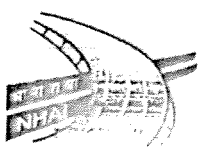


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भारतीय राष्ट्रीय राजमार्ग प्राधिकरण (पोत परिवहन, सड़क परिवहन और राजमार्ग मंत्रालय) National Highways Authority of India

(Ministry of Shipping, Road Transport and Highways)
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NHAI/11033/CGM(FA)/4/2014

29th January, 2014

CIRCULAR

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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 or the Selected bidder/consortium Members of such project SPV, in a harmonious manner, in accordance with the provisions of Clause 40.3 of the Model Concession Agreement read with the Substitution Agreement set forth in Schedule-V of the Model Agreement.

2. This decision shall be applicable to all National Highway Project under PPP mode awarded/yet to be awarded on Build-Operate-Transfer(BOT) mode of delivery as mentioned hereunder:
 - 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 where 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 the with(a), (b) and/or (c) above, as the case may be.

3. For the purpose of the harmonious substitution as detailed herein, an event of "Financial Default" as defined shall be deemed to include situations where the Authority and / or the Senior Lenders have reasons to apprehend, in their considered opinion, that the Concessionaire is likely to face financial distress and is likely to default in the compliance of the terms of the Concession. For the purpose of the harmonious substitution as detailed herein, the term "Nominated Company" shall mean, wherever the Selected Bidder/Consortium Members of the project SPVs/ are sought to be substituted, the current SPV company itself.

4. Provisions pertaining to substitution of the Concessionaire by the Lenders 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 Clause 3.3 of the Substitution

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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 Clause 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 shall be applicable, and in addition the procedure laid down herein below shall be applicable.

- (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 Substitution. Upon receiving the said request, the Lender's Representative shall make its own assessment regarding the said request and upon being satisfied that it will be in the interest of the Project that the Substitution be effected, 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 said Substitution as defined herein.
- (ii) Selection of the substitute (company or the Selected bidder/ Consortium Members of such project SPV) and the valuation of the Equity of the Concessionaire would be determined by the Concessionaire and Lenders.
- (iii) Upon receiving the proposal of the Lender's Representative, the Authority shall satisfy itself about the credentials of the Nominated Company or of the substitute to the Selected bidder/Consortium Members of such projects and accord its concurrence regarding such substitution considering the following.
 - 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 entity should have the requisite financial and technical qualifications to bid for a project of at least the same size.

Thereafter, (where the substitution entity is a new company), the nominated company will form an SPV for taking over the project along with all the rights and obligations of the concessionaire.

- (iv) While concurring with 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

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purpose by the Authority subject to a cap of 1% (one per cent) of Total Project Cost.

Where the responsibility for delay in execution or completion for the project is on account of non-fulfilment or delay in 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. The Authority would be required to remedy the defaults before the formal agreement for substitution is signed.

- (v) Subsequent to such substitution, the Concessionaire shall ensure compliance to clause 5.3 and Clause 7.1(k) of the Model Concession Agreement read with the definition of "Change in Ownership" as prescribed in Article 48 of the Model Concession Agreement.
- (vi) The procedure prescribed in other clauses of the Concession Agreement and the Substitution Agreement, except to the extent of this modified scheme of harmonious substitution, shall be strictly adhered to.
- (vii) The Authority shall stand fully discharged of any claims whatsoever, by the existing Concessionaire where the substitution entity is a new company.
- (viii) Such substitution may be permitted only once during construction Period.

5. The above clarifications/stipulations read with the clauses referred hereinabove shall apply mutatis mutandis to the relevant provisions of related Concession Agreement executed between the parties thereto.


G. Suresh
CGM(FA)

To

ALL PDs./ ROs/CGMs & GMs at HQ.

Copy for information to:

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