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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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CIRCULAR

In view of the difficulties being faced by Concessionaires in Public-Private-Partnership (PPP Projects), Government has decided to permit the substitution of existing Concessionaires, in a harmonious manner, in accordance with provisions of Clause 40.3 of the Model Concession Agreement read with Substitution Agreement set forth in Schedule-V of the Model Concession Agreement.

2. This decision shall be applicable to all National Highway projects under PPP mode awarded/yet to be awarded on Build-Operate-Transfer (BOT) mode of delivery:

- (a) The on-going 2-laning and 4-laning National Highway projects where financial close has been achieved by the Concessionaire but Commercial Operation Date (COD) has not yet been declared by the Authority;
- (b) The 6-laning National Highway projects wherein the financial close has been achieved by the Concessionaire but the project completion certificate has not yet been issued by the Authority;
- (c) Completed 2-laning, 4-laning and 6-laning National Highway projects awarded on Build-Operate-Transfer (BOT) mode of delivery under PPP mode; and
- (d) All the new National Highway projects under PPP mode yet to be bid out on BOT mode of delivery in line with (a), (b) and/or (c) above, as the case may be.

3. Provisions pertaining to substitution of the Concessionaire by the Lender's Representative are contained in Clause 40.3 of the Model Concession Agreement read with the Substitution Agreement set forth in Schedule-V of the Model Concession Agreement in general, and Clause 3.1.1 of the Substitution Agreement in particular. Clause 3.2 and 3.3 of the Substitution Agreement provide for substitution in the event of Financial Default and Concessionaire's Default respectively. It is further clarified that Right of Substitution by the Lender's Representative can be exercised in situations other than those illustrated in Clause 3.2 and 3.3 of the Substitution Agreement. In cases of harmonious substitution as envisaged in this circular, the provisions contained in Clause 3.4 of the Substitution Agreement, except those contained in para 3.4.1, shall be applicable, in addition, to the procedure laid down herein below:

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- (i) The Concessionaire shall make a written representation to the Lender's Representative with a copy to the Authority requesting the Lender's Representative to seek approval of the Authority for its Substitution. Upon receiving the said request, the Lender's Representative shall make its own assessment regarding the said request of the Concessionaire and upon being satisfied that it will be in the interest of the Project that the Concessionaire may be substituted by a Nominated Company, Lender's Representative in consultation with the Concessionaire would invite, negotiate and procure offers either by private negotiations or public auction or tenders, for the takeover and transfer of the Project Highway including the Concession to the Nominated Company.
- (ii) Selection of the Nominated Company and the valuation of the Equity of the Concessionaire would be done by mutual consent of the Concessionaire and the Lender's Representative.
- (iii) Upon receiving the proposal of the Lender's Representative for substitution of the Concessionaire with the Nominated Company under Clause 3.4.3, the Authority shall satisfy itself about the credentials of the Nominated Company and accord its concurrence regarding such substitution.
 - a. For projects that have achieved COD, the substituting entity should have adequate experience of operating and maintaining completed road projects by itself or through its associates/subsidiaries.
 - b. For projects under construction, the substituting consortium/entity should have the requisite financial and technical qualifications to bid for a project of at least the same size, or higher/better.


Thereafter, the nominated Company will form a SPV for taking over the project along with all the rights and obligations of the Concessionaire.

- (iv) While concurring to the said proposal of the Lender's Representative, Authority's Board may levy an appropriate penalty keeping in view the nature and extent of default as per the procedure to be prescribed for the purpose by the Authority subject to a cap of 1% (one per cent) of Total Project Cost.
- (v) Where the responsibility for delay in execution or completion of the project is on account of non-fulfilment of the obligations of the Authority, namely, land acquisition, environmental clearances, other statutory/regulatory approvals/clearances, no penalty would be levied on the Concessionaire for non-fulfilment of its obligations. However, the Authority would be required to remedy the defaults before the formal agreement for substitution is signed.
- (vi) Subsequent to such substitution, for completed projects, the lead substituting entity shall be required to maintain at least 51% holding in the project SPV, save and except the situation for dilution of equity, in accordance with the provisions of Clause 7.1(k) of the Model Concession Agreement read with the definition of "Change of Ownership" as prescribed in Article 48 of the Model Concession Agreement.

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- (vii) The procedure prescribed in other clauses of the Concession Agreement and the Substitution Agreement, other than that contained in Clause 3.4.1 of the latter, shall be strictly adhered to.
- (viii) The Authority shall stand fully discharged of any claims whatsoever, by the exiting Concessionaire.
- (ix) Such substitution may be permitted only once during construction period.

4. The above clarifications/stipulations read with the Clauses referred hereinabove are with reference to Concession Agreements based on the Model Concession Agreement dated August, 2011. However, these shall apply *mutatis mutandis* to the relevant provisions of other Concession Agreements signed by the Authority for BOT Projects on PPP mode of delivery from time to time.


(B. N. Sahay)
General Manager

To

All PDs / ROs / CGMs & GMs at HQ.

Copy for information to:

1. PS to Hon'ble Minister (RT&H)
2. PS to Secretary (RT&H)
3. PS to Chairman
4. PS to All Members
5. PS to CVO