

NHAI

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भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(सड़क परिवहन और राजमार्ग मंत्रालय)
National Highways Authority of India
(Ministry of Road Transport and Highways)
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NHAI/11033/CGM(Fin)/2011

Dated:-09.09.20

Sub.: Financial Closure of BOT Projects.

The Authority in its 81st Meeting of the Executive Committee held on 06.08.2011 decided that Financial Closure date may be declared by NHAI submission of following -

- (i) Executed Financing Documents.
- (ii) Signing of Escrow & Substitution Agreements by all the parties
- (iii) A letter from the Lenders Agent that the Concessionaire has satisfied the Conditions Precedent to initial drawdown as laid down in the Common Loan Agreement and has access to Funds.
- (iv) An undertaking from the Concessionaire that he will amend the executed documents incorporating the review/comments, if any, furnished by NHAI and will ensure that the Financing Agreements are in line with the provisions of the Concession Agreement, within a period of 90 days of Financial Closure date (NHAI will be the final Authority to decide whether the Financing Agreements are in line with the Concession Agreement) Failure to do so, may be treated a Concessionaire's default under Clause 37.1.1 (m) of the Concession Agreement and may attract consequences thereof.


(N. R. Dash)
CGM (F&A)

- Copt to :-
- 1. PS to Chairman
 - 2. PS to Member (F), Member (T), Member (P)
 - 3. All CGMs (Tech) at NHAI Hqr.
 - 4. All ROs
 - 5. All Financial Consultants.

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In accordance with Clause 5.2.2 of the Concession Agreement, the Concessionaire shall submit to the Authority the drafts of all Financing Agreements for its review/comments. The Authority shall review the documents and provide its comments within 15 days of the receipt of such drafts. The review and comments shall be limited to ensuring compliance with the terms of the Concession Agreement.

2. The Concessionaire after incorporating the comments/suggestions shall submit the Executed Financing Documents to the Authority. The Authority shall cross check whether the Executed Documents have incorporated the comments/suggestions of the NHA, if not, the Concessionaire shall be advised to do the needful to align the Financing Agreements with the Concession Agreement through Supplementary Agreements. Sometimes in order to meet the deadline of 180 days, Concessionaires submit executed documents directly. In such situations the executed documents can be examined/reviewed by NHA and if any comments are offered, the same shall be incorporated by the Concessionaires through Supplementary Financing Agreements.

3. On submission of (a) Executed Financing Agreements (b) Executed Escrow and Substitution Agreements (c) a letter from the Lender's Agent stating that the Concessionaire has fulfilled all Conditions Precedent for initial drawdown as contained in the Facility Agreement and that the Concessionaire has access to funds, the Financial Closure is deemed to have been achieved on the date on which the Concessionaire has satisfied the Conditions Precedent for initial drawdown as stated in the letter issued by the Lender's Agent. If such a date has not been mentioned in the letter issued by the Lender's Agent, the date on which the letter has been issued by the Lender's Agent may be treated as the Financial Closure Date. It is observed that the Lenders are issuing letters which are conditional, indicating the Conditions Precedent under Clause 4.1.2 not fulfilled by the Authority. In such situations delay in Financial Closure may attract penalty on the Authority under Clause 10.3.2 of the Concession Agreement. Hence in such situations also Financial Closure may be deemed to have been achieved on the date the Conditions Precedent for initial drawdown have been satisfied as stated in the letter or if such a date is not mentioned on the date of issue of the letter.

4. If all the comments/observations of NHA on the draft documents/ executed documents have not been complied with by the Concessionaire by the date, the Financial Closure has been achieved, the Concessionaire shall be required to give an undertaking that he will amend the Executed Documents incorporating the reviews/comments of NHA and will ensure that the Financing Agreements are in line with the provisions of the Concession Agreements within a period of 90 days of Financial Closure Date and that NHA will be the final Authority to decide whether the Financial Agreements are in line with the Concession Agreement.

5. Clause 24.1.1 provides for achievement of Financial Close by the Concessionaire within 180 days from the date of Concession Agreement. In case of delay, the Concessionaire gets a further period of 120 days for achieving Financial Closure subject to payment of damages to the Authority at

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the rate of 0.1% of the Performance Security for each day of delay or 200 day subject to payment of damages specified in clause 4.3 of the Concession Agreement. The clause also stipulates that the damages shall be payable every week in advance and the period beyond the said 180 days shall be granted only to the extent of damages so paid. The damages payable under this clause are in addition to the damages payable under clause 4.3 of the Concession Agreement. The Clause also provides that no damages shall be payable in such delay in Financial Close has occurred solely as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. It is observed that invariably in most of the cases the Authority is unable to fulfill the Conditions Precedent under Clause 4.1.2 within the stipulated 180 days from the Concession Agreement, even till the time the Financial Closure is achieved. Since there is delay in procuring the Conditions Precedent by the Authority, Banks also delay in executing the Facility Agreements and issue of letter stating that the Concessionaire has achieved the Conditions Precedent for initial drawdown as the conditions include the Conditions Precedent under clause 4.1.2 of the Concession Agreement. In such cases the Authority is unable to impose any penalty for delay in Financial Closure. For this reasons, it is also not practical to ask for damages to be deposited every week in advance beyond 180 days. However, NHAJ may issue a letter to the Concessionaire to explain the reasons as to why damages under clause 24.1.1 should not be imposed for delay in Financial Closure. On receipt of the reply from the Concessionaire, an appropriate decision regarding imposition of penalty may be taken by the Competent Authority.

6. On submission of the documents mentioned at para-3 and 4 above, Finance Division may process the file for information of the Competent Authority regarding achievement of Financial Closure for the project and NHAJ may issue a letter to the Concessionaire stating the following

"It is noted from the Lenders Agent letter No. dated that Financial Closure has been achieved on If there has been any delay for achieving the Financial Closure, the Concessionaire may be asked to explain the delay to decide imposition of penalty.

(Signature)
 (N.R.Dash)
 CGM(Fin)
 15.12.2011

Member(Fin)

This is as per the discussions held in MATH where Advisor to Dy. Chairman, PC was also present. May be further discussed in Exe. Committee pt.

Chairman

16/12

19/12

CGM(NRD)

अध्यक्ष सचिवालय, महाराष्ट्र प्रा.
 Chairman, NHAJ
 475
 16/12/11
 Date

The agenda item was approved by the Authority.

Agenda Item No. XVII **Amendment to the NHAI (Recruitment, Seniority and Promotion) Regulations, 1996.**

The agenda item was approved by the Authority.

Agenda Item No. XVIII **Non-fulfillment of condition precedent under the concession agreement-Delay in submission of Performance Security & financial closure.**

After deliberations, the Board decided as follows:

- (1) Performance security must be given by the Concessionaire within the specified period as performance security is not linked with the financial closure. A notice may be issued to those concessionaires, who have not furnished the performance guarantee, to furnish the same.
- (2) Regarding financial closure, the Board agreed to give additional period of 200 days, over and above, the maximum 180 days + 200 days only in such cases, where the default is on part of NHAI and the condition precedent have not been met by NHAI.

Agenda Item No. XIX **Conversion of equity into Sub-Debt by the Concessionaire Hazaribagh-Ranchi Expressway Ltd.**

The Agenda was deferred by the Board. The Board wanted further examination as to why does the concessionaire want this kind of unconventional financial structure and whether it has got any impact on the obligations/commitment of the concessionaire. The Board also felt that if at all such structure is agreed to after examination, the concessionaire should undertake not to retire the debt during the pendency of the concession.

Agenda Item No. XX **Equity Participation by NHAI in the Company being incorporated under the Companies Act, 1956 in the name of "Indian Highways Management Company Limited" by NHAI jointly with the Concessionaires and the Financial Institutions involved in NHAI Projects/Concessions to carry out ICT initiatives including electronic tolling etc for Corridor Management.**

The matter was approved by the Board. The Board also felt that initially the Board of the company may be chaired by

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