

No. NH-24028/19/2016-H(Pt.)
 Government of India
 Ministry of Road Transport & Highways
 (Highways Section)

1, Sansad Marg, Parivahan Bhavan,
 New Delhi, dated 30 November, 2016

Office Memorandum

Subject: Suspension of Collection of user fee at fee plazas on NHs due to demonetization of Rs. 500 and Rs. 1000 notes-compensation to be paid to the Concessionaire/Contractors-reg

To ensure seamless implementation of the decision of Government of India for demonetization of currency notes in the denomination of Rs. 500 and Rs. 1000 not being valid legal tender w.e.f. 9th November, 2016, it was decided to suspend toll collection on National Highways (NHs) from 9th November, 2016 onwards till the mid-night of 2nd / 3rd December 2016.

2. The loss on account of the non-collection of toll during this period at the toll plazas on NHs across the country requires to be addressed as per the provisions in the respective Concessionaire/Contract documents that define the engagement of Authority/ MoRTH with such entities. There are three possible cases here:

i) **BoT (Toll) Concessions** where the Concessionaire is entitled to collect toll during the entire concession period and the above suspension falls within such specified concession period. This eventuality is addressed in the Model Concession Document applicable for the Concessions signed post 2009, in clause 34.6.2(b) which is reproduced below:

"After COD, whereupon the Concessionaire is unable to collect Fee despite making best efforts or it is directed by the Authority to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from collection of Fee on account thereof;"

Also relevant in this context is clause 34.7 that describes 'the allocation of costs arising out of Force Majeure'

Clause 34.7.2 says *"upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political event shall be reimbursed by the Authority to the Concessionaire."* It is further stated that *"For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent that such information is relevant."*

On the above, it is abundantly clear that in such Concessions, action to be taken by the Authority is two-fold:

- a. To extend the concession period equal in length to the period during which Concessionaire was prevented from collection of fee (Toll).

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- b. Pay to the Concessionaire a sum equivalent to pro rata value of interest payment on debt and O&M expenses for the relevant period.

However, NHAI, in consultation with MoRTH, would require to scrutinize the Concession agreements signed prior to 2009, when the Model Concession Framework did not exist, to ascertain the exact formulation of the clause that is supposed to address such eventuality. Decisions in such cases will have to be taken on a case to case basis depending on the exact formulation.

ii) **BoT (Annuity) Concessions and EPC contracts:**

Since the toll responsibility is not with such Concessionaires / Contractors, toll suspension does not affect revenue of such entities.

iii) **OMT Concessions** also envisage a political event and effect of force majeure event on the concession. Clause 26.6.2 of the MCA is reproduced below:

"In any Force Majeure Event occurs after COD, whereupon the Concessionaire is unable to collect Fee despite making best efforts or it is directed by the Authority to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from collection of Fee on account thereof:....."

Parallel to clause in BOT (Toll) Concession, Clause 26.7.2(b) in the OMT Concession Document states *"upon occurrence of an Indirect Political Event or a Political Event, all Force Majeure Costs attributable to such Indirect Political Event or Political Event, as the case may be, shall be reimbursed by the Authority to the Concessionaire."*

It is further stated that *"For the avoidance of doubt, Force Majeure Costs may include interest payments on debt, O&M Expense and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent it is relevant."*

Regarding the above, it is abundantly clear that in such Concessions, action to be taken by the Authority is to be similar to the action in BoT(Toll) Concession i.e. two-fold as follows:

- a. To extend the Concession period equal in length to the period during which Concessionaire was prevented from collection of fee (Toll).
- b. Pay a sum to the Concessionaire equivalent to pro rata value of interest payment on debt and O&M expenses for the relevant period.

iv) **Annual toll contract of NHAI to third parties:**

These are governed by the specific contracts/ agreements.

Most of such agreements specify a procedure for force majeure, consultation and duty to mitigate and termination due to force majeure. A typical clause, by way of example is Clause 25(c) (5), *"the relief under force Majeure will be calculated on the basis of average collection per day, arrived based on the agreed weekly remittance. The difference in collection per day during force majeure and average amount of collection per day arrived based on the agreed weekly remittance multiplied by number of days of force majeure will be payable to the contractor."*

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Hence, in such cases action is required to be taken in accordance with the relevant clause (s) of the agreement.

3. In view of the above, the undersigned is directed to convey that NHAI may take necessary action accordingly.

4. This has the approval of Competent Authority.

Uttam Prakash

(Uttam Prakash)

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To

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