Ministry of Finance
Department of Economic Affairs
….

Public Private Partnership Appraisal Committee (PPPAC)
23rd Meeting on February 20, 2009

Record Note of Discussion

The 23rd meeting of the Public Private Partnership Appraisal Committee, chaired by Secretary, Economic Affairs was held on February 20, 2009. The list of participants is annexed.

2. The Chairman welcomed the participants and invited Joint Secretary (Infrastructure) to present the agenda. Joint Secretary (Infrastructure) informed that two port projects and five national highway projects would be considered by the PPPAC. It was decided to first consider proposals from Department of Shipping (DoS).

Agenda Item I: Development of 13th to 16th multipurpose cargo (other than liquid/container cargo) berths on BOT basis at Kandla Port, Kutch, Gujarat

3. Chairman, Kandla Port Trust (KTP) made a presentation on the proposal. The existing facilities at the Kandla port included twelve dry cargo berths, six oil jetties and three SPMs. Ten of the dry cargo berths were being operated by Kandla Port Trust; berth 11 and 12 were being operated by a private company on a BOT basis. It was noted that it was proposed to develop four multipurpose berths, each with a berth dimension of 300 x 55 meters and back up area of 21.7 hectares on 'as is where is basis'. Only one berth was proposed to be licensed to one concessionaire. The PPPAC had granted 'in-principle' approval to the project in November 2006. However, the process of issue of RFP had been pending finalization of MCA for port sector and tariff fixation. Eleven bidders had been shortlisted, of which ten had been granted security clearance. There were no multinational firms among the shortlisted bidders.

4. The representative of KTP informed that the deviations from the model concession agreement (MCA) suggested in the Draft Concession agreement (DCA) were being withdrawn from the proposal. Hence, the following changes were being effected in the DCA:

a. Restoration of exclusivity period;
b. Restoration of the provision for non-implementation of competing facilities in exclusivity period;
c. Restoration of the provision of minimum guaranteed cargo (MGC); and,
d. Restoration of the provision of employment of personnel

5. Representative of Planning Commission noted that since the four berths were homogenous in nature, the project could have been bid out as a single berth instead of the area being bifurcated into four equal sized berths. The size of berths offered by JNPT was more than what was being proposed in the instant proposal. It was suggested that the absence of participation of foreign operators in the bidding process could be on account of smaller sized berths. Furthermore, it would not be the most efficient way of awarding projects since the bidder offering the highest revenue share to the Port Trust would be granted only a single berth; with the other berths being awarded to bidders offering lesser revenue shares.

6. Secretary, Department of Shipping noted that sufficient backup area was being provided with each of the berths and the proposed dimensions (300 x 55 m^2) were adequate for a draft of 14 meters. Offering one berth per concessionaire was in accordance with the policy of Department of Shipping to encourage competition and check monopoly on the port premises.

7. The Chairman observed that though many firms had evinced an interest in the project during the bidding process, inadequate interest from multinational firms could be due to the size of the berths. He suggested that Department of Shipping may separately examine the issue regarding a more viable project size for offering berths on BOT basis. However, in respect of the instant proposal, since the bidding process was at an advance stage, the berth size and number of berths may be retained as proposed. However, Department of Shipping may consider granting more than one berth to the bidders quoting higher revenue share. This was not likely to result in operational difficulties since the current experience of the Port indicated that there was one operator (KTP) operating ten berths and another (private company) operating two berths.

8. As the bids were being invited at the same time, a provision may be made in the bid documents allowing the eligible competitive bidders to be awarded upto two berths.

(Action: DoS)

9. Representative of Planning Commission stated that the DCAs for the two port sector projects require changes, as several clauses would result in disputes or loss to the public exchequer.

i. Open-ended Contingent Liability: Article 17.1(b) of the DC A provides that termination charges to the Concessionaire shall be lowest of (i) book value, (ii) 90% of the debt due and (iii) actual project cost. The definition of actual project cost has been kept open-ended. The Concessioning Authority has been empowered to permit increases in actual project cost, even beyond estimated project cost. It is necessary that the Project Cost and the contingent liabilities of the Government are clearly defined. It is, therefore, suggested that the capital cost should be defined, indicated and quantified at one place in clear terms. It is suggested that Actual Project Cost should be replaced by the concept of 'Total Project Cost' and should be defined as the lower of (i) capital cost of the Project, less Equity Support, as defined in the Financial Package; (ii) the actual capital cost of the project upon completion of the Project Terminal less Equity support; and (iii) a specified sum which is project specific cost estimates including financing charges, less equity support.

ii. Bid Security: The amount of Bid Security has not been specified. The amount may be mentioned in the DCA, without which the provision would remain open ended. This amount is generally 1% of the Total Project Cost.

iii. The definitions of Actual Project Cost, Bid Security, Debt Due, Drawings and Designs, Environmental Law, Equity, Adjusted Equity, Expert, Government Authority, Independent Engineer, License Fee, O & M Contract, Management Contract, Material Adverse Effect, Minimum Guaranteed Cargo, Performance Standards, Project Requirements, Request for Proposal, Port's Assets, Project Facilities and Services, Safety Standards, Statutory Auditor and SBI PLR need to be amended and refined to avoid ambiguities.

iv. Clauses in the DCA relating to Interpretations (Clause 1.3), Concession (Clause 2.1), Ports Assets (Clause 2.4), Use of Port's Assets (Clause 2.5), Conditions Precedent (Article 3), Performance Guarantee (Clause 4.1), Independent Engineer (Clause 5.1), Project Implementation (Article 6), Preparation of Designs and Drawings (Clause 6.1), Extension of Concession Period (Clause 6.2), Obligations of the Concessionaire (Clause 6.4), Change of Scope (Clause 6.8), Operation and Maintenance (Article 7), Liability for Shortfall in Performance (Clause 7.3), Tariff (Clause 8.1), Payments to the Concessioning Authority (Article 9), Certified Accounts (Clause 9.4), Escrow Account (Clause 9.5), Permitted Charge of Assets (Clause 10.2), General Rights Duties and Obligations (Article 12), Change in Law (Article 13.1), Concessionaire's Remedies (Clause 13.2), Force Majeure (Clause 14.5), Events of Default (Clause 15.1), Termination (Clause 16.5), Compensation (17.1) and Payment of Compensation to Lenders (Clause 17.4) need redrafting so as to remove ambiguities and avoid disputes leading to avoidable claims against the exchequer or the cost and efficiency of services for the users. Planning Commission has given suggestions on the above in the Appraisal Note. The Department of Shipping may take steps to address these issues to avoid disputes and loss to the public exchequer as well as for safeguarding the interests of the users.

10. The representative of Department of Expenditure stated that the MCA for port sector may be examined to ensure that the contingent liabilities are not open ended. Representative of DEA informed that the issue of contingent liabilities and other observations of Planning Commission on the MCA were being separately examined and would be placed before PPPAC for consideration after consultation with all members of the Committee. However, two proposals of Paradip port, based on the MCA, and cleared by PPPAC in the 18th meeting, had been approved by the Cabinet. Following the same approach, the PPPAC, in its 22nd meeting, had cleared three port sector projects. Therefore, the instant proposals could also be considered by adopting the same approach of not recommending departures from the approved MCA.

11. After deliberations, the project was granted final approval, subject to the following conditions:

i. The Actual Project Cost (APC) approved by TAMP may be examined and a written communication sent to DEA confirming that the cost includes financing and interest during construction (IDC) charges.

Since the responsibility of capital dredging rested with the KTP, the cost of capital dredging may not be included in the APC.

ii. The Port has a single channel entry through the Sogal canal. The scheduling of the ships is decided by the KTP on a 'first come first serve' basis; the choice of the berth is indicated by the parties owning/operating the ships/vessels. The process may be adequately clarified in the DCA.

iii. A proviso may be suitably incorporated in the DCA that the 13th to 16th berths shall not constitute 'competing facility' to each other.

iv. The Minimum Guaranteed Cargo (MGC) should be kept reasonably high to safeguard the interests of the port authorities. Representative of Planning Commission suggested that it may be indicated as equivalent to the level of capacity utilisation approved by TAMP for the berths (i.e. 75 percent). Further, revenue may be calculated at the tariff rates approved by TAMP. It was decided that the level of MGC may be determined as atleast 25 percent of the capacity utilisation; the exact level, and the rate of progression of rates during later years of the concession period may be decided by DoS.

v. Appendix-12 of the DCA would indicate the tariff rates approved by TAMP.

vi. Clause 8.1.2 suggested by Planning Commission (reproduced below) and approved for incorporation in the DCAs by the PPPAC during the 22nd meeting, held on January 12, 2009 would be suitably incorporated in the project DCA.

"8.1.2 The Concessionaire hereby acknowledges and agrees that it is not entitled to any revision of Tariff or other relief from the Trust or any Government. Instrumentality, except in accordance with the express provisions of Agreement, the Concessionaire further acknowledges and hereby accepts the risk of inadequacy, mistake or error of facts, assumptions or projections in the tariff order issued by TAMP and agrees that the Trust shall not be liable for the same in any manner whatsoever to the Concessionaire. "

(Action: DoS)

Agenda Item 2: Setting up of Iron Ore Handling Facility on BOT basis as a Back up requirement to Deep Draft Multipurpose Berth at New Mangalore Port, Dakshina Kannada, Karnataka

12. Chairman, New Mangalore Port Trust (NMPT) made a presentation on the project. It was noted that the project had been granted in-principle approval in its meeting held on August 29, 2006. The proposal for setting up mechanised iron ore handling facility consisted of developing marshalling yard, storage facilities and loading facility. The facility would utlise the fourteenth berth, a multipurpose berth, constructed by MNPT in February 2006 for loading the ships with mobile ship loaders. It was noted while the proposed facility was the only mechanised iron ore handling facility, there were nine general cargo berths which could also handle iron ore. The project documents did not provide certainty of cargo or revenues for the concessionaire. Representative of MNPT indicated that majority of the iron ore would go to the proposed facility which would provide mechanised handling. However, it was expected that existing berths, which provided manual handling of iron ore, could also be utilised by some smaller capacity vessels, especially during the monsoon seasons.

13. The representative of MNPT informed that 11 bidders had been shortlisted, out of which ten had been cleared from security aspect. It was noted that total project cost was Rs 309.85 crore, which included IDC amounting to Rs 32.74 crore. It was suggested that the figure / component of cost may be confirmed. The amount appeared to be a consolidated amount consisting of financing charges and IDC.

14. The representative of DEA pointed out that the project FIRR and IRR indicated that the project was marginally viable; the traffic and resultant cargo for the proposed facility appeared to based on unrealistic assumptions; hence the viability of the project could fade completely, if these assumptions did not remain valid. The representative of MNPT informed that the traffic was expected to grow exponentially in the region, and confirmed that the project was intrinsically viable.

15. After deliberations, the project was granted final approval, subject to the following conditions:

i. The Minimum Guaranteed Cargo (MGC) may be restored in the DCA. The MGC should be kept reasonably high to safeguard the interests of the port authorities. The level may be determined as atleast 25 percent of the capacity utilisation; the exact level, and the rate of progression of rates during later years of the concession period may be decided by DoS.

ii. Since berth was not proposed to be handed over to the Concessionaire, Clause 2.7, Clause 7.1and other provisions of the DCA may be suitably modified as per project requirements and delete references of berths.

iii. Appendix-12 of the DCA may indicate the tariff rates approved by TAMP.

iv. Clause 8.1.2 suggested by Planning Commission (reproduced in para 10 above) may be suitably incorporated in the project DCA.

(Action: DoS)

II. <u>Proposal from Department of Road Transport and Highways (DoRTH)</u>

Agenda Item 3: Four laning of Talegaon-Amravati Section of NH-6 in the State of Maharashtra under NHDP III on DBFOT (Toll) basis

16. Chairman, NHAI indicated that the project highway was a segment of the Kolkata-Mumbai East-Wast link in the country. Its four laning would result in the four laning of the entire East West link.

17. The representative of Planning Commission pointed out that that the cost of the project was very high (Rs 9.27 crore per km). The project cost may be reduced by eliminating/ phasing the structures on the project. This would also increase the viability of the project. Chairman, NHAI informed that the project was designed in accordance with the Manual of Specifications and Standards (MSS) approved by DoRTH. Though the project was structure heavy, it would not be possible to remove/delay project components since it would compromise the safety of the project highway. Similarly, the service lanes proposed were required since the project highway passed through four major towns. Representative of Planning Commission suggested that in case it was necessary to build the proposed structures, the project viability could be improved by charging higher toll rate for the structures, which was prescribed under the New Toll Rules.

18. The representative of Planning Commission observed that Planning Commission was not supportive of the project, which was intrinsically unviable. It was emphasised that DoRTH should pose proposals based on their budgetary allocation. It was further noted that the approved Financing Plan for national highways required NHAI to fix annual budgetary ceilings in consultation with Planning Commission and Ministry of Finance. However, the exercise had not been undertaken.

19. Secretary, DoRTH stated that the Department had the mandate to build technically optimal roads as per prescribed standards. However, it would not be possible to ensure that all projects remain attractive for private operators, while also ensuring that the standards and security are not compromised on the project highways. Therefore, PPPAC could take a view on the matter and recommend that the project may not be bid on BoT (Toll) basis, in case it was intrinsically unviable. He emphasised that the NHAI had sent the revised Financing Plan for approval almost a year ago, which was pending consideration of the Planning Commission. Further, the Department did not require additional budgetary support for undertaking the projects.

20. The representative of DEA pointed out that the implementation methodology for National Highways approved by the Cabinet was based on the premise that the market should not be pre-judged and that each project should be tested in the market to establish its viability. Hence, the PPPAC would examine the project for its clearance for bidding on BoT (Toll) basis.

21. The Chairman noted that examination of the viability of the project proposals was a critical responsibility assigned to the PPPAC. Accordingly, this role was being discharged by Ministry of Finance and Planning Commission. Hence, the PPPAC, while considering the projects for clearance, closely examined the viability of the projects. He suggested that in case DoRTH was of the view that intrinsically unviable projects should not be tested in the market for implementation in the BoT

(Toll) framework, the Department may circulate a note for consideration of the PPPAC.

(Action: DoRTH)

22. The representative of DoRTH pointed out that the approved Financing Plan was based on a cost of Rs 6.52 crore per km for NHDP Phase III projects on 2006 prices. Hence, on current prices, this would amount to around Rs 7.5 to 8.0 crore per km. Hence, the project could be considered for grant of approval subject to NHAI reviewing the project structures to reduce the project cost to Rs 8.00 crore per km. This was agreed to.

(Action: NHAI)

23. It was noted that the traffic would reach the design capacity of the project highway in 22 years. Therefore, it was decided that the concession period may be fixed as 22 years, instead of 18 years proposed by the sponsoring authority.

24. The proposal was granted final approval, subject to buy back of tolling rights being included in the pre-construction costs, and not in the Total Project Cost of the project.

(Action: DoRTH)

Agenda Item 4 to 7:

i. **Four laning of Dindigul - Theni Section of NH-45 Ext. and Kumili - Theni Section of NH 220 in the State of Tamil Nadu under NHDP III on BOT (Toll) basis**
ii. **Four laning of Tindivanam - Krishnagiri Section of NH-66 from km 38/150 to km 214/000 in the State of Tamil Nadu under NHDP III on BOT (Toll) basis**
iii. **Four laning of Muzaffarpur-Sonbarsa Section of NH77 in the State of Bihar under NHDP III on BOT (Toll) basis**
iv. **Four laning of Pune – Sholapur Section of NH 9 in the Maharashtra under NHDP III A on BOT (Toll) basis**

25. It was noted that the projects were unviable as four laned project highways. Further, the traffic projections did not support immediate four laning of the project highways. It was decided that the Dindigul-Theni - Section of NH45 Ext and Kumili-Theni Section of NH 220 may be restructured as a two lane project with paved shoulders. The latter three project highways may be restructured as two laned highways with paved shoulders, with augmentation to four laning on reaching the projected design capacity of 18000 PCUs. The revised documents may be sent to DEA for record.

(Action: DoRTH)

26. It was noted that Planning Commission had sent detailed comments on project DCAs. Chairman, NHAI stated that though the observations were largely acceptable, some observations, which appeared to contravene IRC guidelines, were being examined by NHAI. NHAI was requested to send the written response on the observations of Planning Commission to DEA for record.

(Action: DoRTH, NHAI)

27. The projects were granted final approval subject to satisfaction of conditions cited in para 24 and 25 above.

Agenda item 8: Note on changes in Model Concession Agreement (MCA)

28. Chairman, NHAI informed that the Organisation was in discussion with various stakeholders, including banking organisations, for better response for NHDP projects during the present economic downturn. Certain changes in the MCA had been suggested by the banks which had been circulated to the members of the PPPAC for consideration. Representative of Planning Commission suggested that the proposal may be considered by the IMG for the MCA headed by Secretary, DoRTH. Secretary, DoRTH clarified that it was not proposed to change the MCA; certain relaxation from the provisions of the MCA were being sought for a period of one year in view of the prevalent market conditions. It was noted that NHAI was examining the suggestions of the banks. It was decided that NHAI would share their recommendations on the lenders' suggestions with the members of PPPAC. The other members of the PPPAC would also examine the proposal. The PPPAC would consider the proposal on completion of the process of examination by the members.

(Action: NHAI, Members of PPPAC)

29. The meeting ended with a vote of thanks to the chair.

Annex

Ministry of Finance
Department of Economic Affairs
……

Public Private Partnership Appraisal Committee (PPPAC)
23rd Meeting on February 20, 2009

List of Participants

I. Department of Economic Affairs

i. Shri Ashok Chawla, Secretary (In Chair)
ii. Smt L.M. Vas, Additional Secretary
iii. Shri Govind Mohan, Joint Secretary
iv. Smt. Aparna Bhatia, Joint Director
v. Ms. Pratibha A, Deputy Director

II. Department of Expenditure

vi. Shri M. A. Siddique, Deputy Secretary

III. Planning Commission

vii. Shri Gajendra Haldea, Adviser to Dy. Chairman
viii. Shri Ravi Mittal, Adviser
ix. Shri K.R. Reddy, Joint Adviser

IV. Ministry of Law

x. Ms. D. Bhardwaj

V. Department of Road Transport & Highways

xi. Shri Brahm Dutt, Secretary
xii. Shri P.K. Tripathy, Joint Secretary

VI. Department of Shipping

xiii. Shri A.P.V.N. Sarma, Secretary
xiv. Ms. Geetu Joshi, Deputy Secretary

VII. National Highways Authority of India

xv. Shri Brijeshwar Singh, Chairman
xvi. Shri A. Didar Singh, Member (Finance)
xvii. Shri M.P. Sharma, CGM
xviii. Shri S.S. Nahar, CGM

VIII. Kandla Port Trust

xix. Mr. Tamil Vanan, Chairman

IX. New Mangalore Port Trust

xviii. Shri P.D. Vaghela, Chairman