

F.No. 3D(3)/2/2012-PPP(pt.)  
Government of India  
Ministry of Finance  
Department of Economic Affairs  
(PPP Cell)

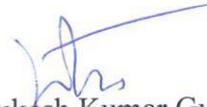
North Block, New Delhi  
Dated 17<sup>th</sup> June, 2019

**OFFICE MEMORANDUM**

**Subject: Record of Discussion of the 34th Meeting of Empowered Committee held on 03.06.2019 to discuss VGF issue of Hyderabad Metro Rail Project.**

The undersigned is directed to enclose a copy of Record of Discussion of the meeting of Empowered Committee held on 03.06.2019 on the captioned subject under the chairmanship of Finance Secretary and Secretary (DEA) for information and necessary action.

Encl: as stated above

  
(Mukesh Kumar Gupta)  
Director (PPP)

To,

1. CEO, NITI Aayog, Parliament Street, New Delhi
2. Secretary, Ministry of Housing and Urban Affairs, Nirman Bhawan, Maulana Azad Road, New Delhi
3. Secretary, Department of Legal Affairs, Shastri Bhawan, New Delhi
4. Secretary, Department of Expenditure, North Block, New Delhi
5. Chief Secretary, Government of Telangana, Hyderabad.

Copy to:

PPS to Finance Secretary and Secretary, DEA  
PPS to JS (IPF)

**Government of India**  
**Ministry of Finance**  
**Department of Economic Affairs**  
**(PPP Cell)**

**Empowered Committee for the**  
**Scheme for Financial Support to PPP in Infrastructure**  
**34th Meeting held on 3<sup>rd</sup> June 2019**

**Record Note of Discussion**

The 34th Meeting of Empowered Committee (EC) chaired by Finance Secretary and Secretary, DEA was held on 03.06.2019. The list of participants is annexed.

**Agenda Item: Hyderabad Metro Rail Project: VGF issues**

1. The meeting began with a brief presentation on the agenda item, especially with regard to the status of progress on decisions taken in the last EC meeting held on 16.01.2019. In the last EC meeting, the following decisions were taken:

- i. Department of Legal Affairs (DoLA) may opine on:
  - a. Applicability of the Central Metro Act, overriding the provisions for fare fixation enshrined in Schedule R of the Concession Agreement and also made applicable for the Viability Gap Funding provided under the Tripartite Agreement, keeping in consideration the fact that there are no provisions for PPP projects under the Central Act and this is a PPP project.
  - b. In case the applicability of the Central Act is found to be lawful, whether the fare determination should have been dealt with under the Change in Law provisions or under the Central Act.
- ii. Viability issue would be dealt with after determination of the legal issue first, taking into account the provisions of the VGF Guidelines, Tripartite Agreement and the Concession Agreement.

2. Commenting on the developments since the last meeting, the Chair noted that DEA was of the view that the Central Act was not applicable in this case in view of there being no provisions in the Central Act about public private partnership (PPP) projects and general principle about the sanctity of the contracts. However, very clear and unambiguous view about the applicability of the Act has been expressed by the Ministry administering the Central Act and also dealing with the metro projects. Further, the Ministry of Law has provided very clear and unambiguous opinion that the Central Act's provisions are applicable in this case and fare revision made by the Metro Rail Administration in this case is perfectly lawful. In view of this, Secretary, DEA stated that DEA is not pressing on the reservations it had and will accept the views and opinion of MoHUA and Ministry of Law. The Chair then invited representatives from the concerned ministries to provide their views.

3. On the applicability of the Central Metro Act, DoLA reiterated their views that:

- i. In view of the notification dated 24.1.2012, the Concessionaire, L&T Hyderabad Metro Rail Pvt. Ltd (LTHMRL) is a Metro Railway Administration under the Central Metro Act, 2002 and can fix the fare as per the provisions of Section 33 of the Act.
- ii. In view of the position at 3(i), the revision of fare as elaborated in Schedule-R of the Concession Agreement (CA) stands altered and the fare determination shall be under the Central Act only.
- iii. In the initial fare, a Fare Fixation Committee (FFC) recommendation is not necessary and therefore an FFC need not be constituted for this. For subsequent revision, an FFC is must.

4. No other participant had a different view. In view of this, the EC decided that on the basis of Legal Opinion provided by DoLA, the issue of applicability of the Central Metro Act gets settled and the Concessionaire has lawfully determined the initial fares under the Central Metro Act.

5. On the question of the Change in Law, it was brought to the notice of the EC that as per the CA, Change in Law means the occurrence of any of the following after the date of Bid:

- i. the enactment of any new Indian law as applicable to the State;
- ii. the repeal, modification or re-enactment of any existing Indian law;
- iii. the commencement of any Indian law which has not entered into effect until the date of Bid;
- iv. a change in the interpretation or application of any Indian law by a judgment of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the date of Bid; or
- v. any change in the rates of any of the Taxes that have a direct effect on the Project.

6. During the discussions, it was noted that the Concession Agreement was signed on 04.09.2010 and the Central Metro Act became applicable to this project in 2012. Therefore, the Change in Law provisions of the Concession Agreement are applicable to the project. Taking into consideration the legal opinion of DoLA and facts of the case, the EC decided that the applicability of Central Metro Act amounts to Change in Law as per CA.

7. It was noted that the Concessionaire vide its fare notification dated 25 November, 2017 has fixed the fare using a basis provided under the Central Metro Act (not provided for in the Concession Agreement), which is substantially higher than the fare as prescribed in Schedule R of the Concession Agreement. In view of the provisions of the Viability Gap Funding Scheme and Tripartite Agreement among Concessionaire, Lead Financial Institution, and Empowered Institution (with Project Authority as the confirming party), the relevant provisions of Change in Law in the CA become applicable to the case:

**Article 41.2: Reduction in Costs:** *“If as a result of Change in Law, the Concessionaire benefits from a reduction in costs or increase in net after—tax return or other financial gains, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.5% (zero point five percent) of the Realisable Fare in any Accounting Year, the Government may so notify the Concessionaire and propose amendments to this Agreement so*

*as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the decreased costs, increase in return or other financial gains as aforesaid. Upon notice by the Government, the Parties shall meet, as soon as reasonably practicable, but no later than 30 (thirty) days from the date of notice, and either agree on such amendments to this Agreement or on any other mutually agreed arrangement;*

*Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Government may by notice require the Concessionaire to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Concessionaire shall pay the amount specified therein to the Government; provided that if the Concessionaire shall dispute such claim of the Government, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 41.2 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement.*

**Article 41.3: Protection of NPV:** *Pursuant to the provisions of Clauses 41.1 and 41.2 and for the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Parties shall rely on the Financial Model to establish a net present value (the "NPV") of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred."*

8. It was brought to the notice of the EC that the Concessionaire gets the right to charge the higher fares as per its notification dated 25.11.2017 due to applicability of the Central Metro Act and associated Change in Law. Therefore, the Concessionaire becomes liable to pay back the gains from the higher fares to the Project Authority in NPV terms. Concession Agreement has been signed between the Project Authority and the Concessionaire. Therefore, any gains from Change in Law (in this case higher fares notified by Concessionaire) are to be paid back to the Project Authority as per applicable Article 41 of the Concession Agreement. It was also mentioned that this Article refers only to financial implications of "Change in Law" as mentioned in the CA.

9. Secretary, Ministry of Housing and Urban Affairs (MoHUA) argued that concessionaire has suffered losses due to Change of Scope, Force Majeure, etc. It was also mentioned that the Commercial Operation Date of 71 km was expected to be in July 2017; however, till date only around 56 km of Metro is operational. He, therefore, proposed that impact of the cost overrun due to Change of Scope, Force Majeure and Other Reasons may also be considered and Viability Gap may be reassessed after taking the additional cost implications on account of these factors.

10. Following provisions were brought to the notice of EC with respect to the Change of Scope, Force Majeure and Time and Cost Overruns.

i. Article 16.3.1 of the Concession Agreement states as under:

*“Within 7 (seven) days of issuing a Change of Scope Order, the Government shall make an advance payment to the Concessionaire in a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the Government bills for payment in respect of the works in progress or completed works, as the case may be, supported by such Documentation as is reasonably sufficient for the Government to determine the accuracy thereof. Within 30 (thirty) days of receipt of such bills, the Government shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable and after making a proportionate deduction for the advance payment made hereunder, and in the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.”*

- ii. Force Majeure cases are to be dealt in accordance with Article 34 of the Concession Agreement by the Project Authority (State Govt) and Concessionaire, being signatories of the CA.
- iii. Other provisions that address other factors causing time and cost overrun, e.g., any delay in fulfilling the Conditions Precedent are to be dealt in accordance with Article 4 of the Concession Agreement which does have the provisions for Damages to be paid to the Concessionaire by the Project Authority. This is a PPP project in which there is allocation of risk between the Project Authority and the Concessionaire as per the defined provisions in the Concession Agreement and EC may not be the competent authority to alter these provisions after the signing of the Agreement between Project Authority (State Govt) and Concessionaire. Other factors that may cause time and cost overruns need to be considered as per the relevant provisions of the Concession Agreement by the Concessionaire and the Project Authority.

11. Secretary, MoHUA further stated that if the Hyderabad Metro Project was a public sector implemented project and not a PPP project, then the Government would have to provide for time and cost overruns. Therefore, he said that in the interest of the project, viability gap needs to be reassessed considering the time and cost overrun of the project.

12. Chair noted the case made by Secretary, MoHUA and also the provisions of Concession Agreement. Chair also noted that VGF was the bidding parameter and VGF is not to exceed the sum specified in the Bid as accepted by the Government. However, noting that this is a major PPP metro project, it was agreed to understand the cost implications of all these factors - Change in Scope, Force Majeure and other factors. There was, however, no commitment to consider cost implication of any factor which is not lawfully recognized in the CA.

13. Secretary, MoHUA opined that the Project Authority, Concessionaire and representative of IIM Bangalore should have been called for the EC Meeting. It was explained that only EC members along with Department of Legal Affairs (DoLA) were called for the Meeting. Project Authority and the Concessionaire are not constituents of the EC. It was decided that in the next meeting, Project Authority, Chief Secretary, Government of Telangana, Concessionaire and representative of IIM Bangalore may also be invited.

14. After detailed deliberations, it was decided that:
- i. Disregarding reservations of the Department of Economic Affairs relating to non-applicability of Central Metro Act for Public Private Partnership (PPP) Projects and undesirability of charging fare deviating from the system laid down in the Concession Agreement, in view of the opinion provided by the Department of Legal Affairs after consulting the AG and also views of the Ministry of Housing and Urban Affairs, the revision of fare carried out by the Metro Rail Administration (Concessionaire) was accepted and the fare system as elaborated in Schedule-R of the CA stands altered; and the fare determination for the project shall be under the Central Act only.
  - ii. In the light of the fact that the Central Metro Act became applicable after the date of signing of Concession Agreement, the Change in Law provisions of the Concession Agreement were accepted to have become applicable.
  - iii. As per the provisions of the Concession Agreement signed between the Project Authority and Concessionaire, the Government of Telangana would provide analysis and facts to the DEA of the financial implication of Change in Law (fare fixation provisions of Central Metro Act prevailing over Schedule R of the Concession Agreement). These would be examined in the next EC meeting to determine whether any Viability Gap Funding approved earlier is required to be reduced.
  - iv. It was recognised that additional project cost on account of the time and cost overrun e.g. on account of change of scope, force majeure should be dealt with as per the provisions of the Concession Agreement between the Project Authority (State Govt) and the Concessionaire. The Government of Telangana would provide these financial details as well. In the next meeting, the justification of these cost as well as their admissibility will be considered.
  - v. Copies of the presentation made in the Meeting on 16.01.2019 and in this Meeting would be shared with the EC Members.

**Annexure****List of Participants of the 34th Meeting of EC:**

<b>Sl. No</b>	<b>Name</b>	<b>Designation</b>
1	Shri Subhash Chandra Garg	Finance Secretary & Secretary, Economic Affairs (In Chair)
2	Shri Durga Shanker Mishra	Secretary, Ministry of Housing and Urban Affairs
3	Shri Girish Chandra Murmu	Secretary, Department of Expenditure
4	Dr. Kumar V Pratap	Joint Secretary, Infrastructure Policy and Finance, Department of Economic Affairs
5	Shri S.K.Saha	Adviser, HSR&PPP, NITI Aayog
6	Dr. Rajiv Mani	JS & LA, Department of Legal Affairs
7	Shri Mukund Kumar Sinha	OSD (UT) & ex-officio JS, Ministry Housing and Urban Affairs
8	Shri Mukesh Kumar Gupta	Director (PPP), Department of Economic Affairs
9	Dr. R.J.R. Kasibhatla	Deputy Legal Adviser, Department of Legal Affairs
10	Shri Manoj Kumar Madholia	Deputy Director (PPP), Department of Economic Affairs
11	Shri Arun Dewan	OSD (PPP), Department of Economic Affairs
12	Shri Shubham Goyal	Assistant Director (PPP), Department of Economic Affairs