

## CHAPTER X: MINISTRY OF ROAD TRANSPORT AND HIGHWAYS

### National Highways Authority of India

#### 10.1 Retention of extraneous clause in Concession Agreements of four laning BOT (Toll) projects

**NHAI failed to levy damages of ₹12.36 crore on the concessionaires in two contracts for delays in fulfillment of conditions precedent, as NHAI had also delayed issue of fee notification which was one of the conditions precedent of the Concession Agreement. The issue of fee notification was an extraneous condition precedent clause in the concession agreements relating to four laning projects as toll operations were to be started on achieving the Commercial Operation Date.**

National Highways Authority of India (NHAI) entered into two concession agreements for four laning of Shivpuri-Guna Section from km 236.00 to km 332.100 and four laning of Biaora to Dewas section from km 426.100 to km 566.450 of NH-3 in the State of Madhya Pradesh on 15 June 2015 and 27 August 2015, respectively. The Appointed Date<sup>1</sup> of the projects was declared as 25 January 2016 and 9 July 2016 and the scheduled completion date was 24 July 2018 and 6 January 2019, respectively.

For the purpose of developing National Highways, Planning Commission published a Model Concession Agreement with the approval of a Committee on Infrastructure for application to Public Private Partnership Projects for construction of highways in April 2009 (second edition) for use by Ministry of Road Transport and Highways (MoRTH) and also NHAI. As per the Model Concession Agreement, Article 4 related to 'Condition Precedent', rights and obligations of NHAI and the Concessionaire, under the Concession Agreement, shall be subject to the satisfaction in full of the conditions precedent specified in this Article. One of the condition precedent to be fulfilled by NHAI is 'issue of the fee notification'. Further, Article 4.2 and 4.3 of Model Concession Agreement states that in the event, NHAI or Concessionaire, failed to satisfy any condition precedent of Concession Agreement, they will be liable to pay damages.

With regard to above said two projects, it was noted that NHAI did not levy damages of ₹12.36 crore<sup>2</sup> on account of delays in fulfilling the conditions precedent (Article 4.1.3 of Concession Agreement) by the concessionaires as NHAI also delayed issue of fee notification due to procedural lapses which was one of the condition precedent (Article 4.1.2 of Concession Agreement).

<sup>1</sup> Appointed date is the date of commencement of concession period as well as concessionaire getting the right to commence construction work of the National Highway.

<sup>2</sup> ₹10.62 crore for 67 days delay in Biaora to Dewas section and ₹1.74 crore for 21 days delay in Shivpuri-Guna Section.

The scrutiny of records revealed the following:

(i) As per Article 15.1 of Model Concession Agreement regarding Commercial Operation Date, four laning shall be deemed to be complete when the Completion Certificate or the Provisional Certificate<sup>3</sup>, as the case may be, is issued under the provisions of Article 14 and accordingly Commercial Operation Date of the project shall be the date on which such Completion Certificate or the Provisional Certificate is issued. The Project Highway shall enter into commercial service on Commercial Operation Date whereupon the Concessionaire shall be entitled to demand and collect fee in accordance with the provisions of Article 27. Thus, it can be noted that the Concessionaire would be entitled to start the toll operation on completion of at least 75 per cent of construction of the project or after completion of the entire construction work of the project. Further, the need for issue of fee notification for collection of user fee in both the above stated cases would have arisen on completion of 75 per cent of the project i.e., on or after the Commercial Operation Date of the project and not before the date of start of construction. Hence, issue of fee notification was an extraneous condition precedent clause in the concession agreements relating to four laning projects on which toll operations were to be started on achieving Commercial Operation Date.

(ii) With regard to above, during test check, Audit noticed that in six concession agreements<sup>4</sup> entered with other concessionaires, the MoRTH/ NHAI had modified the concession agreements as per the project specific requirement by deleting the condition precedent of issue of fee notification in consonance with the views of Planning Commission which stated in the forwarding to Model Concession Agreements that MoRTH and NHAI may adopt this Model Concession Agreement with or without modification, in their sole discretion. However, in the above two said projects, this clause was not deleted.

Hence, inconsistent approach of the MoRTH/ NHAI in deleting the clause related to issue of fee notification as condition precedent in concession agreements resulted in non-levy of penalty of ₹12.36 crore on the concessionaires.

The Management in its reply stated (August 2020) that damages payable by NHAI were more than the damages due to delay in achievement of condition precedent by concessionaire in both the cases. Further, deletion of condition precedent of issue of fee notification was not provided under the square parenthesis, therefore, it was not modified. As per the Model Concession Agreements, any revision/ omission of this condition precedent was not considered appropriate and may not be acceptable to the Concessionaire. The delay in publication of fee notification was procedural.

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<sup>3</sup> *Provisional Certificate may, upon the request of the Concessionaire be issued for operating part of the Project Highway, if at least 75 per cent of the total length of the Project Highway has been completed.*

<sup>4</sup> *Badarpur Elevated Highways, Jammu to Udhampur, Chenani to Nashri, Quazigund to Banihal, Agra to Aligarh & Panipat to Jalandhar*

MoRTH while accepting the Audit observation stated (March 2021) that the Audit point is valid that this condition precedent was not required for declaring appointed date as tolling would start only after Commercial Operation Date. But as this provision is the part of Model Concession Agreement, rectification, if required, can be done only at the time of revision of Model Concession Agreement in due course of time. Condition precedent of issue of fee notification was not provided under the square parenthesis, therefore it was not modifiable. Now concession agreements are mostly awarded on Hybrid Annuity basis and this condition precedent is not prescribed for the projects awarded on Hybrid Annuity basis. Thus, it can be stated that remedial measures have already been taken in this regard. Delay in publication of Fee Notification was procedural and happened in order to comply with the prescribed procedure prevailing at that time.

However, the fact remains that despite knowing that this condition precedent of issue of fee notification was extraneous, no action has been taken by NHAI for its amendment in Model Concession Agreement. Resultantly, NHAI could not impose and recover damages from the concessionaire despite delay on the part of concessionaire. Further, Audit noticed on test check basis in six cases that NHAI had deleted this condition precedent, as mentioned above but failed to delete it in both the concession agreements of Shivpuri - Guna and Biaora - Dewas projects. Also Planning Commission in the forwarding to Model Concession Agreements had stated that MoRTH and NHAI may adopt this Model Concession Agreements with or without modification, in their sole discretion.

Thus, due to non-deletion as well as delay in fulfillment of extraneous condition precedent, having penal implications, NHAI could not impose penal provision of the Concession Agreement on the concessionaires and was forced to mutually waive off damages to the tune of ₹12.36 crore.

***Recommendation No. 11***

*In order to not extend undue benefit to the concessionaires, NHAI may review the Model Concession Agreement for rectification of extraneous provisions such as issue of fee notification as condition precedent in all BOT (Toll) projects.*

***10.2 Undue benefit to concessionaire by resorting to post contract modification of damage computation clause in the agreement in violation of CVC guidelines***

**NHAI extended undue benefit of ₹10.94 crore to concessionaire by levying damages at a rate lesser than that specified in concession agreement by modifying the calculation method of damages which was in violation of CVC guidelines.**

Central Vigilance Commission (CVC) published a document on common irregularities and lapses in award and execution of contracts and guidelines for improvement thereof in November 2002. CVC observed that after award of the contract, amendments/modifications having financial implications are subsequently authorised in the contract conditions giving financial benefit to the contractors. CVC further observed that after conclusion of the contract, any relaxation in the contract terms/ specifications should be severely discouraged (Clause 22 – Post Contract Management).

National Highways Authority of India (NHAI) entered (March 2005) into a Concession Agreement with West Gujarat Expressway Limited (WGEL), a company promoted by Industrial Leasing and Financial Services Limited. The scope of work included widening (from two to four lane) of the existing 26 km. Jetpur-Gondal Section C-1 (km.117 to km.143), making improvements in the existing 32 km. Gondal-Rajkot 4 lane Section C-2 (km.143 to km.175) and widening (from two to four lane) of the existing 10 km. Rajkot Bypass Section C-3 (km.175 to km.185) on National Highway-8B in Gujarat on Build, Operate and Transfer (BOT) basis. The Commercial Operations Date (COD) for Section C-2 was 26 October 2006 and that for Sections C-1 and C-3 was 17 March 2008. According to the agreement, WGEL was allowed a concession period of 20 years for collecting toll from the users.

Chapter IV of the Concession Agreement dealt with 'Project Development and Operations' and Clause XVIII of the chapter stipulated the terms and conditions of 'Operation and Maintenance'. Sub-clause 18.3 provided that the Concessionaire shall, before the beginning of each year, provide to NHAI its proposed programme of preventive and other scheduled maintenance of the project highway subject to minimum maintenance requirements set forth in Maintenance Manual and Schedule 'L' of the Concession Agreement for keeping the Project Highway at all times in conformity with the Specifications and Standards.

Clauses 3.3.7 and 4.3.2.3 of Schedule 'L' required the Concessionaire to carryout periodic maintenances of the carriageway as required and at least once in every five years from COD. In case, the Concessionaire fails to maintain the project highway according to the Standards and Specifications, clause 18.12 of the Concession Agreement allowed NHAI to undertake such repair and maintenance at the risk and cost of Concessionaire. If NHAI chose not to exercise the option provided in clause 18.12, as per clause 18.13 of the agreement NHAI could recover damages for default in operating and maintaining the project highway, calculated at the higher of ₹10,000 or 0.1 *per cent* of the cost of such repairs as estimated by the Independent Consultant for each day of default, after a cure-period of 30 days till the default was cured. Damages payable by either party to the other were defined in clause 1.2(p) of the Concession Agreement as the mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the party entitled to receive the same and are not by way of penalty or liquidated damages.

WGEL delayed completing the first fifth year periodic maintenance and the Independent consultant estimated the damages to be recovered from WGEL as detailed below:

**Table 10.1: Estimated damages to be recovered from WGEL**

Section	COD	Due date for the fifth-year maintenance	Delay in first five-year maintenance	
		First due date	Completed on	Estimated damages
C2	26.10.2006	26.10.2011	31.03.2013	₹13.41 crore*
C1 and C3	17.03.2008	17.03.2013	06.01.2014	₹7.64 crore#
<b>Total</b>				<b>₹21.05 crore</b>

\* by Independent Consultant, M/s Sai Consulting Engineering Private Limited; does not include routine maintenance cost.

# by Consulting Engineers, M/s Frishmann Prabhu; excluding the penalty of ₹4 lakh recommended by Independent Consultant for WGEL's delayed response to Independent Consultant's remarks.

WGEL did not pay the damages as recommended by the Consultants and requested (August 2017) for a meeting with the Chairman of NHAI. In the meeting held in September 2018, NHAI offered the option of calculating the damages as per NHAI's 'Policy Guidelines/ calculation for periodic maintenance and damages' of February 2018. These guidelines stated that damages should be applicable on cost of repair work which was getting reduced on a day-to-day basis when work was being done at site. NHAI applied the same and reduced the damages to be paid from ₹21.05 crore to ₹10.11 crore; WGEL remitted the amount in July 2019.

Audit observed that NHAI extended undue benefit of ₹10.94 crore (₹21.05 crore - ₹10.11 crore) to the Concessionaire by levying damages lesser than that specified in the Concession Agreement. Application of NHAI guidelines of February 2018 brought down the claim of damages to ₹10.11 crore from ₹21.05 crore. Audit is also of the view that revision of methodology in calculating the damages based on the guidelines of February 2018 for a contract entered in March 2005 was in violation of CVC guidelines published in November 2002.

NHAI/ Ministry of Road Transport and Highways stated (July 2020/ January 2021) that the policy guidelines did not modify any clause of the agreement; it only clarified how the delay period should be calculated and that the damages should be applicable on cost of repair work which was getting reduced on day-to-day basis when renewal work was being done at site.

The reply of NHAI/ Ministry is not tenable as there was no lack of clarity in the Concession Agreement regarding damages to be imposed. On the other hand, the change in method of calculation of damages tantamounts to revision/ relaxation in the contractual terms which ultimately resulted in extending financial benefit of ₹10.94 crore to the Concessionaire.

Thus, NHAI extended undue benefit of ₹10.94 crore to the Concessionaire by levying damages lesser than that specified in Concession Agreement by resorting to post contract relaxation in the terms and conditions which was in violation of the CVC guidelines.

***Recommendation No. 12***

*NHAI should ensure adherence to the contractual terms while executing the contracts in the best financial interest of the Organisation and retrospective application of NHAI guidelines with reference to computation of damages should be avoided.*