

Ministry of Finance
Department of Economic Affairs

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Public Private Partnership Appraisal Committee (PPPAC)
22nd Meeting on January 13, 2009

Record Note of Discussion

The 22nd meeting of the Public Private Partnership Appraisal Committee, chaired by Secretary, Economic Affairs was held on January 13, 2009. The list of participants is annexed.

2. The Chairman welcomed the participants and invited Director (Infrastructure) to present the agenda. Director (Infrastructure) informed that three port projects would be considered during the meeting, of which two are container berths and one a coal berth. He requested Department of Shipping (DoS) to make short presentations on the proposals and thereafter comments would be invited thereupon.

3. Adviser to Deputy Chairman, Planning Commission stated that the DCAs for the three projects require changes, as several clauses would result in disputes or loss to the public exchequer. There is no concept of "total capital cost" in the DCAs that limits the contingent liabilities in a precisely defined manner. This could lead to avoidable disputes and open-ended contingent liabilities for the Port Authorities and Central Government. It was stated that definitions of Actual Project Cost, Bid Security, Debt Due, Drawings and Designs, Environmental Law, Equity, Adjusted Equity, Expert, Government Authority, Independent Engineer, Licence 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.

4. The representative of Planning Commission stated that 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 above observations of the Planning Commission have not been examined on merits in any forum so far.** 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.

5. The representative of Department of Expenditure was also of the view that comments of Planning Commission raised issues on contingent liabilities and needed consideration on merits.

6. The representative of DEA stated that the observations of Planning Commission related to the clauses of the MCA of the ports sector, which has been approved by the Cabinet. It was pointed out that the observation that comments of Planning Commission have not been examined on merits in any forum was contestable since the views were considered by the IMG constituted for finalisation of the MCA as well as Committee of Joint Secretaries established in the Cabinet Secretariat, with representation from stakeholder Departments, including Planning Commission, for finalisation of the MCA for ports sector. It was noted that two proposals of Paradip port, based on the MCA, and cleared by PPPAC in the 18th meeting, had recently been approved by the Cabinet. Therefore, the instant proposals could also be considered by adopting the same approach of not recommending departures from the approved MCA.

Agenda Item 1: Development of Eighth Berth as Container Terminal on Build Operate & Transfer (BOT) basis at Tuticorin Port

7. Chairman, Tuticorin Port Trust made a presentation on the project. The PPPAC noted that the estimates of future container traffic at the existing berth No.7 provided adequate spill-over of traffic for the container terminal at the proposed eighth berth. It was noted that the capital cost of the project was Rs. 312.23 crore and that there was no variance between the cost proposed by the port authorities and considered by TAMP while fixing the tariff rates. The upfront tariff fixed by TAMP had been incorporated in the Appendix-12 of the Draft Concession Agreement (DCA) of the project. It was noted that the process of short-listing the bidders at the RfQ stage had been completed and the RfP to the five short listed bidders would be

issued after obtaining the approval of PPPAC. The proposed bid due date was February 28, 2009. The service commencement on the eighth berth would be after two years of construction period.

8. The representative of Planning Commission observed that Appendix-12 of the DCA provided the details of the formulation of upfront tariff for container terminal at Port. It was suggested that instead of reproducing the tariff notification by TAMP, it may be advisable to provide only the rates of tariff in the DCA. Since the MCA prescribes that the relevant extracts of the tariff notification may be provided in Appendix-12, the proposed change would not constitute a departure from the MCA. This was agreed to.

9. The representative of Planning Commission indicated that various parameters are used by TAMP in determining the tariff, which have all been quantified in the tariff notification. Any change in these parameters, viz., capacity; capital cost of the terminal; operating cost of the terminal; tonnage/TEU's to be handled could affect the revenues of the concessionaire, who may seek revision of tariffs. In order to avoid any challenge or dispute, the following clause could be inserted 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. "

10. The representative of DoS stated that the MCA clearly provides the parameters for revision of the tariff caps. Hence, the clause suggested by Planning Commission may not be necessary. Furthermore, the proposed formulation would constitute a departure from the MCA. The representative of Planning Commission stated that the proposed clause was clarificatory in nature and would provide an additional safety to ensure that the tariff is not under dispute at a later stage. Therefore, its inclusion would strengthen the project documents from the legal perspective.

11. The representative of DEA pointed out that while the proposed clause was not provided for in the MCA, it was not at variance with the spirit/ principles enshrined in the MCA and TAMP guidelines. Hence, it should not be treated as an amendment to the MCA. Furthermore, PPPAC could suggest/approve departures from MCA in the project DCAs.

12. It was pointed out that the amounts of bid security and payments to the concessioning authority had not been indicated in the DCAs and may be specified by the port authorities before bidding the projects. The project site details provided in the DCA were very generic. The details of the project site with suitable drawings & description and detailed project assets may be indicated in Appendix 1 and 2 of the DCA respectively. This was agreed to.

13. The PPPAC granted final approval to the project subject to suitable incorporation of the safety clause suggested by Planning Commission and reproduced in Para 9 above in the project DCA.

(Action: DoS)

Agenda Item 2: Development of a Coal Terminal at Port of Mormugao, Goa on Design, Build, Finance, Operate and Transfer (DBFOT) Basis

14. Chairman, Mormugao Port Trust made a presentation on the proposal. It was noted that the existing facilities at the port included six dedicated berths for coal, iron ore, liquid bulk and two general cargo berths. The berth no. 7 was proposed to be developed as a dedicated coal handling facility, which would serve the coal requirements of the steel and power industries in Goa and adjoining regions of Karnataka. It was noted that to provide 300 meters quay length for the proposed berth, about 118 meters would have to be released from the existing liquid berth no. 8. It was explained that the liquid berth was operated by the Port Trust and the shift in the operations would not adversely affect the services of the said berth, which brought in finished products such as oil, ammonia, phosphoric acid and other chemicals to the region.

15. It was noted that the scope of work included reclamation of the water front area, capital dredging along side the proposed berth, laying railway tracks, designing and setting up coal handling plant, etc. It was confirmed that the proposed scope of work was to cater to the requirements of the proposed coal terminal and not as a common property resource for utilisation by other berths.

16. The PPPAC noted that there was variance in the project parameters *vis-a-vis* those approved by TAMP, including the yard and quay capacity and the capital cost of the project. Enhancement of these parameters in the project documents, could result in litigation or subsequent requests by the concessionaire for revision in the tariff rates. It was decided that the parameters approved by TAMP would be reflected as the project specifications in the project documents. It was agreed that the provision of Minimum Guaranteed Cargo would be retained in the project DCA to ensure an objective decision on the bid response.

17. The representative of Planning Commission observed that it was proposed to delete clause 7.1 (a) xiii in the project DCA which provided for Minimum Guaranteed Cargo. Deletion of this clause would impact the objectivity of the selection process since the bid variable was the percentage revenue share and not an absolute number. The representative of DoS stated that deletion of the clause was admissible as per the MCA and the Department was of the view that Minimum Guaranteed Cargo should not be stipulated for Greenfield projects.

18. The project was granted final approval subject to the following conditions:

- i. The parameters approved by TAMP would be reflected as the project specifications in the project documents
- ii. The responsibility of provisioning of power and water, as stipulated in clause 7.2 of the MCA, would be retained by the Concessioneing Authority.
- iii. The provision of Minimum Guaranteed Cargo, provided as Clause 7.1(a)xiii, would be retained in the project DCA.
- iv. Appendix-12 of the DCA would indicate provided the tariff rates for the coal terminal approved by TAMP and not the tariff notification.
- v. Clause 8.1.2 suggested by Planning Commission and reproduced in Para 9 above would be suitably incorporated in the project DCA.
- vi. The amounts of bid security and payments to the concessioneing authority may be specified in the project documents before bidding the projects. The details of the project site with suitable drawings & description and detailed project assets may be indicated in Appendix 1 and 2 of the DCA respectively.

(Action: DoS)

Agenda item 3: Construction of Container Terminal at Ennore Port in Tamil Nadu on BOT basis

19. CMD, Ennore Port Limited made a presentation on the proposal. It was noted that though a major port, it was incorporated as a company under the Companies Act, 1956 in 1999. Accordingly, the tariff caps for the terminal had not been fixed by TAMP. It was noted that the tariffs had been determined by National Maritime Academy; and that there were no variations between the parameters determined by NMA and those indicated in the project documents.

20. The project was granted final approval subject to the following conditions:
- i. The provision of Minimum Guaranteed Cargo, provided as Clause 7.1(a)xiii, would be retained in the project DCA.
 - ii. Appendix-12 of the DCA would indicate provided the tariff rates for the coal terminal approved by TAMP and not the tariff notification.
 - iii. Clause 8.1.2 suggested by Planning Commission and reproduced in Para 9 above would be suitably incorporated in the project DCA.
 - iv. The amounts of bid security and payments to the concessioning authority may be specified in the project documents before bidding the projects. The details of the project site with suitable drawings & description and detailed project assets may be indicated in Appendix 1 and 2 of the DCA respectively.

(Action: DoS)

21. The meeting ended with a vote of thanks to the chair.
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List of Participants

- I. Department of Economic Affairs**
- i. Shri Ashok Chawla, Secretary (Economic Affairs) (In Chair)
 - ii. Smt. L.M.Vas, Additional Secretary
 - iii. Shri Govind Mohan, Director
 - iv. Smt. Aparna Bhatia, Joint Director
 - v. Ms. Prathibha A, Deputy Director
- II. Department of Expenditure**
- vi. M.A.Siddique, Deputy Secretary (PF-II)
- III. Planning Commission**
- vii. Shri Ravi Mittal, Adviser
 - viii. Shri K.R.Reddy, Joint Adviser
- IV. Department of Legal Affairs**
- ix. Poonam Suri, Legal counsel
- V. Department of Shipping**
- x. Shri Vijay Chibben
 - xi. Shri Rajeev Gupta, Joint Secretary
 - xii. Smt.Geetu Joshi, Deputy Secretary
 - xiii. Shri Srinivasa Naik, Director (Port)
- VI. Tuticorin Port Trust**
- xiv. Shri G.J.Rao, Chairman
 - xv. Shri A.Subbiah, Deputy Chairman
 - xvi. Shri S.Natarajan, FA & CAO.
- VII. Mormugao Port Trust**
- xvii. Shri Praveen Agarwal, Chairman
- VIII. Ennore Port Trust**
- xviii. Shri S.Velumani Chairman-cum-Managing Director