

Ministry of Finance
Department of Economic Affairs

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Public Private Partnership Appraisal Committee (PPPAC)
20th Meeting on December 31, 2008

Record Note of Discussion

The 20th meeting of the Public Private Partnership Appraisal Committee, chaired by Secretary, Economic Affairs was held on December 31, 2008. The list of participants is annexed.

2. The Chairman welcomed the participants and noted that the PPPAC would consider five projects, viz., one from Ministry of Railways (MoR) and the others from Department of Road Transport and Highways (DoRTH). It was decided to first consider the proposals from DoRTH.

3. Representative of Planning Commission sought permission of the Chair to make a short presentation. It was indicated that while the presentation was on the larger issue of development of the highway sector, the issues were also germane to the proposals under consideration. Secretary, DoRTH noted that the presentation had earlier been made before the Empowered Sub-committee of Committee on Infrastructure, where the members of the PPPAC, or their representatives, were present. It was suggested that since the presentation was not specific to the projects proposals under consideration, the agenda items of the meeting may be first considered. It was agreed that Planning Commission would highlight the issues during discussion of the project proposals.

Agenda Item 2: Proposal from DoRTH: Four laning of project highways on BOT (Annuity) basis.

- i. Four laning of Hazaribagh-Ranchi section of NH 33 in the state of Jharkhand under NHDP III on BOT (Annuity) basis.**
- ii. Four laning of Hajipur-Muzafarpur section of NH 77 in the state of Bihar under NHDP III on BOT (Annuity) basis.**

4. Representative of DEA informed that the two proposals had earlier been considered by the PPPAC in its 19th meeting on November 21, 2008, which had, after deliberation, deferred the agenda item since Planning Commission, while raising concerns about the financing of the annuity proposals and the proposed project structure, had not undertaken a detailed legal appraisal of the DCAs in respect of the

two projects. However, Planning Commission had not undertaken appraisal of project DCAs during the intervening period of one month between the 19th and 20th meetings of PPPAC.

5. Chairman, NHAI informed that the project highways had been bid out twice as BOT (Toll) projects but did not elicit any response. Accordingly, with the approval of CCEA, it was decided to invite bids on BOT (Annuity) basis. The cost per km of the first project was around Rs 9 crore per km while the cost of the latter was Rs 8.36 crore per km. He emphasised that the four laning of the road was required based on the average traffic movement and the speed restrictions being experienced by the traffic and urged that the projects, based on the revised/new MCA for BOT (Annuity) projects, may be granted approval.

6. Representative of Planning Commission made the following observations:

- i. Budget/availability of resources : The approved Financing Plan for NHDP states that the annual annuity limit of NHAI may be fixed on a year to year basis in consultation with the Finance Ministry and the Planning Commission, keeping in view the objective that all NHAI projects are fully funded and the borrowings, including annuity payments, are determined so that they can be serviced out of the projected cess revenues. Since the Eleventh Plan does not provide any GBS for NHDP programme, DoRTH needs to fix the annual borrowing and annuity limit in consultation with Ministry of Finance and Planning Commission before any new Annuity Projects are taken up. The revised financing plan proposed by NHAI was considered by Committee of Secretaries (CoS) in its meeting held on 29.7.2008. It was decided that the financing plan may be considered first by the Committee set up in the Planning Commission under the Chairmanship of Shri Anwarul Hoda, Member, Planning Commission. NHAI receives about Rs 7000 crore as cess revenues every year; it has already committed 27 projects under annuity mode with an annual liability of about Rs1800 crore. Furthermore, the Hoda Committee is considering a proposal to allocate one third of cess revenues for non NHDP National Highway projects. In case it is so decided, there would not be much scope for awarding more annuity projects from cess funds as all the cost are to be borne by NHAI. The CCEA in its meeting held on 5.6.2008 had decided that a Committee under the chairmanship of Secretary, DoRTH will establish a ceiling on the liability arising out of annuity payments as a proportion of expected cess revenues. It was, therefore, suggested that PPPAC may consider annuity projects only after the annuity limit is finalised.
- ii. Project Structure: The two projects proposed under Annuity mode were bid out earlier under BOT (Toll) mode but no response was received. This was

primarily due to the reason that the concession period was kept much lower than what is provided in the MCA and that the project involved construction of six lane permanent concrete structures. In case the project is restructured after reducing costs and re-bid again on BOT (Toll) mode, suitable offers are likely to be achieved.

- iii. Migration to the annuity model: Instead of proceeding with a BOT (Annuity) mode, a hybrid model consisting of elements of BOT (Toll) with viability gap funding and residual annuity could be adopted to reduce the drain on the exchequer.
- iv. Deferring the agenda item: The two annuity projects may be deferred and brought back after compliance of the above.

7. The representative of Department of Expenditure also supported the need for, at the first instance, examining whether the projects would fall within the approved financing plan for NHAI.

8. Representative of NHAI informed that as per the existing procedure, NHAI / DoRTH brings before the Planning Commission the proposed budget for the following year which includes not just the cess payment and GBS but also IE&BR which includes borrowings from international agencies/market as well as proposed raising of funds through issue of 54EC bonds. NHAI had already submitted a revised Financing Plan to the Committee set up by Planning Commission under chairmanship of Shri Anwarul Hoda and this plan includes the annuity payment for approved projects as well as for J&K and SARDPE projects which are expected to be taken up under Annuity. NHAI presently had 25 projects under Annuity mode with an expected annual Annuity of about Rs.1818 crore once all the projects are on stream. During the current year, NHAI paid Annuity of only Rs 576 crore for the projects under Phase-I. Revised Financing Plan including a sensitivity analysis for including further projects under Annuity was being considered by the Committee under Chairmanship of Secretary, DoRTH who would be examining the issue of liabilities arising out of the Annuity payment. As far as the present two projects to be taken up under Annuity were concerned, it was pointed out that NHAI had not given out any project of Phase-I, II or III under Annuity mode during the last one year. Three small projects under SARDPE-NE had been bid out on annuity, for which there was a separate dispensation. Therefore, it was emphasised, that funds were available for the likely annuity outgo on account of the two projects.

9. Secretary, DoRTH pointed out that the projects had already been bid out twice on BOT (Toll) basis. Hence, following the procedure prescribed, with the approval of the CCEA, for mode of implementation of National Highway projects, they were eligible for being considered/bid out on annuity basis. It was further pointed out that the CCEA in its meeting held on 5.6.2008 had decided that a ceiling

would be established for annuity outflows. It had not decided that annuity as a mode of implementation of PPP projects could not be adopted at all. It was reiterated that annuity payments for the two projects could be met within the approved financing plan for National Highways. Drawing attention to the proposal by DoRTH regarding allocation of one third of cess revenues for non NHDP National Highway projects, currently being considered by Hoda Committee in Planning Commission, it was emphasised that the proposal had been made with the caveat that in case DoRTH would subsequently require more funds for its NHDP programme, the same would be provided by Ministry of Finance. It was further pointed out that the hybrid annuity model, suggested by Planning Commission, had been deliberated upon by Committee of Secretaries, and it was decided to proceed with a pure Annuity model for administrative convenience. Chairman, NHA added that re-examining the structure of the two projects to elicit a better response for BOT (Toll) may not be practicable in the current financial scenario.

10. The Chairman noted that the comments of Planning Commission regarding the financing plan and proper structuring of projects for attracting bids were relevant. He noted that the projects had already been bid out twice with the BoT (Toll) framework and that the administrative department was of the view that bidding in the same framework may not attract bids in the current scenario. Further, the likely annuity payments for the project were expected to be covered within the financing plan for the NHDP programme. Therefore, the projects could be considered by the PPPAC for clearance.

11. The representative of DEA noted that the projects were based on the new MCA for annuity projects. The Department had conveyed comments on the MCA with the approval of the Minister in charge. It was suggested that the same observations/ suggested modifications may also be incorporated in the project DCAs under consideration. These include:

- i. The concession period may not be left to be concessioning authority for its determination and may be determined with reference to the year in which the projected traffic would exceed the design capacity of the project highway.
- ii. Clause 27 of the draft DCAs states that "...Authority agrees and undertakes to pay to the Concessionaire for each Annuity Payment Period, on each Annuity payment date as set forth in Schedule M...". The term Annuity Payment Period has not been defined. The Annuity Payment Period may be defined as annual or semi-annual periods in the project documents.
- iii. Clauses 28.1.4 and 28.2.4 deal with delays not attributable to the concessionaire for payment of bonus or reduction in annuity provided such delays have occurred after successful completion of the first Project Milestone. The clause does not provide for any compensation if an event

like a force majeure event or authority default should have occurred prior to the first project milestone. This anomaly may be rationalized.

- iv. Clauses 39 and 41.1 allow for a doubling of the percentile amounts to be retained in the escrow account in the event of termination; and in the event of increase in costs/reduction in after tax return due to change in law from 5% to 10% and from 0.5% to 1% respectively. Assuming that these changes have been effected to protect the additional contingent liabilities arising in BoT (Annuity) vis-a-vis BoT (Toll), a symmetrical change in Clause 41.2, which deals with reduction in costs due to change in law is not justified. The old provisions may be retained in clause 41.2.
- v. Clause 27.10 in the base MCA deals with overloaded vehicles and additional fee for the same. This entire clause has been deleted. The Concessionaire should be given the option to prevent entry of overloaded vehicles into the highway so that such vehicles do not accelerate the deterioration of the highway. This would however be subject to the condition that the concessionaire shall have no cause or claim against the Authority in the event of his inability to prevent such overloaded vehicles from using the project highway.
- vi. The definition of Total Project Cost refers to actual cost of the project, less Equity support. When there is no Grant and hence no Equity Support, reference to Equity support may be deleted.
- vii. While the authority has retained the right to toll, the concessionaire's right to levy or collect toll has been removed, which is in order. But the DCA refers to Toll Plaza' in various places such as Clauses 12.3(f) {drawings of toll plaza), 45.1 (disclosure of specified documents at the Toll Plaza), **46.1.1** (Complaint register at the Toll Plaza), 48.1 (Project assets including the Toll Plaza), and Schedule C (Project facilities including Toll Plaza). Even the definition of Toll Plaza has been retained which *inter alia* states that the Toll Plaza location are to be decided by the Concessionaire in consultation with the Independent Engineer. Further, definitions in respect of tractor and truck have been removed, but those in respect of bus, car and motorcycle have been retained, which is not consistent. These anomalies need to be removed.

12. Secretary, DoRTH confirmed that the suggested changes would be incorporated in the project DCAs .

13. The projects were granted final approval subject to the modifications in the project documents as indicated in para 11 above.

(Action: DoRTH)

Agenda Item 3: Proposal from DoRTH: Four laning of project highways on BOT (Toll) basis.

- i. Four laning of Thiruvananthapuram-Kerala/Tamilnadu border section of NH 47 in the state of Kerala under NHDP IIIA on BOT basis.**
- ii. Four laning of Kerala/Tamilnadu border to Kanyakumari section of NH 47 and Nagercoil-Kavalkinaru section of NH 47B in the state of Tamil Nadu under NHDP IIIA on BOT basis.**

14. The representative of DEA indicated that majority of the stretch proposed under the scope of work for the two proposals was a new alignment since the existing road length had continuous built up area close to the road. The project financials suggested that the projects were unviable, even with 40% grant. Planning Commission had suggested that the project cost could be rationalised by adopting its suggestions on the Manual of Standards and Specifications. It was indicated that the view of DEA was that since the existing 2 lane road continues to be in operation, the four laning of the new alignment may not be immediately required, especially when the existing road is expected to take 50% of the traffic load. The new alignment could, therefore, be constructed initially as a two-lane highway to be augmented later to a four lane capacity, except for the road length which uses the existing NH 47 alignment. This would reduce the cost of the projects and also make them more viable.

15. The representative of Planning Commission emphasised that the projects, with their proposed structure, were unviable and suggested that in the first instance, they should be taken up only for two laning. It was further suggested that their viability could be enhanced by making the high cost structures on the project highways eligible for higher tolls provided under the new Toll Rules.

16. The representative of Department of Expenditure noted that since the entire project length had built up area along the roads, fresh alignment was the only alternative for the projects. He supported the two-stage augmentation suggested by DEA for these projects.

17. The project proposals were granted final approval subject to the modifications in the project documents to provide for two-stage augmentation. The fresh alignment proposed may be two laned till the design capacity for four laning of the highway is reached.

(Action: DoRTH)

Agenda Item 4: Proposal from DoRTH: Addressing concerns of Total Project Cost and bankability of NHDP projects, earlier granted approval by PPPAC, for greater financial viability.

18. The representative of DEA stated that the PPPAC in its 19th meeting held on November 21, 2008 had considered the proposal from DoRTH for enhancing the Total Project Cost and concession periods of National Highways projects approved by PPPAC for greater financial viability. The 19th PPPAC had decided that Department of Expenditure would examine the proposal and send its recommendation to Chairman, PPPAC. The DoE, after examination of the matter in consultation with the representatives of DoRTH recommended that the measures sought by DoRTH may be approved as a one-time measure. DEA had also examined the proposal and supported the proposal for enhancement of Total Project Costs. The increase in the Concession periods, without a case by case examination, was not supported.

19. It was noted that the issue was subsequently discussed in a meeting of Committee of Secretaries on December 10, 2008. During the meeting, it was, *inter alia*, decided that DoRTH may go through the financial bidding process with increase in TPC by 10% and 20% for the projects with feasibility reports prepared in 2006 and 2007 respectively. The representative of Planning Commission further suggested that in case the administrative department requires to extend the concession period for any project, they may propose the same at a later stage to the PPPAC. This was agreed to.

20. The representative of Planning Commission suggested that the PPPAC could consider undertaking an examination of the performance of the NHDP projects cleared by it. Secretary, DoRTH supported the suggestion and further informed that the Department was in the process of independently examining the matter and placing it before the CoS. Accordingly, the assessment of performance could be undertaken by the PPPAC during the third week of January, 2009. This was agreed to.

(Action: DEA, DoRTH)

Agenda Item 1: Proposal from Ministry of Railways: Approval of the amended RfQ for Redevelopment and Modernisation of New Delhi Railway Station

21. Representative of DEA stated that the proposal has been considered by the PPPAC in the 17th meeting and granted 'in principle' approval. As advised by Department of Expenditure (DoE), Ministry of Railways (MoR) had discharged the RfQ for the project dated 30.10.2007. Subsequently, bids had been reinvited on 27.10.2008 as per the amended RfQ. MoR had requested PPPAC to approve the suggested amendments in the RfQ as per the provisions in Ministry of Finance. The proposal was considered in the 19th meeting of the PPPAC on November 21, 2008. After deliberations, the 19th PPPAC decided that:

- i. In Clause 2.2.1 (c), the direct and indirect threshold of the cross shareholding could be retained at five percent of the paid up and subscribed share capital of the applicant or its member(s) or associate(s), for the purpose of reckoning conflict of interest, which would satisfy the twin objectives of facilitating competition and checking cartelisation.
- ii. The provision of the model RfQ for Clause 2.2.1 (d) would be retained.
- iii. Planning Commission would examine the proposed amendments in the RfQ, including inter alia, amendments to Clauses 2.2.2 (A) and 3.2.1 in consultation with the representatives of MoR and send their appraisal in a period of one week to the PPPAC for consideration.

22. It was noted that Planning Commission had not sent an appraisal of the proposal. Planning Commission had reiterated that PPPAC is not the forum for discussing any modifications to the model RfQ document. Furthermore, Government was considering setting up of a committee under Sh. B.K. Chaturvedi Member (Power), Planning Commission to suggest changes in the model RfQ document. MoR may be advised to proceed with the project based on the model RfQ document and may use the flexibility provided through square brackets and footnotes and other eligibility conditions under Clause 2.2.1 (e).

23. Representative of MoR made a presentation bringing out the following:
- i. Para 9.1 of the D/o Expenditure's O.M. circulating the model RfQ document provides for sector or project specific changes to be made in the project RfQ with the prior approval of PPPAC. This view was endorsed by DEA and DoE.
 - ii. The changes were proposed in the project RfQ on the basis of experience from the earlier RfQ exercise carried out by MoR wherein difficulties on account of conflict of interest clause, definition of associate, indirect control, loose definition of project categories, inadequate emphasis on technological relevance, project development experience and gaps in the

formats allowing the bidders to provide misleading/incomplete information led to discharge of the RfQ.

- iii. The above deficiencies were being sought to be rectified by modifying/introducing the clauses related to conflict of interest, defining indirect control and project categories, capping revenue claims at 50% of the cost of the project, technical proposal, sequence of evaluation, earnest money and new formats for seeking information. These requirements/changes could not be dealt with through flexibilities provided in the Model RfQ through footnotes and square brackets.
- iv. The word 'Associate' in the Conflict of Interest clause was proposed to be deleted to facilitate evaluation of the bidders.

24. The representative of Planning Commission pointed out that for symmetric treatment of the matter, removal of the word "Associates" from Conflict of Interest clause would require its deletion from the assessment of technical and financial score of the bidders. This could result in legal disputes since infrastructure projects are implemented through establishment of Special Purpose Vehicles. Representative of Department of Expenditure noted that changes in the eligibility criteria after discharge of the first RfQ could result in litigation and disputes.

25. After detailed discussions, it was decided that MoR may proceed with the RfQ process subject to the following:

- i) The decisions of the 19th meeting of the PPPAC reproduced in para 21 above, regarding Conflict of Interest clause and non eligibility of Adviser(s) to be engaged by the applicant on the same project would be adhered to.
- ii) MoR shall delete the provision proposed by them with regard to foreign exchange deflator.
- iii) The reference to Associate(s) in Conflict of Interest clause and the provision for reckoning the technical and financial score of the Associate(s) in the relevant clauses shall be retained in the RfQ document.
- iv) The formulation regarding the Experience Score in respect of revenue in category I & II projects, provided in the Model RfQ, may be retained.
- v) The original formulation for project categories may be adhered to.
- vi) The proposed changes in formats to meet the specific needs of the project/RfQ document were agreed to.
- vii) Flexibilities provided in the footnotes and square brackets and Clause 2.2.1(c) may be appropriately used.

(Action: Ministry of Railways)

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

**Ministry of Finance
Department of Economic Affairs**

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**Public Private Partnership Appraisal Committee (PPPAC)
20th Meeting on December 31, 2008**

List of Participants

- I. Department of Economic Affairs**
- i. Shri Ashok Chawla, Secretary, Economic Affairs (In Chair)
 - ii. Shri Govind Mohan, Director
 - iii. Smt. Aparna Bhatia, Joint Director
 - iv. Ms. Prathibha A, Deputy Director
- II. Department of Expenditure**
- v. Shri M.A. Sidhique, Deputy Secretary
- III. Planning Commission**
- vi. Shri Gajendra Haldea, Adviser to Dy. Chairman
 - vii. Shri Ravi Mittal, Adviser
 - viii. Shri S.K. Saha, Director
 - ix. Shri S.P. Chouhan, Director
- IV. Ministry of Law**
- x. Ms. Poonam Suri
- V. Ministry of Railways**
- xi. Shri V.K. Gupta, Adviser (L& A)
 - xii. Shri S.K. Mishra, Executive Director, Railway Board
 - xiii. Shri P.K. Aggarwal
 - xiv. Shri A.K. Gupta
 - xv. Shri Rajesh Agarwal
- V. Department of Road Transport & Highways**
- xvi. Shri Brahm Dutt, Secretary
 - xvii. Shri P.K. Tripathy, Joint Secretary
- VI. National Highways Authority of India**
- xviii. Shri Brijeshwar Singh, Chairman
 - xix. Dr A. Didar Singh, Member (Finance)

- xx. Shri Nirmal jit Singh
- xxi. Shri S.K. Puri, Member(Tech.)
- xxii. Shri M.P. Sharma, CGM
- xxiii. Shri Rajesh Poonia, GM(T)
- xxiv. Shri H.C. Arora, CGM
- xxv. Lt. Col. Chandan, GM
- xxvi. Shri G. Suresh, GM