

No. NH-24028/14/2014-H (Vol-II)
Government of India
Ministry of Road Transport & Highways
(Highways Section)

1, Sansad Marg, Parivahan Bhavan,
 New Delhi, dated 01st December, 2015

Office Memorandum

Subject: Hybrid Annuity Model for implementing highway projects-furnishing of clarification-reg.

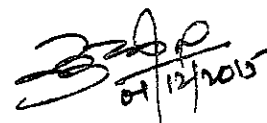
The undersigned is directed to refer to Department of Economic Affairs (DEA)'s No. 1/24/2013-PPP(Vol.II) dated 27/11/2015 on the subject mentioned above and to convey the response of this Ministry on the issues raised by Department of Economic Affairs as follows:-

S.No	Issue identified by DEA	MoRTH response
i	The rationale for back loading the annuity payments is not clear - not only would it increase the interest burden but may not help the concessionaire in repaying the debt. In the CoS meeting minutes at para 10 (i), MoRTH has been asked to consider providing flexibility in the MCA to permit structuring of annuities to match the expected revenue stream for each specific projects. This may be confirmed	The annuity payments are based upon a decision of the CoS that structuring of annuities should broadly match the expected revenue stream of highway projects.
ii	The interest on outstanding annuity payment in proposed at "Bank Rate plus 3%". As the Bank Rate does not reflect the lending rate, the correct rate to be used may perhaps be "SBI Base Rate". As SBI Base Rate would typically be higher than Bank Rate (say by 1%), the proposed interest payment may be at SBI Base Rate plus 2%	While it is understood that Bank Rate does not reflect the actual lending rate, the reason for choosing the same for interest calculation under the Model include: (a) there are a large number of banks who lend to roads & highways sector and it was felt that the basis for calculation of interest should be bank agnostic; (b) business decisions of an individual bank may have bearing on the interest outgo of the Authority in-spite of no other bank taking a similar decision.

iii	<p>MoRTH may reconfirm that they would consider only those projects under this model which are not found feasible under BOT (Toll) model, i.e, where the VGF requirement is more than 40%</p>	<p>Projects which are not found feasible under the BOT (Toll) model i.e. where the VGF requirement is more than 40% are to be considered under the Hybrid Annuity Model. Further, the projects which do not attract bids on BOT(Toll) model would also be considered under this Model. The Cabinet has also decided that BOT(Toll) need not be the default mode and further mandated that MoRTH can decide on mode of delivery vide CCEA decision {Case No. 132/CCEA/2014} dated 27/08/2014.</p>
iv	<p>MoRTH may clarify the provision for payment of annuity for incomplete works. From the proposal it appears that in case COD occurs on the basis of Provisional Certificate, full annuity is payable as if all works have been completed. This may not be justified and annuity amount should be proportionally reduced for incomplete work.</p>	<p>Clause 14.3.2 of the MCA provides that provisional certificate can be issued only when the concessionaire has completed construction on 100% of the site handed over to it upto 180th day from the Appointed Date.</p> <p>Clause 10.3.4 of the MCA provides that "...In the event, the Authority is unable to provide the remaining Site within 180 (one hundred and eighty days) from the Appointed Date the remaining Site of the Project Highway shall be removed from the scope of the work under the provision of Change of Scope".</p> <p>Clause 16.6.1 of the MCA provides for the mechanism of reduction of Bid Project Cost in case of reduction on scope and Clause 16.7 of the MCA provide the mechanism for reduction of O&M payments, in case of reduction of scope of work.</p> <p>From the above clauses, it may be clarified that Concessionaire has to complete the construction on 100% of the site handed over to it till 180 days from the Appointed Date and the balance site, not handed over by the Authority, would be reduced from its scope of work. Further a clear mechanism has been provided for reduction of the Bid Project Cost and O&M cost.</p> <p>Clauses 14.3.2, 10.3.4, 16.6.1 and 16.7 of the MCA are placed at Annexure A for reference. The MCA and RFP documents for the Model are available on the MoRTH website at http://morth.nic.in/index2.asp?slid=1706&sublinkid=1301&lang.</p>

v	MoRTH may confirm that MCA has been legally vetted.	The MCA has been legally vetted by a competent Law Firm empanelled by NHAI and selected by the World Bank.
vi	MoRTH may confirm that, prior to bidding, it will have in place internal mechanisms for robust estimation of total project cost (TPC) as a comparator to guard against the risk of TPC being either unworkably low or gold plated.	A robust mechanism to estimate the TPC for highway projects prior to bidding is already in place at MoRTH/NHAI by way of a streamlined appraisal mechanism. Depending on the civil construction cost of the project, this appraisal is carried out at a competent level.
vii	MoRTH may also confirm that they have established safeguards like defining the minimum number of eligible bids that would be required to ensure proper market discovery of TPC through wide competition.	MoRTH would follow the extant public procurement policy of the Government. Open competitive bidding via electronic tendering provides a level playing field and a transparent mechanism where price discovery is rational, fair & market driven.

2. This has the approval of Competent Authority.


01/12/2015

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Encl: as above
To

Ministry of Finance
Department of Economic Affairs
[Kind Attn: Ms Abhilasha Mahapatra, Director (PPP)]
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shall ensure and procure that no encroachment thereon takes place, and in the event of any encroachment or occupation on any part thereof, the Concessionaire shall report such encroachment or occupation forthwith to the Authority and undertake its removal at its cost and expenses.

- 10.3.4 The Authority shall make best efforts to procure and grant, no later than 90 (ninety) days from the Appointed Date, the Right of Way to the Concessionaire in respect of all land included in the Appendix, and in the event of delay for any reason other than Force Majeure or breach of this Agreement by the Concessionaire, it shall pay to the Concessionaire Damages in a sum calculated at the rate of Re. 1 (Rupee one) per day for every 10 (ten) square meters or part thereof, commencing from the 91st (ninety first) day of the Appointed Date and until such Right of Way is procured or 180 (one hundred and eighty) days from the Appointed Date whichever is earlier. The Damages payable in terms of this clause shall be the sole remedy available to the Concessionaire and the Authority shall not be liable for any consequential loss or damage to the Concessionaire. In the event, the Authority is unable to provide the remaining Site within 180 (one hundred and eighty days) from the Appointed Date the remaining Site of the Project Highway shall be removed from the scope of the work under the provision of Change of Scope.
- 10.3.5 Upon receiving Right of Way in respect of any land included in the Appendix, the Concessionaire shall complete the Construction Works thereon within a reasonable period to be determined by the Independent Engineer in accordance with Good Industry Practice; provided that the issue of Provisional Certificate shall not be affected or delayed on account of vacant access to any part of the Site not being granted to the Concessionaire or any construction on such part of the Site remaining incomplete on the date of Tests on account of the delay or denial of such access thereto. For the avoidance of doubt, it is expressly agreed that Construction Works on all lands for which Right of Way is granted within 180⁷(one hundred and eighty) days of the Appointed Date shall be completed on or before the Scheduled Completion Date. It is further agreed that the obligation of the Concessionaire to complete the affected Construction Works shall subsist so long as the Authority continues to pay the Damages specified herein, and upon the Authority ceasing to pay such Damages after giving 60 (sixty) days' notice thereof to the Concessionaire, the obligation of the Concessionaire to complete such works on such part of the Site shall cease forthwith. It is also expressly agreed that completion of the respective Construction Works within the time determined by the Independent Engineer hereunder shall be deemed to be Project Milestones for the purposes of levy and recovery of Damages under and in accordance with the provisions of Clause 12.3.2.
- 10.3.6 The Authority shall procure the additional land required for construction of works specified in Change of Scope Order issued under Article 16, in accordance with the provisions of this Agreement, and upon procurement thereof, such land shall form part of the Site. In case of any additional land required for Toll Plazas, Traffic Aid Posts, Medical Aid Posts, under passes and over passes or for construction of works specified in Change of Scope Order issued under Article 16, in accordance with this Agreement and


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⁷ To be calculated as 20% of the Construction Period

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provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the Authority; provided further that the Punch List shall also include the cost of completion for each of the outstanding items.

- 14.3.2 The Parties hereto expressly agree that a Provisional Certificate under this Clause 14.3 may, upon request of the Concessionaire to this effect, be issued for operating part of the Project, if the Concessionaire has completed construction of 100% (Hundred per cent) of the Site made available to the Concessionaire up to [180 days]¹ from the Appointed Date. Upon issue of such Provisional Certificate, the provisions of Article 15 shall apply to such completed part, and the rights and obligations of the Concessionaire for and in respect of such completed part of the Project shall be construed accordingly.

14.4 Completion of Punch List items

- 14.4.1 All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) days of the date of issue of the Provisional Certificate and for any delay thereafter, other than for reasons solely attributable to the Authority or due to Force Majeure, the Authority shall be entitled to recover Damages from the Concessionaire to be calculated and paid for each day of delay until all items are completed, at the lower of (a) 0.1% (zero point one per cent) of the Performance Security, and (b) 0.2% (zero point two per cent) of the cost of completing such items as estimated by the Independent Engineer. Subject to payment of such Damages, the Concessionaire shall be entitled to a further period not exceeding 120 (one hundred and twenty) days for completion of the Punch List items. For the avoidance of doubt, it is agreed that if completion of any item is delayed for reasons solely attributable to the Authority or due to Force Majeure, the completion date thereof shall be determined by the Independent Engineer in accordance with Good Industry Practice, and such completion date shall be deemed to be the date of issue of the Provisional Certificate for the purposes of Damages, if any, payable for such item under this Clause 14.4.1.
- 14.4.2 Upon completion of all Punch List items, the Independent Engineer shall issue the Completion Certificate. Failure of the Concessionaire to complete all the Punch List items within the time set forth in Clause 14.4.1 for any reason, other than conditions constituting Force Majeure or for reasons solely attributable to the Authority, shall entitle the Authority to terminate this Agreement.

14.5 Withholding of Provisional or Completion Certificate

- 14.5.1 If the Independent Engineer determines that the Project or any part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in commercial operation, it shall forthwith make a report in this behalf and send copies thereof to the Authority and the Concessionaire. Upon receipt of such a report from the Independent Engineer and after conducting its own inspection, if the Authority is of the opinion that the Project is not fit and safe for commercial service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Concessionaire of the defects and deficiencies in the Project and direct the Independent Engineer to withhold issuance

¹20% of the Construction Period

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16.5.1 Notwithstanding anything to the contrary contained in Clauses 16.1.1 and 16.3, the Authority may, after giving notice to the Concessionaire and considering its reply thereto, award any works or services, contemplated under Clause 16.1.1, to any person on the basis of open competitive bidding; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority, and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Concessionaire shall be entitled to exercise such option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% (ten per cent) thereof. It is also agreed that the Concessionaire shall provide access, assistance and cooperation to the person who undertakes the works or services hereunder⁸.

16.5.2 The works undertaken in accordance with this Clause 16.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimizes disruption in operation of the Project. The provisions of this Agreement, insofar as they relate to Construction Works and Tests, shall apply mutatis mutandis to the works carried out under this Clause 16.5.

16.6 Reduction in Scope of the Project

16.6.1 If the Concessionaire shall have failed to complete any Construction Works on account of Force Majeure or for reasons attributable to the Authority, the Authority may, in its discretion, direct the Independent Engineer to assess the civil cost of the reduced Scope, as per the applicable schedule of rates. On or before a Payment Milestone immediately succeeding the date of finalization of such Reduction in Scope, the Bid Project Cost would be reduced by the [115%]⁹ of the civil cost of the Reduction in Scope assessed by the Independent Engineer. The sum so arrived at would further be adjusted by the ratio of Bid Project Cost to Estimated Project Cost and all payments made or to be made to the Concessionaire shall be suitably adjusted and recoveries, if any, shall be made from the payment to be released on that Payment Milestone immediately succeeding the date of finalization of Reduction in Scope.

For the avoidance of doubt, it is agreed that upon the Reduction of Scope and revision of Bid Project Cost, all references to Bid Project Cost would mean the revised Bid Project Cost and all the payments would be calculated as per the revised Bid Project Cost.

16.6.2 For determining the obligations of the Concessionaire under this Clause 16.6, the provisions of Clauses 16.1, 16.2 and 16.4 shall apply mutatis mutandis, and upon issue of Change of Scope Order by the Authority hereunder, the Concessionaire shall pay forthwith the sum specified therein.

16.7 Effect of Change in Scope on the O&M Costs

⁸The Authority shall transfer 75% (seventy five per cent) of the amount so received to the first ranked bidder whose bid shall have been matched by the Concessionaire.

⁹ This percentage shall be the calculated as (Estimated Project Cost divided by civil construction cost estimated by Authority)X 100


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Pursuant to the provisions of this Article 16, if the Change in Scope leads to a reduction or increase in the length of the Project Highway, the O&M Payments as provided in Clause 23.7 shall be reduced or increased in proportion to the reduction or increase in the length of the Project Highway.