

## CHAPTER VIII: MINISTRY OF ROAD TRANSPORT AND HIGHWAYS

### National Highways Authority of India

#### 8.1 Extending of undue benefit to the concessionaire

**Undue benefit given to concessionaire in fixing the appointed date resulted in a loss of ₹93.78 crore to the National Highways Authority of India/exchequer.**

National Highways Authority of India (NHAI) entered (19 July 2010) into a Concession Agreement (Agreement) with SP Jammu Udhampur Highway Private Limited (Concessionaire) for four-laning of a part<sup>1</sup> (approx.64.58 km) of the Jammu-Udhampur section of National Highway No. 1-A on design, build, finance, operate and transfer annuity basis (DBFOT annuity).

As per Article 24 of the agreement, financial close was to be achieved within 180 days from the date of agreement and as per Article 48 of the agreement, Appointed date means the date on which financial close is achieved or an earlier date that the parties may by mutual consent determine which shall be deemed to be the date of commencement of concession period. Hence, the financial close cannot be before the Appointed Date as per Article 48 of the agreement. NHAI approved (29 April 2011), the date of financial close as 24 March 2011 i.e. with a delay of 68 days. However, subsequently, it was observed (08 June 2011) that the construction was started by the concessionaire without fixing an Appointed date. The Appointed date was later on fixed as 17 June 2011 as approved by the Executive Committee of NHAI in its 90<sup>th</sup> meeting held on 20 October 2011.

The concessionaire commenced construction and, on 1 June 2014, the Independent Engineer (IE) certified that, since a length of 50.587 km (i.e. 78.33 *per cent* of total length as per the agreement) of the project highway was complete, the project highway was provisionally fit for entry into commercial operation on 1 June 2014 as per Article 14.3<sup>2</sup> of the agreement. Thereafter, citing the reason that the project was completed 14 days before the Scheduled Completion Date (COD), i.e. 15 June 2014<sup>3</sup>, NHAI paid (19 June 2015) a bonus of ₹15.45 crore to the concessionaire as per Article 28.1 of the agreement for early completion of the project.

With regard to fixing of Appointed date on later date, examination of the records revealed the following:

<sup>1</sup> From Kilometer 15.000 to Kilometer 67.000

<sup>2</sup> Independent Engineer may, at the request of the concessionaire, issue provisional certificate for operating part of the project highway, if at least 75 (seventy five) *per cent* of the total length of the project highway has been completed.

<sup>3</sup> According to Article 12.4.1 of the agreement, scheduled date of completion was the 1095<sup>th</sup> (one thousand and ninety fifth) day from the Appointed date.

- In letter dated 8 June 2011 from General Manager (J&K), posted in NHAI Headquarter, addressed to concessionaire and referring to the visit by Member (Finance) to the project site on 04 June 2011, it was observed that the construction was started by the concessionaire without fixing an Appointed Date. The letter also stated that the Project Director (Jammu) informed that the concessionaire had started the work since March 2011. A copy of this letter was also forwarded to Regional Office (J&K/HP) of NHAI.
- The fact that construction was started earlier than June 2011 was also substantiated by the Monthly Progress Report (MPR) for the month of June 2011 as strip chart<sup>4</sup> for the project shows that cleaning and grubbing and excavation in Ordinary Soil/Rock work were undertaken from chainage 15.200 to 17.100 and from chainage 45.500 to 45.600, which was equivalent to nine *per cent* of the total cleaning and grubbing work.
- The Executive Committee (EC) of the Authority in its 90<sup>th</sup> meeting (20 October 2011) fixed 17 June 2011 as Appointed Date, with corresponding scheduled COD as 15 June 2014 considering the actual date of start of work by concessionaire as 17 June 2011 as reported by RO Chandigarh. However, audit observed that the decision of the EC with respect to the Appointed date was not based on facts since the record of the visit of the Member (Finance) and strip chart clearly revealed that the concessionaire had started the construction work in March 2011 itself and the financial close was achieved by the concessionaire and approved by the NHAI on 24 March 2011.
- Therefore, in terms of the provisions of the Agreement, 24 March 2011 should have been the Appointed Date and 22 March 2014 should have been the scheduled COD. Resultantly, the commercial operation of the project was achieved after a delay of 71 days from 22 March 2014 rather than earlier than the scheduled COD. Hence, in terms of Article 28.2<sup>5</sup> of the agreement, a reduction of ₹78.33 crore in the Concessionaire's First Annuity should have been effected instead of granting a bonus of ₹15.45 crore.

The Management in its reply (30 March, 2016) stated that the concessionaire had started construction work from 17 June 2011, hence, in compliance to the terms of the provision of the agreement the Appointed date was correctly fixed as 17 June 2011 and accordingly, the bonus to the concessionaire was admissible for early completion of the project.

The reply of the Management is not tenable due to the following:

- The documents indicate that the concessionaire had started the construction work in March 2011 itself; financial close was achieved on 24 March 2011 and, therefore 24 March, 2011 should have been the Appointed date.

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<sup>4</sup> *A strip chart is a special form of graph, which presents a record of raw data over a period of time.*

<sup>5</sup> *In case the concessionaire achieves COD after the scheduled four laning date then it shall be liable for reduction in its first annuity for delayed completion of the project. The reduction for such delayed completion shall be the product of average daily annuity and the number by which the COD preceded the scheduled four laning date.*

- Audit also noted that the reply was silent with regard to the documents mentioned by audit. Therefore, audit sought (4 December 2015, 1 November 2016, 18 June 2018 and 25 July 2018,) additional clarifications and documentary evidence in the form of MPR for the months of March 2011 to May 2011 along with the Request for Inspection<sup>6</sup> (RFI). Besides this audit sought copy of joint site inspection report carried out as per Article 10.3.1<sup>7</sup> of the agreement and copy of video recording carried out as per Article 13.6<sup>8</sup> of the agreement.
- The Management in its further reply (23 August 2018) stated that Project Implementation Unit (PIU) Jammu had requested the concessionaire to provide the copy of documents requisitioned by Audit. However, the Concessionaire intimated that the copies of RFI from serial no. 1 to 50 were not traceable as several documents were destroyed during heavy rain/floods in September 2014. However, the Management was silent in respect of the copy of RFI retained by IE (Project Director of NHAI). Audit did not find the reply acceptable since the basic records relating to any project are to be maintained at the project office itself for monitoring purpose and to requisition the same from the concessionaire was improper.
- Further, as per the Article 23 of the agreement, IE, who is to inspect the construction work and project highway once every month, is to be appointed not later than 90 days from the date of the agreement. Audit noted that NHAI did not adhere to this requirement and appointed the IE only in August 2011. In the absence of the IE's MPR (prepared independently) and other documents, the correspondence of the Project Director (PD) Jammu, who was carrying out the duties of the IE, has to be relied upon. In any case, even the first MPR submitted by the concessionaire for June 2011 revealed that work was started prior to June 2011 since it indicated the cumulative progress up to May 2011, which was that 4.00 hectares site clearance work for diversion out of total work of site clearance of 44.00 hectares was executed. Therefore, the Appointed date should not have been taken in June 2011. Considering the Appointed date of 24 March 2011, the scheduled date of completion was to be 22 March 2014. Hence, there was a delay of 71 days in completion of work.
- While approving the Appointed date as 17 June 2011, Executive Committee decided to fix the Appointment Date as 17 June 2011 as reported by RO Chandigarh. However, Member (Finance) in his visit to project site on 4 June 2011 observed that construction had been started since March 2011. Hence, the contention of the Management that the work was started from 17 June 2011, as reported by RO Chandigarh, is not tenable.

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<sup>6</sup> *A formal letter issued by Concessionaire to IE for inspection of a particular item of project highway.*

<sup>7</sup> *Before declaration of appointed date, NHAI and Concessionaire inspect the site and prepare a memorandum containing an inventory of the site including the vacant and unencumbered land etc., deemed to constitute a valid licence and Right of way to the Concessionaire for free and unrestricted use and development.*

<sup>8</sup> *Concessionaire would provide to NHAI a video recording covering the status and progress of construction works within seven days of the appointed date and thereafter close of each quarter.*

To sum, undue benefit was given to concessionaire in fixing the Appointed Date which resulted in a loss of ₹93.78 crore<sup>9</sup> to NHAI and exchequer.

The matter was referred to the Ministry in November 2018; their response was awaited (May 2019).

## **8.2 Failure in Project Management**

**Undue favour to contractor and poor project management by National Highways Authority of India (NHAI) in construction of second office building for NHAI, right from the stage of project conception till its execution resulted in time overrun, cost overrun, blockage of fund amounting to ₹43.60 crore (upto October 2018) and avoidable payment of rent of ₹11.79 crore (during April 2015 to October 2018). Though more than five years have lapsed from the scheduled date of completion and over a decade from the date of release of land, the envisaged benefits of the proposed building are yet to be reaped as the building construction work is still in progress.**

NHAI established under the NHAI Act 1988 has its Head Office at Dwarka in Delhi. Over time, because of expansion of its activities and increased staff strength, the space at existing Head Office Building fell short. Consequently, NHAI Board approved (April 2005) purchase of land measuring 6,072 sqm. at Dwarka from Delhi Development Authority (DDA) at cost of ₹0.87 crore for construction of its second office building (building). Allotted land (April 2005) was physically handed over to NHAI by DDA in November 2005. However, due to delay in appointment of architect, delay in obtaining the approval from Delhi Urban Arts Commission and delay in settling the queries raised by DDA, NHAI obtained No Objection Certificate (NOC) from DDA in February 2011, i.e. after a delay of more than five years from the date of allotment of land by DDA. In the meanwhile, to accommodate the increased staff strength, NHAI hired (August 2010) a building from MTNL in Dwarka.

NHAI entered (February 2012) into an agreement with M/s Unity Infraprojects Limited (contractor) for construction of building (Phase I) for NHAI at Dwarka at a cost of ₹51.09 crore with the scheduled date of completion, March 2014. Interior/furniture work, IT work, security work and other allied works were kept outside the scope of work of the contractor, as these items were to be dealt separately in Phase II. The contractor could achieve only 34 *per cent* of financial progress upto the scheduled completion date of the work i.e. March 2014. A supplementary agreement was entered (August 2014) between NHAI and contractor for extension of time (EoT) upto 31 March 2015 along with support of working capital advance of ₹5.00 crore against bank guarantee (BG) to the contractor and deferment of levy of liquidated damages (LD). However, the contractor still could not complete the work and achieved only 59 *per cent* of financial progress upto January 2016. Thereafter, the contractor requested (July 2016) for foreclosure of the contract through amicable settlement. Due to failure on part of contractor to achieve the milestones, as per the agreed terms and conditions, NHAI encashed (August 2016) BG amounting to ₹4.70 crore which was furnished by the contractor against the working capital advance. NHAI finally foreclosed (July 2018) the principal contract and supplementary contract for construction of building retrospectively, w.e.f. 1 January 2018 while retaining a

<sup>9</sup> *Average daily annuity of ₹1,10,33,000 \* 71 days i.e. delay in completion + ₹15.45 crore Bonus paid*

performance BG of ₹5.10 crore of the contractor against the work executed and equipment supplied by it till completion of the project. An amount of ₹36.76 crore was paid to the contractor upto 31 December 2017 against work done and the full and final settlement of contractor including issues of EoT, LD, defective works etc. was yet to be finalised under amicable settlement process. NHAI awarded (3 July 2018) the Phase I left over work and Phase II work to M/s ANJ Turnkey Projects Pvt. Ltd. at a total cost of ₹58.75 crore with a completion period of one year .

Audit observed the following infirmities in project management of the building construction by NHAI:

- It took more than five years, from date of handing of physical possession of land by DDA, to obtain (February 2011), NOC from DDA for construction of building.
- It took more than one year, from date of NOC, to enter into an agreement with the contractor for construction of building.
- The agreement entered into with the contractor did not have any “foreclosure clause” or “risk and cost clause” to safeguard the interest of NHAI inspite the NHAI being in the business of construction activities for so long.
- M/s Datta & Datta, the architect/ design consultant (consultant) of the building construction work, repeatedly issued show cause notices to the contractor and pursued NHAI for termination of the agreement, as the contractor was unable to meet the construction milestones because of its financial crunch and lack of knowledge on its part to manage the situation. Infact, the Chairman & Managing Director of M/s Unity Infraprojects Limited admitted the fact that due to shortage of cash flow with them there were problems in mobilisation of manpower and procurement of costly equipment like lifts, Diesel Generating (DG) sets, Heating, Ventilation, and Air Conditioning (HVAC) systems etc. This explanation was reiterated by contractor management many times but still NHAI kept on granting extension to the contractor and that too without levying of LD. NHAI even entered into supplementary agreement with the contractor so as to provide support of ₹5.00 crore working capital advance. Nonetheless, contractor kept on failing in its promises and no concrete action towards repudiation of contract was initiated by NHAI.
- Consultant (M/s Datta & Datta) was removed (January 2018) from its services and M/s D K Associates was made the architect/design consultant (supervision consultant) for remaining work of the construction of building. M/s D K Associates concurred (June 2018) with the request (July 2016) of the contractor for foreclosure of contract by passing the onus of delay in construction of building on NHAI and the consultant. The reasons attributed by supervision consultant and the contractor were: a) there was non-synchronisation of work due to splitting of building work in two phases; b) delay in technical clearances and administrative approvals and c) the ineffective supervision of consultant. Strangely, these reasons were never raised by contractor before nor were pointed out by the consultant (M/s Datta & Datta); while, NHAI accepted these reasons in the foreclosure

agreement, the failure on part of contractor in arranging the requisite men and machinery (a dominant reason pointed out throughout by the consultant and admitted by contractor) were not incorporated in the foreclosure agreement. This lopsided foreclosure agreement thus jeopardized the interests of NHAI in the amicable settlement process including the levy of LD, EoT and claims against defective works.

- NHAI accepted the suggestions of supervision consultant and the Phase I left over work and Phase II work were synchronized as a single work inspite of the fact that the consultant was of the view that splitting of work was not hampering the work of contractor and infact it was the other way round as the tender for phase II could not be finalised because of failure on part of contractor to adhere to its work schedule as Phase-I and Phase II were interrelated. This was indicative of NHAI's irresolute nature in planning the building construction work as it changed its decisions as per the consultant's views.

The Management in its reply (October 2018) accepted delay on part of contractor in construction of second office building & furnished factual position of chronology of events.

Thus, even after lapse of more than 13 years from date of NHAI's Board decision to purchase land, the work of building construction for NHAI is still in progress indicating poor planning, execution and management of the project. Besides the time and cost overrun, NHAI actions were reflective of undue favours to the contractor which may compromise its financial interests in the future settlement process. In the meantime an amount of ₹43.60 crore (upto October 2018 and including consultancy charges) has been spent on construction of building and avoidable payment of rent of ₹11.79 crore (during April 2015<sup>10</sup> to October 2018) for MTNL Building while the work of building construction is still in progress.

Thus, failure in project management by NHAI resulted in time overrun and cost overrun besides blockage of fund and avoidable payment of rent of ₹11.79 crore till October 2018.

The matter was referred to the Ministry in December 2018; their response was awaited (May 2019).

### **8.3 Undue financial benefit to concessionaire**

**Undue financial benefit to the concessionaire on account of payment of early completion bonus amounting to ₹14.08 crore by NHAI, Begusarai**

NHAI entered (8 April 2011) into a Concession Agreement(CA) with Khagaria-Purnea Highway Project Ltd. (concessionaire) to augment the existing road from km 270.00 to km 410.00 (approximately 140.42 km) on the Khagaria-Purnea Section of NH-31 on design, build, finance, operate and transfer on annuity (DBFOT Annuity) basis. Appointed date for the project was 5 October 2011 and the scheduled two laning date (STLD) was 2 April 2014.

<sup>10</sup> Considering scheduled completion date of Phase I and adding one year to it for Phase II work.



As per clause 14.3 of the CA, the Independent Engineer (IE), at the request of the concessionaire could issue a Provisional Certificate of Completion if at least 90 *per cent* of the total length of the project highway was complete and the highway could be safely and reliably placed in commercial operation.

As per Schedule-M of the CA, 29 annuities of ₹56 crore each were payable to the concessionaire (October 2014 to October 2028). Clause 28.1.1 of CA provided that in case the concessionaire achieved Commercial Operation Date (COD) prior to the STLD then, it shall be entitled to receive bonus for early completion of the project. It was, however, explicitly clarified that completion achieved on issue of Provisional Certificate would not qualify for payment of bonus and bonus would be payable only when Completion Certificate was issued before STLD. As per clause 28.1.2 of the CA, bonus shall be product of average annuity and number of days by which COD preceded the STLD date.

Provisional Certificate was issued w.e.f. 4 November 2013 after completion of 131 km length (out of total 140.42 km). Completion Certificate was issued w.e.f. 3 February 2014. NHAI released first annuity on 4 October 2014 and early completion bonus on 31 July 2015 for 149 days amounting to ₹45.59 crore on the recommendation of the Executive Committee of NHAI. Out of the 149 days, 45 days were allowed under article 28.1.3(i) for delay on the part of NHAI in conveying the appointed date while 104 days were allowed on account of early completion.

Audit observed that while allowing 45 days for the delay in conveying the appointed date was in order, Executive Committee's decision to allow early completion bonus for 104 days was not correct, as the early completion bonus was allowable for only 58 days {STLD (April 2, 2014) minus COD (3 February 2014)} instead of 104 days allowed by NHAI considering the date of issuance of Provisional certificate. Thus, bonus was allowed for extra 46 days.

Audit also noted that Executive Committee allowed early completion bonus for 104 days based on the recommendations of the Independent Engineer. The Project Director and the Regional Officer had recommended only 58 days for calculation of bonus. Independent Engineer's recommendation of bonus from date of issuance of Provisional certificate was in violation of clause 28.1.1 which explicitly clarified that Provisional certificate would not qualify for payment of bonus.

The Management stated (January 2019) that, clause 28.1.1 of the agreement laid down only the qualifying criteria for eligibility of bonus and that the quantum of bonus was provided in clause 28.1.2 which prescribed the computation of bonus from COD. Further, as per clause 15.1 of the agreement, COD is the date of issuance of completion certificate or provisional certificate. It further stated that the concessionaire was made to accept 45 days of delay in conveying appointed date, and not claim interest on delay in the release of bonus and that the decision of Executive Committee was based on detailed deliberations and therefore, its interpretation of the bonus clause may be agreed to.

The reply of the Management was not acceptable because clause 28.1.1 of the CA explicitly clarified that the COD achieved on issue of Provisional Certificate would not qualify for payment of bonus and bonus would be payable only when Completion Certificate was issued before the STLD date. Further, clauses 28.1.1 and 28.1.2 are both

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sub-clauses of Clause 28.1 which deals with “Bonus in Annuity on account of early Project Completion” and the entire clause 28.1 needs to be considered to correctly calculate bonus.

Thus, NHAI paid extra early completion bonus of ₹14.08 crore for 46 days ( $46 * ₹0.306$  <sup>11</sup> crore) to the concessionaire in violation of clause 28.1.1 of CA.

The matter was referred to the Ministry in January 2019; their response was awaited (May 2019).

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<sup>11</sup> *Average Annuity= ₹56 crore/182.5 days= ₹0.306 crore.*