

Government of India
Ministry of Finance
Department of Economic Affairs

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**Empowered Committee for the Scheme for Financial Support to Public Private
Partnerships in Infrastructure**

Sixth Meeting on January 21, 2009

Record Note of Discussions

The sixth meeting of the Empowered Committee, chaired by Secretary, Economic Affairs was held on January 21, 2009 in North Block, New Delhi. The list of participants is annexed.

2. The Chairman welcomed the participants and noted that the Empowered Committee, in its fifth meeting, held on January 20, 2009 had met to consider the proposal from Government of Maharashtra for amendments in the draft Concession Agreement (DCA) for Mumbai Metro Rail Project – Corridor II (Charkop-Bandra-Mankhurd). The Empowered Committee had also considered key observations of Planning Commission in respect of the project DCA, received subsequent to the project being recommended by Empowered Committee to Finance Minister. He noted that while the key issues raised by Planning Commission were discussed during the fifth meeting, the Empowered Committee had remitted the other outstanding issues to a small group with representatives of DEA, Planning Commission and MMRDA. The Empowered Committee was meeting again, after those deliberations, to consider the outstanding issues, if any, and to approve the amended project documents for Mumbai Metro Rail Project – Corridor II .

3. Secretary, Urban Development observed that all members of Empowered Institution (EI) and Empowered Committee (EC) had deliberated at length on the project proposal before it was recommended to the Finance Minister for ‘in-principle’ approval. He noted that based the approval of project documents, thus granted, the project authorities had invited financial proposals from the shortlisted bidders (RfP). He emphasised that MMRDA had proposed few amendments in the project documents based on consultations with the bidders during the pre-bid conference, which did not alter the core of the concession agreement. He queried about the justification of examination of the observations on the project DCA by Planning Commission, by the Empowered Committee at this advanced stage of

bidding, which could result in modification in the principle tenets of the Concession Agreement and require another pre-bid consultation with the bidders.

4. Director (Infrastructure), DEA clarified that the Planning Commission, after clearance of the project by Empowered Committee in its fourth meeting, held on August 25, 2008, had undertaken legal appraisal of the project. It was emphasised that certain clauses could result in contingent liabilities for the project, which required to be mitigated / ring-fenced. Accordingly, it was decided that the observations of Planning Commission would also be considered by the Empowered Committee, while considering amendments proposed by MMRDA in the project documents. Furthermore, during the fifth meeting of the EC, it was decided, with the approval of the Chair, to first consider the observations of Planning Commission since, on examination of the proposed amendments by MMRDA, it was noted that many of the observations had already been suitably addressed by the Sponsoring Authority in the project documents.

5. The Empowered Committee noted that while most of the issues highlighted by Planning Commission had been suitably addressed/ resolved by the group constituted by the EC, few issues required consideration and decision by the EC. The EC, thereafter, deliberated upon these issues as under:

5.1 **Article 29- Effect of Variations in Traffic:** It was noted that the Empowered Committee in its fifth meeting had decided that the Article, which had not been used by the project authorities in the DCA may be restored in the document. The matter was being considered again in the sixth meeting of the Empowered Committee at the instance of the Project Authorities. Representative of MMRDA explained that the State Government had deliberated on the matter in detail earlier and was of the view that the provision should not be incorporated in the Concession agreement on two counts; first, in Mumbai adequate ridership would not be a cause for concern and most trains are packed with average passenger traffic of 16 persons per square meter during peak traffic hours; secondly, it would be difficult to monitor ridership, hence there would be scope of manipulation on the part of the concessionaire to under-report the traffic to secure extension in the concession period. Secretary, Urban Development stated that the Department supported the views of the Sponsoring Authority and stated that Article 29 could be considered based on the city under consideration and recommended that deletion of Article 29 may be accepted as a project-specific decision. Representative of Planning Commission pointed out that the clause was not oriented towards additional comfort to the concessionaire or extension of the concession period alone; it could also come into force if the traffic breached the designated levels and result in curtailment of the concession period.

Representative of MMRDA reiterated that incorporation of the said Article could result in under-reporting of the traffic through manipulation of issuance of tickets, etc. by the concessionaire. It was decided that the Empowered Committee would recommend to the Government of Maharashtra to consider incorporation of the Article 29 in the project DCA; and the final view on the matter would be taken by the State Government.

- 5.2 **Article 5.6- Engagement of Personnel:** The latter part of the Article provides that the Government has the power to cause the concessionaire to change the Project Manager. Representative of MMRDA explained that the performance of the Project Manager was critical for the execution of the project and its timely completion; hence the State Government was keen to retain the provision in the interest of the project. Representative of Planning Commission stated that the clause provided the Sponsoring Authority with intrusive powers on day to day business decisions of the concessionaire. It was decided that the said provision would be deleted from the project DCA.
- 5.3 **Article 10.3.2- Extent of Right of Way:** The Article provides that the Government shall grant vacant access and Right of Way (ROW) such that the appendix shall not include more than 50% of the total area of the Site required. Planning Commission had pointed out that the Appendix should not indicate more than 10% of the aggregate land required for the Project. The representative of MMRDA assured that the land would be provided in due course to ensure that the progress of the project is not hampered. It was clarified that to provide adequate measure of confidence to the concessionaire, it was proposed to undertake a joint survey of the land with the selected concessionaire and to provide a schedule with milestones for grant of RoW to the concessionaire. It was emphasized that RoW under consideration was 32 km of land in Mumbai, including road stretches. Hence, the same was proposed to be provided in a phased manner, as required by the concessionaire, commensurate with progress of construction. It was informed that the experience of the State Government with Line I of Mumbai Metro Rail (VAG corridor) was that 50% land was adequate provisioning before financial closure of the project, since the activities such as setting up the SPV, pre-construction activities, mobilisation of equipment, etc. require a long process, which took about one year with Line 1. The RoW has been provided smoothly, thereafter, and the project was progressing at a steady pace, almost two years ahead of schedule. Secretary, Urban Development emphasized that it should be acknowledged that the Project Authorities were equally keen to ensure progress of the project, hence a practical and balanced approach may be adopted while recommending adequate extent of RoW in the said Article.

It was decided that the State Government would reconsider the requirement and indicate the extent of RoW in the said article, specify the milestones for grant of access to the remaining land required, and provide that non-adherence to the agreed milestones would constitute an event of default by the Sponsoring Authority.

- 5.4 **Discounted and Differential fare:** The Empowered Committee noted that the Concession Agreement did not have a provision relating to discounted fare for frequent users or differential fare for peak and off peak hours.
- 5.5 **Additional Termination Payment:** Representative of MMRDA agreed to incorporate definition and reference to Additional Termination Payments in Articles 34 and 37, as recommended by Planning Commission.
- 5.6 **Article 34- Force Majeure:** It was noted that the Force Majeure provision in the DCA covered of events occurring outside India which would affect delivery of rolling stock. Representative of Planning Commission urged that Clause 34.2 (c) and Clause 34.2 (f), presently not used, may also be provided for in the DCA as a good industry practice. Representative of MMRDA stated that the matter had been considered, and with the approval of the Chief Minister, a decision had been taken that relief under Force Majeure clause, for events occurring outside India, should be confined in respect of rolling stock. Extending similar relief in respect of construction and related activities may result in misuse of the clause by the concessionaire to cloak other infirmities/delays in reaching the project milestones. Representative of Planning Commission pointed out that the provision did not provide any financial benefit to the concessionaire, and was available only for the contractors of the concessionaires and not sub-contractors. The Empowered Committee recommended that the Government of Maharashtra may take the final decision on the retention of the two deleted sub-clauses.
- 5.7 **Article 38- Divestment of the Project upon termination of the Concession Agreement:** It was agreed that Planning Commission would obtain legal advice on the formulation of the clauses in the DCA with the objective to ensure that the observations of Planning Commission on the matter have been addressed in the project document. Planning Commission was requested to ensure that the assignment was completed at the earliest.
- 5.8 **Article 9.3-Performance Security:** It was noted that the Group to examine the modifications in the project DCA, proposed by MMRDA/ suggested by

Planning Commission had accepted the provision in the DCA in respect of release of performance security after the Concessionaire had expended 40 percent of the Total Project Cost. Representative of Planning Commission requested a review of the decision and suggested that the level may be retained at 20 percent of the total project cost, since 40 percent threshold would not provide additional security to the Government while, it may act as a deterrent to the Concessionaire and add to the Project Cost. Representative of MMRDA explained that since the damages payable on default were with reference to the quantum of performance security, higher level of performance security had been provided. It was decided that 40 percent threshold may be retained.

(Action : GoM, MMRDA)

6. The Empowered Committee noted that the Empowered Committee, in its fifth meeting, had considered few of the key amendments in the DCA proposed by MMRDA. Thereafter, the Group with representatives of Planning Commission, DEA and MMRDA reviewed the proposed changes. While most of the proposed modifications had been decided for suitable incorporation/deletion in a manner acceptable to the members of the Group, few proposed amendments required consideration of the Empowered Committee. These changes were accordingly examined by the Empowered Committee. After deliberation, it was decided as under:

- 6.1 **Clause 10.2.1.1** provides that with the prior approval of the Government, the concessionaire may undertake design and/or construction work during the development period. It was decided that the provision may be deleted.
- 6.2 **Clause 14.3.2** – Grant of provisional certificate for part operating of the line: It was agreed that the Clause may be retained if a contiguous stretch is ready, subject to suitable incorporation in the clause that part provisional certificate is granted subject to adherence of project milestones for the incomplete parts of the rail system and its completion as per schedule.
- 6.3 **Clause 12.4.1- Conflict of Interest:** The clause was sought to be amended to change cross holding percentage from 1 % to 10% for the purpose of determining the conflict of interest. It was noted that the PPPAC had approved the cross holding percentage of 5% for determining the conflict of interest in respect of the proposal for Redevelopment of New Delhi Railway Station. It was decided that MMRDA may ensure that the project DCA mirrors the provision indicated in the project RfQ document; if the RfQ

document does not provide for such a threshold, it may be indicated as 5% in the said Clause.

(Action : GoM, MMRDA)

7 Representative of Planning Commission requested that the Total Project Cost of the project, approved as Rs 7,660 crore may also be reviewed by the Empowered Committee. It was pointed out that the capital cost of the project had been increased from Rs 4,480 crore to Rs 7,660 crore without its evaluation by a certified technical organisation. Representative of MMRDA stated that the cost had been certified first by Metropolitan Commissioner, MMRDA (as prescribed under the Scheme for Financial Support to PPPs in Infrastructure) and subsequently by Chief Secretary, Maharashtra. It was emphasised that the observation by Planning Commission was unjustified since the estimate prepared by Planning Commission for the project and shared with the State Government had indicated an estimated project cost of about Rs 9,000 crore. Secretary, Urban Development pointed that the matter had been deliberated at length during meetings of EI and EC before acceptance of TPC and that the process prescribed under the Scheme had been observed while granting approval to the project. He emphasised that the cost thus recommended should be taken as final and suggested that any further review/ examination of the matter should be in accordance with the procedure prescribed under the Scheme. The Empowered Committee noted that the initial project cost of Rs 5,527 crore was based on 2005 prices and the 8th meeting of Empowered Institution, held in January 2007, had not approved the project cost. Further, the project cost and views of the members of the Committee had been deliberated at length by the Empowered Institution and Empowered Committee in August 2008 before the proposal was recommended to Finance Minister for in-principle approval for VGF assistance. The then Finance Minister had also considered the recommendation and the concerns of Planning Commission before granting in-principle approval for VGF support for the project. Accordingly, the Empowered Committee decided that review of the TPC was not warranted.

8. Representative of Planning Commission further indicated that the Real Estate potential of the project was not being adequately utilised for the project, which would imply a greater requirement of VGF. It was emphasized that the land earmarked for the car depots at Mankhurd and Charkop could be used for real estate development above the ground floor. Representative of MMRDA reiterated that the matter had been extensively discussed earlier during meetings of the EI and EC held in August 2008 and a decision taken on the matter after considering all associated issues. The Chairman of the Empowered Committee noted that the matter had also been considered by the then Finance Minister, who had also replied on the subject to

the Deputy Chairman, Planning Commission. It was decided that review of the matter by the Empowered Committee was not warranted.

9. The meeting ended with a vote of thanks to the Chair.
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