F. No. 2/2/2018-PPP
Government of India
Ministry of Finance
Department of Economic Affairs
PPP Cell

North Block, New Delhi
24th November, 2020

OFFICE MEMORANDUM

Subject: Record of Discussion of 84th Meeting of Empowered Institution (EI) under Scheme for Financial Support to PPPs in Infrastructure (Viability Gap Funding Scheme)

The undersigned is directed to enclose a copy of Record of Discussion of 84th Meeting of Empowered Institution (EI) held on 12th November 2020 at 3:00 PM through VC under the chairmanship of Additional Secretary (Investment), DEA for Vizhinjam International Deepwater Multipurpose Seaport Project for information and necessary action.

Encl: As stated above

(Mukesh Kumar Gupta)
Director (PPP)

To,

1. Shri. Rajeev Ranjan, Additional. Secretary, D/o Expenditure, North Block, New Delhi
2. Shri S.K. Saha, Adviser, NITI Aayog, Yojana Bhawan, New Delhi
3. Shri Arvind Chaudhary, Eco. Adviser, M/o Shipping, Transport Bhawan, New Delhi
4. Shri Sanjay Kaul, Secretary, Fisheries & Ports (E) Department, G/o Kerala, Thiruvananthapuram

Copy to:

1. PPS to AS (Investment), DEA
2. PPS to JS (IPF), DEA

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Record of Discussion of 84th Meeting of Empowered Institution (EI) under Scheme for Financial Support to PPPs in Infrastructure (Viability Gap Funding Scheme)

The 84th Meeting of Empowered Institution (EI) held on 12th November 2020 at 3:00 PM through VC under the chairmanship of Additional Secretary (Inv), DEA for Vizhinjam International Deepwater Multipurpose Seaport Project at North Block. The list of participants is annexed.

2. Director (PPP) made the brief presentation on the project and informed that the proposal of "*Development of a minor sea port at Vizhinjam on DBFOT basis to handle upto 18,000 TEU container ships and rated annual capacity of the Port shall be 10 lakh TEUs in the state of Kerala*" was first considered in the 57th meeting of EI held on 8.8.2014 wherein it was recommended for the approval of Empowered Committee (EC). The proposal was then reconsidered and accorded In-Principle approval and recommended for approval of FM in the 23rd meeting of EC held on 26.12.2014.

3. The In-Principle approval of FM for the captioned proposal was conveyed to GoK by DEA vide OM dated 3.2.2015 with revised TPC of Rs 4089 crore and the applicable VGF as per extant DEA's VGF Scheme and Guidelines was conveyed. In FM approval it was mentioned that the Agreement of Revenue Share with DEA, GOI, should explicitly contain the provision that the revenue will be shared until entire GoI contribution of "Grant" under DEA's scheme and Guidelines for Financial Support to PPPs in Infrastructure (VGF Scheme) is repaid in Net Present Value (NPV) terms. The Draft Agreement may please be furnished to DEA before submitting application for final approval.

4. Director (PPP) also raised issues related to project which require detailed discussion by EI.

a. **Changes after EC Approval**

5. DEA informed that, GoK vide letter dated 07.03.2019 intimated that these changes were made subsequent to receipt of in-principle approval under VGF Scheme.

a. Description on of Funded Works [Clause 12.6.2 & annex-II (schedule-B)]: The lump sum cost of all construction works comprising Funded Works modified from Rs.1,210 crore to Rs.1,463 crore

b. Mortgage of Site & Project Assets [Clause 41.5]: The following clauses were inserted: *"Notwithstanding anything to the contrary contained in this Agreement, upon request made in this behalf by the lender's representative, the Authority and the Concessionaire shall jointly execute a mortgage deed ("Mortgage Deed") forthwith for the benefit of the Senior Lenders".*

6. JS (IPF), DEA observed that CAG also had pointed out that the funded works were awarded to Concessionaire at the estimated cost without assessing market rate. The estimated cost of breakwater & fishing harbour was revised from Rs 1,210 crore to account for exchange rate fluctuations and again to Rs 1,463 crore after acceptance of the concept of funded works. CAG also commented that Final TPC was based on BER prepared and resulted into excess grant to the Concessionaire.

7. NITI Aayog also stated that changes were made after the approval of DEA under VGF scheme and are not part of the RFQ approved by EC (DEA). GoK replied that cost of funded works for EPC contract was revised not on account exchange rate fluctuations. It was also informed that five bidders qualified at RfQ stage. Out of five qualified bidders, three bidders had purchased the RfP and only APSEZ submitted the financial bid. It was also informed that the project was not financially viable due to the negative NPV of Rs. 298 crores. It is also to be confirmed whether these changes were made after RFQ stage and available to the only qualified bidders.

8. DEA informed that CAG in its Audit has observed that according to the CVC guidelines, pre-qualification criteria (PQ) should be framed with a view to attract participation of reputed and capable firms with proper track record. Therefore, the PQ criteria should be exhaustive, yet specific and unambiguous. The changes in project parameters when compared to the same as per the RFQ as mentioned below:

Particulars	RFQ	RFP/Draft Concession Agreement (DCA)
Model for project development	Land lord model	Combination of land lord & private services models
Concession Period	Not specified	Specified as 40 years extendable by 20 years.
Total Project Cost	Rs 3,900 crore	Rs 4,089 crore
Construction of breakwater & fishing harbour	To be awarded as per EPC tender	To be done by Concessionaire as funded work at a total cost of Rs 1,463 crore.
Port Estate Development	Not mentioned	30% of project land to be given on licence to Concessionaire for commercial development including real estate development
Mortgage of Project assets	Not mentioned	Concessionaire allowed to mortgage project assets Including land to finance the project.
Capacity of the Port	1 MTEU by COD	0.6 MTEU by COD & 1 MTEU within 10 years after COD.

9. CAG has also observed that changes were not incorporated in the RFQ/DPR/Master Plan made available to prospective investors at the RFQ stage, unfair advantage was given to the qualified bidders. Since there were major changes in the project parameters, the tender process should have been cancelled and fresh tenders invited. This would have increased the attractiveness of the project and ensured transparency in the award of work.

10. In light of CAG observations, Chair requested GoK to clarify on the same along with all documents clearly stating the changes made in the documents approved by EC (DEA) along with the justification for the same. Any contravention to CVC guidelines also needs to be brought to

the notice of EI regarding bidding process and whether it had any impact on VGF also need to be assessed and explained by GoK. The updated status of the project may also be furnished. The GoK agreed to the same.

b. **Port Estate Development**

11. DEA informed that the project had granted in-principle approval on the basis of the assurance furnished by GoK that all activities proposed in Port Estate Development are port related & envisaged as part of the requirements of the project. However, this condition was not incorporated in the Concession Agreement (CA). Further, as per in-principle approval "*the extant of Port Estate Development has been capped to 30% of port area of which not more than 1/3 can be used for residential purposes*". GoK confirmed that the total area of the Site has been quantified at 120 acres in the Concession Agreement. GoK also confirmed that the Port Estate Development including residential building was made coterminous with the concession period. It was explained that as per the CA (Article 31.6), in the event of Termination prior to expiry of such maximum permissible period, the tenure of the sub-licences and the rights of the sub-licencees shall continue to subsist as if the sub-licences were granted by the Authority, and the Authority shall, for the remaining period of each sub-licence, be deemed to be the grantor of the sub-licence by stepping into such sub-licence in pursuance of the Covenant. The Chair suggested GoK to provide all the necessary explanation in the writing with supporting documents.

c. **Bidding Process & Conditions Precedents (CPs)**

12. DEA informed that Project Authority had waived CPs pertaining to Escrow Agreement, Substitution Agreement, Applicable Permits & execution of Financial Agreement and confirmed the appointed date as 05.12.2015. It is not a standard practice for concessionaire to declare appointed date without financial closure. Construction work commenced from 05.12.2015, whereas the escrow agreement was executed on 29.04.2016. Specifically, clause 32.1, article 32 of the signed CA states "*the Concessionaire shall prior to the Appointed Date open and establish an Escrow Account with a Bank in accordance with this agreement read with the Escrow Agreement*". As per CA, the Escrow Account should be opened before the appointed date to monitor the inflows.

13. GoK has explained that CA provides 270 days period for fulfilment of the various CPs. For the purposes of making use of fair weather and to commence works earlier, 05.12.2015 was confirmed as Appointed Date. It was confirmed that GoK permitted waiver of the CP relating to execution of Escrow Agreement. The escrow agreement was executed on 29.04.2016 & around Rs. 28 crores has routed through this account during this period (05.12.2015 to 29.04.2016), which is yet to be verified by concurrent auditor.

14. JS (IPF) highlighted the fact that appointed date without achieving financial close was not the part of in-principle approval granted to this project and the unsecured loan from Parent company should be treated as equity component and should not be considered as Debt to avail VGF from DEA. Yes Bank to provide Rs 500 crore of debt, however, the financial assessments are till FY-34 only and estimated that VGF for O&M is being utilized in FY-21 (Rs 368 cr) &

FY-22 (Rs 40.30 crore) whereas, as per CA, VGF of O&M is to be utilized 7.5% every quarter till VGF is exhausted. NITI Aayog added that debt & equity are important parameters of the project and have implications for financial close which is a critical CP for declaring appointed date. Therefore, once it is decided at time of in-principle approval, it cannot be changed without informing the Approving authority EC (DEA) in this case.

15. The Chair suggested GoK to provide all the explanation for granting waiver of Conditions Precedents pertaining to Escrow Agreement with supporting documents & concurrent auditor to certify the amount routed through escrow account as per the provisions of CA.

d. **Concession Period**

16. DEA pointed out that on assurance by the GoK that there has been no artificial lengthening of the concession period to reduce VGF requirement, EC in its 23rd meeting agreed with the concession period for the project to be 40 years extendable by 20 years on the concessionaire request. It was also informed that VGF guidelines require the state government to certify that the project term cannot be increased for reducing the VGF. However, as per the clause 3.1.1 of signed CA, at any time no earlier than 5 years prior to completion of the Concession Period extended herein-above, the Parties may, with mutual agreement, extend the Concession Period for such further period as they may determine, but not exceeding 20 years in any case. This clause on concession period accord discretion to the GoK to extend it to further 20 years and effectively make concession period 80 years (40+20+20) which is not in line with EC (DEA) approval.

17. DEA also pointed out that this clause was added after RfQ and not available to all bidders and may impact the response to the project itself. NITI Aayog also supported DEA's view and stated that this was added after selecting qualified bidders and accorded undue advantage to qualified bidders. The chair suggested GoK to explain this deviation along with detailed financial impact on the project because of it.

e. **Tariff Structure**

18. DEA mentioned that in CA that after 10 years commencing from the Appointed Date Concessionaire can determine the tariffs on the basis of Competition. One of the conditions for eligibility under VGF Scheme is that Project should provide the service against payment of a pre-determined tariff or user charge. Further, Para 3(iv) of the Scheme requires the concerned government/statutory authority to certify, that

- That the tariff/user charge cannot be increased to eliminate or reduce the viability gap of the PPP;
- That the project term cannot be increased for reducing the viability gap; and
- That the capital costs are reasonable and based on the standards and specifications normally applicable to such projects and that the capital costs cannot be further restricted for reducing the viability gap.

19. As per DEA's VGF scheme, project authority is required to submit certificate certifying that the tariff/user charge cannot be increased to eliminate or reduce the viability gap of the PPP. The calculation of VGF is based on pre-determined tariff and leaving tariff to the market rate makes calculation of VGF redundant. NITI Aayog added that this is not in accordance with VGF Guidelines which does not allow for open ended tariff structure. The chair opined without the pre-determined tariff the VGF is meaningless and greater clarity on the same is required and suggested GoK to submit document clarifying that the conditions of approval of EI/EC of DEA are not violated to the advantage of concessionaire.

f. **Revenue Share**

20. DEA stated that FM approved that the Agreement on Revenue Share should explicitly contain the provision that the revenue will be shared until the entire GoI contribution of Grant under the GoI, DEA's Scheme and Guidelines for Financial Support to PPP in Infrastructure (DEA's VGF Scheme) is repaid in Net Present Value (NPV) terms. The existing CA does not have any clause on Revenue Share. DEA also stated that Revenue Share Agreement along with detailed calculations need to be submitted to justify that VGF of DEA can be repaid in NPV terms during the Concession Period. Since, under the VGF Scheme first 20% of VGF is being granted by Central Government, therefore recovery of VGF as percentage of revenue share should be given first priority and only after the recovery of the VGF of Central Government in NPV terms, Concessionaire should pay the revenue share to the Authority. The Chair requested GoK to provide their reply to these queries/observations.

g. **Capacity**

21. DEA informed EI that as per the signed CA, capacity means the rated capacity of the Port or any equipment, as the case may be, to handle a volume of 6,00,000 TEUs on Commercial Operation Date (COD), which shall be augmented to 10,00,000 TEUs no later than the 10th anniversary of COD. At the RfQ stage, the capacity of the port is 1 MTEU by COD which was changed to 0.6 MTEU by COD and 1 MTEU within 10 years after COD at RFP Stage. It implies that initially Concessionaire will invest only part of the Total project Cost of Rs. 4089 crores to attain only 0.6 million TEUs capacity by COD given that Rs. 4089 crores was envisaged to attain the 1 million TEUs capacity and therefore, the quoted VGF of 39.98% of TPC of Rs. 4089 crores could not hold its sanctity.

22. NITI Aayog stated that GoK should have taken EC approval under VGF Scheme and stated process as per VGF Guidelines should have been followed. The alteration of conditions post RFQ is not desirable and amount to undue favour to qualified bidders. It was said by GoK that relaxation is only given in terms of traffic and not in terms of capacity creation. The chair stated that GoK may substantiate it with appropriate documents.

23. D/o Expenditure had requested clarifications from GoK as to what circumstance necessitate such a substantive deviation from in-principle approval accorded by EC of DEA. It was also stated that this project is unviable from start given NPV of the project is negative Rs. 298 crores. Therefore, there is no rationale for allowing these changes which amounts to ex post

facto approval. It was also requested that GoK may provide the impact of these changes made post RfQ on the profitability and timeline of the project.

24. The Chair requested GoK to provide present status of the project along with detailed information on all issues as mentioned above along with the compliance of decisions made in 21st EC & 23rd EC meeting of DEA.

25. The meeting ends with vote of thanks to the chair.

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Annexure

Record of Discussion of 84th Meeting of Empowered Institution (EI) under Scheme for Financial Support to PPPs in Infrastructure (Viability Gap Funding Scheme)

S.No.	Name	Designation
1.	Shri K Rajaraman	Additional Secretary (Inv), DEA – in Chair
2.	Shri Baldeo Purushartha	Joint Secretary (IPF)
3.	Shri Sanjay Kaul	Secretary, Port Department, Govt of Kerala
4.	Shri S. K. Saha	Adviser, NITI Aayog
5.	Shri Arvind Choudhary	Adviser, Ministry of Shipping
6.	Shri Mukesh Kumar Gupta	Director (PPP)
7.	Ms. Shivali Chouhan	Director, Department of Expenditure
8.	Shri Manoj Kumar Madholia	Deputy Director (PPP), DEA
9.	Shri Arun Dewan	OSD (PPP), DEA
10.	Ms. Nidhi Arora	Consultant, NITI Aayog