

F. No. 3D(3)/2/2012-PPP(pt.)
Ministry of Finance
Department of Economic Affairs
(PPP Cell)

North Block, New Delhi
Dated 24th January, 2019

OFFICE MEMORANDUM

Subject: Record of Discussion of 32nd Meeting of the Empowered Committee (EC) on the Scheme for Financial Support to PPPs in Infrastructure (Viability Gap Funding Scheme) – reg.

The undersigned is directed to enclose a copy of the Record of Discussion of 32nd Meeting of the EC on the Scheme for Financial Support to PPPs in Infrastructure held on 16th January, 2019 under the Chairmanship of Secretary (EA) for information and necessary action.

Encl: as above


(Mukesh Kumar Gupta)
Director (PPP)

To,

1. CEO, NITI Aayog, Yojana Bhawan, New Delhi
2. Chief Secretary, Government of Telangana, C-Block, Telangana Secretariat, Hyderabad
3. Finance Secretary & Secretary, Department of Expenditure, North Block, New Delhi
4. Secretary, Ministry of Housing and Urban Affairs, Nirman Bhawan,
5. Managing Director, Hyderabad Metro Rail Ltd., Rasoolpura, Begumpet, Hyderabad
6. Managing Director & Chief Executive Officer, L&T Metro Rail (Hyderabad)

Copy for information: Sr. PPS to Secretary, DEA/ PPS to JS (IPF)

F. No. 3D(3)/2/2012-PPP(pt.)
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Record of Discussion of 32nd meeting of the Empowered Committee (EC) on the 'Scheme for Financial Support to Public Private Partnerships in Infrastructure'

The 32nd meeting of Empowered Committee (EC) on the Scheme for Financial Support to Public Private Partnerships in Infrastructure chaired by Secretary, Economic Affairs, was held on 16th January 2019 at North Block, New Delhi to discuss the issues related to viability gap funding of Hyderabad Metro Rail Project. The list of participants is annexed.

2. Secretary, DEA (the Chair) welcomed the participants. JS (IPF) made a brief presentation on the background of the instant case and project details. Secretary (EA) underlined that there are two issues which need to be discussed and determined:

- a. Schedule R to the concession agreement provides for fixation of fares as per the Andhra Pradesh Municipal Tramways (Construction, Operation and Maintenance) Act, 2008. The viability gap funding for the project was determined with reference to this fare fixation method. The Metro Authority for the L&T Metro Rail Hyderabad Ltd (L&TMRHL) has, however, fixed first fare for the project in accordance with the Central Metro Act, 2002. Is this lawful and can the fare so fixed be considered for determining the viability gap funding for the project given all the provisions in the Tripartite Agreement for the Viability Gap Funding?
- b. If the fare so fixed is validly applicable for the project under consideration, what should the acceptable method and factors to be taken into account to assess whether the project still remains unviable to the extent viability gap funding granted?

3. JS (Infra) drew attention to the relevant provisions of the VGF Scheme

- a. Para 3.6 of VGF Guidelines provides "*The project should provide a service against payment of a pre-determined tariff or user charge.*"
- b. The tariffs fixed by the Concessionaire/Metro Authority in November 2017 are substantially higher (around 71%) than the pre-determined tariff as per the tariff formula stated in Schedule-R of the Concession Agreement.
- c. The Project Authority, while applying for final approval of VGF to DEA, had furnished a certificate stating that the proposal complies with the provisions and eligibility criteria specified in the VGF Scheme. It was specifically stated in the said certificate that "*The user charge/tariff as fixed for this project are furnished in Annexure-III enclosed herewith*". It was stated that Annexure III mentioned in the said certificate had the same tariff as in Schedule-R of the Concession Agreement.

- d. As per Tripartite Agreement, any amendment made to Concession Agreement (CA), which materially affects the terms and conditions of CA is not binding on the EI/ EC and the Central Govt, unless approved by the EC beforehand (clause 1.1.3).
- e. As per Clause 3.1 (c) of the TA, the Project Authority, represents, warrants and confirms that project shall provide the service against payment of predetermined tariff/user charge as set forth in the Concession Agreement.
- f. As per Clause 2.4(iii) of the TA, in the event of VGF Default, the disbursement of balance of undisbursed amount of VGF would be suspended or terminated.
- g. As per Clause 27.1.1 of the CA, on and from the COD till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Fare from the Users in accordance with this Agreement and the Fare Notification set forth in Schedule-R. As per Clause 27.2.2 of the CA, the Concessionaire hereby acknowledges and agrees that it is not entitled to any revision of Fare, except in accordance with the express provisions of this Agreement.

4. Responding to the issues raised in the presentation on the point of legality of the fare determined in accordance with the Central Act in departure from the provisions in the Concession Agreement, Secretary, MoHUA explained that fares actually notified by the Metro Authority are in accordance with the provisions of Central Metro Act - Metro Railway (Operation and Maintenance Act), 2002. As per Section 33 of the Central Metro Act, Metro Rail Administration (MRA) may fix the fare without recommendations of the Fare Fixation Committee on the initial opening of metro railway. Secretary, MoHUA added that the Andhra Pradesh Municipal Tramways Act, 2008 had no provisions with regard to the safety and security of the Metro Rail systems and to take care of these issues, the Hyderabad Metro Rail Project was brought under the ambit of Central Metro Act, 2002 through a notification in 2012. It was also observed by Secretary MoHUA that the Central Metro Act, 2002 has no provisions on PPPs in metro rail. It was also mentioned that the Central Metro Act, 2002 has no prescribed fares. Therefore, the Metro Rail Administration/Concessionaire fixed the fare for Hyderabad Metro Rail which was justified, in their judgement, for the Project which might be higher than that mentioned in Schedule R of the Concession Agreement. In substance, Secretary (MoHUA) stated that the Central Act has overriding effect and upon the notification issued by the Central Government in 2012, the Andhra Pradesh metro law stopped to be applicable. In such a case, the fare determined by them is perfectly lawful and should be construed as the applicable fare in substitution of the fare formula given in Schedule R of the Concession Agreement.

5. Secretary, DEA joining in discussion emphasized that the Central Act, as admitted by Secretary (MoHUA) has no provision for fare determination of the PPP projects and actually in general is not applicable for PPP projects. In such a situation, the provision of Andhra Pradesh Act for determination of fare, as enshrined in the Andhra Act only can be considered to be applicable. Secretary (EA) therefore felt that the determination of fare by the Concessionaire/ Metro Authority might not be legally sustainable. Moreover, as provided for the Tripartite Agreement specifically, if there was any change being brought about, the Concessionaire must have approached the EC before fixing fare.



6. MD, HMRL stated that as per Section 103 of the Central Metro Act, "*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.*" Therefore, the Central Metro Act was assumed to prevail over the Concession Agreement with respect to Fare Fixation. The Chair again pointed to the fact of the Central Metro Act having no provision with respect to PPPs, and felt that in his understanding the provisions related to fare fixation under Andhra Pradesh Municipal Tramways Act, 2008 should continue to be applicable to this project.

7. On the issue of Fare Fixation by concessionaire, Secretary, DEA further enquired whether the fare fixed by concessionaire (vide Press Release dated 25.11.2017) are initial fares to confirm the requirement of Fare Fixation Committee as decided in the earlier meeting dated 12.07.2018. MD, HMRL replied that no other fare has been fixed for Hyderabad Metro other than the fare notified by the Concessionaire. Therefore, the same should be treated as the first fare of Hyderabad Metro.

8. After deliberations, it was agreed that the entire matter on this critical issue may be referred to Department of Legal Affairs for determination.

9. JS (IPF) brought up another related aspect. The Concession Agreement was entered under the provisions of Andhra Pradesh Municipal Tramways (Construction, Operation and Maintenance) Act, 2008 and subsequently brought under the ambit of the Central Metro Act - Metro Railways (Operation and Maintenance) Act, 2002. He wanted the Committee to treat this change as a "Change in Law" which may then be dealt in accordance with the provisions of the Article-41 of the Concession Agreement. As per Clause 41.2 of the Concession Agreement, if the Concessionaire benefits from the Change in Law, then the Government may notify the Concessionaire and propose amendments to the CA so as to place the Concessionaire in the same financial position as it would have enjoyed, had there been no such Change in Law. As per Clause 41.3 of the CA, the Net Present Value (NPV) of the Concessionaire may be protected in the case of Change in Law.

10. Secretary (EA) concluded that this issue may also be referred to the Law Department that even if the Central Act was the only applicable law after the notification of 2012, whether the fare fixation should have been dealt with in accordance with the provisions relating the Change in Law, instead of determining under the Central Metro Act.

11. Thereafter, a few findings of the IIM Report were discussed. On the finding of the Report that Project viability has deteriorated on account of substantial gap between the current best case ridership scenario and the high ridership figures considered during the Financial Closure, it was pointed out that Ridership gap between the expected and actual traffic should be dealt in accordance with Article 29 of the Concession Agreement which deals with "Effects of Variations in Traffic Growth." Further, Target date for traffic assessment as per the Concession Agreement is 1 October, 2024 and the relevant remedy for any shortfall of traffic is Modification in the Concession Period. So, it is premature to discuss the issue in 2019. In addition, Central Government is not liable for wrong traffic forecasts of the Concessionaire.



12. It was further pointed out that as per the Report, current fare charged by L&TMRHL is consistent with the fares charged by the Metro Rail Operators of other cities and Metro fare is also lower than the fare charged by Air Conditioned RTC bus services in Hyderabad.

13. In view of the paucity of time, the issue of continued unviability was not discussed comprehensively. Secretary (EA) stated that let the legal issue be determined first and thereafter we can deal with the viability issue, taking into account the provisions of the Tripartite Agreement and the Concession Agreement.

14. To summarise, following decisions were taken:

- a. Legality of the matter of the applicability of the Central Metro Act, overriding the provisions for fare fixation enshrined in the Schedule R of the Concession Agreement and also made applicable for the Viability Gap funding provided under the Tripartite Agreement, keeping in consideration the fact that there are no provisions for PPP projects under the Central Act and this is a PPP Project be referred to the Department of Legal Affairs for determination and also in case the applicability of the Central Act is found to be lawful, whether the fare determination should have been dealt with under the Change in Law provisions of the Concession Agreement or under the Central Act.
- b. Viability issue would be dealt with after determination of the legal issue first taking into account the provisions of the VGF Guidelines, Tripartite Agreement and the Concession Agreement.



Annexure

Record of Discussion of 32nd Meeting of the Empowered Committee (EC) on the Scheme for Financial Support to PPPs in Infrastructure (Viability Gap Funding Scheme)

List of Participants:

S.No.	Name	Designation
1.	Shri Subhash Chandra Garg	Secretary (Economic Affairs) – in Chair
2.	Shri Durga Shankar Mishra	Secretary, Ministry of Housing and Urban Affairs
3.	Shri Yaduvendra Mathur	Additional Secretary, NITI Aayog
4.	Dr. Kumar V. Pratap	Joint Secretary (IPF), DEA
5.	Shri S. K. Saha	Adviser, NITI Aayog
6.	Shri Mukund Kumar Sinha	OSD (UT), Ministry of Housing & Urban Affairs
7.	Shri NVS Reddy	MD, Hyderabad Metro Rail Ltd.
8.	Shri Mukesh Kumar Gupta	Director (PPP), DEA
9.	Shri Deepender Kumar	Director, Department of Expenditure
10.	Shri Manoj Kumar Madholia	Deputy Director (PPP), DEA
11.	Shri Shubham Goyal	Assistant Director (PPP), DEA
12.	Shri KVB Reddy	MD & CEO, L&T Metro Rail (Hyderabad) Ltd
13.	Prof. M. S. Narsimhan	Professor (Finance & Accounting), IIM Bengaluru