



January – March 2024

This JSA Highways & Logistics Newsletter focuses on key developments undertaken in the Indian roadways and logistics sector between January – March 2024.

## **MoRTH notifies amendments to the model concession agreement for TOT projects**

The Ministry of Road Transport and Highways (“**MoRTH**”), on March 15, 2024, announced amendments to the model concession agreement for Tolling Operation Transfer (“**TOT**”) projects. The summary of the amendments carried are as follows:

1. In terms of the provision dealing with variations in toll collection at various target points i.e., specific points of time during the concession period where the actual fee collection is benchmarked with the targeted fee collection, Target Point 2 has been revised from 2037 to 2035. Additionally, a new target point i.e., Target Point 3 is introduced in the model concession agreement.
2. The provisions dealing with variation in the concession period due to variation in the target fee collected at each target point have been substantially revised. As per the amended provisions, in case the actual fee collected is 5% lower than the target fee for a particular target point, then for every 1% shortfall over and above the 5% threshold, then the remaining concession period as on the date of target point, the concession period will be increased by 1%. Further, in case the shortfall in actual fee is a fraction of 1% (beyond the 5% variation threshold), then the remaining concession period will increase on pro-rata basis. Similarly, in such a scenario, the target fee for the subsequent target point will be decreased by the same percentage. A similar provision and mechanism have been included in case the actual fee collected is 5% higher than the target fee for a particular target point with the difference being that in this scenario, the concession period will be decreased and the target fee for the subsequent target point will be increased.

The key change from the previous draft of the model concession agreement is that in the erstwhile draft the trigger event for change in the concession period was: (a) for Target Point 1, the actual fee would have to fall short or exceed by 20% of the target fee; and (b) for Target Point 2, the actual fee would have to fall short or exceed by 30% of the target fee. Further, in the previous draft of the model concession agreement, the quantum of increase of the concession period was fixed as 1.5% for every percentage shortfall from 20% threshold. The decrease of the concession period was fixed at 0.75% for every percentage of fee exceeding the 20% threshold.

3. The amended provisions also expressly specify that in the event that the actual fee is falling below or exceeding the threshold as mentioned above in point (2) above, it will be the remaining concession period, as on the date of target point, which will be increased or decreased, as the case may be. In the previous draft the increase or decrease was computed for the total concession period irrespective of the date of the target point.

*Source: MoRTH Office Memorandum dated March 15, 2024*

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

The MoRTH, on March 15, 2024, issued amendments to the model concession agreement for Build Operate Transfer (Toll) (“**BOT (Toll)**”) road projects. These amendments have been largely brought about to revive the BOT (Toll) model for road development and make the same more attractive for investment by private developers, as this model had seen a decline due to various financial and other viability concerns faced by the private developers. The amendments also seek to provide clarity to some of the provisions under the MCA.

For a detailed analysis of the above, please refer to the [JSA Prism of April 25, 2024](#).

*Source: MoRTH Office Memorandum dated March 15, 2024*

## **NHAI completes the largest InvIT Monetization Round**

National Highways Infra Trust (“**NHIT**”), the Infrastructure Investment Trust of NHAI, successfully concluded its fund-raising through ‘InvIT Round-3’ for national highway stretches of aggregate length of 889 kms (eight hundred and eighty nine kilometers) at an enterprise value of over INR 16,000 crore (Indian Rupees sixteen thousand crore). This happens to be the largest tranche of monetization by NHAI and one of the largest transactions in the history of Indian road sector

The units of NHIT saw subscription from both existing and new investors, which included foreign pension funds viz. Canada Pension Plan Investment Board and Ontario Teachers’ Pension Plan Board; domestic pension/provident funds (IOCL Employee’s Provident Fund, L&T Staff Provident Fund, Rajasthan Rajya Vidyut Karamchari Pension Fund, SBI Pension etc.), insurance companies (Tata AIG, SBI Life, HDFC Life), other mutual funds and banks.

Upon the completion of the ‘InvIT Round – 3’, the total realized value of all 3 (three) rounds of NHIT stands at INR 26,125 crore (Indian Rupees twenty-six thousand one hundred twenty-five crore) and the trust holds a diversified portfolio of 15 (fifteen) operating toll roads with an aggregate length of about 1,525 km (one thousand five hundred and twenty-five kilometer) spread across the 9 (nine) states of Assam, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Telangana, Uttar Pradesh and West Bengal. The concession periods of these road projects range between 20 (twenty) – 30 (thirty) years.

*Source: NHAI Press Release*

## **MoRTH issues advisory and clarification in relation to refund of road taxes**

MoRTH has issued an advisory dated January 19, 2024, whereby it has stated that there has been an increased number of cases where upon movement of vehicles from one state to another, owners of such vehicles are facing delays in receiving refund of motor vehicle tax paid to the original state/ union territory at the time of registration of motor vehicles. This has led to owners having to pay double motor vehicle tax as such owners have to pay taxes in the new state as well.

Considering the above situation, the MoRTH has directed all states/ union territories to devise specific timelines for refund of motor vehicle tax. The advisory directs states/ union territories to clearly specify the number of days from the date of receipt of application from owner for refund of motor vehicle tax within which the refund will be made to the owner.

*Source: MoRTH Advisory dated January 19, 2024*

## **MoRTH issues revised RFP for consultants for preparation of DPRs allowing for deemed approval of DPRs**

MoRTH issued a revised model request for proposal (“RFP”) document for the appointment of consultants for preparing detailed project reports (“DPR”) for national highways and centrally sponsored road projects. The key highlight in the revised RFP is that for evaluation of technical bid submitted by consultants, quality of past performance in the last 5 (five) DPRs will be taken into account. A dynamic database will be maintained by MoRTH after taking inputs from all executing agencies of MoRTH. The database will provide real-time analysis of the performance of each consultant based on their last 5 (five) DPRs.

Further, MoRTH has also issued a clarification dated February 9, 2024, whereby it has recognized that timely approval of the DRPs submitted by DPR consultants to project implementing agencies such as NHAI is of critical importance. In this regard, a provision of deemed approval has been included in the RFP document whereby if no approval/comments are provided by the project implementing agency within the timelines indicated in the RFP document, the DPR will be deemed to be approved by the project implementing agency.

*Source: Revised draft of the RFP for Appointment of Consultants for preparation of DPR*

*MoRTH Clarification on Deemed Approval of DPRs dated February 9, 2024*

## **MoRTH clarifies that inspecting authorities must mandatorily ascertain unauthorized occupation of highways**

On March 18, 2024, the MoRTH clarified the powers of inspection conferred on the inspecting authorities of MoRTH and implementing agencies such as NHAI. As per the clarification, inspecting authorities have been directed to ascertain unauthorized occupation of national highways during the course of inspection.

As part of the inspection, the inspecting authorities have been directed to bring out in their inspection report, whether or not there has been unauthorized occupation or encroachment of a highway stretch and the extent of such unauthorized occupation. The inspecting authorities have been directed to submit this report to the designated national highway administrators.

In turn, the clarification has directed the project directors of NHAI, general managers/deputy general managers of National Highways & Infrastructure Development Corporation Limited (NHIDCL) or the executive engineers of the state highways i.e., the highway administrators, to remove the unauthorized occupation under Sections 26 and 27 of the Control of National Highways (Land and Traffic) Act, 2002 read with the Highway Administration Rules, 2004.

*Source: MoRTH Clarification dated March 18, 2024*

## **One time settlement of contractual disputes under scheme approved by MoRTH**

The MoRTH, on January 18, 2024, issued a circular detailing the launch of a scheme for one time settlement of disputes between MoRTH and its subordinate organizations and private contractors. The scheme will follow the principles and norms which are being followed under Government of India’s contractual disputes settlement scheme named *Vivad se Vishwas*. The settlement under the MoRTH scheme will be available for all arbitral awards passed up to September 30, 2023 and for court orders passed till December 31, 2023.

The claims under this MoRTH scheme was permitted to be submitted by contractors until March 31, 2024, through the Government e-Marketplace (“GeM”) for which GeM will provide a dedicated link for implementing the scheme.

*Source: MoRTH Scheme dated January 18, 2024*

## **NHAI clarifies the scope of deductions to be made from settlements under Vivaad se Vishwas**

The NHAI has issued a circular dated January 11, 2024 clarifying the extent of deductions which can be made from the settlement amount to be paid to contractors under the Government of India's flagship contractual dispute settlement scheme- *Vivaad se Vishwas*.

The circular clarifies that the NHAI has noted that while deciding upon the settlement amount to be paid to the contractors under *Vivaad se Vishwas*, the Technical Department of NHAI has been making deductions under several heads. To avoid arbitrary deductions, the circular clarifies that for BOT and hybrid annuity model (HAM) projects, deductions can be made from the escrow account as per the waterfall mechanism set out in the concession agreement. It has further been clarified that the following dues (which have priority over debt service) will be recovered from the escrow account: (a) Dues against premium including interest; and (b) Expenses made by NHAI at its risk and cost including damages chargeable over such expenses.

In the case of engineering, procurement, and construction ("EPC") projects, deductions which are in the nature of dues, as per the concession agreement, will be deducted from the settlement amount.

Finally, the circular clarifies that the settlement amount must be offered to the contractor without any deductions and that the deductions will be specified in a separate calculation sheet. It must be clarified by NHAI to the contractor that the deductions calculated will be debited from the escrow account without prejudice to the rights of NHAI to recover other dues on account of damages arising from performance of the concession agreement.

*Source: NHAI Policy Circular dated January 11, 2024*

## **Clarification issued in relation to assignment and usage of 'BH' series registration mark**

The MoRTH issued an advisory dated March 18, 2024, in relation to the usage of the 'BH' series of vehicle registration under the Central Motor Vehicles Rules, 1989 ("CMVR"). The MoRTH has observed that it has been receiving several grievances from vehicle owners that state vehicle registering authorities have been refusing to assign 'BH' registration number to their vehicles.

In this regard, the MoRTH in its clarification has reiterated that Rule 51B was included in the CMVR for extending the provision and usage of BH series vehicle registration mark to eligible vehicle owners employed in government offices and in private sector having their offices in four States / Union Territories or more. Considering the same, MoRTH has urged the state vehicle registering authorities to comply with Rule 51B of the CMVR in letter and spirit and assign the BH series registration mark to eligible applicants/ vehicle owners.

*Source: MoRTH Advisory dated March 18, 2024*

## **MoRTH issues advisory on the definition of 'contract carriage' under the MV Act**

The MoRTH, on January 22, 2024, issued an advisory clarifying that 'motor cycles' would fall within the ambit of the definition of 'contract carriage' under Section 2 (7) of the Motor Vehicles Act, 1988 ("MV Act") and advised all states and union territories to process applications for granting contract carriage permits to motor cycles as per the provisions of MV Act and rules framed under the MV Act.

As per the advisory, the MoRTH has analyzed the definition of 'contract carriage' and has stated that it clearly includes 'motor vehicles' as defined under the MV Act. Section 2 (28) of the MV Act defines 'motor vehicles' includes vehicles having less than 4 (four) wheels with engine capacity more than 25 cc (twenty-five cubic centimetres) and therefore

contract carriage would include all 2 (two) wheelers which have more engine capacity higher than 25 cc (twenty-five cubic centimetres).

By way of this clarification, MoRTH has sought to make it clear to the respective transport departments of the state governments and union territories that the correct interpretation of the definition of contract carriage read with definition of motor vehicles would mean that motor cycles having engine capacity higher than 25 cc (twenty-five cubic centimetres) can be issued a permit of contract carriage and that there should be no delay in issuing motor cycles with permits for contract carriage.

This clarification was necessary as the transport authorities of the states and union territories had been taking a misconstrued view that motor cycles cannot be granted a permit for contract carriage under the MV Act.

*Source: MoRTH Advisory dated January 22, 2024*

## **Government launches pilot program for cashless treatment of road accident victims**

The Government of India has announced that it will be launching a pilot program to provide cashless treatment to the victims of road accidents caused by the use of motor vehicles.

The pilot program, will be developed under the aegis of the MoRTH and will be trialed in Chandigarh first and will have the aim of establishing an ecosystem for providing timely medical care to the victims of road accidents, including during the golden hour.

The government has announced that the National Health Authority (NHA) will be the implementing agency for the pilot program, in coordination with police, hospitals, State Health Agency (SHA) etc.

The key features of the pilot program will include:

1. Road accident victims will be entitled to cashless treatment up to a maximum of INR 1,50,000 (Indian Rupees one lakh fifty thousand) per accident per person for a maximum period of 7 (seven) days from date of accident.
2. The scheme will be applicable to all road accidents caused by use of motor vehicle on any category of road.
3. The packages for trauma and polytrauma cases under the *Ayushman Bharat* scheme will be co-opted.
4. Claims raised by hospitals for providing treatment will be reimbursed from the Motor Vehicle Accident Fund.

*Source: PIB*

## **Reduction in value of additional performance security under NHAI's EPC contracts**

The MoRTH has issued a circular dated February 29, 2024, where it has announced that for existing EPC projects the additional performance guarantee which is required to be submitted by the EPC contractor in case of abnormally low bid price will be reduced in value to 3% of the bid price.

The submission of lower additional performance guarantee will be permitted subject to the contractor completing certain milestones under the contract and there being no pending disputes or court proceedings. This benefit is being provided on account of the liquidity crunch being faced by several contractors.

*Source: MoRTH Circular dated February 29, 2024*

## Highways & Logistics Practice

In the highways sector, JSA provides end to end assistance to its clients in all aspects of development and operations including but not limited to setting up of green field projects and documentation in respect thereof such as joint venture agreements, shareholders agreements, foreign direct investment approvals, project financing, EPC contracts, O&M contracts, vetting of tender documents including review of concession agreements and regulatory issues including competition, licensing and tariff matters before various regulatory fora.

JSA advises clients on across the spectrum of contractual, commercial, policy, regulatory and legal issues at all stages of the value chain in the logistics sector – infrastructure such as roads, railways, inland waterways, aviation, ports, and logistics parks, as well as services such as transportation, cold chain facilities, and warehousing. JSA has been regularly engaged in advising project developers, investors, suppliers and contractors on commercial/ transactional issues, advising financial institutions and borrowers in relation to financing transactions and dispute resolution (including arbitration, litigation and representation before various judicial fora).

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