parties agree that additional payments shall be made to the System Integrator in order to cover any additional expenditures not envisaged in the cost estimates referred to in Clause 6.1.1 above, the Agreement Value set forth in Clause 6.1.2 above shall be increased by the amount or amounts, as the case may be, of any such additional payments.

6.2 Currency of payment

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

6.3 Mode of billing and payment

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

- (a) The System Integrator shall be paid for its services as per the Payment Schedule at Annex-6 of this Agreement, and based on the project milestone completion & acceptance of deliverables, ~~Clauses 3 of the TOR~~, and the rates specified in Annex-5 of this Agreement, subject to the System Integrator fulfilling the following conditions:
 - i. No payment shall be due for the next stage till the System Integrator completes to the satisfaction of the KMRL the work pertaining to the preceding stage; and
 - ii. The KMRL shall pay to the System Integrator, only the undisputed amount.
- (b) The KMRL shall cause the payment due to the System Integrator to be made within 30 (thirty) days after the receipt by the KMRL of duly completed bills with necessary particulars (the "Due Date"). Any invoice remaining unpaid after the credit period of 45 days shall be treated as debt owed by KMRL to System Integrator and System Integrator shall , without prejudice to any other rights that it may have in this regard, entitled to charge interest @12% per annum on the amount due and remaining unpaid till the actual date of payment.

RFP for supply and Implementation of ERP at KMRL

- (c) The final payment under this Clause 6.3 shall be made only after the final Deliverable shall have been submitted by the System Integrator, followed by a request for issue of 'Completion Certificate' to the KMRL and the final deliverable is approved as satisfactory and a Completion Certificate issued by the KMRL. The Services shall be deemed completed and finally accepted by the KMRL and the final Deliverable shall be deemed approved by the KMRL as satisfactory upon expiry of 60 (sixty) days after receipt of the final Deliverable unless the KMRL, within such 60 (sixty) day period, gives written notice to the System Integrator specifying in detail, the deficiencies in the Services. The System Integrator shall thereupon promptly make any necessary corrections and/or additions, and upon completion of such corrections or additions, the foregoing process shall be repeated until the KMRL accepts all the deliverables under the contract. The KMRL shall make the final payment upon acceptance of the final Deliverable by the KMRL.
- (d) Any amount which the KMRL has paid or caused to be paid in excess of the amounts actually payable in accordance with the provisions of this Agreement shall be reimbursed by the System Integrator to the KMRL within 30 (thirty) days after receipt by the System Integrator of notice thereof. Any such claim by the KMRL for reimbursement must be made within 1 (one) year after receipt by the KMRL of a final report in accordance with Clause 6.3 (c). Any delay by the System Integrator in reimbursement by the due date shall attract simple interest @ 10% (ten per cent) per annum.
- (e) All payments under this Agreement shall be made to the account of the System Integrator as may be notified to the KMRL by the System Integrator.

7. LIQUIDATED DAMAGES AND PENALTIES

7.1 Performance Security

- 7.1.1 For the purposes of this Agreement, performance security shall be deemed to be an amount equal to 10% (ten per cent) of the Agreement Value (the "**Performance Security**"); and the System Integrator shall require to provide Performance Security in the form of a bank guarantee.
- 7.1.2 Notwithstanding anything to the contrary contained in Clause 7.1.1, as and when payments become due to the System Integrator for its Services, the KMRL shall retain by way of Performance Security, 10% (ten per cent) of all the amounts due and payable to the System Integrator, to be appropriated against breach of this

RFP for supply and Implementation of ERP at KMRL

Agreement or for recovery of liquidated damages as specified in Clause 7.2. The balance remaining out of the Performance Security shall be returned to the System Integrator at the end of three months after the expiry of this Agreement pursuant to Clause 2.4 hereof. For the avoidance of doubt, the parties hereto expressly agree that in addition to appropriation of the amounts withheld hereunder, in the event of any default requiring the appropriation of further amounts comprising the Performance Security, the KMRL may make deductions from any subsequent payments due and payable to the System Integrator hereunder, as if it is appropriating the Performance Security in accordance with the provisions of this Agreement.

7.1.3 The System Integrator may, in lieu of retention of the amounts as referred to in Clause 7.1.1 above, furnish a Bank Guarantee substantially in the form specified at Annex-7 of this Agreement.

7.1.4 After the successful completion of the implementation services 5% of the contract value will be released by KMRL after effecting any applicable deductions as per this agreement. Balance 5% will be retained as performance bank guarantee till the completion of the services as per this agreement. All incidental charges whatsoever such as premium, commission etc. with respect to the performance bank guarantee shall be borne by the SI

7.2 Liquidated Damages

~~7.2.1 Liquidated Damages for error/variation~~

~~In case any error or variation is detected in the reports submitted by the System Integrator and such error or variation is the result of negligence or lack of due diligence on the part of the System Integrator, the consequential damages thereof shall be quantified by the KMRL in a reasonable manner and recovered from the System Integrator by way of deemed liquidated damages, subject to a maximum of the Agreement Value.~~

7.2.2 Liquidated Damages for delay

In case of delay in completion of Services, liquidated damages not exceeding an amount equal to 0.5% (zero point five per cent) of the Agreement Value per week, subject to a maximum of 10% (ten per cent) of the Agreement Value shall be imposed and shall be recovered by appropriation from the Performance Security or otherwise. Further it is opined that Liquidated damages are generally levied at the

RFP for supply and Implementation of ERP at KMRL

rate of 0.5% per week of the value of the delayed services/items/deliverables and not on the entire contract value. The total LD shall not exceed 10 % of the contract value. The Liquidated Damages will be levied for reasons of delay solely attributable to the Bidder and KMRL should not have contributed any act or omission which led to such delay.

~~In case of delay in completion of Services, liquidated damages not exceeding an amount equal to 0.5% (zero point five per cent) of the Agreement Value per day, subject to a maximum of 10% (ten per cent) of the Agreement Value shall be imposed and shall be recovered by appropriation from the Performance Security or otherwise. However, in case of delay due to reasons attributable to KMRL, suitable extension of time shall be granted.~~

7.2.3 Encashment and appropriation of Performance Security

~~The KMRL shall have the right to invoke and appropriate the proceeds of the Performance Security, in whole or in part, without notice to the System Integrator in the event of breach of this Agreement or for recovery of liquidated damages specified in this Clause 7.2. The KMRL shall have the right to invoke and appropriate the proceeds of the Performance Security, in whole or in part, without notice to the System Integrator for an amount equal to the sums due to KMRL as per this agreement or for recovery of liquidated damages specified in this Clause 7.2, provided the System Integrator fails to pay such dues on demand by KMRL in 15 days of such demand and no running bills from which recoveries can be effected, is due to be paid to the System Integrator.~~

7.2.4 The System Integrator's failure to perform its contractual responsibilities, to perform the services, or to meet agreed service levels shall be excused if and to the extent System Integrator's non-performance is caused by KMRL's omission to act, delay, wrongful action, failure to provide Inputs, or failure to perform its obligations under this Agreement

7.3 Liability for deficiency in Services

Liability for deficiency in service. In addition to the liquidated damages specified in clause 7.2.2, in case of deficiency in service resulting adverse effect on the Project or affecting the reputation of KMRL the System Integrator shall be liable to rectify the deficiency in addition to compensating KMRL for the loss to the extent of the Performance Security

RFP for supply and Implementation of ERP at KMRL

~~In addition to the liquidated damages not amounting to penalty, as specified in Clause 7.2, warning may be issued to the System Integrator for minor deficiencies on its part. In the case of significant deficiencies in Services causing adverse effect on the Project or on the reputation of the KMRL, penal action including but not limited to debarring for a specified period and/or stopping of all payments under the Agreement may also be initiated as per policy/discretion of the KMRL.~~

8. FAIRNESS AND GOOD FAITH

8.1 Good Faith

The Parties undertake to act in good faith with respect to each other's rights under this Agreement and to adopt all reasonable measures to ensure the realisation of the objectives of this Agreement.

8.2 Operation of the Agreement

The Parties recognise that it is impractical in this Agreement to provide for every contingency which may arise during the life of the Agreement, and the Parties hereby agree that it is their intention that this Agreement shall operate fairly as between them, and without detriment to the interest of either of them, and that, if during the term of this Agreement either Party believes that this Agreement is operating unfairly, the Parties will use their best efforts to agree on such action as may be necessary to remove the cause or causes of such unfairness, but failure to agree on any action pursuant to this Clause 8.2 shall not give rise to a dispute subject to arbitration in accordance with Clause 9 hereof.

9. SETTLEMENT OF DISPUTES

9.1 Amicable settlement

The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Agreement or the interpretation thereof.

9.2 Dispute resolution

9.2.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "**Dispute**") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 9.3.

RFP for supply and Implementation of ERP at KMRL

9.2.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

9.3 Conciliation

In the event of any Dispute between the Parties, either Party may call upon Director (Systems) KMRL and the Managing Partner/ Chairman of the Board of Directors of the System Integrator or a substitute thereof for amicable settlement, and upon such reference, the said persons shall meet no later than 10 (ten) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 10 (ten) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 9.2.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 9.4.

9.4 Arbitration

9.4.1 ~~Any Dispute which is not resolved amicably by conciliation, as provided in Clause 9.3, shall be finally decided by reference to arbitration by an Arbitral Tribunal appointed in accordance with Clause 9.4.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The venue of such arbitration shall be Kochi and the language of arbitration proceedings shall be English.~~

9.4.2 Any dispute arising between the Parties in relation to or in connection with this Agreement and its implementation which are not amicably resolved shall be settled under the Rules of the Arbitration and Conciliation Act, 1996. Each Party shall appoint one arbitrator and the two arbitrators so appointed shall, in agreement between them, appoint the third arbitrator who shall act as chairman of the arbitral tribunal. If either Party fails to appoint its own arbitrator within one month from receipt of a request by the other Party or the two arbitrators appointed by the Party fail to reach agreement on the appointment of the third arbitrator within one month from the date of the last appointment, the arbitrator or arbitrators shall be

RFP for supply and Implementation of ERP at KMRL

appointed by the High Court of Kerala at the request of either Party. The third arbitrator, being the chairman of the arbitral tribunal, shall be a member of the legal profession. The arbitration process shall be conducted in English. The seat of arbitration shall be Kochi. An application for the enforcement of the arbitration award rendered may be made to the courts in Ernakulam having jurisdiction.

~~Any unresolved dispute or difference whatsoever arising between the Parties to this Agreement out of or relating to the construction, meaning, scope, operation or effect of this Agreement or the validity of the breach thereof shall be referred to a sole arbitrator to be appointed by mutual consent. The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made there under shall be final and binding upon the Parties hereto, subject to legal remedies available under Applicable Law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996, or of any modifications, rules or re-enactments thereof.~~

- 9.4.3 The arbitrators shall make a reasoned award (the “**Award**”). Any Award made in any arbitration held pursuant to this Clause 9 shall be final and binding on the Parties as from the date it is made, and the System Integrator and the KMRL agree and undertake to carry out such Award without delay.
- 9.4.4 The System Integrator and the KMRL agree that an Award may be enforced against the System Integrator and/or the KMRL, as the case may be, and their respective assets wherever situated.
- 9.4.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

10. Compliances with the applicable laws

10.1 Statutory Obligations.

- (a) The Agreement shall be governed by and construed in accordance with the laws of the Republic of India.
- (b) System Integrator confirms to KMRL that the performance of obligations under this Agreement will not conflict with or result in a breach of any of the terms, conditions or provisions of or constitute a default or require any consent under, any instrument or arrangement to which System Integrator is a party or violate any other Applicable Laws or any writ, order, injunction or judgment by

RFP for supply and Implementation of ERP at KMRL

which System integrator is bound resulting in a material adverse effect on its ability to provide Services to KMRL as agreed under this Agreement .

~~System Integrator represents and warrants to KMRL that the performance of obligations under this Agreement will not conflict with or result in a breach of any of the terms, conditions or provisions of or constitute a default or require any consent under, any instrument or arrangement to which System Integrator is a party or violate any other Applicable Laws or any writ, order, injunction or judgment by which System integrator is bound.~~

10.2 Compliance with Laws

- (a) The System Integrator shall perform the Services in accordance with the Applicable Laws and shall take all practicable steps to ensure that any Sub contractor of the System Integrator, as well as the Personnel and agents of the System Integrator, comply with the Applicable Laws
- (b) Each Party to the Agreement accepts that its individual conduct shall (to the extent applicable to it) at all times comply with all Applicable Laws, rules and regulations. For the avoidance of doubt the obligations of the Parties to this Agreement are subject to their respective compliance with all Applicable Laws.
- (c) Each parties to this agreement agree and undertake to observe, adhere to, abide by, comply with all Applicable Laws in force or as are or as made applicable in future, pertaining to or applicable to them, their business, their employees or their obligations towards them pursuant to the Project and shall indemnify, keep indemnified, hold harmless, defend and protect the other party and its employees/officers/staff/ personnel/representatives/agents from any failure or omission on its part to do so and against all claims or demands of liability and all consequences that may occur or arise for any default or failure on its part to conform or comply with the above and all other statutory obligations arising therefrom.
- (d) Each parties to this agreement represent and warrant that it has obtained all the consents, permissions, approvals, licenses, etc., as may be necessary or required for any of the purposes of this Agreement or for the conduct of its own business under any Applicable Law, government regulation/guidelines and shall keep the same valid and in force during the Term and shall endeavour to promptly obtain all such future approvals and consents from

RFP for supply and Implementation of ERP at KMRL

various departments as may be required in future under any amendments in law or notifications issued by the government, and in the event of any failure or omission to do so, shall indemnify, keep indemnified, hold harmless, defend, protect and fully compensate the other party and its employees/ officers/ staff/ personnel/ representatives/agents from and against all claims or demands of liability and all consequences that may occur or arise for any default or failure on its part to conform or comply with the above and all other statutory obligations arising therefrom.

11. Miscellaneous

11.1 Independent Contractors

Nothing in this Agreement shall be construed as establishing or implying any partnership or joint venture between the Parties to this Agreement and, except as expressly stated in this Agreement, nothing in this Agreement shall be deemed to constitute any Parties as the agent of any other Party or authorizes either Party:

- (a) To incur any expenses on behalf of the other Party,
- (b) To enter into any engagement or make any representation or warranty on behalf of the other Party,
- (c) To pledge the credit of or otherwise bind or oblige the other Party,
- (d) To commit the other Party in any way whatsoever without in each case obtaining the other Party's prior written consent.

11.2 Authority for Assignment.

- (a) All terms and provisions of this Agreement shall be binding on and shall inure to the benefit of both the Parties and their respective successors and permitted assigns.
- (b) System Integrator shall not assign this Agreement or any part hereof or any benefit or interest therein without the prior written consent of KMRL
- (c) In the event of an assignment of this Agreement pursuant to the previous clause, the System Integrator will not be released from any of its liabilities or obligations hereunder. In the event of any permitted assignment of this Agreement by either Party, the designated assignee will assume, in writing (in

RFP for supply and Implementation of ERP at KMRL

form and substance reasonably satisfactory to the other Party), the rights and obligations of the assigning Party under this Agreement.

- (d) KMRL may assign or novate this Agreement in part or whole as part of a reorganization, restructuring, consolidation, merger, or as per the decisions of Government of Kerala or board of Directors of KMRL.
- (e) In the event of an assignment of this Agreement by System Integrator pursuant to the previous clauses, KMRL retains the right to reject the assignment, if it finds that the assigned party has (i) conflict of interest with KMRL (ii) been black listed by Government of Kerala (iii) does not have the financial strength to operate the Project as per the Agreement.

11.3 Specific Performance.

System Integrator acknowledges and agrees that KMRL would suffer irreparable loss and damage in the event any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached. Accordingly, System Integrator agrees that KMRL shall be entitled to an injunction or such other equitable relief without notice to System Integrator to prevent any breach of the provisions of this Agreement and to enforce this Agreement specifically and the terms and provisions hereof in any action instituted in any court having jurisdiction over the Parties and the matter, in addition to any other remedy to which KMRL may be entitled, at law or in equity. Any relief sought by KMRL shall be notified to the SI.

11.4 Severability.

If any provision of the Agreement, or any part thereof, shall be found by any court or administrative body of competent jurisdiction to be illegal, invalid or unenforceable, the illegality, invalidity or unenforceability of such provision or part provision shall not affect the other provisions of the Agreement or the remainder of the provisions in question which shall remain in full force and effect. The Parties shall negotiate in good faith in order to agree to substitute for any illegal, invalid or unenforceable provision a valid and enforceable provision, which achieves to the greatest extent possible the economic, legal and commercial objectives of the illegal, invalid or unenforceable provision or part provision.

11.5 Waiver.

RFP for supply and Implementation of ERP at KMRL

- (a) No waiver of any provision of this Agreement shall be effective unless set forth in a written instrument signed by the Party waiving such provision. No failure or delay by a Party in exercising any right, power or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of the same preclude any further exercise thereof or the exercise of any other right, power or remedy. Without limiting the foregoing, no waiver by a Party of any breach by any other Party of any provision hereof shall be deemed to be a waiver of any subsequent breach of that or any other provision hereof
- (b) Waiver including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:
 - i. Shall be in writing
 - ii. Shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;
 - iii. Shall be executed by a duly authorized representative of the Party; and
 - iv. Shall not affect the validity or enforceability of this Agreement in any manner.

11.6 Survival

The termination of this Agreement shall in no event terminate or prejudice ~~(a) any right or obligation arising out of or accruing under this Agreement attributable to events or circumstances occurring prior to such termination;~~ (b) the provisions of this Agreement that by their nature are intended to survive the termination of this Agreement, including without limitation the provisions dealing with the Representations and Warranties of the Parties, Termination, Confidentiality, Indemnity, Arbitration, Governing Law and Notice respect

11.7 Professional Fees

All expenses incurred by or on behalf of each Party to this Agreement, including all fees of agents, legal advisors, accountants and actuaries employed by either of the Parties in connection with the negotiation, preparation and execution of this



RFP for supply and Implementation of ERP at KMRL

Agreement or the other supplementary agreements shall be borne solely by the Party which incurred them

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be signed in their respective names as of the day and year first above written.

SIGNED, SEALED AND DELIVERED

SIGNED, SEALED AND DELIVERED

For and on behalf of

For and on behalf of

System Integrator:

KMRL

(Signature)

(Signature)

(Name)

(Name)

(Designation)

(Designation)

(Address)

(Address)

(Fax No.)

(Fax No.)

In the presence of:

1.

2.

RFP for supply and Implementation of ERP at KMRL

Annex -1

Terms of Reference

(Refer Clause 3.1.2)

(Reproduce from the RFP and the response of the System Integrator)

RFP for supply and Implementation of ERP at KMRL

Annex-2

Deployment of Key Personnel

(Refer Clause 4.2)

(Reproduce as per Form-6 of Appendix-I)

RFP for supply and Implementation of ERP at KMRL

Annex-3

Estimate of Personnel Costs

(Refer Clause 4.2)

(For additional work if any and for staff augmentation)

RFP for supply and Implementation of ERP at KMRL

Annex-4

The Sub-Contractor (s)

(Refer Clause 4.7)

(Reproduce as per Form-12 of Appendix-I)

RFP for supply and Implementation of ERP at KMRL

Annex-5

Cost of Services

(Refer Clause 6.1)

(Reproduce The project cost with mile stones)

RFP for supply and Implementation of ERP at KMRL

Annex-6

Payment Schedule

(Refer Clause 6.3)

The selected bidder for the project of ERP Implementation would be paid by the KMRL as per the schedule mentioned below:

1. A maximum of 10% of the Implementation Services shall be paid as mobilization advance on project kickoff on furnishing of an unconditional advance payment bank guarantee. The mobilisation advance will be recovered in three equal instalments from the subsequent milestone payments. The Advance payment guarantee at any point of time shall not be lower than 110% of the advance outstanding.
 2. 15% of cost of implementation services shall be paid at the completion of project preparation phase.
 3. 35% of cost of implementation services to be paid after completion of blueprint phase.
 4. 35% of cost of Implementation services to be paid at the successful completion of realization phase.
 5. 15% of cost of implementation services to be paid after one annual quarter of successful operation and successful completion of three months of user adoption services.
 6. The charges for support services will be paid quarterly in arrear.
-
- 1) The above payments shall be made to the System Integrator provided that the payments to be made at any time shall not exceed the amount certified by the KMRL.
 - 2) All Reports shall first be submitted as draft reports for comments of the KMRL. The KMRL shall provide its comments no later than three weeks from the date of receiving a draft report and in case no comments are provided within such three weeks, the System Integrator shall finalise its report.

RFP for supply and Implementation of ERP at KMRL

- 3) If the minimum monthly site deployment as per clause 5.1 is not met, proportionate reduction in the subsequent payments shall be made for each month of shortfall during the contract period".

Annex-7

Bank Guarantee for Performance Security

(Refer Clause 7.1.3)

To

The Managing Director

Kochi Metro Rail Limited

Ernakulum, Kerala – 682011

In consideration of _____ acting on behalf of the [Managing Director, KMRL] (hereinafter referred as the “KMRL”, which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators and assigns) having awarded to M/s _____, having its office at _____ (hereinafter referred as the “**System Integrator**” which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns), vide the KMRL’s Agreement no. _____ dated _____ valued at Rs. _____ (Rupees _____), (hereinafter referred to as the “**Agreement**”) a Project for ERP Implementation for KMRL, and the System Integrator having agreed to furnish a Bank Guarantee amounting to Rs. _____ (Rupees _____) to the KMRL for performance of the said Agreement.

We, _____ (hereinafter referred to as the “**Bank**”) at the request of the System Integrator do hereby undertake to pay to the KMRL an amount not exceeding Rs. _____ (Rupees _____) against any loss or damage caused to or suffered or would be caused to or suffered by the KMRL by reason of any breach by the said System Integrator of any of the terms or conditions contained in the said Agreement.

2. We, _____ (indicate the name of the Bank) do hereby undertake to pay the amounts due and payable under this Guarantee without any demur, merely on a demand from the KMRL stating that the amount/claimed is due by way of loss or damage caused to or would be caused to or suffered by the KMRL by reason of breach by the said System Integrator of any of the terms or conditions contained in the said Agreement or by reason of the System Integrator’s failure to perform the said Agreement. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs. _____ (Rupees _____).

3. We, _____ (indicate the name of Bank) undertake to pay to the KMRL any money so demanded notwithstanding any dispute or disputes raised by the System Integrator in any suit or proceeding pending before any court or tribunal relating thereto, our liability under this present

RFP for supply and Implementation of ERP at KMRL

being absolute and unequivocal. The payment so made by us under this bond shall be a valid discharge of our liability for payment thereunder and the System Integrator shall have no claim against us for making such payment.

4. We, (indicate the name of Bank) further agree that the Guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said Agreement and that it shall continue to be enforceable till all the dues of the KMRL under or by virtue of the said Agreement have been fully paid and its claims satisfied or discharged or till the KMRL certifies that the terms and conditions of the said Agreement have been fully and properly carried out by the said System Integrator and accordingly discharges this Guarantee or till guarantee expiry i.e, _____ (expiry date), whichever is earlier. Unless a demand or claim under this Guarantee is made on us in writing on or before the date of expiry of this Guarantee, we shall be discharged from all liability under this Guarantee thereafter.

5. We, (indicate the name of Bank) further agree with the KMRL that the KMRL shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said Agreement or to extend time of performance by the said System Integrator from time to time or to postpone for any time or from time to time any of the powers exercisable by the KMRL against the said System Integrator and to forbear or enforce any of the terms and conditions relating to the said Agreement and we shall not be relieved from our liability by reason of any such variation, or extension being granted to the said System Integrator or for any forbearance, act or omission on the part of the KMRL or any indulgence by the KMRL to the said System Integrator or any such matter or thing whatsoever which under the law relating to sureties would, but for this provision, have the effect of so relieving us.

6. This Guarantee will not be discharged due to the change in the constitution of the Bank or the System Integrator(s).

7. We, (indicate the name of Bank) lastly undertake not to revoke this Guarantee during its currency except with the previous consent of the KMRL in writing.

8. The terms of this document/instrument will be governed by Indian law.

9. Notwithstanding anything contained herein above,

a. Our liability under this Bank Guarantee shall not exceed _____ (_____) only.

b. This Bank Guarantee shall be valid upto _____ ; and

c. We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only if any claim or demand is received by us in writing at this office by hand, by post or by courier, by

RFP for supply and Implementation of ERP at KMRL

close of banking hours, on or before _____, thereafter the bank will stand discharged of all its liabilities in all respect whether or not the original Bank Guarantee is returned to us.

Dated, the day of 20

For

(Name of Bank)

(Signature, name and designation of the authorised signatory)

Seal of the Bank:

NOTES:

- (i) The Bank Guarantee should contain the name, designation and code number of the officer(s) signing the Guarantee.
- (ii) The address, telephone no. and other details of the Head Office of the Bank as well as of issuing Branch should be mentioned on the covering letter of issuing Branch.

SCHEDULE-3

(See Clause 2.3.3)

GUIDANCE NOTE ON CONFLICT OF INTEREST

1. This Note further explains and illustrates the provisions of Clause 2.3 of the RFP and shall be read together therewith in dealing with specific cases.
2. System Integrators should be deemed to be in a conflict of interest situation if it can be reasonably concluded that their position in a business or their personal interest could improperly influence their judgment in the exercise of their duties. The process for selection of System Integrators should avoid both actual and perceived conflict of interest.
3. Conflict of interest may arise between the KMRL and a System Integrator or between System Integrators and present or future concessionaries/ contractors. Some of the situations that would involve conflict of interest are identified below:
 - (a) KMRL and System Integrators:
 - (i) Potential System Integrator should not be privy to information from the KMRL which is not available to others.
 - (ii) Potential System Integrator should not have defined the project when earlier working for the KMRL.
 - (iii) Potential System Integrator should not have recently worked for the KMRL overseeing the project.
 - (b) System Integrators and concessionaires/contractors:
 - (i) No System Integrator should have an ownership interest or a continuing business interest or an on-going relationship with a potential concessionaire/ contractor save and except relationships restricted to project-specific and short-term assignments.
 - (ii) No System Integrator should be involved in owning or operating entities resulting from the project.
 - (iii) No System Integrator should bid for works arising from the project.

The participation of companies that may be involved as investors or consumers and officials of the KMRL who have current or recent connections to the companies involved, therefore, needs to be avoided.

4. The normal way to identify conflicts of interest is through self-declaration by System Integrators. Where a conflict exists, which has not been declared, competing companies are likely to bring this to the notice of the KMRL. All conflicts must be declared as and when the System Integrators become aware of them.
5. Another approach towards avoiding a conflict of interest is through the use of “Chinese walls” to avoid the flow of commercially sensitive information from one part of the System Integrator’s company to another. This could help overcome the problem of availability of limited numbers of experts for the project. However, in reality effective operation of “Chinese walls” may be a difficult proposition. As a general rule, larger companies will be more capable of adopting Chinese walls approach than smaller companies. Although, “Chinese walls” have been relatively common for many years, they are an increasingly discredited means of avoiding conflicts of interest and should be considered with caution. As a rule, “Chinese walls” should be considered as unacceptable and may be accepted only in exceptional cases upon full disclosure by a System Integrator coupled with provision of safeguards to the satisfaction of the KMRL.
6. Another way to avoid conflicts of interest is through the appropriate grouping of tasks. For example, conflicts may arise if System Integrators drawing up the terms of reference or the proposed documentation are also eligible for the consequent assignment or project.
7. Another form of conflict of interest called “scope–creep” arises when System Integrators advocate either an unnecessary broadening of the terms of reference or make recommendations which are not in the best interests of the KMRL but which will generate further work for the System Integrators. Some forms of contractual arrangements are more likely to lead to scope-creep. For example, lump-sum contracts provide fewer incentives for this, while time and material contracts provide built in incentives for System Integrators to extend the length of their assignment.
8. Every project contains potential conflicts of interest. System Integrators should not only avoid any conflict of interest, they should report any present/ potential conflict of interest to the KMRL at the earliest. Officials of the KMRL involved in development of a project shall be responsible for identifying and resolving any conflicts of interest. It should be ensured that safeguards are in place to preserve fair and open competition

and measures should be taken to eliminate any conflict of interest arising at any stage in the process.
