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MoRTH issues amendments to the model concession agreement for BOT (Toll) Model

Pursuant to extensive deliberations with the implementing agencies and the sector stakeholders, the Ministry of Road Transport and Highways, Government of India ("**MoRTH**") issued several amendments to the Model Concession Agreement for Build Operate Transfer (Toll) ("**BOT (Toll)**") road projects ("**MCA**") on March 15, 2024. Some of the critical amendments are discussed below:

1. **Change in Ownership**

   Earlier, in case of a consortium, each member, whose financial and technical criteria were considered during bid evaluation, was required to hold 26% equity in the concessionaire/ project SPV for the construction period and a period of 1 (one) year from the date of completion of Punch List (as defined in the MCA). An amendment has been made to the above provision to clarify that each such member shall hold: (a) 26% of such equity in the concessionaire which will also not be less than 5% of the Total Project Cost; and (b) this period of 1 (one) year that is computed from the date of completion of the Punch List items will exclude the Punch List items pending due to reasons attributable to the National Highways Authority of India ("**NHAI**")/ governmental authority.

2. **Performance Security**

   Prior to the amendment, the NHAI accepted performance security in the form of a bank guarantee. Now, in addition to bank guarantees, the amended MCA permits concessionaire to furnish performance security in the form of insurance surety bond issued by an insurance company authorized by Insurance Regulatory and Development Authority of India, accounts payee demand draft, banker's cheque or e-bank guarantee from banks set out in the MCA. Further, the quantum of the performance security is now revised to 3% of the Estimated Project Cost (as defined in the 'request for proposal'). Earlier, the amount was 5% of the Total Project Cost (as defined in the MCA) plus the anticipated toll revenues for 12 (twelve) months.

3. **Change of Scope**

   a) Under the earlier draft of the MCA, NHAI could initiate change of scope when it required *additional works or services* to be performed by the concessionaire. The amended provision in the MCA allows NHAI to also make any modifications in the scope of work as part of change of scope.

   b) Further, in the earlier iteration of the MCA, in the event the NHAI issued a change of scope notice, the concessionaire was only required to provide preliminary documentation providing, *inter alia*, the options for implementing the proposed change of scope. The provision has been amended in the MCA requiring concessionaires to furnish *detailed proposal* and mandatory information for implementing the change of scope. This includes *inter alia*: (i) break-up of the quantities, unit rates and cost for different items of work; (ii) proposed design for the change of scope; and (iii) proposed modifications, if any, to the Scheduled Completion

Date.

c) The amended MCA also sets out the method for determination of cost and time for implementing a proposed change of scope, which was absent in the previous MCA document.

4. **Construction Support and Equity Support**

Earlier, the NHAI only provided equity support to the concessionaire under the MCA. The revised MCA has introduced the new concept of construction support, which will be provided to the concessionaire during the construction period. Such construction support will be paid in 10 (ten) equal installments linked to the completion of physical progress of construction. This amount will be assessed by the NHAI based on the estimated toll revenue during the construction period, subject to a maximum of 40% of the Total Project Cost (*as defined in the MCA*).

The previous iteration of the MCA provided equity support up to a sum of 10% of the Total Project Cost. In the amended MCA, equity support and construction support will be provided to the concessionaire up to 40% of the Total Project Cost. It has been clarified that in case the quantum of construction support goes up to 40% of Total Project Cost then the provisions of equity support in the MCA and the other bidding documents will not apply.

5. **Buy back of the project by NHAI in case project reaches design capacity**

In the earlier iteration of the MCA, if the average daily traffic of passenger car units ("**PCUs**") in any financial year exceeded the design capacity, it was considered to be an Indirect Political Event and in case of termination on such account, a certain amount of termination payment was payable by NHAI as per the terms of the MCA. The MCA has been amended to introduce the concept of buy back which allows NHAI to buy back the project from the concessionaire if the average daily traffic in PCUs (as defined in the MCA*)* in any 2 (two) financial years in a block of 3 (three) continuous accounting years reaches the design capacity. This buy back would take place by way of NHAI terminating the concession agreement by giving 90 (ninety) days' termination notice. Upon such termination, the NHAI will pay *higher* of the following amounts as termination payments to the concessionaire:

a) 80% of the product of the average monthly fee and 75% of the balance concession period, <u>after deducting</u> cost of major maintenance provisioned in the Financial Model in the remaining concession period;

Or

b) Termination payment payable on occurrence of Indirect Political Event of force majeure.

6. **Obligations of Authority in relation to Competing Roads**

In the earlier iteration of the MCA, NHAI or any government instrumentality was not permitted to construct or cause to be constructed any Competing Road (as defined in the MCA) at any time before the 10th (tenth) anniversary of the Appointed Date, except in cases where the average traffic on the project highway in any year exceeded 90% of its design capacity. Upon breach of this obligation, the NHAI was liable to pay compensation to the concessionaire. In the amended MCA, the NHAI is also required to provide extension of the concession period. It has been further clarified that such payment of compensation and extension of concession period will be deemed to cure the breach by NHAI.

7. **Modifications in concession period based due to construction of additional tollway**

The MCA originally restricted the NHAI or any government authority from constructing or initiating construction of an Additional Tollway (as defined in the MCA) during the construction period. Upon breach of the said obligation, apart from receiving compensation from NHAI, the concessionaire was also entitled to extension of the concession period with the enhancement of concession period being equal to the duration of the period between the opening of Additional Tollway and completion of concession period. This extension of concession period was only permissible if the effect of construction of Additional Tollway caused enhancement in the concession period beyond 20% of the original concession period.

Under the amended MCA, the above restriction on construction of Additional Tollway, on the NHAI/ government authority, has been imposed for the entire concession period. Further if an Additional Tollway is constructed by the NHAI/ governmental authority, the extension in the concession period will be on the basis of shortfall in traffic on account of construction of such additional tollway and such extension will also be capped to 30% of the original concession period. The amended MCA clarifies that such extension of concession period will be deemed to have cured the breach by NHAI/ governmental authority.

8. **Compensation for default of authority**

Previously, in case of material breach of the concession agreement by NHAI after the Appointed Date, the compensation payable to the concessionaire was the same irrespective whether such breach had occurred on or after the commercial operation date ("**COD**"). This remedy was in the nature of compensation of all direct costs suffered or incurred by the concessionaire as a consequence of such material default or breach by NHAI.

The amended MCA introduces different compensation mechanism for: (i) the period starting from the Appointed Date till achievement of COD; and (ii) the period after COD. For the period prior to COD, NHAI will compensate concessionaire for the direct costs suffered by the concessionaire and loss of toll fee revenue provided that this compensation will not include debt repayment obligations. The amended MCA also provides for a detailed mechanism through which direct costs suffered by concessionaire on account of material breach will be calculated.

For the period after the COD where material default or breach leads to suspension of or reduction in collection of toll fee by concessionaire, NHAI will pay as compensation: (a) interest on the Debt Due and (b) operating and maintenance expenses as determined from the original draft of the financing agreements.

9. **Termination Payments**

Under the amended MCA, the definition of 'Termination Payment' specifies that, at any time during the concession period, the aggregate of Debt Due and Adjusted Equity will be limited to the Total Project Cost.

Under the earlier MCA, termination payment on account of concessionaire's default was not payable prior to the Project Completion Date. An amendment has been made to state that termination payment to concessionaire will not become payable prior to COD in case physical progress is less than 40% and that in the event of physical progress exceeds 40%, termination payment payable on occurrence of concessionaire default after COD will apply, in respect of the expenditure exceeding 40% of the Total Project Cost and to the extent applicable to Debt Due. Further, the aggregate liability of NHAI for making termination payment on account of concessionaire default has been increased to 115% of the Total Project Cost from the earlier 100%.

Conclusion

The BOT (Toll) model for road concessions witnessed a slowdown as the private developers faced viability concerns on account of issues such as delays in receiving right of way and environment clearances during the construction period, lack of financing available from the lenders, changing traffic flow on account of alternate routes being developed. Resultantly, NHAI focused on the other modes of project implementation where government absorbed the financial risk. This, in the long run, caused financial burden to NHAI and MoRTH and therefore, the government has been keen on reviving the BOT (Toll) model. In this regard, significant amendments have been made to the MCA as described above.

Some of the amendments which may prove beneficial for concessionaires include introduction of construction support of up to 40% of the Total Project Cost, disallowing the government from constructing Additional Tollway for the entire duration of the concession period as opposed to construction period, providing additional remedy of extension of concession period along with compensation, in case the NHAI breaches its obligations towards not constructing Competing Roads. Having said so, some of the amendments may also prove to be onerous for concessionaires such as right of termination to the NHAI in case concessionaire fails to complete construction as per revised schedule of construction, the requirement of submitting extensive and detailed documents at the time of change of scope and for monthly progress reports.

Nevertheless, the outlook for BOT (Toll) projects looks positive with the NHAI having identified 53 BOT (Toll) projects worth INR 2.2 lakh crore (Indian Rupees two point two lakh crore) and covering a length of 5200 kms (five thousand two hundred kilometers) to be bid out across various states in India during the course of the present financial year.

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