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Knowledge Management Semi-Annual Highways and Logistics Compendium 2024

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JSA Knowledge Management - Semi-Annual Highways and Logistics Compendium 2024



Introduction

This Compendium consolidates all key developments undertaken in the Indian roadways and logistics sector which were circulated as JSA Newsletters/ Prisms from January 2024 till June 2024 (half-yearly).

Ministry of Road Transport and Highways notifies amendments to the model concession agreement for Tolling Operation Transfer projects

The Ministry of Road Transport and Highways (“MoRTH”), on March 15, 2024, announced amendments to the model concession agreement for Tolling Operation Transfer projects. The summary of the amendments are as follows:

1. in terms of the provision dealing with variations in toll collection at various target points i.e., specific points of time during the concession period where the actual fee collection is benchmarked with the targeted fee collection, Target Point 2 is revised from 2037 to 2035. Additionally, a new target point

i.e., Target Point 3 is introduced in the model concession agreement;

2. the provisions dealing with variation in the concession period due to variation in the target fee collected at each target point have been substantially revised. As per the amended provisions, in case the actual fee collected is 5% lower than the target fee for a particular target point, then for every 1% shortfall over and above the 5% threshold, then the remaining concession period as on the date of target point, the concession period is increased by 1%. Further, in case the shortfall in actual fee is a fraction of 1% (beyond the 5% variation threshold), then the remaining concession period will increase on pro-rata basis. Similarly, in such a scenario, the target fee for the subsequent target point is decreased by the same percentage. A similar provision and mechanism have been included in case the actual fee collected is 5% higher than the target fee for a particular target point with the difference being that in this scenario, the concession period is decreased and the target fee for the subsequent target point is increased;

3. the key change from the previous draft of the model concession agreement is that in the erstwhile draft the trigger event for change in the concession period was: (a) for Target Point 1, the actual fee would have to fall short or exceed by 20% of the target fee; and (b) for Target Point 2, the actual fee would have to fall short or exceed by 30% of the target fee. Further, in the previous draft of the model concession agreement, the quantum of increase of the concession period was fixed as 1.5% for every percentage shortfall from 20% threshold. The decrease of the concession period was fixed at 0.75% for every percentage of fee exceeding the 20% threshold; and
4. the amended provisions also expressly specify that if the actual fee is falling below or exceeding the threshold as mentioned above in point (2) above, it is the remaining concession period, as on the date of target point, which is increased or decreased, as the case may be. In the previous draft the increase or decrease was computed for the total concession period irrespective of the date of the target point.

MoRTH issues amendments to the model concession agreement for Build Operate Transfer (Toll) model

Pursuant to extensive deliberations with the implementing agencies and the sector stakeholders, MoRTH issued several amendments to the Model Concession Agreement for Build Operate Transfer (Toll) (“**BOT (Toll)**”) road projects (“**MCA**”) on March 15, 2024. Some of the critical amendments are as follows:

1. Change in ownership

Earlier, in case of a consortium, each member, whose financial and technical criteria were considered during bid evaluation, was required to hold 26% equity in the concessionaire/ project special purpose vehicle for the construction period and a period of 1 (one) year from the date of completion of Punch List (as defined in the MCA). An amendment is made to the above provision to clarify that each such member must hold: (a) 26% of such equity in the concessionaire which will also not be less than 5% of the Total Project Cost (as defined in the MCA); and (b) this period of 1 (one) year that is computed from the date of completion

of the Punch List items will exclude the Punch List items pending due to reasons attributable to the National Highways Authority of India (“**NHAI**”)/ governmental authority.

2. Performance security

Prior to the amendment, NHAI accepted performance security in the form of a bank guarantee. Now, in addition to bank guarantees, the amended MCA permits concessionaire to furnish performance security in the form of insurance surety bond issued by an insurance company authorised by the Insurance Regulatory and Development Authority of India (“**IRDAI**”), accounts payee demand draft, banker’s cheque or e-bank guarantee from banks set out in the MCA. Further, the quantum of the performance security is revised to 3% of the Estimated Project Cost (as defined in the ‘request for proposal’). Earlier, the amount was 5% of the Total Project Cost plus the anticipated toll revenues for 12 (twelve) months.

3. Change of scope

- a) Under the earlier draft of the MCA, NHAI could initiate change of scope when it required additional works or services to be performed by the concessionaire. The amended provision in the MCA allows NHAI to also make any modifications in the scope of work as part of change of scope.
- b) In the earlier iteration of the MCA, in the event NHAI issued a change of scope notice, the concessionaire was only required to provide preliminary documentation providing, *inter alia*, the options for implementing the proposed change of scope. The provision is amended in the MCA requiring concessionaires to furnish detailed proposal and mandatory information for implementing the change of scope. This includes *inter alia*: (i) break-up of the quantities, unit rates and cost for different items of work; (ii) proposed design for the change of scope; and (iii) proposed modifications, if any, to the scheduled completion date.
- c) The amended MCA also sets out the method for determination of cost and time for implementing a proposed change of scope, which was absent in the previous MCA document.

4. Construction support and equity support

Earlier, NHAI only provided equity support to the concessionaire under the MCA. The revised MCA introduced the new concept of construction support, which is provided to the concessionaire during the construction period. Such construction support is paid in 10 (ten) equal installments linked to the completion of physical progress of construction. This amount is assessed by NHAI based on the estimated toll revenue during the construction period, subject to a maximum of 40% of the Total Project Cost.

The previous iteration of the MCA provided equity support up to a sum of 10% of the Total Project Cost. In the amended MCA, equity support and construction support is provided to the concessionaire up to 40% of the Total Project Cost. It is clarified that in case the quantum of construction support goes up to 40% of Total Project Cost then the provisions of equity support in the MCA and the other bidding documents will not apply.

5. Buy back of the project by NHAI in case project reaches design capacity

In the earlier iteration of the MCA, if the average daily traffic of Passenger Car Units ("PCUs") (as defined in the MCA) in any financial year exceeded the design capacity, it was considered to be an indirect political event and in case of termination on such account, a certain amount of termination payment was payable by NHAI as per the terms of the MCA. The MCA is amended to introduce the concept of buy back which allows NHAI to buy back the project from the concessionaire if the average daily traffic in PCUs in any 2 (two) financial years in a block of 3 (three) continuous accounting years reaches the design capacity. This buy back would take place by way of NHAI terminating the concession agreement by giving 90 (ninety) days' termination notice. Upon such termination, NHAI will pay higher of the following amounts as termination payments to the concessionaire:

- a) 80% of the product of the average monthly fee and 75% of the balance concession period, after deducting cost of major maintenance provisioned in the financial model in the remaining concession period;

or

- b) termination payment payable on occurrence of indirect political event of force majeure.

6. Obligations of authority in relation to Competing Roads

In the earlier iteration of the MCA, NHAI or any government instrumentality was not permitted to construct or cause to be constructed any Competing Road (as defined in the MCA) at any time before the 10th (tenth) anniversary of the appointed date, except in cases where the average traffic on the project highway in any year exceeded 90% of its design capacity. Upon breach of this obligation, NHAI was liable to pay compensation to the concessionaire. In the amended MCA, NHAI is also required to provide extension of the concession period. It is further clarified that such payment of compensation and extension of concession period is deemed to cure the breach by NHAI.

7. Modifications in concession period based due to construction of additional tollway

The MCA originally restricted NHAI or any government authority from constructing or initiating construction of an Additional Tollway (as defined in the MCA) during the construction period. Upon breach of the said obligation, apart from receiving compensation from NHAI, the concessionaire was also entitled to extension of the concession period with the enhancement of concession period being equal to the duration of the period between the opening of Additional Tollway and completion of concession period. This extension of concession period was only permissible if the effect of construction of Additional Tollway caused enhancement in the concession period beyond 20% of the original concession period.

Under the amended MCA, the above restriction on construction of Additional Tollway, on NHAI/ government authority, is imposed for the entire concession period. Further if an Additional Tollway is constructed by NHAI/ governmental authority, the extension in the concession period is on the basis of shortfall in traffic on account of construction of such additional tollway and such extension will also be capped to 30% of the original concession period. The amended MCA clarifies that such extension of concession period

is deemed to have cured the breach by NHAI/ governmental authority.

8. Compensation for default of authority

Previously, in case of material breach of the concession agreement by NHAI after the appointed date, the compensation payable to the concessionaire was the same irrespective whether such breach had occurred on or after the Commercial Operation Date (“COD”). This remedy was in the nature of compensation of all direct costs suffered or incurred by the concessionaire as a consequence of such material default or breach by NHAI.

The amended MCA introduces different compensation mechanism for: (i) the period starting from the appointed date till achievement of COD; and (ii) the period after COD. For the period prior to COD, NHAI will compensate concessionaire for the direct costs suffered by the concessionaire and loss of toll fee revenue provided that this compensation will not include debt repayment obligations. The amended MCA also provides for a detailed mechanism through which direct costs suffered by concessionaire on account of material breach is calculated.

For the period after the COD, where material default or breach leads to suspension of or reduction in collection of toll fee by concessionaire, NHAI will pay as compensation: (a) interest on the debt due and (b) operating and maintenance expenses as determined from the original draft of the financing agreements.

9. Termination payments

Under the amended MCA, the definition of ‘Termination Payment’ specifies that, at any time during the concession period, the aggregate of debt due and adjusted equity is limited to the Total Project Cost.

Under the earlier MCA, termination payment on account of concessionaire’s default was not payable prior to the project completion date. An amendment is made to state that termination payment to concessionaire will not become payable prior to COD in case physical progress is less than 40% and that in the event of physical progress exceeds 40%, termination payment payable on occurrence of concessionaire default after COD will apply, in respect of the expenditure

exceeding 40% of the Total Project Cost and to the extent applicable to debt due. Further, the aggregate liability of NHAI for making termination payment on account of concessionaire default is increased to 115% of the Total Project Cost from the earlier 100%.

Conclusion

The BOT (Toll) model for road concessions witnessed a slowdown as the private developers faced viability concerns on account of issues such as delays in receiving right of way and environment clearances during the construction period, lack of financing available from the lenders and changing traffic flow on account of alternate routes being developed. Resultantly, NHAI focused on the other modes of project implementation where the Government of India (“GOI”) absorbed the financial risk. This, in the long run, caused financial burden to NHAI and MoRTH and therefore, the GOI is keen on reviving the BOT (Toll) model. In this regard, significant amendments have been made to the MCA as described above.

Some of the amendments which may prove beneficial for concessionaires include introduction of construction support of up to 40% of the Total Project Cost, disallowing the GOI from constructing Additional Toll way for the entire duration of the concession period as opposed to construction period, providing additional remedy of extension of concession period along with compensation, in case NHAI breaches its obligations towards not constructing Competing Roads. Having said so, some of the amendments may also prove to be onerous for concessionaires such as right of termination to NHAI in case concessionaire fails to complete construction as per revised schedule of construction, the requirement of submitting extensive and detailed documents at the time of change of scope and for monthly progress reports.

Nevertheless, the outlook for BOT (Toll) projects looks positive with NHAI having identified 53 BOT (Toll) projects worth INR 2.2 lakh crore (Indian Rupees two point two lakh crore) and covering a length of 5200 kms (five thousand two hundred kilometers) to be bid out across various States in India during the course of the present financial year.

MoRTH issues annual performance data for financial year 2023-2024



MoRTH, on April 24, 2024, published its official data pertaining to the sector's performance during financial year 2023-2024. As per the data made available, the financial year 2023-24 witnessed construction of 12,349 kms (twelve thousand three hundred and forty-nine kilometers) of national highways and this was 20% higher than the national highway length constructed during financial year 2022-2023. The data also states that the country witnessed 9,642 kms (nine thousand six hundred and forty-two kilometers) of lane augmentation and that this was 17% more than the lane augmentation which took place in financial year 2022-2023.

In terms of capital expenditure, MoRTH saw the highest ever capital expenditure during the financial year 2023-2024 with INR 3.01 lakh crore (Indian Rupees three point zero one lakh crore) capital expenditure (as compared to INR 2.41 lakh crore (Indian Rupees two point four one lakh crore) in financial year 2022-2023). There was positive news when it came to asset monetisation and private investment as well. Financial year 2023-2024 saw private investment to the tune of INR 34,805 crore (Indian Rupees thirty-four thousand eight hundred and five crore) (which was 59% more than financial year 2022-2023) and highest ever quantity of asset monetisation with value of INR 40,314 crore (Indian Rupees forty thousand three hundred and fourteen crore) (which was 72% more than financial year 2022-2023).

MoRTH issues advisory and clarification in relation to refund of road taxes

MoRTH issued an advisory dated January 19, 2024, whereby it has stated that there is an increased number of cases where, upon movement of vehicles from one State to another, owners of such vehicles are facing delays in receiving refund of motor vehicle tax paid to the original State/ Union Territory at the time of registration of motor vehicles. This has led to owners having to pay double motor vehicle tax as such owners have to pay taxes in the new state as well.

Considering the above situation, MoRTH directed all States/ Union Territories to devise specific timelines for refund of motor vehicle tax. The advisory directs States/ Union Territories to clearly specify the number of days from the date of receipt of application from owner for refund of motor vehicle tax within which the refund is made to the owner.

MoRTH issues revised Request for Proposal for consultants for preparation of Detailed Project Reports

MoRTH issued a revised model Request for Proposal ("RFP") document for the appointment of consultants for preparing Detailed Project Reports ("DPRs") for national highways and centrally sponsored road projects. The key highlight in the revised RFP is that for evaluation of technical bid submitted by consultants, quality of past performance in the last 5 (five) DPRs is taken into account. A dynamic database is maintained by MoRTH after taking inputs from all executing agencies of MoRTH. The database will provide real-time analysis of the performance of each consultant based on their last 5 (five) DPRs.

Further, MoRTH issued a clarification dated February 9, 2024, whereby it is recognized that timely approval of the DPRs submitted by DPR consultants to project implementing agencies such as NHAI is of critical importance. In this regard, a provision of deemed approval is included in the RFP document whereby if no approval/comments are provided by the project implementing agency within the timelines indicated in the RFP document, the DPR is deemed to be approved by the project implementing agency.

MoRTH clarifies that inspecting authorities must mandatorily

ascertain unauthorised occupation of highways

On March 18, 2024, MoRTH clarified the powers of inspection conferred on the inspecting authorities of MoRTH and implementing agencies such as NHAI. As per the clarification, inspecting authorities have been directed to ascertain unauthorised occupation of national highways during the course of inspection.

As part of the inspection, the inspecting authorities have been directed to bring out in their inspection report, whether or not there is unauthorised occupation or encroachment of a highway stretch and the extent of such unauthorised occupation. The inspecting authorities have been directed to submit this report to the designated national highway administrators.

In turn, the clarification has directed the project directors of NHAI, general managers/deputy general managers of National Highways & Infrastructure Development Corporation Limited or the executive engineers of the State highways i.e., the highway administrators, to remove the unauthorised occupation under Sections 26 and 27 of the Control of National Highways (Land and Traffic) Act, 2002 read with the Highway Administration Rules, 2004.

One time settlement of contractual disputes under scheme approved by MoRTH

MoRTH, on January 18, 2024, issued a circular detailing the launch of a scheme for one time settlement of disputes between MoRTH and its subordinate organizations and private contractors. The scheme will follow the principles and norms which are being followed under the GOI's contractual disputes settlement scheme named *Vivad se Vishwas*. The settlement under MoRTH scheme is available for all arbitral awards passed up to September 30, 2023, and for court orders passed till December 31, 2023.

The claims under MoRTH scheme are permitted to be submitted by contractors until March 31, 2024, through the Government e-Marketplace ("**GeM**") for which a dedicated link for implementing the scheme will be provided.

Clarification issued in relation to assignment and usage of 'BH' series registration mark

MoRTH issued an advisory dated March 18, 2024, in relation to the usage of the 'BH' series of vehicle registration under the Central Motor Vehicles Rules, 1989 ("**CMVR**"). MoRTH observed that it is receiving several grievances from vehicle owners that State vehicle registering authorities have been refusing to assign 'BH' registration number to their vehicles.

In this regard, MoRTH in its clarification reiterated that Rule 51B was included in the CMVR for extending the provision and usage of BH series vehicle registration mark to eligible vehicle owners employed in government offices and in private sector having their offices in four States / Union Territories or more. Considering the same, MoRTH urged the State vehicle registering authorities to comply with Rule 51B of the CMVR in letter and spirit and assign the BH series registration mark to eligible applicants/ vehicle owners.

MoRTH issues advisory on the definition of 'contract carriage' under the Motor Vehicles Act, 1988

MoRTH, on January 22, 2024, issued an advisory clarifying that 'motor cycles' would fall within the ambit of the definition of 'contract carriage' under Section 2 (7) of the Motor Vehicles Act, 1988 ("**MV Act**") and advised all States and Union Territories to process applications for granting contract carriage permits to motor cycles as per the provisions of MV Act and rules framed under the MV Act.

As per the advisory, MoRTH analysed the definition of 'contract carriage' and stated that it clearly includes 'motor vehicles' as defined under the MV Act. Section 2 (28) of the MV Act defines 'motor vehicles' includes vehicles having less than 4 (four) wheels with engine capacity more than 25 cc (twenty-five cubic centimetres) and therefore contract carriage would include all 2 (two) wheelers which have more engine capacity higher than 25 cc (twenty-five cubic centimetres).

By way of this clarification, MoRTH sought to make it clear to the respective transport departments of the State Governments and Union Territories that the

correct interpretation of the definition of contract carriage read with definition of motor vehicles would mean that motor cycles having engine capacity higher than 25 cc (twenty-five cubic centimetres) can be issued a permit of contract carriage and that there should be no delay in issuing motor cycles with permits for contract carriage.

This clarification was necessary as the transport authorities of the States and Union Territories had been taking a misconstrued view that motor cycles cannot be granted a permit for contract carriage under the MV Act.

Reduction in value of additional performance security under NHAI's Engineering, Procurement and Construction contracts

MoRTH issued a circular dated February 29, 2024, where it is announced that for existing Engineering, Procurement and Construction ("EPC") projects the additional performance guarantee which is required to be submitted by the EPC contractor in case of abnormally low bid price is reduced in value to 3% of the bid price.

The submission of lower additional performance guarantee is permitted subject to the contractor completing certain milestones under the contract and there being no pending disputes or court proceedings. This benefit is being provided on account of the liquidity crunch being faced by several contractors.

NHAI completes the largest Infrastructure Investment Trusts Monetisation Round

National Highways Infra Trust ("NHIT"), the Infrastructure Investment Trust ("InvIT") of NHAI, successfully concluded its fund-raising through 'InvIT Round-3' for national highway stretches of aggregate length of 889 kms (eight hundred and eighty-nine kilometers) at an enterprise value of over INR 16,000 crore (Indian Rupees sixteen thousand crore). This happens to be the largest tranche of monetisation by NHAI and one of the largest transactions in the history of Indian road sector

The units of NHIT saw subscription from both existing and new investors, which included foreign pension funds viz. Canada Pension Plan Investment Board and Ontario Teachers' Pension Plan Board; domestic pension/provident funds (IOCL Employee's Provident Fund, L&T Staff Provident Fund, Rajasthan Rajya Vidyut Karamchari Pension Fund, SBI Pension etc.), insurance companies (Tata AIG, SBI Life, HDFC Life), other mutual funds and banks.

Upon the completion of the 'InvIT Round - 3', the total realised value of all 3 (three) rounds of NHIT stands at INR 26,125 crore (Indian Rupees twenty-six thousand one hundred and twenty-five crore) and the trust holds a diversified portfolio of 15 (fifteen) operating toll roads with an aggregate length of about 1,525 km (one thousand five hundred twenty-five kilometers) spread across the 9 (nine) States of Assam, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Telangana, Uttar Pradesh and West Bengal. The concession periods of these road projects range between 20 (twenty) – 30 (thirty) years.

NHAI clarifies the scope of deductions to be made from settlements under Vivaad se Vishwas



NHAI issued a circular dated January 11, 2024, clarifying the extent of deductions which can be made from the settlement amount to be paid to contractors under the GOI's flagship contractual dispute settlement scheme- *Vivaad se Vishwas*.

The circular clarifies that NHAI noted that while deciding upon the settlement amount to be paid to the contractors under *Vivaad se Vishwas*, the Technical Department of NHAI is making deductions under several heads. To avoid arbitrary deductions, the circular clarifies that for BOT and Hybrid Annuity Model ("HAM") projects, deductions can be made from

the escrow account as per the waterfall mechanism set out in the concession agreement. Further it is clarified that the following dues (which have priority over debt service) is recovered from the escrow account: 1. dues against premium including interest; and 2. expenses made by NHAI at its risk and cost including damages chargeable over such expenses.

In the case of EPC projects, deductions which are in the nature of dues, as per the concession agreement, is deducted from the settlement amount.

Finally, the circular clarifies that the settlement amount must be offered to the contractor without any deductions and that the deductions are specified in a separate calculation sheet. It must be clarified by NHAI to the contractor that the deductions calculated are debited from the escrow account without prejudice to the rights of NHAI to recover other dues on account of damages arising from performance of the concession agreement.

Guidelines regarding descopeing of construction of wayside amenities from scope of road contractors and adherence to approved layout plans

On March 11, 2022, NHAI issued Standard Operating Procedure (“SOP”) regarding development of Wayside Amenities (“WSA”) along the national highways and expressways for award of wayside amenities. Thereafter, on July 5, 2023, a policy circular was issued for descopeing of construction of WSA from the scope of road contractors. However, owing to the non-availability of WSA drawings which specifies the exact specification/plinth area in the concession/contract agreement, certain difficulties were being faced by the field officers in calculating the cost of WSA to be descopeed from the concession/contract agreement.

Accordingly, NHAI devised a mechanism under its policy circular dated June 11, 2024, which implements the calculating cost for descopeing/withdrawal of construction of WSA in compliance with the relevant clauses of the concession/contract agreement. The mechanism and costing for descopeing of WSA work for different modes of contract, i.e., EPC contract, HAM, BOT (Toll)/BOT(Annuity) is also laid down under the said policy circular.

GOI launches pilot program for cashless treatment of road accident victims

The GOI announced that it is launching a pilot program to provide cashless treatment to the victims of road accidents caused by the use of motor vehicles.

The pilot program is developed under the aegis of MoRTH and is trialed in Chandigarh first and will have the aim of establishing an ecosystem for providing timely medical care to the victims of road accidents, including during the golden hour.

The GOI announced that the National Health Authority is the implementing agency for the pilot program, in coordination with police, hospitals, State Health Agency etc.

The key features of the pilot program will include:

1. road accident victims are entitled to cashless treatment up to a maximum of INR 1,50,000 (Indian Rupees one lakh and fifty thousand) per accident per person for a maximum period of 7 (seven) days from date of accident;
2. the scheme is applicable to all road accidents caused by use of motor vehicle on any category of road;
3. the packages for trauma and polytrauma cases under the Ayushman Bharat scheme is co-opted; and
4. claims raised by hospitals for providing treatment are reimbursed from the Motor Vehicle Accident Fund.

Indian Highways Management Company Limited invites Global Expression of Interest for implementation of Global Navigation Satellite System based electronic toll collection across national highways

The GOI is planning to implement the ‘Global Navigation Satellite System’ (“GNSS”) based Electronic Toll Collection (“ETC”) system along with the existing FASTag ecosystem. GNSS based ETC is a barrier free method of toll collection which allows toll users to pass through freely and they are charged, basis the distance

travelled on the tolled highway stretch. In view of this, on June 7, 2024, Indian Highways Management Company Limited (“IHMCL”) invited global expression of interest from companies having experience in developing and delivering toll charger software which will form the base for GNSS based ETC system.

Through the implementation of the toll collection system, the GOI aims to facilitate smooth movement of vehicles plying on the national highways. Additionally, it aims to check on leakage and evasion of toll fees on the highways, thereby achieving enhanced efficiency and transparency in toll collection system across India. Initially, a hybrid model is implemented where both radio frequency identification based ETC and GNSS-based ETC will operate simultaneously. Recently, IHMCL also organised an international workshop on GNSS based ETC on June 25, 2024, in New Delhi. The workshop was participated by numerous industry and global experts who deliberated upon the implementation aspects of GNSS based ETC in India.

Clarification in relation to acceptance of goods and services tax audit report and payment of goods and services tax under change in law to the contractors and concessionaires

NHAI, in its policy circular dated May 27, 2024, issued the following clarifications in relation to payment of Goods and Services Tax (“GST”) to the concessionaires/contractors:

1. GST audit report and payment of GST under the change in law provision (blue?)

In view of the change in law provision of the concession agreement/NHAI contract, concessionaires/contractors are required to discharge the liability of GST since the introduction of GST Act, 2017. Accordingly, the aforesaid policy circular sets out the following requirements in relation to GST compliance:

- a) **Timeline for GST audit:** The GST audit must be completed within the timeline specified in the policy circular. The concessionaires/contractors must submit the relevant information and documents to the GST auditor to complete the GST audit.

b) **Methodology:** NHAI outlined the following steps to streamline the acceptance of GST audit report and payment of GST to the concessionaires/contractors:

- after completion of the GST audit report (interim/final), the GST audit report is forwarded to the concessionaire/contractor for acceptance;
- concessionaire/contractor will submit acceptance within 7 (seven) days;
- upon receipt of acceptance from the concessionaire/contractor, an ‘in-principle approval’ is obtained by the GST Cell within 3 (three) working days from the competent authority;
- upon receipt of the ‘in-principle approval’, a letter is issued by the GST Cell immediately to the Project Implementation Unit (“PIU”) along with the GST audit report;
- PIU will seek approval from the Regional Office (“RO”) (if any) and release ad-hoc payment of 90% as per the concession agreement/contract upon receipt of the auditor’s report, within 3 (three) working days;
- after making the ad-hoc payment, observations on the GST audit report by the Project Director (“PD”)/Authority Engineer (“AE”)/Independent Engineer (“IE”), if any, is forwarded to the GST Cell within 15 (fifteen) days of issuance of the ‘in-principal approval’. If no observations are provided, the GST audit report is deemed to be accepted by NHAI authorities and the balance 10% is released by PIU; and
- upon completion of the project, a final audit report is sent to the GST Cell immediately by the PD.

2. Clarification regarding monthly payment of GST to consultants/contractors/service providers/other vendors

NHAI asked the authorities to implement its earlier policy circulars dated November 14, 2017, and September 22, 2020, wherein NHAI had instructed

the release of GST amount claimed by the concessionaires/contractors along with their running bills after obtaining proof of deposit of GST. This clarification is issued as several PIUs had not adhered to the said procedure for payment of GST amount.

NHAI establishes DPR cell for national highway projects



NHAI, *vide* policy circular dated May 24, 2024, proposed the establishment of a dedicated cell at its headquarters for reviewing of DPRs (“DPR Cell”) related to national highways to ensure safety, reliability and quality of national highways. DPR Cell was established on June 27, 2024. The said policy circular, *inter alia*, lays down the roles and responsibilities of DPR Cell, structure of DPR Cell, the roles and responsibilities of DPR experts, procedure for selection of such DPR experts and the governance mechanism and the process flow of DPR Cell. Some of the important aspects of DPR Cell are discussed below:

1. Roles and responsibilities of DPR Cell

DPR Cell is performing the following key functions:

- a) develop mechanisms for and undertake: (i) complete monitoring of DPR; (ii) uniformity in review of DPR; and (iii) preparation of quality and accurate DPRs to enable development of world class national highways;
- b) examine the bid documents and technical schedules of national highway projects;
- c) evaluate cost estimates for project basis the design features of the project;
- d) assist in planning pre-construction activities;
- e) incorporate the project with the highway information model software;
- f) undertake site visits to evaluate proposals of DPR and design consultants; and

- g) suggest new practices to enhance quality output from the implementation of DPR related to a project.

2. Structure of DPR Cell

DPR Cell is established under Member (Projects), NHAI who is the chairman and will have a team of 40 (forty) members. The team will comprise of 5 (five) principal DPR experts (which may be increased or decreased as per the requirement) and various domain experts for road safety, traffic, land acquisition, bridges, tunnels, geotechnical experts, senior highway experts and forest specialists, who is engaged as consultants on retainership basis.

Further, DPR Cell will have full time employees (mentioned below in hierarchy) and will perform roles and responsibilities, as follows:

- a) the chief general manager /general manager is responsible for empanelment of expert and performance monitoring of DPR Cell team as per the identified key performance indicators;
- b) the Deputy General Manager is responsible for monitoring all activities related to the DPR Cell management; and
- c) the manager/deputy manager is responsible for, amongst other things, management of DPR experts/empaneled experts, allocation of projects to DPR experts, coordination with field officers in ROs/PDs, Technical Division (Headquarters) and experts, progress monitoring of all DPR projects.

3. Governance Mechanism

The functions/reporting and review of the DPR Cell is monitored in the following manner:

- a) quarterly impact review to chief general manager and members;
- b) monthly presentation to EC;
- c) monthly meeting with Technical Division/ROs/PDs; and
- d) monitoring and ensuring site visits of DPR Cell experts.

Monitoring of DPR Cell functioning and supporting is done through an independent third-party support system using ‘DataLake’ portal, where periodic reports can be submitted to the chairman and members, or delays can be raised to the

member (Projects). Third party support system will directly report to the member (Projects) through chief general manager/general manager.

Guidelines for monitoring of projects and issuance of provisional completion and completion certificates for EPC/HAM/BOT contracts

NHAI, in its policy circular dated May 24, 2024, issued guidelines for proper monitoring of projects and issuance of Provisional Completion Certificate (“PCC”) and Completion Certificate (“CC”) to the concessionaires/contractors under the concessionaire agreement. NHAI observed the following non-adherence in monitoring of project and issuance of PCC/CC: 1. AE and RO/PD officials are not supervising the work and tests on completion in several cases which lead to incorrect issuance of PCC/CC; and 2. such tests on completion and other compliances were not being submitted in different formats. Procedurally, to obtain PCC/CC from NHAI, the concessionaire/contractor make a request to the IE to conduct tests as per the provisions of the concession agreement and the IE/AE also informs the PD/RO, NHAI to witness the tests.

In view of the above, NHAI issued the below mentioned guidelines to be followed for monitoring and issuance of PCC/CC:

1. AE/IE are required to prepare a detailed checklist (in the format provided in the policy circular) and the concession agreement. This checklist will have to be updated from time to time upon approval of various drawings/design and progress of work;
2. RO/PD are required to review the checklist during the site visit along with routine tests to be conducted at site and laboratory;
3. 3 (three) months prior to the probable issuance of PCC/CC, RO/PD will hold a meeting and site visit to assess the preparedness of site for the issuance of PCC/CC to the concessionaire; and
4. PCC/CC can be issued to the concessionaire/contractor once all the items in the checklist and contractual provisions are successfully complied and the tests on completion are successful.

The details mentioned in the checklist format can vary from contract to contract depending on the facts and circumstances.

NHAI organises workshop for implementation of insurance security bond for NHAI contracts

NHAI, on May 15, 2024, organised a workshop to encourage concessionaires and insurance companies to adopt Insurance Security Bond (“ISB”) as a form of performance security and bid security. This was organised after MoRTH, on March 15, 2024, amended the model concession agreement for BOT (Toll) projects permitting the concessionaires to furnish performance security in the form of an ISB issued by an insurance company authorised by IRDAI. As of May 15, 2024, NHAI received 164 (one hundred and sixty-four) insurances consisting of 20 (twenty) ISB for performance security and 144 (one hundred and forty-four) ISB for bid securities. The attendees of the workshop deliberated upon various challenges in adoption of ISB and the possible measures that can be implemented to ensure for faster adoption of ISB.

SOP issued for implementation of ETC system and operation and maintenance services at national highway fee plazas through system integrators empaneled with IHMCL



NHAI, on January 17, 2022, issued a policy circular which provided that the implementation of ETC system at national highway fee plazas is carried out by the System Integrators (“SI”) which are only empaneled by IHMCL. Therefore, the concerned concessionaire/EPC contractors were required to select the SI solely from

the empaneled list for ETC infrastructure installation in relation to any new project and/or for extending any existing contract for operation and maintenance services.

However, NHAI noticed non-compliance of the aforementioned policy circular by the concessionaires/contractors and accordingly issued SOP under policy circular dated May 10, 2024, to ensure that only empaneled SI are involved by the concessionaires/contractors:

1. the EPC contractor/concessionaire of the project will submit 3 (three) names from the empaneled list to PD;
2. PD will recommend the name(s) of SI to RO for approval after ensuring that the same is/are empaneled by IHMCL and their performance is generally good at fee plazas;
3. thereafter, RO will approve SI after being satisfied regarding SI's performance in general and ensuring that SI is empaneled by IHMCL as on the date of approval; and
4. in case RO is not satisfied with SI proposed by EPC contractor/concessionaire/PD, RO will furnish reason to the contractor/concessionaire with copy to IHMCL. In such case, EPC contractor/concessionaire will submit a revised panel of 3 (three) names for approval of RO.

SOP issued for handling and monitoring of land acquisition arbitration and court cases

To streamline the massive litigations in land acquisition related issues, NHAI, on April 25, 2024, issued a policy circular which provides SOP for the land arbitration and court cases. In the SOP, various modules have been developed on the 'Datalake' portal specifically to deal with land acquisition litigations. The portal/modules enable the users to do the following:

1. empanelment of advocates (individual or firm) by RO, NHAI for land arbitration;
2. allocation of arbitration/court cases by PIU and approval of advocate at RO level;

3. filling in basic details of the cases by advocates, such as type of issue, date of notice, master case number, hearing status of the case;
4. raising of bills by advocates for payment against their services in the arbitration/court matter by submitting invoice through the portal;
5. generation of different case reports by PIUs/ROs/HQ for monitoring purposes; and
6. accessing repository of orders passed by the courts for referencing.

These modules have been in effect from April 26, 2024, and the processing of all activities listed above, and other ancillary activities provided in the SOP related to land acquisition arbitration and court cases will have to be mandatorily done through the portal.



Highways & Logistics Practice

In the highways sector, JSA provides end to end assistance to its clients in all aspects of development and operations including but not limited to setting up of green field projects and documentation in respect thereof such as joint venture agreements, shareholders agreements, foreign direct investment approvals, project financing, EPC contracts, O&M contracts, vetting of tender documents including review of concession agreements and regulatory issues including competition, licensing and tariff matters before various regulatory fora.

JSA advises clients on across the spectrum of contractual, commercial, policy, regulatory and legal issues at all stages of the value chain in the logistics sector – infrastructure such as roads, railways, inland waterways, aviation, ports, and logistics parks, as well as services such as transportation, cold chain facilities, and warehousing. JSA has been regularly engaged in advising project developers, investors, suppliers and contractors on commercial/ transactional issues, advising financial institutions and borrowers in relation to financing transactions and dispute resolution (including arbitration, litigation and representation before various judicial fora).

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