

**SECOND REPORT
OF
THE COMMITTEE
UNDER THE CHAIRMANSHIP OF
SHRI B K CHATURVEDI
MEMBER, PLANNING COMMISSION
GOVERNMENT OF INDIA
ON
FASTER IMPLEMENTATION OF NHDP
(February, 2010)**

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MAIN RECOMMENDATIONS OF THE COMMITTEE

Chapter 2 - Dispute Resolution Mechanism

- (i) One time settlement of pending disputes may be offered to contractors adopting a bucket –based approach to drop all category A cases (amount claimed is less than Rs. 10 crores or 5% of contract price whichever is lower) after a review on case to case basis by an independent expert group. [paras 20-21]
- (ii) NHAI may carefully review the cases other than category A cases in general, the award of Arbitral Tribunal may be accepted in category B cases (amount involved is between Rs. 10 crores to Rs. 100 crores). [para 22]
- (iii) Accountability and credibility of DRB recommendation may be ensured by way of a test check by a technical team. [para 25 (i)]
- (iv) The time for DRB recommendation may be raised to 84 days and that of referring DRB recommendation to Arbitration to 60 days. [para 25 (ii)]
- (v) Review of DPR may be made more intensive. [para 25 (iv)]
- (vi) Cost associated with time extension may be duly quantified. [para 25 (v)]
- (vii) General condition and COPA may be standardized. [para 26]

Chapter 3 - Fiscal and Taxation Related Issues

- (i) There is a case for grant of further dividend distribution tax exemption for policy mandated tier in the corporate structure. [para 3 (i)]
- (ii) The scope of new infrastructure facilities may be clarified in order to remove the ambiguity of applicability of tax holiday for widening and strengthening projects. [para 3 (ii)]
- (iii) Moderation/reduction may be considered in the retention period prescribed for custom duty exemption in respect of specified road construction equipment. [para 4 (i)]

Chapter 4 - Financial Issues

- (i) Take out financing scheme should be operationalised at the earliest. [para 22]
- (ii) The Ministry of Finance may pursue the issue of relaxation in the minimum rating and dividend payment history with Insurance Regulatory and Development Authority (IRDA) so as to enable larger long term source availability for infrastructure projects. [para 24]
- (iii) As regards classification of loans to highway projects, the Committee observes that the mere fact of there being no tangible collateral as in other loans may not be justification enough to classify these loans as 'unsecured'. The Committee noted that satisfaction that there is significant progress on the issue of classifying infrastructure loan as 'secure'. [para 25]

CHAPTER 1

THE BACKGROUND

The Prime Minister has appointed a Committee under the Chairmanship of Shri B.K. Chaturvedi, Member, Planning Commission [‘the Committee’], to suggest measures for faster development of NHDP projects with the objective to resolve procedural impediments as well as the need to take a holistic look at the financing need and arrive at a financing plan that balances the needs of the road sector and other priority areas of the Government.

2. The Committee comprises of the following Members:

- (i) Shri B.K. Chaturvedi, Member, Planning Commission - Chairman
- (ii) Shri Ashok Chawla, Finance Secretary - Member
- (iii) Smt. Sushma Nath, Secretary (Expenditure) - Member
- (iv) Shri Brahm Dutt, Secretary (RT&H) - Member
- (v) Smt. Vini Mahajan, Joint Secretary (PMO) - Member (Associate)

3. The Committee submitted its First Report suggesting a Revised Framework and Financing Strategy for Implementation of the National Highways Development Project, on August 27, 2009, which was placed before the Cabinet Committee on Infrastructure (CCI) on October 1, 2009, vide the Cabinet Note dated September 9, 2009 of the Ministry of Road Transport & Highways. CCI has approved the relevant proposals in the said Cabinet Note with the proviso that the financing plan for 2010-11 onward would be considered by the Empowered Group of Ministers (EGM) [comprising of the Finance Minister, Minister of Road Transport & Highways and the Deputy Chairman, Planning Commission] for further action¹.

4. In this Second Report, the Committee has taken up further suggestions from various stakeholders such as the improvement in Dispute Resolution Mechanism, fiscal incentives for infrastructure projects such as

¹ MoRTH O.M. No. RW/NH/37012/26/2009-PPP dated October 3, 2009, http://nhai.org/Final%20Report%20of%20BKC%20committee%2027%2008%202009%20recd%20%20from%20JS%20_PPP_.pdf

direct/indirect taxation provisions, long term availability of finance for road/ infrastructure projects, delegation of powers to award OMT projects to the NHAI Board, amendments in Company Law with reference to SPVs etc., which may have an overall beneficial impact on road sector awards.

5. The Committee held its meetings on November 6, 2009, January 20, 2010 and February 11, 2010. The Committee also held a separate stakeholder consultation meeting on December 4, 2009, wherein Ernest & Young, Pricewaterhouse Coopers, National Highways Builders Federation (NHBF) and Consulting Engineering Services India (P) Limited made presentations on each of the above issues.

6. The Committee acknowledges the great deal of assistance from various individuals and organizations. In particular, the Committee would like to acknowledge the support provided by NHAI, the Infrastructure Division in the Ministry of Finance and the Transport Division of the Planning Commission for providing valuable inputs for the drafting of Report and secretarial assistance. The Committee would also like to thank the Members of the Working Group for their valuable assistance.

CHAPTER 2

DISPUTE RESOLUTION MECHANISM

Out of a total 406 contracts awarded by NHAI so far [309 EPC/IRCC + 72 BOT (Toll) + 25 BOT (Annuity)], over 1,250 disputes have been raised in ongoing 123 contract packages [EPC 119 and BOT (Annuity) 4] (**Annex-A**). The claims under these disputes amount to Rs. 8,509 crore. Besides these, 114 awards in respect of 490 disputes amounting to Rs 657 crore have been published by various Arbitral Tribunals (**Annex-B**) and only 17 of these awards containing 68 disputes in 11 contract packages for an amount of Rs 31 crore have been accepted by both the parties. NHAI challenged 70 awards containing 300 disputes amounting to Rs 470 crore. The contractors have challenged 15 awards containing 80 disputes amounting to Rs 124 crore. The decision to accept or appeal against the remaining 12 awards in respect of 42 disputes for Rs 35 crore is still awaited.

2. These include 18 packages falling in Kolkata-Chennai Section of NH-5 wherein the issue of price escalation being allowed (amount involved is Rs. 766 crore) is under Arbitration or pending adjudication by the Courts. In these packages, the contract does not allow for application of the price adjustment formula to the works included in the original scope of work. The Law Ministry and the Additional Solicitor General have both opined that nothing more should be added to the contract document and the contract should be interpreted in terms of the express language employed therein. However, Mr. P. Chidambaram had expressed a contrary legal opinion on the issue, in favour of the National Highway Builders Federation, in February 2003.

Dispute Resolution Mechanism in NHAI contracts

3. The existing provisions in the NHAI contracts relating both to the EPC and BOT contracts are as per **Table-A** below (extracts of the provisions are kept in **Annex-C**):

Table-A

Dispute Resolution under NHAI contracts

| S.No. | Provision in EPC Contract | Provision in BOT Contract |
|--------------|---|--|
| (a) | Dispute, in the first place, is resolved by Mediation by the Supervision Consultant/Engineer of the Project. | The dispute is settled by Mediation by Independent Engineer. |
| (b) | If Supervision Consultant/Engineer fails to resolve the Dispute or the decision is not acceptable to the parties, the same is referred to Dispute Review Board/Dispute Review Expert (DRB/DRE) within 14 days of the failure or the decision. | If Independent Engineer fails to resolve the disputes, the same may also be referred to the Chief Executives of the contracting parties for mediation. |
| (c) | If the recommendation of DRB/DRE is not acceptable, the dispute may be referred to Arbitration Tribunal comprising of 3 Arbitrators within 28 days of the decision of DRB/DRE | If dispute is still not resolved then same is referred to Arbitral Tribunal comprising of 3 Arbitrators for Arbitration. |
| (d) | If the Arbitral award is not acceptable to either of the parties the same can be challenged in the Court of Law within the limitation period of 90 days, as provided under the Arbitration & Conciliation Act, 1996. | If the Arbitral award is not acceptable to either of the parties the same can be challenged in the Court of Law within the limitation period of 90 days, as provided under the Arbitration & Conciliation Act, 1996. |

4. In the BOT contracts, there is also a provision for Adjudication of disputes by a Regulatory Authority or Commission. As per Article 44.4 *“in the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all disputes arising after such constitution shall, instead of reference to Arbitration under clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the parties hereto agree that the*

adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law”.

5. However, it is observed that except for 4 packages relating to BOT (Annuity), all the above disputes relate to only EPC/Item Rate Construction Contracts (IRCC) awarded by NHAI. There is also no DRB/DRE in BOT projects. Moreover, the new Model Concession Agreement (MCA) has already addressed the issues – in a broad sense – on which there have been disputes in the BOT projects. In particular, as regards land acquisition which is a major cause for the disputes, the BOT projects can be awarded under the new MCA only if 80% land is available with NHAI even at the time of awarding the contract. **Hence the focus of the discussions here is primarily on the dispute resolution mechanism for the EPC/IRCC contracts of NHAI.**

Dispute Resolution Board

6. The EPC/IRCC contracts of NHAI generally have a provision for DRB/DRE as the first level for resolution of disputes between the Employer and the Contractor. DRB comprises three members experienced with the type of construction involved in the works and with the interpretation of contractual documents. The Members of the DRBs are normally of the rank of retired Chief Engineer or above from the State PWDs, Ministry of Road Transport & Highways, CPWD, MES, BRO etc. and, in general, belong to the same category for selection of Members for Arbitral Tribunals². Moreover, the Member nominated to DRB by one party requires approval of the other party. Even the third Member, selected by the party nominees’, needs to be approved by both the parties.

7. DRB is constituted within 3-4 months of the award and remains in operation throughout the contract period until expiry of the Defects Liability Period (DLP). In fact, the Board continues to be available to process any dispute referred to it by the parties even after termination of its regular activities.

² In some cases, where the contractors have appointed retired Judges as Members of the Tribunal, NHAI has also, as a policy, appointed Judges of matching levels.

8. The DRB members are being paid a monthly retainer fee till completion of DLP in equal share by the Employer and the Contractor. The Board Members visit the work site once in about 3 months till the completion of work or as specifically requested by Employer/Contractor. The site visits include an informal discussion of the status of construction of the work, an inspection of the work and review of any request for recommendation made by the parties. At the conclusion of each site visit, the Board prepares a report covering its activities during the visit.

9. Thus both in terms of expertise and availability, DRB is perhaps best suited to resolve the disputes in a timely manner. **Hence there is every case to accept DRB recommendations, at least in the smaller categories [Category-A³] cases, except where the reviewing authority has strong justification to appeal against such recommendations.**

Review of DRB recommendations

10. Till 2006, the decisions of DRB/DRE were reviewed by a three-Member Committee⁴ before proceeding for Arbitration. The Committee was to examine the decision of the DRB/DRE on merits and recommend whether the decision is acceptable or to be challenged before the Arbitral Tribunal. It was the responsibility of the concerned Technical Division to submit the matter to the said Committee within a period of limitation provided in the contract. Likewise, the same Committee reviewed the Awards of the Arbitrators before challenging the Award in Courts of Law. In case the Committee felt that the decision of DRB/DRE or Arbitral Award was acceptable based on its merit, it was to be agreed to by NHAI without challenging the same in the next forum.

11. This three-Member Committee has now been substituted by the Variation Committee⁵ which now undertakes the above said exercise. However, this NHAI internal mechanism appears to be too pre-occupied to go into merits of such cases, often permit challenging of such awards based

³ Where amount claimed does not exceed Rs. 10 crore or 5% contract price, whichever is lower.

⁴ Comprising the Member concerned (i.e., having jurisdiction over the package under dispute) of NHAI, Member (Finance) and Member(Technical)/CGM(Technical) of any other Technical Division.

⁵ Comprising the Chairman and all Members [i.e. Member (Administration), Member (Finance) and Member (Technical)] of NHAI.

on recommendations placed before them by Technical Divisions. It is observed that the decisions/recommendations of DRB/DRE are rarely being accepted by the parties, such decisions being challenged and taken to Arbitral Tribunals.

Table-B
Appellant-wise Break-up of Disputes

I. Published Awards

| | Both DRB and AT | | Only DRB | | Only AT | |
|-------------------|-----------------|--------------|--------------|--------------|--------------|--------------|
| | Package-wise | Dispute-wise | Package-wise | Dispute-wise | Package-wise | Dispute-wise |
| NHAI | 37 | 148 | 7 | 36 | 37 | 205 |
| Contractor | 11 | 60 | 26 | 142 | 3 | 5 |
| Both | 3 | 12 | 15 | 92 | 8 | 60 |
| Total | 51 | 220 | 48 | 270 | 48 | 270 |

II. Cases Pending with Arbitral Tribunal

| | Package-wise | Dispute-wise |
|-------------------|--------------|--------------|
| NHAI | 55 | 428 |
| Contractor | 62 | 557 |
| Both | 26 | 265 |
| Total | 143 | 1250 |

12. The Appellant-wise analysis of disputes indicates that NHAI is the dominant litigant both at the DRB and Appellate Tribunals (**Table-B** refers). Though contractors have raised disputes in most packages at the DRB level, this is more on account of no DRB provision being available in the contracts. For example, there is no DRB provision in 29 (177) out of 100 (490 disputes) packages pending in Courts and 64 (609 disputes) out of 143 (1250 disputes) packages in cases pending in Appellate Tribunals. Out of the 99 (759 disputes) packages directly taken to Appellate Tribunal by contractors (in both categories), 73 (587 disputes) packages or 74% (77% in terms of number of disputes) did not have any DRB provision.

13. It appears that due to paucity of time and the psychological fear of vigilance and other investigating authorities looking at *bona fides* of decisions taken, rather than the merits involved, seems to propel adoption of the safer route of challenging DRB/DRE awards. However, **NHAI also appears also to be constrained by the time limit of only 28 days available for referring the DRB recommendation to Arbitration.** There may be a case to extend the time limit to say 60 days, to enable NHAI to take a considered decision on acceptance/challenge of the DRB recommendations.

Analysis of data on Arbitral Awards

14. An analysis of data on Arbitral Awards already published was carried out by *bucketing* them into three different categories namely, upto Rs. 10.00 crore subject to 5% of contract price (**Category-A**), Rs. 10.00 crore to Rs. 100.00 crore (**Category-B**), and more than Rs. 100.00 crore (**Category-C**). The details are presented in the Tables in **Annex-D**. The intention was to identify classes of disputes which may not be worth pursuing further based on some broad principles. One hypothesis presented to the Committee was that in **Category-A** cases, the unanimous DRB awards have invariably been upheld by the Arbitral Tribunals and hence could be considered for dropping without significant revenue implications.

15. It is observed that in **Category-A** cases the total award (in 136 disputes excluding cases where there was no DRB provision) increased from Rs. 83.7 crore at the DRB level to Rs. 88.9 crore at the Arbitral Tribunal level. Even in the 90 cases where only NHAI filed the appeal, there was only marginal reduction in the awarded amount from Rs. 63 crore to Rs. 54 crore. If we take into account the costs relating to the Arbitral Tribunals and the interest payments on the awarded cost, the decisions to appeal do not seem to serve the intended purpose, even after factoring in the additional costs which may accrue on account of say the higher unit rate awarded in the DRB recommendations.

16. On the contrary in category B and C, NHAI gains significantly if goes for Appeal against the award of DRB. In the nine cases in Category B where NHAI has gone for Appeal against unanimous decision of DRB there was about 38% reduction in the amount from Rs. 136.4 crores to Rs. 85.2 crores.

In the four cases in category C where NHAH has gone for Appeal against the unanimous award of DRB there was significant reduction (51%) in amount from Rs. 282.3 crores to Rs. 137.5 crores. Thus the purpose for going in Appeal against the award of DRB is served.

Major reasons for Disputes

17. The common issues for disputes include compensation for subsequent legislation (royalty, excise duty, entry tax, etc.); price adjustment/escalation; deemed export benefits; delay in hand over of encumbrance free site, utility shifting, R&R resulting in idling of plant, etc.; variations in BOQ beyond permissible limit; rates for non-BOQ items; and different interpretations on technical items. The largest identifiable chunk of cases relate to non-BOQ items and BOQ variations (beyond permissible limit). Details of common issues along with number of cases and amount involved is placed at **Annex-E**.

18. It appears that most cases relating to technical issues including non-BOQ items and BOQ variations could have been avoided if only the Detailed Project Report (DPR) had been carefully prepared and/or reviewed. There are contractual provisions in the DPR consultancy, such as invocation of Professional Liability Insurance (PLI), to penalize the consultants who do not exercise adequate diligence in DPR preparation. These provisions have not so far been invoked by NHAH at all.

19. Similarly, standardization of contract provisions (which are broadly FIDIC based) would have also enabled minimization of disputes. However, NHAH has made extensive changes to the FIDIC conditions of contract, without any discussion in file or elsewhere regarding the basis for these amendments (details of such variations are in **Annex-F**). There are also significant variations between contracts even in the Conditions of Particular Application (COPA).

Table-C
Cost Benefit Analysis for Cases where NHAI Filed Appeal

Amounts in Rs. crore

| No of cases | Category | Amount Claimed before DRB | Recommended amount by DRB | Number of claims before AT | Claimed amount before AT | Amount recommended by AT | Benefits | | Additional costs | | Net Benefit |
|-------------|----------------------------------|---------------------------|---------------------------|----------------------------|--------------------------|--------------------------|--------------------|--|------------------|-----------------|-------------|
| | | | | | | | Reduction in award | Benefit in rate from additional quantities | Interest cost | Litigation cost | |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) | (11) | (12) |
| 38 | <i>Unanimous decision by DRB</i> | 627.5 | 471.7 | 165 | 976.1 | 267.3 | 204.4 | 645.6 | 66.8 | 9.5 | -773.7 |
| 25 | A | 86.2 | 53.0 | 82 | 58.6 | 44.6 | 8.4 | 7.1 | 11.2 | 6.3 | 1.9 |
| 9 | B | 161.2 | 136.4 | 53 | 133.6 | 85.2 | 51.2 | -3.6 | 21.3 | 2.3 | -24.1 |
| 4 | C | 380.1 | 282.3 | 30 | 783.9 | 137.5 | 144.8 | 642.1 | 34.4 | 1.0 | -751.5 |
| 6 | <i>Majority decision by DRB</i> | 57.6 | 52.3 | 19 | 55.5 | 30.9 | 21.5 | 4.1 | 7.7 | 1.5 | -16.3 |
| 4 | A | 12.8 | 10.0 | 8 | 10.7 | 9.7 | 0.3 | 0.9 | 2.4 | 1.0 | 2.2 |
| 2 | B | 44.8 | 42.3 | 11 | 44.8 | 21.2 | 21.2 | 3.2 | 5.3 | 0.5 | -18.6 |
| 0 | C | 0.0 | 0.0 | 0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Assumptions:

1. 80% of cases are assumed to relate to technical cases and it is further assumed that 80% of the increase in claim before Arbitral Tribunal (AT) from the DRB award is on account of increase in quantities. Assuming a 3-year contract, median date for most DRB claims as 1.5 years, time period between DRB award and claims before AT at 6 months, the benefit is worked out as 80%*80%*2 times the difference between the DRB award and claims before AT.
2. Average period of disposal of claims by AT is assumed at 2.5 years. Interest is worked out at 10% of AT award.
3. Litigation costs are assumed at Rs. 50 lakhs per package (Rs. 25 lakhs per party).

Recommendations

On-going cases

20. The Committee recommends a **one-time settlement** of pending disputes adopting a *'bucket-based'* approach to drop all **Category-A** cases, after a review on a case-to-case basis by an Independent Expert Group (IEG) with eminent representation comprising of say a retired Dy.C&AG, a former Vigilance Commissioner and a retired Senior Officer of the Law Ministry, besides a Technical Expert. The IEG's opinion may be sought by the Variations Committee in all cases where the Tribunal Awards have already been published and appeals are pending in various Courts, and on selective basis in respect of cases pending decision by Arbitral Tribunals⁶. In particular, where the decisions have been similar and unanimous both in the DRB and AT stages, the appeals pending in the various Courts may invariably be withdrawn⁷. Once a decision is taken by NHAI, in consultation with the contractor, to drop further proceedings, the reference to Arbitral Tribunal may be withdrawn in terms of section 30 of the Arbitration Act⁸. As many as 90 disputes (in 29 packages) pending in Courts, and 106 disputes (in 18 packages) pending before Arbitration Tribunals could potentially be dropped on this basis.

21. However, the Committee would like to categorically and unequivocally record that this one-time settlement, proposed to be offered to the contractors in the present context of a large build-up in number of disputes pending arbitration or appeal, shall not imply that the ratios forming the basis of the DRB recommendations or the Arbitral Awards, as the case may be, are also being accepted as binding. The disputes covered by this

⁶ The net likely benefit from withdrawal of pending NHAI references to Arbitral Tribunals in all Category-A cases is estimated at Rs. 6.5 crore.

⁷ In 86 disputes (27 packages) of category-A both the DRB and the AT recommendations have been unanimous.

⁸ As per section 30 of Arbitration Act, 1996, the concurrence of the Arbitral Tribunal is a must even if the parties chose to settle their disputes between themselves with or without the intervention of any mediator or conciliator. Thus, if the Arbitral Tribunal does not accede to the request of the parties to record the settlement in the form of an Arbitral Award, the parties will have no other option but to proceed on the merits of the controversy though in practice such a situation may not arise. However, if the parties merely inform the Arbitrators that they have settled the disputes themselves and do not request him to record the settlement, he has no alternative but to terminate the Arbitral proceedings, unless, of course, there are other Arbitral matters on which they had not been able to reach the settlement.

settlement shall not be treated as having been disposed of by NHAJ on merits and hence shall have no precedence value. Notwithstanding this settlement, it will entirely be open to NHAJ to contest the underlying issues of principle, in all other pending or future cases not covered by this settlement. The binding decisions of the Courts, if any, shall govern all such other cases.

22. NHAJ may also review the references/appeals to determine and pay-off the part of the Award which is acceptable to NHAJ. The references/appeals may, in such cases, be restricted only to issues and amounts where NHAJ has a strong case for non-acceptance on merits. In general, it is recommended that award of Arbitral Tribunal may be accepted in category B cases, particularly in cases where the unanimous decision at DRB level is upheld by the Tribunal. As regards Category-C cases, considering substantial amount involved, NHAJ may carefully consider the award of Tribunal before challenging in the Court. NHAJ may take up with the Arbitral Tribunal/Court for early hearing and disposal of all pending cases. The Committee observes that these measures would enable significant savings in interest payment.

23. As regards existing disputes pending decision by Arbitration Tribunals, the Committee observed that the Tribunals decide issues in 2-3 year time span, after 70-80 sittings. Fast tracking and early disposal of decisions by Arbitral Tribunals may be incentivized by way of a flat fee to the Tribunal Members.

24. With regard to the disputes arising out of projects in NH-5, arising out of erroneous definition of variation clauses, the Committee noted that the dispute is already before the Hon'ble High Court and orders are due.

Future cases

25. The Committee recommends the following course of action for reducing future disputes:

- (i) The DRB recommendations should invariably be accepted, at least in the smaller categories [Category-A] cases, except where the reviewing authority has strong justification to appeal against such recommendations. However, accountability and credibility of the DRB

recommendations may be ensured by way of a test check in say 5% of cases by a technical team led by a Member who has not been part of this decision making process. The DRB members, whose quality of recommendation is found inadequate on review in say 3 decisions, may be disqualified for further appointment/nomination at least for one year;

- (ii) The time limit for the DRB to issue its recommendations may be raised from 56 days to 84 days in line with time-limit prescribed under the corresponding provisions in the FIDIC conditions⁹. The time limit for referring the DRB recommendation to Arbitration may also be raised from 28 days to say 60 days, to enable NHA I to take a considered decision on acceptance/challenge of the DRB recommendations;
- (iii) The appeals filed on the basis of the decisions by the Variations Committee may be periodically monitored and reviewed by MoRT&H *inter alia* regarding whether the strong reasons recorded for non-acceptance of DRB recommendations have been upheld by the Arbitral Tribunal. Appropriate provision in Rules framed under NHA I Act 1988 should be made;
- (iv) Review of DPR may be made more intensive. Where the DPR is deficient in providing the correct estimate of inputs, and deviate by more than say 10%, PLI may be mandatorily invoked;
- (v) Cost associated with time extensions may be duly quantified. Where extension is granted on the grounds of non-availability of any stretch of land, it is imperative that the compensation should be limited only to such stretch and not across the entire project.

26. The Committee also recommends that both the General Conditions and COPA may be standardized at least for adoption in future awards. In particular, the following specific areas need greater clarity and attention:

- (i) *Scope of Independent Engineer*: FIDIC places great reliance on the Engineer both in terms of supervision and first level adjudication of

⁹ Clause 67.1 of FIDIC General Conditions relating to “Engineer’s Decision”.

disputes. This role of the Engineer is being internationally accepted and there is no reason not to adopt a similar role for the Engineer in India. However COPA of NHAI deviates from the spirit of FIDIC conditions, introducing elements substantially diluting the role and authority of the Independent Engineer. This may be reviewed and the international practice of giving greater authority to the Engineer may be restored. In any case, NHAI also appoints a Project Director (PD) for each project and the PD is expected to take adequate care of NHAI interests even at the time of contract management. However, while recommending this enhanced role for the Engineer, the Committee noted that the matter is also under discussion separately with the Department of Expenditure. It was also acknowledged that care should also be taken to keep within the principles laid down in the General Financial Rules;

- (ii) In particular, it is necessary to clearly specify the scope of compensation for price escalation (particularly as several disputes have arisen in respect of whether price escalation includes changes in taxes/royalty, etc.);
- (iii) For BOQ items, a uniform rate may be prescribed irrespective of the amount of variation to bring about certainty in valuation method. The present ceiling of 25% beyond the specified quantity for applicability of the bid rate may be dispensed with;
- (iv) Broad guidelines for determination of non-BOQ rates may be specified. The major (say 5 or 6 nos.) inputs for the non-BOQ items could be identified based on experience so far and the source or method of pricing along with price escalation mechanism for such inputs could be indicated. For e.g. the price of bitumen could be determined based on the nearest refinery gate price (with suitable adjustments);
- (v) Guidance notes may be prepared for interpreting changes vis-a-vis the FIDIC conditions and the COPA.

CHAPTER 3

FISCAL AND TAXATION RELATED ISSUES

1. The Committee considered the following suggestions received from various stakeholders in respect of direct and indirect tax related issues.

Direct Tax related issues

Amendment of Section 80-IA to allow tax holidays to LLP.

Extending DDT exemption to one more layer

Exemption from MAT

Clarification with regard to 'new' infrastructure facilities

Indirect Tax related issues

Custom Duty Exemptions

Service Tax on Toll revenues in BOT projects

Service tax on input services.

Recommendations

2. The details of these suggestions, along with the views of administrative Ministry, are given at **Annexure G**.

3. The Committee examined these suggestions and recommends/ observes the following in respect of suggestions relating to direct taxes:

- (i) Though DDT exemption is available to all companies for one layer, i.e. between a holding company and subsidiary company, the non-optional policy-mandated extra layer in the form of a separate SPV company, effectively nullifies this benefit for the developer. Hence there is a case for grant of further DDT exemption for such policy-mandated tier in the corporate structure, i.e. between an infrastructure SPV and the holding company, where creation of such SPV is mandated by a concession agreement;
- (ii) The scope of 'new' infrastructure facility may be clarified in order to

remove the ambiguity on whether 10-year tax holiday will be applicable to road sector widening and strengthening projects.

- (iii) It is being proposed elsewhere in the Report that the LLP structure may be permitted in road SPVs only after gaining more experience on the operational aspects of LLPs. Hence the issue of granting tax exemption under section 80-IA to LLPs may not arise at this stage; and
- (iv) The importance of stability in tax regime for attracting long term investment in infrastructure cannot be overstated. The proposals in DTC (which is still at the draft stage) *inter alia* to levy of MAT as % of Gross Assets and to restrict the tax holiday only till recovery of investment, have the potential of considerably impacting the returns from infrastructure sectors, thereby reducing the overall attractiveness of such investments. It may be appropriate to maintain *status quo* in respect of these provisions;

4. As regards issues relating to indirect taxes, the Committee recommends/observes the following:

- (i) A moderation/reduction may be considered in the retention period prescribed for the customs duty exemption in respect of specified road construction equipment. This issue may be further taken up by MoRT&H with MoF;
- (ii) The issue of entire toll collected being subject to service tax does not arise in view of the clarification that service tax is charged only on the commission earned by the contractors; and
- (iii) The construction of roads cannot be treated at par with exports for the purpose of levy of service tax. Hence there is no case to recommend exemption in respect of service tax on all input services consumed in pre-road construction activities.

5. On other suggestions mentioned in Annexure G, it is noted that these need to be deliberated by the Ministry of Finance. Therefore, the Committee refrain from making recommendations of these suggestions.

CHAPTER 4

FINANCING ISSUES

1. The Committee considered the following suggestions received from various stakeholders in respect of financing related issues.

Cash Trap

2. Section 205(2A) of the Companies Act mandates all companies to keep aside part (2.5% to 10%) of their distributable income as reserves before payment of any dividend. This provision is applicable to SPVs also. However, a major difference between SPV and other companies is that SPVs have a defined life and scope and the main purpose of the creating the SPV is to ring fence the project. The reserves so created in SPV are of practically no use and actually lock the value of the project indefinitely. Hence it has been suggested to the Committee that, in order to unlock the value of the project and facilitation of more capital availability with the investors, road SPVs may be exempted from such reserve requirements. Alternatively, the suggestion is that the said withdrawals may be permitted for investments in infrastructure bonds.

3. During deliberations, the Administrative Ministry expressed a view that such retention has been mandated under the statute to meet unforeseen contingencies any company may be faced with, and is applicable across the board to all companies. The highway infrastructure companies are not likely to make profit during the early stages of the concessionaire agreement. A cash reserve of 2.5% to 10% out of profits may also be necessary to take care of normal liquidity requirements, even when the projects start making profit. It may not also be the case that the infrastructure company seeks to pay out ever Rupee of the profit it makes, to its shareholders.

Availability of long term debt

4. Availability of pure project finance for funding the debt requirement has remained an issue for road SPVs. In the absence of project finance, SPVs

have to look at commercial banks for debt. In view of the Assets Liability Mismatch (ALM) of Banks, they are not willing to provide long-term debt (generally taken as average maturity of more than or equal 10 years). Further, due to the structure of the concession agreement, debt provided by the lenders is classified as unsecured debt, which comes along with its own set of issues like maturity profile and exposure norms. The following suggestions have been made to the Committee in the context of availability of long-term finance for highway projects:-

- (i) Creation of a Road Finance Corporation;
- (ii) Encouragement of takeout financing;
- (iii) Banks should be allowed to treat bonds or loans at par where it involves infrastructure financing and invest also in unrated and unlisted bonds;
- (iv) Long term infrastructure bonds issued by SPVs (with maturity more than 5 years) held by banks and insurance companies should be allowed to be classified under Held-to-Maturity (HTM) category; and
- (v) Ministry of Finance may ask RBI about the validity of the Escrow and Substitution agreement as a valid security for secured loan.

5. During deliberations, the Administrative Ministry observed that most financing related issues, such as availability of long term debt, have already been raised in some other for a as well. High Level Committees such as the Deepak Parekh Committee, Patil Committee, Percy S. Mistry Committee, Raghuram Rajan Committee have also made several recommendations on the subject. These are structural issues which cannot be tackled with institution specific solutions. Several of these recommendations are already being pursued and are at various stages of implementation.

6. It was also observed that issues involving financial regulation and Regulatory bodies should be resolved, as far as possible, through consensus. In fact, in order to discuss and evolve consensus on issues relating to infrastructure financing, a High Level Standing Committee on Infrastructure Finance has also been set up under the Chair of the Finance Secretary, with representation from various stakeholder groups.

7. The Administrative Ministry also made the following comments on specific issues raised above:

- (i) *Creation of a Road Finance Corporation*: A new financial intermediary would not necessarily augment the availability of finance. Moreover, there are already several existing financial institutions for this purpose;
- (ii) *Take-out financing*: FM has already made an announcement in Budget 2009-10 on this subject. A Scheme of Takeout financing has already been formulated by IIFCL and approved by the Empowered Committee;
- (iii) *Banks' investment in unrated and unlisted infrastructure bonds*: This issue may be of particular relevance to the small to mid-sized developers who seek to bid for larger projects. Banks are exposed to risks of non-recourse financing of the infrastructure SPVs. At present, 10% of non-SLR investments of banks are already allowed in unrated instruments and entire 10% is now allowed to be invested in unrated infrastructure bonds. Unrated claims on corporate in excess of Rs 10 crore attract a risk weight of only 100% at present (150% prior to November 2008);
- (iv) *Classification of infrastructure bonds of SPVs under HTM category*: Adoption of Accounting Standard IFRS 9 (AS 30), which is mandatory from April 1, 2011, may solve this problem;
- (v) *Validity of escrow and substitution agreements as valid security*: These issues were taken up with RBI for consideration and the RBI response is as follows:
 - (a) A lender would default when the cash flows being generated by the project is not sufficient to service the debt. Thus the cash flows under the escrow mechanism would diminish and its ability to minimize losses of banks would depend upon the priority right over the allocation of funds from escrow account. Further, it is difficult to believe that the amount of funds available in the escrow account will cover both the interest and principal amount

as typically the credit would be very large for infrastructure projects;

- (b) When a lender exercises substitution rights i.e. replace the existing company with another company in the event of failure of existing company, it is uncertain whether the cash flows would improve quickly and will be sufficient to service the debt and meet operational expenses. Moreover, the new company would also like to renegotiate the payment commitments as per their commercial perceptions. The amount of uncertainty involved would be high and would result in disruption of servicing of debt and would be a source of concern from a lender's perspective.

Since both the securities mentioned above are intangible and what is not secured by tangible security should not be allowed to be treated as secured artificially, RBI has not been able to consider the exposure covered by these securities as secured exposure.

Refinancing through External Commercial Borrowing (ECB)

8. ECB is limited, at present, to USD 500 M under the automatic route with interest cap of LIBOR plus 350 bps. Amounts beyond this require RBI approval. Due to restrictions on the end use of ECB funds, the existing loans of a SPV cannot be refinanced by ECB. It has been suggested to the Committee that ECB guidelines could be amended for allowing refinancing of existing loans through ECB so that more competitive finance is available for the sector.

9. During deliberations, the Administrative Ministry mentioned that the extant guidelines do not allow for refinancing of existing loans of an SPV through ECB. However, a one-time relaxation has been allowed in respect of payment for spectrum allocation. The payment for spectrum allocation is now allowed to be initially met out of Rupee resources of successful bidders, to be refinanced with a long-term ECB, under the approval route¹⁰. Hence there may be a strong case to extent similar refinancing facility through ECB to other infrastructure projects as well. This issue is also being taken up the

¹⁰ RBI A.P. (DIR Series) Circular No. 28, dated January 25, 2010

Administrative Ministry through the High Level Coordination Committee (HLCC) on Financial Markets (headed by the Governor, RBI).

Automatic approval for FDI in road sector holding companies

10. The 100% FDI approval through the automatic route for the highway sector is not available if the investment is to be made in the holding company for the road and highways sector. The suggestion before the Committee was to extend the 100% FDI approval also to investments in such holding companies.

11. However, it was observed that as per extant guidelines, a holding company set up by an overseas entity, solely for investment in the road sector, needs only to seek a onetime permission from FIPB. FIPB holds weekly sittings and hence application for downstream investments will not entail delay.

Investment by Insurance Companies

12. Current norms for investments by insurance companies mandate a minimum credit rating of A+, and a dividend payment history. The suggestions made are that the minimum rating requirement for bonds or similar instruments issued by infrastructure companies should be lowered to only investment grade (BBB); and that the dividend payment history requirement for equity investment may be relaxed for road & highways SPVs. Further that the threshold investment limit needs to be hiked for banks/pension/insurance funds to have larger fund availability for highway projects.

13. These suggestions were examined by the Committee. As per the investment guidelines prescribed by the Insurance Regulatory and Development Authority (IRDA), for life insurance companies, investments in non-government securities can be either in the form of 'approved investments' (AI) or 'Other Investments' (OTA) and could in turn either be as debt or as equity. Debt in AI category has to be rated AA or higher (under certain circumstances can be relaxed upto A+). Investment in equity shares of dividend paying companies (dividend of not less than 4% including bonus

should have been declared in at least for the 5 preceding years¹¹). The existing norms specify a minimum 15% exposure to infrastructure and housing under the AI category of which at least 75% of 'approved' 'debt' investments should be of AAA quality.

14. LIC has not exhausted even this minimum 15% prescribed for infrastructure investments. In comparison with LIC and other public sector units, the investments from private sector insurance companies may not be substantial.

15. The Administrative Ministry mentioned that the suggestions such as relaxation in the minimum credit rating requirement to investment grade (BBB & above) and raising the exposure norms for investment in infrastructure were also discussed in the First Meeting of the Standing Committee on Infrastructure Finance. However, as already observed, even the existing 15% window to infrastructure and housing under the 'Approved Investment' category has not been fully utilised. This has been due *inter alia* to paucity of good quality of paper from infrastructure projects. One way to utilise this window is to dilute the minimum rating requirement and dividend track record in response to which IRDA has stated that it may not be possible to relax the rating requirement below A+.

16. An alternative approach is to put in place a credit enhancement mechanism to yield requisite quantity of high quality paper for enabling further investment by the insurance funds under this window. There is no such credit enhancement mechanism in place at present. Hence, a proposal for IIFCL to act as a 'monoline' insurer who would undertake credit wrap of bonds/paper issued by infrastructure operators is being worked out separately elsewhere.

Classification of loans to road BOTs as 'secured'

17. RBI has defined projects assets without tangible security as "unsecured" loans. This classification makes it difficult for private road developers to avail loans from banking system on one side and increases the cost of the loan on the other side. It has been suggested to the Committee

¹¹ IRDA Circular Ref. IRDA/INV/CIR/027/2008-09, dated December 26, 2008

that the security mechanism in the form of cash flows from the project, substitution rights to lenders and termination payment guarantee should be equated with tangible security offered in other sectors.

18. In most concession agreements, the lenders' downside is completely protected through debt under-pinning of upto 90% of the debt due in the event of default. The lender gets substitution rights in the event of default, whereby the concessionaire can, subject to approvals of the concession awarding "authority", be replaced (i.e., "step-in" rights & the project/concession can be sold-off to another operator) and future debt repayment ability is protected as the new operator will run the project to generate cash flows. Moreover, in the event the concession awarding "authority" repossess the project, the lenders have the first right over capital payments to be made by the concession awarding "authority" to the concessionaire.

19. In the case of national highways, an explicit provision has also been incorporated in the Model Concession Agreement, in terms of the recommendations of the Committee in its First Report, permitting lenders to create a charge on the Escrow Account to the extent permissible as per their priority in the 'waterfall'.

20. However, during deliberations, the Administrative Ministry mentioned that the issue of classifying infrastructure loans as 'secured' has been taken up, with the Regulator, through the Forum of the Standing Committee on Infrastructure Finance and substantial progress has already been achieved in the matter.

Recommendations

21. As regards the cash trap, the Committee observed that the retention has been mandated under the statute to meet unforeseen contingencies any company may be faced with, and there may be no justification to make an exception only to road sector concessionaires.

22. As regards the issues relating to availability of long-term debt for road sector SPVs, the Committee recommends that the suggestions above may be pursued by the Ministry of Finance through its existing dispensations including the Standing Committee on Infrastructure Finance. In particular, the

Committee also recommends that the takeout financing scheme should be operationalised at the earliest; and the issue of treating escrow and substitution agreements as valid security may be taken up with RBI for consideration. However, the Committee does not recommend creation of a separate Road Finance Corporation.

23. As regards ECB, the Committee observed that the benefits accruing from the suggestion may only be marginal and hence decided not to consider the proposal further. As regards FDI in the road sector, the Committee observed that an across the board relaxation of FDI norms can be misused and hence would not be desirable.

24. As regards infrastructure investments by insurance companies, the Committee observes that the problems mentioned need recognition for finding an appropriate solution. The Ministry of Finance may pursue the issues of relaxation in the minimum rating and the dividend payment history with IRDA, so as to enable larger long-term resource availability for infrastructure projects.

25. As regards classification of loans to highway projects, the Committee observes that the mere fact of there being no tangible collateral as in other loans may not be justification enough to classify these loans as 'unsecured'. However, the Committee took note of the mention that substantial progress has already been achieved in the matter, and decided to ask the Ministry of Finance to pursue the matter to its logical end.

CHAPTER 5

MISCELLANEOUS ISSUES

The Committee also considered the following miscellaneous received from various stakeholders in the context of road projects and NHA awards.

LLP structure for SPVs

2. The highway developers have proposed to the Committee that SPVs formed as LLPs may be permitted, in place of the current practice of having only companies, to execute road projects.

3. A lower level of supervision/regulatory constraints and the fact that relationship between partners in an LLP is governed by contract and not by statute may be the major factors which attract developers to form SPVs under an LLP structure, giving rise to this demand. However, the LLP structure is rather very new, created only under a statute of 2009 and the operational experience with this new structure is very limited so far.

Empowering NHA for OMT Projects

4. PPP projects, to be considered so, need to have an upfront capital expenditure (usually large), such capital expenditure resulting in the creation of a capital asset, a concession granted by the state or its agency authorizing the developer to recover such capital expenditure/ cost through imposition of a structured user fee from the user of the said facility, such recovery being permitted (mostly) after creation of capital asset, time horizon of such cost recovery stretching into a substantially long period, and at the end of such period the asset created reverting to the state or its agency. OMT projects may not qualify to be classified as PPP under any of these counts.

5. The capital expenditure on the asset has already been met by NHA, upfront capital expenditure is only in peripheral/rudimentary constructions; the predominant component of project cost is O&M, which in the normal course does not even qualify to be called as capital expenditure. The user fee is on an asset created by NHA and commences to be charged from day one,

even before any expenditure is made by the so called concessionaire. The period of project is miniscule at 4-9 years, holding no comparison to a normal BOT project. Disaggregated, an OMT project consists of and is a fusion of two contracts, (a) a contract for right to collect toll, and (b) a contract for O&M. These are individually incapable of being categorized as PPP. Hence to associate the term PPP with OMT projects may not be in order.

6. In the past numerous toll collection contracts and O&M contracts have been awarded by NHAI under these powers vested in it. In the meeting of the Authority held on May 19, 2005, it was noted that *“The Ministry of Surface Transport fixed the upper value of the contracts that can be executed by NHAI at Rs.400 crore. The Authority noted this decision”* (Item No. 10 - extracts of agenda and noting enclosed for reference).

7. Hence NHAI holds, since May 19, 2005, the Central Government’s sanction powers vested in it to award projects each of value upto Rs.400 crore. But for the classification of OMT projects as PPP, and consequent requirement for SFC/EFC intervention, NHAI could have awarded the OMT projects directly. As per the procedure decided by the Cabinet in its meeting held on 27.10.2005, appraisal of PPP Projects costing above Rs. 500 crore needs to be submitted by the Administrative Ministry to the PPPAC for approval (Standing Finance Committee for the projects of Rs. 250-500 crore). However, the values of OMT projects have been very small.

8. Hence the proposal for consideration is that NHAI Board should be permitted to award OMT projects under powers vested in it given the small value of such projects and the procedural delays in SFC/EFC processes.

9. However, a contra view has also been expressed that the classification of a project under PPP is not entirely decided only on the basis of the upfront capital expenditure borne by the private party. The OMT projects *inter alia* involve transfer of traffic and other specified risks to the private party and also vest the right to collect toll with the concessionaire. As per this view, the OMT projects may rightly be classifiable only under PPP.

Recommendations

10. As regards permitting LLP structure for road SPVs, the Committee decided that the suggestion may be considered at a later stage only when more experience on the operational aspects of LLPs is available for reference.

11. As regards empowering NHAI to award OMT projects, the Committee noted that NHAI has recently been delegated with more powers, and it would be appropriate to consider further delegation only after a review in the light of the operational experience from such delegation. Hence the Committee decided not to take a call on this issue for the present.

Annex 'A'

CATEGORY-WISE ABSTRACT OF ARBITRATION IN PROGRESS

| Sl. No. | Category | Total No. of Disputes Referred | Amount Referred to DRB (Rs. In Crores) | Amount Recommended by DRB (Rs. In Crores) | Amount Referred to Arbitration (Rs. in Crores) |
|----------------|---|---------------------------------------|---|--|---|
| 1 | Amount involved less than Rs. 10 crore | 317 | 173.08 | 87.48 | 208.9 |
| 2 | Amount involved between Rs. 10 crore to Rs. 100 crore | 538 | 849.45 | 488.79 | 1,916.25 |
| 3 | Amount involved more than Rs. 100 crore | 395 | 3,701.87 | 1,295.41 | 6,022.08 |
| | Total | 1,250 | 4,724.4 | 1,871.68 | 8,147.23 |

Note: An amount of Rs. 362.52 crores towards price escalation has not been considered in claimed amount referred to Arbitration as this issue is to be decided for all 18 packages where similar issue has cropped up.

Annex 'B'

CATEGORY-WISE ABSTRACT OF ARBITRAL AWARDS ALREADY PUBLISHED

| Sl. No. | Category | Total No. of Disputes Referred | Amount Referred to DRB (Rs. In Crores) | Amount Recommended by DRB (Rs. In Crores) | Amount Referred to Arbitration (Rs. in Crores) | Amount Awarded by Arbitration (Rs. In Crores) |
|----------------|---|---------------------------------------|---|--|---|--|
| 1 | Amount involved less than Rs. 10 crore Unanimous | 174 | 110.91 | 55.51 | 133.52 | 103.62 |
| | Majority | 32 | 34.81 | 24.13 | 30.51 | 23.56 |
| 2 | Amount involved between Rs. 10 crore to Rs. 100 crore Unanimous | 183 | 423.4 | 248.45 | 685.94 | 268.9 |
| | Majority | 66 | 148.77 | 96.59 | 256.63 | 103.48 |
| 3 | Amount involved more than Rs. 100 crore Unanimous | 19 | 366.89 | 214.49 | 598.64 | 80.75 |
| | Majority | 16 | 316.82 | 262.91 | 185.3 | 74.59 |
| | Total | 490 | 1,401.6 | 902.08 | 1,890.54 | 654.9 |

Note: An amount of Rs. 370.00 crores towards price escalation has not been considered in claimed amount referred to Arbitration as this issue is to be decided for all 18 packages where similar issue has cropped up.

Sub-Clause 65.2 Special Risks

Sub-Clause 65.2 is amended to read as follows:

The Special Risks are the risks defined under para. (a), sub paras, (i) to (v) of Sub-Clause 20.4".

Clause 67: Settlement of Disputes

The procedure for settlement of disputes is stipulated below

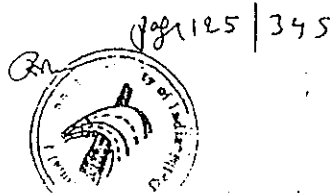
Sub-Clause 67.1: Disputes Review Board

Sub-Clause 67.1 is substituted by the following:

"67.1 If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate Or valuation of the Engineer, the matter in dispute shall, in the first place be referred to the Disputes Review Board ("the Board").

The Board shall be established by the signing of a Board Members Declaration of Acceptance (as required by paragraph 12 of Annex B to these Conditions of Particular Application) by all three Board Members.

The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. If either of these Members is not so selected and approved within 28 days of the date of the Letter of Acceptance, then upon the request of either or both parties such Member shall be selected as soon as practicable by the Appointing Authority specified in the Appendix to Bid. [The third Member shall be selected by the other two and approved by the parties.] If the two Members selected by or on behalf of the parties fail to select the third Member within 14 days after the letter of their selections Or if within 14 days after the selection of the third Member, the parties fail to approve that Member, then upon the request of either or both parties such third Member shall be selected promptly by the same Appointing Authority specified in the Appendix to Bid



who shall seek the approval of the proposed third Member by the parties before selection but failing such approval, nevertheless shall select the third Member. The third Member shall serve as Chairman of the Board.

In the event of death, disability, or resignation of any Member, such Member shall be replaced in the same manner as the Member being replaced was selected. If for whatever other reason a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman then either of the other Members) shall inform the parties and such non-serving Member shall be replaced in the same manner as the Member being replaced was selected. Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board, failing which the replacement shall be made by the Appointing Authority in the same manner as described above. Replacement shall be considered completed when the new Member signs the Board Member's Declaration of Acceptance. Throughout any replacement process the Members not being replaced shall continue to serve and the Board shall continue to function and its activities shall have the same force and effect as if the vacancy had not occurred, provided, however, that the Board shall not conduct a hearing nor issue a Recommendation until the replacement is completed.

Either the Employer or the Contractor may refer a dispute to the Board in accordance with the provisions of Annex B to these Conditions of Particular Application.

If either the Employer or the Contractor is dissatisfied with any Recommendation of the Board, or if the Board fails to issue its Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation, then either the Employer or the Contractor may, within 14 days after his receipt of the Recommendation, or within 14 days after the expiry of the said 56-day period, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 14 days after the parties



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received such Recommendation from the Board, the Recommendation shall become final and binding upon the Employer and the Contractor.

Whether or not it has become final and binding upon the Employer and the Contractor, a Recommendation shall be admissible as evidence in any subsequent dispute resolution procedure, including any arbitration or litigation having any relation to the dispute to which the Recommendation relates.

All Recommendations which have become final and binding shall be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every decision of the Engineer unless and until the same shall be revised as a result of the operation of this Sub-Clause 67.1 or, as hereinafter provided, in an arbitral award.

If during the contract period, the Employer and the Contractor are of the opinion that the Disputes Review Board is not performing its functions properly, the Employer and the Contractor may together disband the Disputes Review Board and reconstitute it. A new board shall then be selected in accordance with the provisions applying to the selection of the original Board as specified above, except that words "within 28 days after the letter of Acceptance" shall be replaced by the words "within 28 days after the date on which the notice disbanding the original Board became effective".

The Employer and the Contractor shall jointly sign a notice specifying that the Board shall stand disbanded with effect from the date specified in the notice. The notice shall be posted by a registered letter with AD or delivered personally to each Member of the Board. A Member shall be deemed to have received the delivery of the letter even if he refuses to do so.

~~Sub-Clause 67.2~~ Sub-Clause 67.2 is deleted without a change in the numbering of the other Sub-clauses of this Clause, 67

~~Sub-Clause 67.3~~ Arbitration

Sub-Clause 67.3 is modified to read as follows:

"Any dispute in respect of which the Recommendation(s), if any,

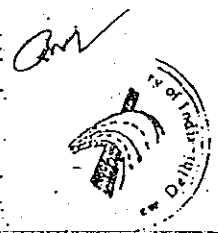


of the Board has not become final and binding pursuant to Sub-Clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the President, Indian Roads Congress. For the purposes of this Sub-Clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties, and shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of Indian Road Congress. For the purposes of this Clause 67, the term "Foreign Contractor" means a contractor who is not registered in India and is not a juridic person created under Indian Law.

(iii) Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify any Board Member from being called as a



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witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

- (iv) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor and the Board shall not be altered- by reason of the arbitration being conducted during the progress of the Works.
- (v) If one of the parties fail to appoint its arbitrator in pursuance of sub- clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of Indian Road Congress both in cases of foreign contractors as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of Indian Road Congress making such an appointment shall be furnished to each of the parties.
- (vi) Arbitration proceedings shall be held at Delhi in India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.
- (vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.



Sub-Clause 67.4

Failure to Comply with Recommendation

Sub-Clause 67.4 is amended to read as follows:

"67.4 Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related Recommendation has become final and binding, either party may, if the other party fails to comply with such Recommendation and without prejudice to any other right it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 shall not apply to any such reference."



EPC (WORLD BANK FUNDED)

LNHP-EF-II (WB)-12

Volume 1

Borrower of the benefits of free and open competition."

Sub-Clause 65.2
Special Risks

Amend Sub-Clause 65.2 to read as follows: "The Special Risks are the risks defined under para (a), subparas (I) to (iv) of Sub-Clause 20.4."

Clause 67
Settlement of
Disputes

The procedure for settlement of disputes is stipulated below.

Sub-Clause 67.1
Disputes Review
Board

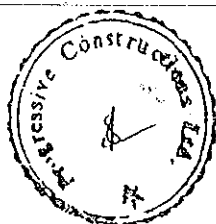
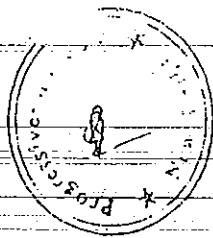
Sub-Clause 67.1 is substituted by the following:

"67.1 If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board ("the Board").

The Board shall be established when each of the three Board Member has signed a Board Members Declaration of Acceptance as required by the DRB's rules and procedures (which, along with the declaration of acceptance form, are attached as Annex "A" to these Conditions of Particular Applications - Para 12)

The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. If either of these Members is not so selected and approved within 28 days of the date of the Letter of Acceptance, then upon the request of either or both parties such Member shall be selected as soon as practicable by the Appointing Authority specified in the Appendix to Bid. The third Member shall be selected by the other two and approved by the parties. If the two Members selected by or on behalf of the parties fail to select the third Member within 14 days after the later of their selections or if within 14 days after the selection of the third Member, the parties fail to approve that Member, then upon the request of either or both parties such third Member shall be selected promptly by the same Appointing Authority specified in the Appendix to Bid who shall seek the approval of the proposed third Member by the parties before selection but, failing such approval, nevertheless shall select the third Member. The third Member shall serve as Chairman of the Board.

In the event of death, disability, or resignation of any Member, such Member shall be replaced in the same manner as the Member being replaced was selected. If for whatever other reason a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman then either of the other Members) shall inform the parties and such non-serving Member shall be replaced in the same manner as the Member being



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replaced was selected. Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board, failing which the replacement shall be made by the Appointing Authority in the same manner as described above. Replacement shall be considered completed when the new Member signs the Board Member's Declaration of Acceptance. Throughout any replacement process the Members not being replaced shall continue to serve and the Board shall continue to function and its activities shall have the same force and effect as if the vacancy had not occurred, provided, however, that the Board shall not conduct a hearing nor issue a Recommendation until the replacement is completed.

Either the Employer or the Contractor may refer a dispute to the Board in accordance with the provisions of Annex A to these Conditions of Particular Application.

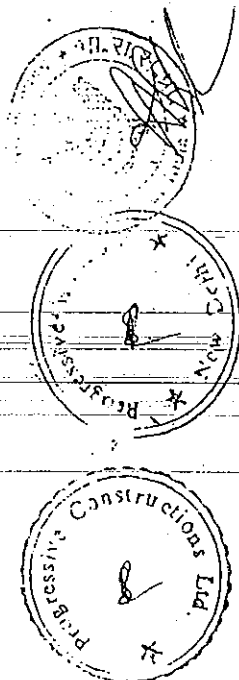
The recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as herein after provided, in an arbitral award. Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works in accordance with the contract.

If either the Employer or the Contractor is dissatisfied with any Recommendation of the Board, or if the Board fails to issue its Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation, then either the Employer or the Contractor may, within 14 days after his receipt of the Recommendation, or within 14 days after the expiry of the said 56-day period, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 14 days after the parties received such Recommendation from the Board, the Recommendation shall become final and binding upon the Employer and the Contractor.

Whether or not it has become final and binding upon the Employer and the Contractor, a Recommendation shall be admissible as evidence in any subsequent dispute resolution procedure, including any arbitration or litigation having any relation to the dispute to which the Recommendation relates.

All Recommendations which have become final and binding shall be implemented by the parties forthwith, such implementation to



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include any relevant action of the Engineer.

If during the contract period, the Employer and the Contractor are of the opinion that the Disputes Review Board is not performing its functions properly, the Employer and the Contractor may together disband the Disputes Review Board and reconstitute it. A new board shall then be selected in accordance with the provisions applying to the selection of the original Board as specified above, except that words "within 28 days after the letter of Acceptance" shall be replaced by the words "within 28 days after the date on which the notice disbanding the original Board became effective".

The Employer and the Contractor shall jointly sign a notice specifying that the Board shall stand disbanded with effect from the date specified in the notice. The notice shall be posted by a registered letter with AD or delivered personally to each Member of the Board. A Member shall be deemed to have received the delivery of the letter even if he refuses to do so.

Sub-Clause 67.2 Sub-Clause 67.2 is deleted without a change in the numbering of the other Sub-clauses of this Clause 67.

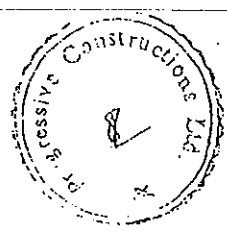
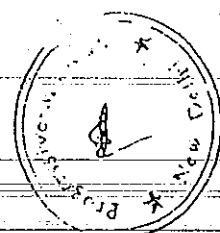
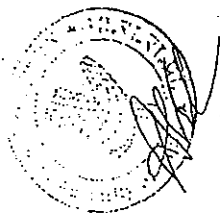
Sub-Clause 67.3 Sub-Clause 67.3 is modified to read as follows:

Arbitration

"Any dispute in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to Sub-Clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress. For the purposes of this Sub-Clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint-venture between such a contractor and a Foreign Contractor

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties, and shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the



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Presiding Arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress. For the purposes of this Clause 67, the term "Foreign Contractor" means a contractor who is not registered in India and is not a juridic person created under Indian Law.

- (iii) Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.
- (iv) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.
- (v) If one of the parties fail to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of the Institution of Engineers (India) both in cases of foreign contractors as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of the Institution of Engineers (India) making such an appointment shall be furnished to each of the parties.
- (vi) Arbitration proceedings shall be held at Delhi India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.
- (vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.



Sub-Clause 67.4
Failure to Comply
with
Recommendation

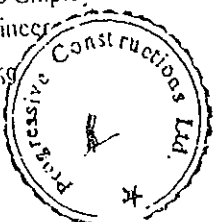
Sub-Clause 67.4 is amended to read as follows:

"67.4 Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related Recommendation has become final and binding, either party may, if the other party fails to comply with such Recommendation and without prejudice to any other right it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 shall not apply to any such reference.



Sub-Clause 68.2
Notice to Employer
and Engineer
Clause 69

For the purposes of this Sub-Clause, the addresses are those specified in the Appendix to Bid



In Sub-Clause 69.1, 69.4, and 69.5, substitute "Sub-Clause 60.8" for "Sub-Clause 60.10".

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MCA (BOT-OLD)

National Highways Authority of India

Concession Agreement

action, suit or proceeding on behalf of the Indemnified Party and the reasonable fees and disbursements of such counsel shall constitute legal or other expenses hereunder.

XXXVIII. RIGHTS AND TITLE OVER THE SITE

- 38.1 The Concessionaire shall have exclusive rights to the use of the Site in accordance with the provisions of this Agreement and for this purpose it may regulate the entry and use of the Project Highway by third parties.
- 38.2 The Concessionaire shall allow access to, and use of the Site for telegraph lines, electric lines or such other public purposes as NHAI may specify. Where such access or use causes any damage to the Project Highway and consequent financial loss to the Concessionaire, it may seek compensation or damages from such user of the Site as per Applicable Laws.
- 38.3 The Concessionaire shall not be liable to pay any property taxes for the Site.
- 38.4 For the purposes of claiming tax depreciation, the property representing the capital investment made by the Concessionaire shall be deemed to be acquired and owned by the Concessionaire.
- 38.5 The Concessionaire shall not sublet the whole or any part of the Site save and except as may be expressly set forth in this Agreement provided however that nothing contained herein shall be construed or interpreted as restricting the right of the Concessionaire to appoint contractors for the performance of its obligations hereunder including for operation and maintenance of all or any part of the Project Highway including Project Facilities.

XXXIX. DISPUTE RESOLUTION

39.1 Amicable Resolution:

- (a) Save where expressly stated to the contrary in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including incompleteness of the Project Highway between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be



4-laning of Kondhali-Talegaon Section
(Km 50+000 to 100+000 of NH-6 on BOT basis)

attempted to be resolved amicably in accordance with the conciliation procedure set forth in Sub-clause (b) below.

- (b) In the event of any Dispute between the Parties, either Party may call upon the Independent Consultant to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Consultant or without the intervention of the Independent Consultant, either Party may require such Dispute to be referred to the Chairman, NHAI and the Chairman of the Board or Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the said two Authorities shall meet not later than 7 (seven) days of the date of such request to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the said period or the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the said two Authorities, either Party may refer the dispute to arbitration in accordance with the provisions of Clause 39.2.
- (c) If the Dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty) working days of the aforesaid notice in writing or such longer period as may be mutually agreed by the Parties then the provisions of Clause 39.2 shall apply.

39.2 Arbitration

39.2.1 Any Dispute, which is not resolved amicably as provided in Clause 39.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2 below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration Act.

39.2.2 There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

39.2.3 The arbitrators shall issue a reasoned Award.

39.2.4 The venue of such arbitration shall be New Delhi, India.



39.3 Arbitration Awards to be Binding

39.3.1 The Concessionaire and NHAI undertake to carry out any decision or award of the arbitrators (the "Award") without delay. Awards relating to any Dispute shall be final and binding on the Parties as from the date they are made.

39.3.2 The Concessionaire and NHAI agree that an Award may be enforced against the Concessionaire and/or NHAI, as the case may be and their respective assets wherever situated.

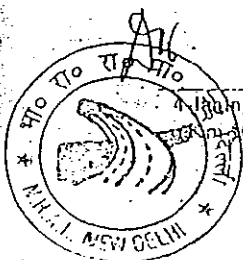
39.3.3 This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder.

XL. DISCLOSURE

40.1 The Concessionaire shall make available for inspection by members of public free of charge during normal business hours on all working days copies of this Concession Agreement, the O&M Contract, the Tolling Contract and the State Support Agreement (hereinafter collectively referred to as "Public Documents") at the Concessionaire's Site office during the subsistence of this Agreement. The Concessionaire shall prominently display at the Toll Plazas public notices about the availability of the Public Documents for inspection and shall make available upon request and payment in advance of copying charges on no profit no loss basis to members of public copies of the said Public Documents.

XLI. REDRESSAL OF PUBLIC GRIEVANCES

41.1 The Concessionaire shall maintain a public relations office adjacent to the Toll Plaza and keep it open to public access at all times. At each such office, the Concessionaire shall open and maintain a register (the "Complaints Register") for recording of complaints by any person (the Complainant) at any time of the day. The availability of and access to such office and the Complaints Register shall be prominently displayed by the concessionaire at each Toll Plaza so as to bring it to the attention of all persons who are entering and exiting the Project Highway.



ARTICLE 44

DISPUTE RESOLUTION

44.1 Dispute resolution

44.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

44.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so

selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree that an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

44.4 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.

ANALYSIS OF DISPUTES

Category 'A' Cases (All Cases)

(Amount Claimed Before Appellate Tribunal up to Rs. 10 crore or 5% Contract Price, Whichever is Lower)

(Rs. in Crore)

| No. of Cases | Category 'A' | Contract Price | 5% Value of Contract Price | Amount Claimed Before DRB | Recommended Amount by DRB | Whether Unanimous or Majority | No. of Claims Before AT | Claimed Amount Before AT | Amount Recommended by AT |
|--------------|--|----------------|----------------------------|---------------------------|---------------------------|-------------------------------|-------------------------|--------------------------|--------------------------|
| 40 | Unanimous Decision by DRB | 8,990.8 | 449.5 | 151.0 | 73.7 | | 128 | 90.6 | 79.2 |
| 9 | Appeal by Contractor | 2,055.1 | 102.8 | 46.4 | 16.1 | | 30 | 18.1 | 24.1 |
| 6 | Appeal by Both | 1,627.4 | 81.4 | 18.3 | 4.6 | | 16 | 14.0 | 10.4 |
| 25 | Appeal by NHAI | 5,308.3 | 265.4 | 86.2 | 53.0 | | 82 | 58.6 | 44.6 |
| 4 | Majority Decision by DRB | 1,235.0 | 61.7 | 12.8 | 10.0 | | 8 | 10.7 | 9.7 |
| 0 | Appeal by Contractor | 0.0 | 0.0 | 0.0 | 0.0 | | 0 | 0.0 | 0.0 |
| 0 | Appeal by Both | 0.0 | 0.0 | 0.0 | 0.0 | | 0 | 0.0 | 0.0 |
| 4 | Appeal by NHAI | 1,235.0 | 61.7 | 12.8 | 10.0 | | 8 | 10.7 | 9.7 |
| 15 | No DRB Provision (or DRB is Terminated) - All Appeals by Contractor | 1,484.5 | 74.2 | | | | 57 | 43.4 | 31.3 |
| 59 | Grand Total | 11,710.3 | 585.5 | 0.0 | 0.0 | | 193 | 144.7 | 120.2 |

Category 'B' Cases (All Cases)

(Amount Claimed Before Appellate Tribunal up to Rs. 10 crore and Rs. 100 crore or 5% Contract Price, Whichever is Lower)

(Rs. in Crore)

| No. of Cases | Category 'B' | Contract Price | 5% Value of Contract Price | Amount Claimed Before DRB | Recommended Amount by DRB | Whether Unanimous or Majority | No. of Claims Before AT | Claimed Amount Before AT | Amount Recommended by AT |
|--------------|---|----------------|----------------------------|---------------------------|---------------------------|-------------------------------|-------------------------|--------------------------|--------------------------|
| 16 | <i>Unanimous Decision by DRB</i> | 3148.3 | 157.4 | 496.1 | 298.1 | U | 113 | 469.4 | 205.1 |
| 0 | Appeal by Contractor | 0.0 | 0.0 | 0.0 | 0.0 | | 0 | 0.0 | 0.0 |
| 7 | Appeal by Both | 1,147.15 | 57.3575 | 334.88 | 161.75 | U | 60 | 335.88 | 119.89 |
| 9 | Appeal by NHAI | 2001.1 | 100.1 | 161.2 | 136.4 | U | 53 | 133.6 | 85.2 |
| 5 | <i>Majority Decision by DRB</i> | 877.5 | 43.9 | 98.5 | 60.1 | M | 29 | 94.7 | 58.0 |
| 1 | Appeal by Contractor | 295.8 | 14.8 | 19.7 | 0.0 | M | 5 | 19.7 | 21.1 |
| 2 | Appeal by Both | 193.8 | 9.7 | 34.0 | 17.8 | M | 13 | 30.2 | 15.7 |
| 2 | Appeal by NHAI | 387.9 | 19.4 | 44.8 | 42.3 | M | 11 | 44.8 | 21.2 |
| 13 | <i>No DRB Provision (or DRB is Terminated) – All Appeals by Contractor</i> | 1,422.9 | 71.1 | | | | 120 | 397.8 | 116.4 |
| 34 | Grand Total | 5,448.7 | 272.4 | 0.0 | 0.0 | | 262 | 961.9 | 379.4 |

Category 'C' Cases (All Cases)

(Amount Claimed Before Appellate Tribunal > Rs. 100 crore)

(Rs. in Crore)

| No. of Cases | Category 'C' | Contract Price | 5% Value of Contract Price | Amount Claimed Before DRB | Recommended Amount by DRB | Whether Unanimous or Majority | No. of Claims Before AT | Claimed Amount Before AT | Amount Recommended by AT |
|--------------|---|----------------|----------------------------|---------------------------|---------------------------|-------------------------------|-------------------------|--------------------------|--------------------------|
| 6 | <i>Unanimous Decision by DRB</i> | 1,182.5 | 59.1 | 683.7 | 477.4 | U | 35 | 783.9 | 155.3 |
| 0 | Appeal by Contractor | 0.0 | 0.0 | 0.0 | 0.0 | U | 0 | 0.0 | 0.0 |
| 2 | Appeal by Both | 372.35 | 18.6175 | 303.62 | 195.11 | U | 5 | 0 | 17.84 |
| 4 | Appeal by NHAI | 810.1 | 40.5 | 380.1 | 282.3 | U | 30 | 783.9 | 137.5 |
| 0 | <i>Majority Decision by DRB</i> | 0.0 | 0.0 | 0.0 | 0.0 | M | 0 | 0.0 | 0.0 |
| 0 | Appeal by Contractor | 0.0 | 0.0 | 0.0 | 0.0 | M | 0 | 0.0 | 0.0 |
| 0 | Appeal by Both | 0.0 | 0.0 | 0.0 | 0.0 | M | 0 | 0.0 | 0.0 |
| 0 | Appeal by NHAI | 0.0 | 0.0 | 0.0 | 0.0 | M | 0 | 0.0 | 0.0 |
| 1 | <i>No DRB Provision (or DRB is Terminated) - All Appeals by Contractor</i> | 0.0 | 0.0 | | | | 0 | 0.0 | 0.0 |
| 7 | Grand Total | 1,182.5 | 59.1 | | | | 35 | 783.9 | 155.3 |

Category 'A' Cases Pending Arbitration

Estimates of Cost Benefit on Withdrawal of NHA1 References in Category 'A' Cases

(Rs. in Crore)

| S.No. | Category 'A' | Contract Price | 5% Value of Contract Price | Claimed Amount Before DRB | Recommended Amount by DRB | No. of Disputes | Total Amount in Arbitration | Est. Net Benefit on Withdrawal of NHA1 Ref. to AT |
|-----------|--|----------------|----------------------------|---------------------------|---------------------------|-----------------|-----------------------------|---|
| 30 | <i>Unanimous Decision by DRB</i> | 4,539.4 | 227.0 | 132.4 | 67.5 | 172 | 116.3 | |
| 12 | Appeal by Contractor | 1,766.9 | 88.3 | 34.1 | 0.6 | 67 | 34.1 | |
| 4 | Appeal by Both | 486.6 | 24.3 | 19.8 | 7.6 | 26 | 8.9 | |
| 14 | Appeal by NHA1 | 2,285.9 | 114.3 | 78.4 | 59.3 | 79 | 73.3 | 2.4 |
| 5 | <i>Majority Decision by DRB</i> | 884.0 | 44.2 | 40.7 | 20.0 | 32 | 21.8 | |
| 1 | Appeal by Contractor | | 0 | 5.4 | 2.2 | 5 | 2.2 | |
| 0 | Appeal by Both | 0 | 0 | 0.0 | 0.0 | 0 | 0.0 | |
| 4 | Appeal by NHA1 | 884.0 | 44.2 | 35.4 | 17.8 | 27 | 19.6 | 0.6 |
| 16 | <i>No DRB Provision, Terminated Contract or DRB Failed to Issue Recommendations</i> | 1,356.1 | 67.8 | | | 113 | 70.8 | |
| 51 | Grand Total | 6,779.4 | 339.0 | | | 317 | 208.9 | |

Note: The benefit computations ignore the interest cost and litigation costs already incurred in respect of the appeal filed. It is presumed that the benefit (net benefit/amount claimed before AT) ratio will remain the same as per analysis of already awarded cases.

Category 'B' Cases Pending Arbitration

Estimates of Cost Benefit on Withdrawal of NHA1 References in Category 'B' Cases

(Rs. in Crore)

| S.No. | Category 'B' | Contract Price | 5% of Contract Price | Claimed Amount Before DRB | Recommended Amount by DRB | No. of Disputes | Total Amount in Arbitration | Est. Net Benefit on Withdrawal of NHA1 Ref. to AT |
|-----------|--|----------------|----------------------|---------------------------|---------------------------|-----------------|-----------------------------|---|
| 23 | <i>Unanimous Decision by DRB</i> | 3,581.2 | 179.1 | 745.9 | 470.9 | 190 | 548.0 | |
| 1 | Appeal by Contractor | 81.4 | 4.1 | 27.5 | 1.3 | 24 | 26.4 | |
| 3 | Appeal by Both | 450.3 | 22.5 | 95.2 | 54.4 | 22 | 82.9 | |
| 19 | Appeal by NHA1 | 3,049.5 | 152.5 | 623.1 | 415.3 | 144 | 438.7 | 14.2 |
| 4 | <i>Majority Decision by DRB</i> | 695.4 | 34.8 | 103.6 | 10.9 | 30 | 103.0 | |
| 1 | Appeal by Contractor | 78 | 3.9 | 26.3 | 0.2 | 8 | 26.0 | |
| 3 | Appeal by Both | 617.37 | 30.8685 | 77.3 | 10.7 | 22 | 77.0 | |
| 0 | Appeal by NHA1 | | 0.0 | 0.0 | 0.0 | | | |
| 33 | <i>No DRB Provision, Terminated Contract or DRB Failed to Issue Recommendations</i> | 2,006.2 | 100.3 | | | 307 | 1,194.9 | |
| 60 | Grand Total | 6,282.8 | 314.1 | | | 527 | 1,846.0 | |

Note: The benefit computations ignore the interest cost and litigation costs already incurred in respect of the appeal filed. It is presumed that the benefit (net benefit/amount claimed before AT) ratio will remain the same as per analysis of already awarded cases.

COMMON MAJOR DISPUTES IN ARBITRATION

| Sl. No. | Description of Dispute | No. of Disputed Cases | Amount Involved (Rs. in Crore) |
|----------------|--|------------------------------|---------------------------------------|
| 1 | Subsequent legislation during pendency of contract such as royalty charges on material (aggregate, sand, cement etc.). | 20 | 24.00 |
| 2 | Subsequent legislation during pendency of contract such as excise duty and entry tax on materials (cement, bitumen etc.). | 20 | 19.00 |
| 3 | Different interpretation of clauses of the contract on price adjustment/escalation on BOQ items. | 18 | 766.00 |
| 4 | Different interpretation of clauses of the contract on deemed export benefit provided for purchase of construction machinery | 5 | 52.90 |
| 5 | Delay in providing working front such as handing over of encumbrance free site, shifting of utility, R&R etc. resulting idling charges of plant, machinery, equipment, manpower etc. | 45 | 225.00 (appx.) |
| 6 | Variation in quantities of BOQ items beyond the permissible limit provided in the contract and fixation of its rates. | 160 | 1200.00 (appx.) |
| 7 | Difference in rates provided by the Contractor and fixed by the Engineer for non BOQ items. | 285 | 1800.00 (appx.) |
| 8 | Different interpretation of clauses of the contract on clearing & grubbing, stump removal etc. | 20 | 20.00 (appx.) |
| 9 | Other items on different interpretation of clauses of the contract on technical issues such as providing metal crash barrier, sinking of well for bridge foundation, payment of test piles, additional cost on procurement of CRMB, reuse of dismantle material etc. | Balance Cases | Balance Amount |

**Changes in FIDIC Conditions of Contract (GCC) Adopted by NHAJ
Under Conditions of Particular Applications (COPA)**

| Clause No. | General Conditions of Contract | Change adopted by NHAJ |
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| 1.1(h) | No clause mentioned in FIDIC | Added definition 1.1(h) i.e. month and years and all dates shall be according to Gregorian calendar kind refer to shall be Indian Standard time |
| 1.5 | A notices Consents, Approvals, Certificates and Determinations - This clause has been amended | Notices will be deemed to be effective (a) In case of personal delivery, on delivery against signature; (b) In the case of registered mail or telegram, on the day of delivery as evidenced by the post-office records; (c) in the case of telex or facsimile, on the date shown on the transmission notice; and (d) a notice or any communication received on a non-working day or after business hours in the place of receipt shall be deemed to be served on the following working day. |
| 2.1(b) | Engineers duties and authority - This clause has been amended | The Engineer shall obtain the specific prior approval of the Employer before taking any of the following actions: (a) approving the subletting of any part of the Works under Clause 4 over and above subcontracts proposed and defined in the Bid; (b) issuing the order to commence the Works under Clause 4.1; (c) determining an extension of time under Clause 44; (d) issuing a variation order under Clause 51, except: i) in an emergency situation as reasonably determined by the Engineer ii) if such variations increase the Contract Price by less than 1% per individual variation or add up to less than 10% in aggregate; (e) fixing rates or prices under Clause 52; (f) ordering suspension of works"; |
| 3.1(a) | Assignment of Contract | The term banker has been replaced by "lender/banker" |
| 4.1 | Subcontracting | The words "the whole" shall be substituted by the words " more than fifty percent of the Contract amount". |
| 5.1 | Languages and Law | a) the language in English b) the law is that in force in India. |
| 5.2 | Priority of contract document has been substituted - This clause has been substituted | 5.2.1 Interpretation of Ambiguities If the Contract discovers any ambiguities, omissions, errors, faults and other defects in the Drawings or in other Contract Documents, he shall immediately notify the same in writing to the Engineer, who will resolve the ambiguity or correct the error and will notify the Contractor of the interpretation to be adopted. 5.2.2 Priority of Contract Documents Subject to the foregoing provisions and unless otherwise provided in the Contract the priority of the documents forming the Contract shall be as follows 1.The Contract Agreement and Undertakings (if completed); 2.The letter of Acceptance 3. The Bid and the Appendix to Bid (Section V); 4. Addenda to the Bidding documents, if any; as applicable 5. The Conditions of Particular Application (Section II); 6. The General Conditions of Contract (Section II); 7. The Technical Specifications (Section IV); 8. The Drawings; 9. The Priced Bill of Quantities (Section VI); 10. Schedules and Annexures (Sections VII to IX); and 11. Documents furnished by the Bidders. |
| 6.6 | Submission of working drawings.- This clause has been added | Submission of Working Drawings All design calculations and fabrication, drawings for Temporary Works (such as form-work, staging, centering, scaffolding, specialised construction, handling and launching equipment and the like) as well as bar bending and cutting schedules for reinforcement, material lists for structural fabrication as well as detailed drawings for templates, and anchorage and temporary support details for pre-stressing cables etc.. as also shop drawings for all structure works shall be prepared by the Contractor at his own case and forwarded in triplicate to the Engineer at least 42 days in advance of actual construction requirements. The Engineer will check and return one copy of the same for the Contractor's use with amendments, if any, noted in red ink within 21days of such submission. Such approval shall not relieve the Contractor of any of his responsibilities in connection with temporary works. The Contractor will supply four copies of the approved |

| Clause No. | General Conditions of Contract | Change adopted by NHAI |
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| | | drawings for the Engineers use. The cost of preparing all such items of work shall be deemed to have been included in the respective rates/prices quoted by the Contractor in the Bill of Quantities. |
| 6.7 | No original clause in FIDIC - This clause has been added | 6.7 Submission of As-Constructed Drawings On completion of the works, the Contractor shall arrange to furnish to the Employer 2 (two) bound sets of all " As constructed" drawings for every component of the Works at his own cost, all such copies being on Polyester film of quality to be approved by the Engineer or his Representative. The Taking-over Certificate of the Works, as per the provisions of Clause 48.1 herein, shall not be issued by the Engineer in the event of the Contractor's failure to furnish the aforesaid "As constructed " drawings for the entire works. |
| 8.1 | Contractors General Responsibilities - This clause has been amended | Add the words, "Drawings" between the words "the design of" and the works "or Specifications" in second line of second para of this Sub-Clause. |
| 9.1 | Contract Agreement | This clause has been deleted. |
| 10.1 | Performance Security - This clause has been substituted entirely. | <p>This clause has been replaced as under;</p> <p>10.1 "The Contractor shall provide security for his performance of the Contract to the Employer within 28days after the receipt of the Letter of Acceptance. The Performance Security shall be in the form of an unconditional bank guarantee from any Indian Nationalized bank or a foreign bank. If the Bank guarantee is drawn on any foreign bank, it will be acceptable only if such guarantee is also accepted by any Indian Nationalized bank. The amount of the bank guarantee shall be 10% (ten percent) of the Contract price. The performance security shall be denominated in Indian Rupees. The same shall be furnished to the Employer in a proforma included in section IX of the Bidding Documents. The Contractor shall notify the Engineer when providing the performance security to the Employer. The performance security of a Joint Venture shall be in the name of the Joint Venture. In cases where the tender of the successful bidder is seriously unbalanced or front loaded, the Employer may require that the amount of the Performance security set forth above, be increased at the expense of the successful bidder to a level sufficient to protect the Employer against financial loss in the event of default of the successful bidder under the Contract, subject to maximum of 25% of the Contact Price. "Without limitation to the provisions of the preceding paragraph, whenever the Engineer determines an addition to the Contract Price as a result of a change in cost and/or legislation or as a result of a variation amounting to more than 25 per cent of the portion of the Contract Price, the Contractor at the Engineer's written request, shall promptly increase the value of the performance security by an equal percentage."</p> <p>10.2 Period of Validity of Performance Security Replace the text of sub-Clause 10.2 with the following: "The performance security shall be valid up to 28days from the date of issue of "Defects Liability Certificate." The security shall be returned by the Employer to the Contractor within 14 days after expiration of the said valid period.</p> |
| 10.3 | Claims under Performance security - This clause has been substituted | This has been changed to "the employer shall make claims under performance security without having to notify the Contractor". |
| 14.1 | Programme to be submitted -This clause has been substituted | "The Contractor shall within 28(twenty eight) days after the date of receipt of the Letter of acceptance, submit to the Engineer for his consent a programme, in six copies, in such form and detail as the Engineer shall reasonably prescribe, for the execution of the work." Unless otherwise agreed, the programme shall be generally based on the programme submitted with the Bid. |
| 14.3 | Cash flow estimate to be submitted - This clause has been amended | The following sentence is added "The time within which the detailed cash flow estimates shall be submitted shall be 28 days." |
| 15.2 | No clause mentioned in FIDIC GCC, but mentioned in COPA | Language Ability of Contractor's Representative "If the Contractor's authorized representative is not, in the opinion of the Engineer, fluent in English, the Contractor shall have available on site at all times a competent interpreter to ensure the proper transmission of instructions and information. Any loss or damage caused by transmission error is to be at the Contractor's cost and peril." |
| 15.3 | No clause mentioned in FIDIC | Review Meetings "The Contractor shall depute at least his Project Manager or Senior Site Representative to attend |

| Clause No. | General Conditions of Contract | Change adopted by NHAI |
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| | | all the periodic review meetings notified by the Engineer." |
| 15.4 | No clause mentioned in FIDIC | Work Order Book "A work order book shall be maintained on the site and it shall be property of the Employer and the contractor shall promptly sign orders given therein by the Engineer or his authorised representative and comply with them. The compliance shall be reported by Contractor to the Engineer in good time so that it can be checked. The blank work order book with machine numbered pages in quadruplicate with perforated sheet for three copies to be detached will be provided by the Engineer for this purpose. Whenever any instructions are written in the work order book, the Contractor will be supplied the first carbon copy." |
| 16.3 | No clause mentioned in FIDIC GCC, but mentioned in COPA | Language Ability of Superintending Staff"A reasonable proportion of the Contractor's superintending staff including his authorised representative shall have a working knowledge of English or the Contractor shall have available on site at all times a sufficient number of competent interpreters to ensure the proper transmission of instructions and information.Any loss or damage caused by transmission error is to be at the Contractor's cost and peril." |
| 16.4 | No clause mentioned in FIDIC GCC, but mentioned in COPA | Employment of Local Personnel "The Contractor is encouraged to the extent practicable and reasonable, to employ staff and labour from sources within India." |
| 17.2 | No clause mentioned in FIDIC | The Contractor shall give to the Engineer not less than 48 (Forty Eight) hours before presentation to set out or give levels for any part of the work so that time arrangement may be made for checking or issuing instructions he shall indicate therein by which date the information, if any, is required by him. |
| 18.1 | The FIDIC GCC clause has been replaced | "If, at any time during the execution of the Works, the Engineer requires the Contractor to make bore-holes or to carry out exploratory excavations in excess of the requirements specified elsewhere in the Contract, such requirement shall be the subject of an instruction in accordance with Clause 51, unless an item or a Provisional Sum in respect of such work is included in the Bill of Quantities." |
| 19.1 | Safety Security and protection of environment - The following clauses has been added which does not exist in FIDIC GCC | e) take all due precaution to avoid soil and water contamination by spillage of oil, grease, fuel and paint in the equipment yard, workshop or site of work and recycle the lubricants; f) Install pollution control device in his asphalt plant; g) implement replantation and grading of steep slopes in quarries and borrow pits to prevent disfiguration of landscape; and h) implement compensatory afforestation plan to counteract destruction of vegetation when required to do so by the Engineer, pay proper attention to the aspect of borrow pit drainage to prevent formation of stagnant pools of water and incidence of mosquito vectors; and ensure that all borrow pits are provided with efficient drains which shall be connected to the natural outfalls. |
| 20.4 | Employer's risks - This clause has been amended | a) insofar as they directly affect the execution of the Works in the country where the Permanent Works are to be executed: i) war and hostilities (whether war be declared or not), invasion, act of foreign enemies; ii) rebellion, revolution, insurrection, or military or usurped power, or civil war; iii) ionizing radiations, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof; iv) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; and v) riot, commotion or disorder, unless solely restricted to the employees of the Contractor or of his Subcontractors or of and arising from the conduct of the Works; b) loss or damage due to the use or occupation by the Employer of any section or part of the Permanent Works, except as may be provided for in the Contract. c) loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor or for which the Contractor is responsible; and d) any operation of the forces of nature (insofar as it occurs on the Site) which an experienced contractor: i) could not have reasonably foreseen, or ii) could reasonably have foreseen, but against which he could not reasonably have taken at least one of the following measures; a) prevent loss or damage to physical property from occurring by taking appropriate measures, or b) insure against such loss or damage. |
| 21.1 | Insurance of works and | 21.1 Insurance of Works and Contractor's Equipment |

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| | contractors equipment - This clause has been amended to the extend mentioned in next para. Also one more provision has been added. | Add the following words at the end of sub-para (a) any immediately before the last word of sub-para (b) of Sub-Clause 21.1: "It being understood that such insurance shall provide for compensation to be payable in Indian Rupees required to rectify the loss or damage incurred." Add the following sub para (d) in Sub Clause 21.1 d) "The insurance cover shall be issued by an insurance company which has been determined by the Contractor to be acceptable to the Employer." |
| 21.2 | Scope of cover - This clause has been amended and also some more provision has been added. | 21.2 Scope of CoverIn sub-para (a), lines 2 and 3, substitute the words "from the start of work at the site" by the words "from the first working day after the Commencement Date."Add the following sub-para (c) & (d) below of Sub-Clause 21.2(b)"c) It shall be the responsibility of the Contractor to notify the Insurance Company of any change in the nature and extent of the works and to ensure the adequacy of the Insurance cover at all times during the Period of the Contract.d) Contractor shall, from time to time, notify the insurance agency of Lenders/Bankers as loss payee, so long as loans or any other fund based/non-based assistance shall be outstanding on its books" |
| 21.4 | Exclusions - This clause has been amended. | 21.4 Exclusions Amend the text of Sub- Clause 21.4 to read as follows; " There shall be no obligation for the insurances in Sub Clause 21.1 to include loss or damage caused by the risks listed under Sub-Clause 20.4 sub-para (a) (i) to (v)." Add the following Sub Clause 21.5 |
| 21.5 | This clause has been added. This does not exist in FIDIC GCC. | 21.5 War Risk Insurance If the Contractor receives instruction from the Employer to insure against War Risk, such insurance if normally available shall be effected, at the cost of the Employer, with an Insurance Company acceptable to the Employer and shall be in the joint names of the Contractor and the Employer. |
| 23.1 | Third Party Insurance - This clause has been clarified. | 23.1 Third Party Insurance (Including Employer's property) Add the following at the end of Sub-Clause 23.1 "The insurance shall be effected with an insurance company acceptable to the Employer." |
| 24.2 | Insurance Against Accident to Workmen - this clause has been amended. | Add the following at the end of Sub-Clause 24.2 "The insurance referred in this Clause shall be effected with an insurance company acceptable to the Employer." Add the following Sub-Clause 24.3 |
| 24.3 | This clause has been added. This does not exist in FIDIC GCC. | "The Contractor shall take out all insurance required to be taken under the laws of India." |
| 25.1 | Evidence and Terms of Insurances - This clause has been amended. | Amend Sub Clause 25.1 by inserting the words " as soon as practicable after the respective insurances have been taken out but in any case" before the words "prior to the start kof work at the site." Add the following Sub - Clause 25.5 |
| 25.5 | Source of Insurance - This clause has been added. This does not exist in FIDIC GCC | "The Contractor shall be entitled to place all insurance relating to the Contract (including, but not limited to, the insurance referred to in Clauses 21,23 and 24) with insurers which have been determined by the Contractor to be acceptable to the Employer." Add the following Sub-Clause 26.2 |
| 26.2 | Inspection and Audit by Employer - This clause has been added. This does not exist in FIDIC GCC | "The Contractor shall permit the Employer to inspect the Contractor's accounts and records relating to the performance of the Contract and to have them audited by auditors appointed by the Employer, if so required by the Employer." |
| 29.1 | Interference with Traffic and Adjoining Properties - This clause has been amended | In sub-Clause 29.1 (b), add the words "railway and any other right of way" after the words "private roads." Add the following Sub-Clauses 29.2 and 29.3 below the Sub-Clause 29.1 |
| 29.2 | This clause has been added. This does not exist in FIDIC GCC | In case any operation connected with traffic necessitates diversion, obstruction closure of any road, railway or any other right of way, the approval of the Engineer or other Engineers. Representative and the concerned authorities shall be contained well in advance by theContractor |
| 29.3 | This clause has been added. This does not exist in FIDIC GCC | If any equipment (floating or otherwise) belonging to or hired by the Contractor or any Sub-Contractor or any person employed by the Contractor or by any Sub-Contractor or any materials or things therein or therefrom sink from any cause whatsoever, it shall immediately be reported |

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| | | by the Contractor to the Competent Authorities and the Engineer, and the Contractor shall forthwith, at his cost, raise and remove any such equipment, materials or things or otherwise deal with the same as the Engineer may direct. The fact that such sunken equipment, materials or things are insured or have been declared a total loss or do not represent any further value, shall not absolve the Contractor from his obligations under this Sub-Clause to raise and remove the same. Until such sunken equipment or materials or things have been raised and removed, the Contractor shall set such buoys and display at night such lights and do all such things for the safety as may be required by the competent authorities or by the Engineer. In the event of the Contractor not carrying out the obligations imposed on him by this Sub-Clause, the Employer may cause to set buoys and display, at night, lights on such equipment and raise and remove the same without prejudice to the right of the Employer to hold the Contractor liable and all expenses and consequences thereon and incidental thereto shall be borne by the Contractor and shall be recoverable from him as a debt by the Employer or may be deducted by the Employer from any monies due or which may become due to the Contractor. |
| 30.2 | Transport of Contractor's Equipment or Temporary works - This clause has been amended | Add the following at the end of Sub-Clause 30.2 "provided that it is found necessary for the contractor to move one or more loads of heavy constructional plant and equipment, materials or pre-constructed units or parts of units of work over roads, highways, bridges on which such oversized and overweight items are not normally allowed to be moved, the Contractor shall obtain prior permission from the concerned authorities. payments for complying with the requirements, if any, for protection of or strengthening of the roads, highways or bridges shall be made by the Contractor and such expenses shall be deemed to be included in his Contract price. Add the following Sub-Clauses 34.2 and 34.3 below sub-clause 34.1 |
| 34.2 | Compliance with labour regulations - This clause has been added. This does not exist in FIDIC GCC | The Contractor and his subcontractors shall abide by the local laws and regulations governing labour as detailed in Annexes A and A-1. |
| 34.3 | Observance by Sub-Contractors-This clause has been added. This does not exist in FIDIC GCC | The Contractor shall be responsible for observance by his sub- contractors of the provisions in sub clause 34.2. |
| 35.1 | Returns of labour and contractor's equipment - The provisions of labour regulations has been added | Add the following at the end of Sub-Clause 35.1: "For contractor's labour regulation, refer to Annexure A and Annexure A-1". |
| 36.1 | Quality of Materials, Plant and Workmanship - This clause has been amended | Add the following paragraph at the end of Sub Clause 36.1 "The Contractor is encouraged, to the fullest extent practicable and reasonable, to use plant and materials from sources within India." Add the following Sub-Clause 36.6 below Sub Clause 36.5 |
| 36.6 | Methodology - This clause has been added. This does not exist in FIDIC GCC | "At least 14 days in advance of his programmed commencement of each item of work, the contractor shall furnish for the Engineer's consent, the detailed methodology he intends to adopt for executing the item, providing full details of the method of working, equipment and materials to be deployed and measures to be adopted for ensuring quality of construction and safety." |
| 41.1 | Commencement of Work - This clause has been substituted | Substitute the text of this Sub-Clause by the following: The Contractor shall commence the Works on site within 28 (twenty eight) days after receipt by him of a notice to this effect from the Engineer, which notice shall be issued within 28 days after the receipt of the Performance Security in accordance with Clause 10.1 hereof. Thereafter the Contractor shall proceed with the works expeditiously and without delay. The requirement to commence the works at site' shall be fulfilled if; a) A programme has been submitted in accordance with Sub-Clause 14.1; b) The contractor's authorized Representative, vide Clause 15.1, with full supporting staff are in position at the site; and c) All requirements including equipments, materials and labour for the work programmed for execution in the first 2 months, have been mobilized at the site. |
| 47.3 | Bonus for early completion - This clause | If the contractor achieves completion of the whole of the works, complying fully with the requirements of the Technical Specifications and Conditions of Contract prior to the time of |

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| | has been added. This does not exist in FIDIC GCC, but exist in COPA of FIDIC | completion prescribed in clause 43, the employer shall pay to the contractor a sum stated in Appendix to Bid as bonus for every Fifteen days, which shall elapse between the date of completion of all items of works as stipulated in the Contract, including variations ordered by the Engineer and the time prescribed in clause 43. For the purpose of calculating bonus payments, the time given in the Bid for completion of the whole of the works is fixed and unless otherwise agreed, no adjustments of the time by reason of granting and extension of time pursuant to clause 44 or any other clause by these conditions will be allowed. Any period falling short of a fifteen days shall be ignored for the purpose of computing the period relevant for the payment of bonus. Add the following Sub-Clause 48.5 below Sub-Clause 48.4 |
| 48.5 | Prevention from Testing - This clause has been added. This does not exist in FIDIC GCC | If the Contractor is prevented from carrying out the Tests on completion by a cause for which the Employer or the Engineer or other Contractors employed by the Employer are responsible, the employer shall be deemed to have taken over the Works on the date when the tests on completion would have been completed but for such prevention. The Engineer shall issue a Taking-Over Certificate accordingly. Provided always that the Works shall not be deemed to have been taken over if they are not substantially in accordance with the Contract. If the Works are taken over under this sub-clause the Contractor shall nevertheless carry out the tests on completion during the Defects Liability Period. The Engineer shall require the Tests to be carried out by giving 14 days notice. Any additional costs to which the Contractor may be put, in making the tests on completion during the Defects Liability Period, shall be added to the Contract price. Add the following Sub-Clause 49.5 |
| 49.5 | Extension of Defects Liability - This clause has been added. This does not exist in FIDIC GCC | The provisions of the clause shall apply to all replacements or renewals of Constructed works carried out by the Contractor to remedy defects and damages as if the replacements and renewals had been taken over on the date they were completed. The Defects Liability Period for the works shall be extended by a period equal to the period during which the works can not be used by a reason of a defect or damage, if only part of the works is affected the Defects Liability Period shall be extended only for that part. In neither case shall the Defects Liability period extend beyond 2 years from the date of taking over. |
| 52.2 | Power of Engineer to Fix Rates - This clause exist in COPA of FIDIC | Add the following below the sub-clause 52.2: "Provided further that no change in the rate of price for any item contained in the Contract shall be considered unless such item accounts for an amount more than 2 (Two) percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent". |
| 54.1 | Contractor's Equipment etc. - This clause has been amended | The words " All contractor's Equipment For the execution of the Works' in the first three lines of this Clause shall be substituted by the following. "All contractor's equipment temporary works and materials provided by the Contractor at the site of the Works shall be of the capacity and quality approved by the Engineer and shall be deemed to be exclusively intended for the execution of the Works and all these shall be operated/used and maintained in a manner acceptable to the Engineer". |
| 54.3 | Custom's Clearance - This clause has been substituted | Delete the text of this sub-clause and substitute therefor the following: "Subject to the provisions contained herein, the Employer will assist the contractor when required, by furnishing letter of recommendation for obtaining expeditious clearance through customers of constructional plants, material and other things required for the Works and then for re-export, if any. Employer will issue the essentiality certificate to the Contractor within two months of their specific and fully detailed request. The following publications amongst others, may be referred to by the Contractor for guidance about Custom regulations etc. However, the responsibility for obtaining accurate and up to date information in this regard will be that of the Contractor and the Employer shall not be held liable on that account: i) Import & Export Policy, together with amendments, if any, published by Govt. of India, Ministry of Commerce. ii) Hand Book of Procedures forming a part of EXIM policy, together with amendments, if any, Volume 1 and 2 published by Ministry of Commerce; and iii) Customs and Central Excise Tariff, together with amendments, if any, published by Central Customs and Central Excise. The Contractor shall pay, and the Contract Price and/or rates named by him in his Bid for the work shall include, all customs or other import duties, harbour dues, port rates, tolls, pilotage, landing charges, wharfage and local imposts and dues in respect of any materials required for the permanent or temporary works imported to India in connection with the Works either in the |

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| | | name of the Contractor or of the Employer." |
| 54.4 | Re-export of Contractor's equipment - This clause has been substituted | Delete the text of this sub-clause and substitute therefor the following: "The Contractor shall obtain all the relevant information regarding procedure for the import and subsequent re-export of his equipment and materials from the Chief Controller of Imports and Exports and the Employer, and shall inform himself and keep himself informed on the details of customs charges and drawback regulations as applicable to the items of constructional plant. The contractor shall provide the necessary guarantee/bonds where these are required by the customs notwithstanding that import licenses maybe granted in the name of the Employer." |
| 54.5 | Conditions of Hire of Contractor's Equipment - This clause has been amended | Add the following below the sub-clause 52.2: "The Contractor shall in respect of any item of equipment held by him under any agreement for hire or hire purchase thereof notify to the Engineer in writing the name and address of the owner thereof or the name and address of the vendor named in the agreement for hire purchase thereof. A certified copy of the agreement shall be supplied to the Engineer, when required." Add the following, when required." |
| 54.9 | Materials and Plant supplied by the Employer - This clause has been added. This does not exist in FIDIC GCC | No material or plant shall be supplied by the Employer. The Contractor shall be fully responsible for all materials, plant and equipment required for the construction." |
| 55 | Quantities | Add the following sub-clause 55.2 |
| 55.2 | Omissions of Quantities - This clause has been added. This does not exist in FIDIC GCC | Items of the works described in the Bill of Quantities for which no rates or prices have been entered in the contract shall be considered as included in other rates and prices in the contract and will not be paid for separately by the Employer". |
| 60 | Certificates and Payment - The original clause of FIDIC has been deleted and the new clause has been added | Delete the text of clause 60 of the General Conditions of Contract, in its entirety, and substitute therefor the following sub-clause 60.1-60.15: |
| 60.1 | Monthly Statements - The original clause of FIDIC has been deleted and the new clause has been added | The Contractor shall submit a statement in 3 (Three) copies of the Engineer by the 7th (Seventh) day of each month for the work executed up to the end of the previous month in a tabulated form approved by the Engineer, showing the amounts to which the Contractor considers himself to be entitled. The statement shall include the following items, as applicable, which shall be taken into account in the sequence listed: (a) the estimated Contract value of the Temporary and Permanent Works executed up to the end of the month of question, determined in accordance with Sub-Clause 56.1 at the unit rates and prices included in the Contract. (b) the actual value certified for payment for the Temporary and Permanent works executed up to the end of the previous month, at the unit rates and prices included in the contract. (c) the estimated contract value at the unit rates and prices included in the contract of the Temporary and permanent works for the month in question, obtained by deducting (b) and (a); (d) the value of any variations executed up to the end of the month in question less the amount certified in the previous Interim Payment Certificate, pursuant to Clause 52; (e) amounts approved in respect of Daywork executed up to the end of the months in question, less the amount for Daywork certified in the previous Interim Payment Certificate, as determined from the Daywork schedule of the Bill of quantities; (f) amounts reflecting changes in cost and legislation, pursuant to Clause 70. (g) any credit or debit for the month in question in respect of materials and Plant for the Permanent Works, under the conditions set forth in Sub-clause 60.3 (h) any amount to be withheld under the retention provisions of sub-clause 60.5, determined by applying the percentage set forth in Sub-clause 60.5 to the amounts due under paras 60.1 (c), (d), (e) and (f); (i) any amounts to be deducted as repayment of the Advance under the provisions of sub-clause 60.7; (j) any other sum, expressed in Indian Rupees, to which the Contractor may be entitled under Contract or otherwise; (k) an amount to be deducted for all taxes in accordance with Clause 73 hereof; and (l) net amount of application in Indian Rupees. |

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| 60.2 | Monthly Payments - The original clause of FIDIC has been deleted and the new clause has been added | The said statement shall be approved or amended by the Engineer in such a way that, in his opinion, it reflects the amounts due to the Contractor in accordance with the Contract, after deduction, other than pursuant to Clause 47, of any sums which may have become due and payable by the Contractor to the Employer. In cases where there is a difference of opinion as to the value of any item, the Engineer's view shall prevail. Within 21 days of receipt of the monthly statement referred to in sub-clause 60., the Engineer shall determine the amounts due to the Contractor and shall issue to the Employer and the Contractor a certificate herein called the "Interim Payment Certificate". Certifying the amounts due to the Contractor. Provided that the Engineer shall not be bound to certify any payment under this Sub-Clause if the net amount thereof, after all retentions and deductions would be less than the minimum amount of Interim Payment certificate stated in the Appendix to Bid. However, in such case, the unpaid certified without will be added to the next interim payment, and the cumulative unpaid certified amount will be compared in the minimum amount of interim payment. Notwithstanding the terms of this Clause or any other Clause of the Contract, no amount will be certified by the Engineer for payment until the Performance Security has been provided by the Contractor and approved by the Employer. |
| 60.3 | Materials for the Permanent Works - The original clause of FIDIC has been deleted and the new clause has been added | With respect to materials and Plant brought by the Contractor to the Site for incorporation in the Permanent Works, the Contractor shall be (i) received a credit in the month in which these materials and Plant are brought to the Site and (ii) charged a debit in the month in which they are incorporated into the Permanent Works, both such credited and debit to be determined by the Engineer in accordance with the following provisions: a) no credit shall be given unless the following conditions shall have been met to the Engineer's Satisfaction; i) the materials and Plant are in accordance with the Specifications for the Works; ii) the materials and Plant have been delivered to the site and are properly stores and protected against loss, damage or deterioration; iii) the Contractor's records of the requirements, orders, receipts and use of materials are kept in a form approved by the Engineer, and such records are available for inspection by the Engineer; iv) the Contractor has submitted statement of his cost of acquiring and delivering the materials to the Site, together with such documents as may be required for the purpose of evidencing such cost; v) the origin of the materials and the currency of payment therefore are those indicated in clause 14.2 of Section I; and vi) the materials are to be used within a reasonable time as determined by the Engineer b) the amount to be credited to the Contractor shall be the equivalent of 75 (seventy five) percent of the Contractor's reasonable cost of the materials delivered to the Site, as determined by the Engineer after review of the documents listed in paragraph (a) (iv) above; and c) the amount to be debited to the Contractor for any materials and plant incorporated into the Permanent Works shall be equivalent to the credit previously granted to the Contractor for such materials pursuant to Sub-para (b) above, as determined by the Engineer. |
| 60.4 | Place of payment - The original clause of FIDIC has been deleted and the new clause has been added | Payments to the contractor by the Employer shall be made in Indian Rupees into a bank account or accounts nominated by the contractor or by cheque at the contractor's option. |
| 60.5 | Retention Money - The original clause of FIDIC has been deleted and the new clause has been added | A retention money amounting to 10 (ten) percent of the amount due in Indian Rupees; determined in accordance with the procedure set out in Sub-Clause 60.1 (h), shall be made by the Engineer in the first and following Interim Payment Certificates, until the amount so retained reaches a limit of retention money as stated in the Appendix to Bid. At this stage, the Contractor may, at his option, replace the retention amount with an unconditional bank guarantee from a bank, acceptable to the employer. However, upon the contractor's request, an early replacement of the retention money with unconditional bank guarantee from a bank, acceptable to the Employer can be permitted with the prior approval of the Employer. |
| 60.6 | Payment of Retention Money - The original clause of FIDIC has been deleted and the new | Upon the issue of the Taking-over Certificate with respect to the whole of the works, one half of the Retention Money, or upon the issue of a Taking-Over Certificate with respect to a Section or part of the Permanent Works only such proportion thereof as the Engineer determines having regard to the relative value of such Section or part of the Permanent Works, shall be certified by |

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| | clause has been added | <p>the Engineer for payment to the contractor. Upon the expiration of the Defect Liability Period for the works the other half of the retention money shall be certified by the engineer for payment to the contractor (or return of the bank guarantee, as the case may be). Provided that, in the event of different Defect Liability Periods being applicable to different Sections or parts of the Liability Period" shall for the purposes of this Sub-Clause, be deemed to mean the expiration of the latest of such periods. Provided also that if at such time, there shall remain to be executed by the Contractor any work ordered, pursuant to Clauses 49 and 50, in respect of the works, the Engineer shall be entitled to withhold certification until completion of such work of so much of the balance of the Retention Money as shall, in the opinion of the Engineer, represent the cost of the work remaining to be executed.</p> |
| 60.7 | Mobilization Advance Loan - The original clause of FIDIC has been deleted and the new clause has been added | <p>The Employer will make an interest - free advance to the contractor for the costs of mobilization in respect of the works in a lump-sum amount equivalent to 10 (ten) percent of the Contract Price named in the Letter of Acceptance, payable in Indian Rupees. Payment of advance will be due under separate certification by the Engineer after (i) execution of the Form of Agreement by the parties thereto (ii) provision by the contractor of the Performance Security in accordance with Sub-Clause 10.1 and (iii) provision by the Contractor (and not by any other agencies employed/ appointed by him) of an unconditional bank guarantee in a form and by a bank acceptable to the Employer in amount equal to the advance payment. Such bank guarantee shall remain effective until the advance payment has been repaid pursuant to paragraph (d) below, but the amount thereof shall be progressively reduced by the amount repaid by the Contractor as indicated in Interim Payment Certificates issued in accordance with this Clause.</p> <p>b) In addition to the advance mentioned in sub-para (a) above, the Employer will pay another interest-free advance against key plant and machinery required for the Works and brought to site, if so requested by the Contractor. The maximum, amount such advance shall be 5 (five) percent of the Contract Price stated in the Letter of Acceptance. In the case of new plant and equipment, the advance shall be limited to ninety percent of the price of such new plant and equipment by the Contractor for which the Contractor shall produce satisfactory evidence. In the case of used plant and equipment, the amount of such advance shall be limited to ninety percent of the depreciated value of plant and equipment as may be determined by the Engineer. This advance shall be further subject to the condition that : (i) such plant and equipment are considered by the Engineer to be necessary for the works, (ii) such plant and equipment are in working order, and acceptable to the employer in an amount equal to the advance. Such bank guarantee to remain effective until the advance has been completely repaid by the contractor out of current earnings under contract and certified accordingly by the employer. No advance shall be granted on any piece of plant or equipment of value less than Rs. 50,000/- (Rupees fifty thousand). No advance for plant and equipment shall be granted after eight months from the date of commencement which period may be extended, if considered reasonable by the Employer.</p> <p>c) The bank guarantee shall be denominated in Indian Rupees which the mobilisation advance is payable. The contractor has the option of splitting the bank guarantee into parts each not less than 2.5% (two and half percent) of the Contract price aggregating separately to the amount stipulated in Clause 60.7 (a) and 60.7 (b) herein. Each part of the guarantee shall remain effective for the period determined pursuant to Sub-Clause 60.7 (a) and 60.7 (b). Such part guarantee shall be returned to the Contractor by the Engineer on recovery under the Contract of the full amount of such part guarantee within 28 (Twenty eight) days of the said recovery.</p> <p>d) repayment of advance - The total advance described in sub-para (a) and (b) of Sub-clause 60.7 above shall be repaid as percentage deductions from the interim payments certified by the Engineer in accordance with this Clause. Deductions shall commence in the next Interim payment certificate following that in which the total of all Interim payments certified to the Contractor has reached 30% (thirty percent) of the Contractor price less provisional sums and shall be made at the rate of 10% (ten percent) of the gross amount of all Interim Payment Certificates in the types and payable in Indian Rupees in which the advances were made, until such time as the advances have been repaid, always provided the loan shall be completely repaid when 90% of the Contract price of the work has been paid.</p> |
| 60.8 | Time of payment and interest - The original clause of FIDIC has been deleted and the new clause has been added | <p>The amount due to the Contractor under any interim payment certificate issued by the engineer pursuant to this clause or to any other term of the Contract shall subject to Clause 47 be paid by the Employer to the Contractor within 14 days after the contractor's monthly statement has been certified by the Engineer or, in the case of Final Certificate pursuant to sub-clause 60.13 within 84 days after the agreed final state and written discharge have been submitted to the Engineer for</p> |

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| | | certification in the event of the failure of the Employer to make payment within the time state, the Employer shall pay to the contractor interest compounded monthly at the rates stated in the Appendix to Bid upon all sums unpaid from the date up to which the same should have been paid. |
| 60.9 | Correction of Certificates - The original clause of FIDIC has been deleted and the new clause has been added | The Engineer may by Interim payment Certificate make any correction or modification in any previous Interim Payment Certificate which has been issued by him and shall have authority, if any work is not being carried out to his satisfaction to omit or reduce the value of such work in any Interim Payment Certificate. |
| 60.10 | State of Competition - The original clause of FIDIC has been deleted and the new clause has been added | Not later than 84 days after the issue of the Taking-Over Certificate in respect of the whole of the Works, the contractor shall submit to the Engineer a Statement at completion in the number of copies specified in the Appendix to Bid, with supporting documents showing in detail, in the form approved by the Engineer. a) the final value of all work done accordance with the contract up to the date stated in such Taking-over certificate. b) any further sums which the contractor considers to be due; and c) an estimate of amounts which the Contractor considers will become due to him under the contract. Estimated amounts shall be shown separately in such Statement at completion. The Engineer shall certify payment in accordance with Sub Clause 60.2. |
| 60.11 | Final Statement - The original clause of FIDIC has been deleted and the new clause has been added | Not later than 56 days after the issue of the Defects Liability Certificate pursuant to Sub-Clause 62.1 the contractor shall submit to the Engineer for consideration a draft final statement in the number of copies stipulated in the Appendix to Bid with supporting documents showing in detail, in the form approved by the Engineer. (a) the value of all work done in accordance with the Contract; and (b) any further sums which the Contractor considers to be due to him under the Contract. If the Engineer disagrees with or cannot verify any part of the draft final statement, the contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed (for the purposes of these conditions referred to as the final statement). If the following discussions between the Engineer and the Contractor and any changes to the draft final statement which may be agreed between them, it becomes evident that a dispute exists, the Engineer shall issue to the employer an interim payment certificate for those parts of the draft final statement which arte not in dispute. The dispute shall then be settled in accordance with clause 67. The final statement shall be agreed upon settlement of the dispute. |
| 60.12 | Discharge - The original clause of FIDIC has been deleted and the new clause has been added | Upon submission of the final statement, the contractor shall give to the employer, with a copy to the Engineer, a written discharge confirming that the total of the final statement represents full and final settlement of all monies due to the contractor arising out of or in respect of the contract. Provided that such discharge shall become effective only after payment due under the Final Certificate issued pursuant to Sub-clause 60.13 has been made and the performance security referred to in Sub-clause 10.1 has been returned to the Contractor. |
| 60.13 | Final Certificate - The original clause of FIDIC has been deleted and the new clause has been added | Within 28 days after receipt of the Final statement, and the written discharge, the Engineer shall issued to the employer 9with a copy to the contractor) a Final certificate state; a) the amount, which in the opinion of the Engineer is finally due under the contract; and b) after giving credit to the Employer for all amount previously paid by the Employer and for all sums to which the employer is entitled under the contract, other than clause 47, the balance, if any, due from the Employer to the Contractor or form the contractor to the Employer as the case may be. |
| 60.14 | Cessation of Employer's Laibility - The original clause of FIDIC has been deleted and the new clause has been added | The Employer shall not be liable to the contractor for any matter or thing arising out of or in connection with the contract or execution of the works. Unless the contractor shall have included a claim in respect thereof in his final statement and (except in respect of matters or things arising after the issue of the Taking-Over Certificate in respect of the whole of the Works) in the Statement at Completion referred to in Sub-Clause 60.10. |
| 60.15 | Provisional Payments - The original clause of FIDIC has been deleted and the new clause has | Payments shall also be made to the contractor provisionally for the permanent works done in the first fortnight of a month, within 7 (seven) days of the receipt of such requires from the contractor. The value of the work done shall be assessed on rough estimation; measurement shall not be recorded. Amount of provisional payment in a month shall not exceed 1 (one) |

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| | been added | percent of the Contract price and shall be adjusted in the monthly payments |
| 63 | Remedies | |
| 63.1 | Default of Contractor - This clause has been amended | <p>The following amendments shall be incorporated in this Sub-Clause;</p> <p>1) In first para of this Sub-Clause, insert the works "with the prior permission of the Employer" after the word "reconstruction" in parenthesis in third line.</p> <p>2) Substitute sub-para (b) (i) as under:- "to commence the works within 28 days of the date of commencement in accordance with sub-clause 41.1, or"</p> <p>3) Insert the following as sub-para (f), (g) and (h) below sub-para (e) f) "has substantially suspended the works for a period of 14 days without authority from the Engineer and has failed to proceed further with the Works within 28 days or receipt of a notice from the Engineer. or" g) "has failed to supply sufficient or suitable construction equipment, temporary works, key personnel, labour, materials as proposed in the programme for the execution of the works furnished under sub-clause 14.1; or" h) "has failed to comply with the requirements applicable to Joint Ventures as per the Contract."</p> <p>4) Delete the last paragraph below sub-para 9e) of this Sub-clause and Substitute therefore the following below sub-para (h): "then the Employer may, after giving 14 (fourteen) days notice to the Contractor, enter upon the site and expel the Contractor therefrom without thereby avoiding the Contract, or releasing the Contractor from any of his obligations or liabilities under the contract, or affecting the rights and powers obligations or liabilities under the Contractor, or affecting the rights and powers conferred on the employer or the Engineer by the Contract, and may himself complete the Works of may employ any other contractor to complete the works The employer or such other contractor may use for such completion so much of the contractor's equipment, Temporary Works, Plants and material which have been deemed to be reserved exclusively for the execution of the works, under the provisions of the contract, as he or they may think proper and the employer may, at any time, sell any of the said Contractor's Equipment, temporary works and unused plant and materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the contractor under Contract."</p> |
| 63.2 | Valuation of Date of Expulsion - The heading of this clause has been amended | Modify the heading of Sub-clause 63.2 by substitution: "Valuation of Date of Expulsion for "Valuation at Date of Termination". In sub clause 63.2 delete the work "termination" on the second and fifth lines and substitute expulsion. |
| 63.3 | Payment after Expulsion - This clause has been amended | Modify the heading of sub-clause 63.3 substituting "Payment after Expulsion" for "Payment after Termination". In sub-clause 63.3, delete the words "terminates" the contractor's employment on the first line and substitute " shall enter and expel the contractor. |
| 63.4 | Assignment of Benefit of Agreement - This clause has been amended | In sub-clause 63.4 delete the word "termination" on the second line and substitute expulsion. Add the following sub-Clause 63.5: |
| 63.5 | Corrupt or Fraudulent Practices - This clause has been added. This does not exist in FIDIC GCC | if in the judgement of the employer the contractor has engaged in corrupt or fraudulent practices, in competing for or in executing the Contract, then the employer may, after having given 14 days notice to the Contractor, terminate the contract's employment under the contract and expel the contractor from the site, and the provisions of clause 63 shall apply as if such expulsion had been made under Sub-Clause 63.1. |
| 67.1 | Engineer's Decision - The first para of this clause has been amended | First para of this sub-clause shall read as under:"If a dispute arises between the Employer and the Contractor in connection with, or arising out of the works, whether during the execution of the works or after their completion and whether before or after repudiation or other termination of the Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty fourth day on which he received such reference, the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is pursuant to this Clause." In the last line of second paragraph of the Sub-clause, delete the words an amicable settlement or." If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after |

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| | | <p>their completion and whether before or after the repudiation or other termination of Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate Or valuation of the Engineer, the matter in dispute shall, in the first place be referred to the Dispute Review Board ("the Board").The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. The third member shall be selected by the other two and approved by the parties. If either the Employer or the contractor is dissatisfied with any Recommendation of the Board, or if the Board fails to issue its Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation, then either the Employer or the Contractor may, within 14 days after his receipt of the Recommendation, or within 14 days after the expiry of the said 56 days period, as the case may be, give notice to the other party, with a copy of information to the Engineer, of his intention to the commence arbitration.If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 14 days after the parties received such Recommendation from the Board, the Recommendation shall become final and binding upon the Employer and the Contractor.</p> |
| 67.2 | The provision of amicable settlement has been deleted | Sub clause 67.2 is deleted without a change in the numbering of the other sub clause of this clause 67. |
| 67.3 | Arbitration - This clause has been replaced | <p>This sub clause shall read as follows: "Any dispute in respect of which the decision, if any, of the Engineer has not become final and binding pursuant to sub clause 67.1 shall be finally settled as set forth below:</p> <p>i) the dispute with the Contractor, whether Indian or foreigner, shall be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. The arbitration tribunal shall consist of three arbitrators, one each to be appointed by the Employer and the Contractor: the third arbitrator shall be chosen by the two Arbitrator so appointed by the parties and shall act a presiding Arbitrator. In case of failure of the two Arbitrator, appointed by the parties, to reach upon a consensus within a period of 28 days from the appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President, Indian Road Congress. For the purposes of this sub clause, the term "Indian Contractor" means a Contractor who is registered in India and is a judic person created under Indian Law as well as a joint venture between such a contractor and a foreign contractor.</p> <p>ii) neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments already put before the Engineer, for the purpose of obtaining his said decision. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrators or any matter whatsoever relevant to the dispute.</p> <p>iii) the reference to arbitration may proceed notwithstanding that the works shall not then be or be alleged to be complete, provided always that the obligations of the employer, the Engineer and the Contractor shall not be altered by the reason of the arbitration being conducted during the progress of the works. Neither party shall be entitled to suspend the works, and payment to the contractor shall be continued to be made as provided by the contract.</p> <p>iv) if one of the parties fails to appoint its arbitrator in pursuance of sub para (i) above, within 60days after receipt of the notice of the appointment of this arbitrator by the other party, the President, Indian Road Congress shall appoint the arbitrator. A certified copy of the President, Indian Road Congress's order, as the case may be making such an appointment shall be furnished to both the parties.</p> <p>v) arbitration proceedings shall be held at New Delhi, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.</p> <p>vi) the decision of the majority of arbitrators shall be final and binding upon both parties. The fees and expenses of the arbitrators and expenses of the arbitration proceedings as determined by the arbitrators shall be shared equally by the Employer and the Contractor. However, the expenses incurred by each party in connection within the preparation, presentation, etc., of its case prior to during and after the arbitration proceeding shall be borne by each part itself. All arbitration awards shall be in writing and shall state the reason in the award."</p> |
| 67.4 | Failure to Comply with Engineer's Decision - This clause has been | Sub-Clause 67.4 is amended to read as follows; "Where neither the employer nor the contractor has given notice of intention to commence arbitration of a dispute within the period stated in sub-clause 67.1 and the related recommendations or decision, as the case may be, has become |

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| | amended | final and binding, either party may, if the other party fails to comply with such recommendation or decision and without prejudice to any other right it may have, refer the failure to arbitration in accordance with sub-clause 67.3. The provisions of sub clause 67.1 shall not apply to any such reference." |
| 68.2 | Notice to Employer and Engineer - This clause has been further clarified | For the purposes of this Sub-Clause the address of the employer is The Employer: Chairman, National Highways Authority of India, 1-Eastern Avenue, Maharani Bagh, New Delhi- 110 065 |
| 69 | Default of Employer - This clause has been substituted | In sub clauses 69.1, 69.4 and 69.5 substitute "sub-Clause 60.8" for "sub-clause 60.10." |
| 69.1 | Default of Employer - The time period has been amended | In sub clause 69.1(a) substitute "56 days" for "28 days" Delete sub clause 69.1 (d) |
| 69.3 | Payment of Termination - this clause has been amended | Delete the portion after the words "provisions of clause 65" in line 3 of this sub clause. |
| 70 | Changes in Cost and Legislation - This clause has been substituted in entirety | Delete the text of clause 70 in its entirety and substitute, therefore, the following sub clauses 70.1 to 70.8 |
| 70.1 | Price Adjustment - This clause has been substituted in entirety | The amounts payable to the contractor and valued at base rates and prices pursuant to sub clause 60.1 hereof shall be adjusted in respect of the rise or fall in the cost of labour, contractor's equipment, plant, materials and other inputs to the works by the addition or subtraction of the amounts determined by the formulae prescribed in this clause. |
| 70.2 | Other changes in Cost - This clause has been substituted in entirety | The extent that full compensation for any rise or fall in the costs to the Contractor is not covered by the provisions of this or other clauses in the contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs. |
| 70.3 | Adjustment Formulae - This clause has been adopted as provided in the COPA of FIDIC | ---- |
| 70.4 | Sources of Indices - This clause has been added | The sources of indices shall be those listed in the Appendix to bid is approved by the Engineer. |
| 70.5 | Increase or Decrease of Price of Specified Materials - This clause has been added | Increase or decrease of price of specified materials will be adjusted by either and addition to or a deduction from the Contract Prices. For the purpose of this sub clause. "specified materials" means the materials stated in Schedule 2 of Section VII of the Bidding Documents and required on the site for the execution and completion of the Permanent works. "Basic Price" means the price for "specified materials" indicated in schedule 2 of section VII of the bidding documents. |
| 70.6 | Limit to Price Adjustment - This clause has been added | Provided that, in determining all such price adjustment in accordance with the aforesaid sub clauses; a) No account will be taken of any amount by which any cost incurred by the contractor has been increased by default or negligence of the contractor. b) If the contractor fails to complete the work within time for completion under clause 43.1, increases or decrease of cost of specified materials shall be made using either the indices or prices relating to prescribed time for completion, or the current indices or prices, whichever is more favourable to the employer, provided that if an extension of time is granted pursuant to clause 44.1 the above position shall apply to the adjustments made after expiry of such extension of time. (This provision also appears as sub clause 70.3(l) and is repeated herein for clarity.) c) On completion of the works and before final payment the contractor shall give a certificate that he has made full and complete disclosure to the Engineer of every increase or decrease in price obtained by him on all items affected by this clause. |
| 70.7 | Exemption from Price Adjustment - This clause has been added | The following items shall not be included in the price adjustment calculation: a) Liquidated damages; b) Retention withheld and released; c) advance payments in the form of loans and their repayments; d) The value of any additional or varied work valued at current prices; and d) payment to " Nominated" sub-contractors included as "Provisional Sums" or Prime Cost items in the general cost. |
| 70.8 | Subsequent Legislation - | If, after the date 28 days prior to the closing date for submission of bids for the contract there are |

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| | This clause has been added | changes to any national or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority or the introduction of any such State Statute, Ordinance, Decree, Law regulation or by-law in India or States of India which causes additional or reduced cost to the Contractor, other than under the preceding sub clauses of this clause in the execution of the contract, such additional or reduced cost shall, after due consultation with the employer and the contractor, be determined by the engineer and shall be added to or deducted from the contract price and the engineer shall notify the contractor accordingly, with a copy to the employer, Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have been taken in to account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of sub clauses 70.1 to 70.7 of this clause |
| 71.2 | Currency Restrictions | This clause has been deleted. |
| 72.1 | Rate of Exchange | This clause has been deleted. |
| 72.2 | Currency Proportions | This clause has been deleted. |
| 72.3 | Currency for payments of provisional sums | This clause has been deleted. |
| 73 | Taxation | |
| 73.1 | Foreign Taxation - This clause has been added. This does not exist in FIDIC GCC | The prices bid by the contractor shall include all taxes, duties and other charges imposed outside the Employer's country on the production, manufacture, sale, and transport of the Contractor's Equipment, Plant, materials, and supplies to be used or furnished under the contractor, and on the services performed under the Contract. |
| 73.2 | Local Taxation - This clause has been added. This does not exist in FIDIC GCC | The prices bid by the contractor shall include all customs duties, import duties, business taxes, and income and other taxes that may be levied in accordance with the laws and regulations prevailing on the date 28 days prior to the latest date for submission of bids in the Employer's country on the contractor's equipment, plant materials, and supplies permanent, temporary, and consumable) acquired for the purpose of the Contract and on the services performed under the Contract. Nothing in the Contract shall relieve the contractor from his responsibilities to pay any tax that may be levied in the Employer's country on profits made by him in respect of the Contract. |
| 73.3 | Advance deduction of taxes -This clause has been added. This does not exist in FIDIC GCC | Advance deduction of taxes, recoverable at source, shall be made from each interim payment Certificate in accordance with the relevant provisions of all prevailing Acts and Regulations |
| 73.4 | Personal Income Tax - This clause has been added. This does not exist in FIDIC GCC | The contractor's staff and labour will be liable to pay personal income taxes in the Employer's country in respect of such of their salaries and wages as are chargeable under the laws and regulations for the time being in force, and the contractor shall perform such duties in regard to such deductions thereof as may be imposed on him by such laws and regulations. |
| 74.1 | Termination of Contract for Employer's Convenience - This clause has been added. This does not exist in FIDIC GCC | The Employer shall be entitled to terminate this contract at any time for the Employer's convenience after giving 56 days prior notice to the Contractor, with a copy to the Engineer. In the event of such termination, the contractor a) shall proceed as provided in such-clause 65.7; and b) shall be paid by the Employer as provided in sub-clause 65.8 |
| 74.2 | Bribes - This clause has been added. This does not exist in FIDIC GCC | If the contractor, or any of his sub-contractors, agents or servants gives or offers to give to any person any bribe, gift gratuity or commission as an inducement or reward for doing or forbearing to do any action in relation to the contract or any other contract with the Employer, or for whoing or forbearing to show favour or disfavour to any person in relation to the contract or to any other contract with the employer, then the employer may enter upon the site of the works and expel the contractor and the provisions of clause 63 hereof shall apply as if such entry and expulsion had been made pursuant to that clause |
| 75.1 | Drawings and photographs of the works - This clause has been added. This does not exist in FIDIC GCC | The contractor shall not disclose details of drawings furnished to him and works on which he is engaged without the prior approval of the Engineer in writing. No photograph of the works or any part thereof or equipment employed thereon shall be taken or permitted by the contractor to be taken by any of his employees or any employee of the sub-contractor appointed by him without the prior approval of the Engineer in writing and no such photographs shall be published or otherwise circulated without the approval of the Engineer in writing. |
| 76.1 | Use of Explosives - This clause has been added. This does not exist in | Except as may be provided in the contract or ordered or authorised by the Engineer, the Contractor shall not use explosives. Where the use of explosives is so provided or ordered or authorised, the contractor shall comply with the requirements of the following besides the law of |

| Clause No. | General Conditions of Contract | Change adopted by NHAI |
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| | FIDIC GCC | <p>the land as applicable</p> <p>a) The contractor shall at all times take very possible precaution and shall comply with appropriate laws and regulations relating to the importation, handling transportation storage and use of explosives and shall, at all time when engaged in blasting operations post sufficient warning flagmen, to the full satisfaction of the Engineer.</p> <p>b) The contractor shall at all times make full liaison with, and inform well in advance and obtain such permission as is required from all Government Authorities, public bodies and private parties whosoever are concerned or affected or are likely to be concerned or affected by blasting operations.</p> <p>c) The Contractor shall pay all license fees and charges which may be required for storage of explosives or in respect of any other matter whatsoever.</p> |
| 77.1 | Noise and Disturbance - This clause has been added. This does not exist in FIDIC GCC | All works shall be carried out without unreasonable noise and disturbance. The Contractor shall indemnify and keep indemnified the Employer from and against any liability for damages on account of noise or other disturbance created while or in carrying out the works and from and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in regard or in relation to such liability. |
| 77.2 | Pollution - This clause has been added. This does not exist in FIDIC GCC | <p>Subject and without prejudice to any other provision of the Contract and the law of the land and its obligations as applicable, the contractor shall take all reasonable precautions</p> <p>a) in connection with rivers, streams, waterways, drains, water-courses, lakes, reservoirs and like to prevent</p> <ul style="list-style-type: none"> i) sitting ii) Erosion or their beds or banks; and iii) Pollution of the water so as to affect adversely the quality or appearance thereof or cause injury or death to animal and plant life. <p>b) In connection with underground water resources including percolating water to prevent:</p> <ul style="list-style-type: none"> i) any interference with the supply to or obstruction from such sources; and ii) pollution of the water so as to affect adversely the quality thereof |
| 78 | Law - This clause has been added. This does not exist in FIDIC GCC | This contract shall be governed by and constructed in accordance with the Law of India and no suit or other proceeding relating to the Contract shall be filed or taken by the contractor in any court of law except in the High Court which has jurisdiction over the area in which the works lie, to hear and determine all action and proceedings. |
| 79 | Maintenance of Right of Way - This clause has been added. This does not exist in FIDIC GCC | Throughout the period of the Contract the Contractor shall at all times maintain public vehicular access along the right-of-way and from the right-of-way to all public and private access and land, as exists immediately prior to his commencement of the works. The contractor may on written request (including a drawing, programme and specification), to the Engineer, be given approval to operate; a) a road diversion suitable for the road traffic and suitable width, or b) traffic on a one way system using manual co-ordinated direction control or automatic traffic lights having a secure source of power. Applications for approval shall show every detail of the proposals including road construction (cross section including pavement and surfacing, and profile and drainage), road signing, communication between the ends of the controlled section lighting and proposed period of operations. One way systems shall be provided with adequate sign posting and the contractor shall limit delays to any traffic to the minimum and with the approval of the Engineer. The travelling public shall be notified by signs, of exceptional delay well in advance of the site of delay, as required by the Engineer. Payment for temporary diversions, traffic provisions and maintenance of roadways shall be as provided in the contract and as instructed by the Engineer. |
| 80.1 | The Apprentices Act 1961 - This clause has been added. This does not exist in FIDIC GCC | The Contractor shall duly comply with the provisions of the Apprentices Act 1961 (III of 1961) the rules made there under and any order that may be issued from time to time under the said Act and the said Rules and on his failure or neglect to do so he shall be subject to all liabilities and penalties provided by the said Act and the said rules. |

SUGGESTIONS RECEIVED FROM VARIOUS STAKEHOLDERS IN RESPECT OF DIRECT AND INDIRECT TAX RELATED ISSUES

Direct Tax related Issues

Amendment of Section 80-IA to allow tax holidays to LLP

The Government recently introduced the concept of Limited Liability Partnership (LLP) as a convenient form of organization that builds in an appropriate level of insulation from risk to the owners. LLP's are thus extremely well placed, economically, to undertake the business of development of road projects. The present tax law, however, allows tax holiday benefit u/s 80-IA only to a company. The MCA also permits only a company to act as SPV for a road project. If, LLPs are allowed to undertake road projects, the typical organization structure of LLP will not only allow a proper risk-reward trade off considering the size and exposure involved in business of road project development but will also prove to be tax efficient, because LLPs are exempted from several levies like Dividend Distribution Tax (DDT), Minimum Alternate Tax (MAT), etc. that apply typically to a company. In an LLP the conduct of business by the LLP and the relationship between the partners would be governed by a contractual arrangement as against statutory provisions as applicable in case of limited liability companies and ease in operation unconstrained by statutory provisions result.

2. It was, therefore, suggested to the Committee that section 80-IA of the Income Tax Act needs amendment to extend the facility to LLPs. The MCA would also need to be amended to enable LLPs to execute road projects.

Extending DDT exemption to one more layer

3. Domestic companies on declaration, distribution or payment of dividend under section 115-O of the Income Tax Act are required to pay additional income tax (DDT) at an effective rate of 16.995%. However, where the ultimate holding company (holding more than 50% of the nominal value of equity share capital in the subsidiary) receives dividend from its subsidiary which has paid DDT, the holding company on declaration of dividend is exempted from paying DDT on such dividend. Therefore, at present, only one layer of the holding company is allowed to avoid the cascading effect of DDT.

4. Typically, infrastructure development business often requires a multi-tier corporate structure with a holding company at the top and various step-down subsidiaries which are involved in the actual execution of the project. The subsidiaries are created so as to comply with the guidelines set out in the respective concession/license agreements. Also typically, as per the concession agreement, the concessionaire companies are required to form separate SPV for each project.

5. These subsidiaries pay DDT on distribution of dividend to the holding company, which in turn is required to pay DDT while distributing dividend to shareholders. This reduces the return to investors of the holding company, making such investment less attractive. It is therefore suggested the administration of DDT be rationalized to remove its cascading effect. To make it simple to understand, suppose, "Group A", having won the bid for various infrastructure projects floats Concessionaire Company which in turn floats different SPV for executing each of the projects. Now, if the SPV declares the dividend, the same shall be chargeable to DDT. At the time of declaration of dividend by the concessionaire to its parent company, it shall not be eligible to claim the benefit of provisions of section 115-O(1A) of the Act (i.e. exemption from DDT) because of restriction u/s 115-O(1A) of the Act (concessionaire being subsidiary of any other company).

6. Hence it has been suggested that at least two layers should be allowed for avoiding DDT particularly for infrastructure companies. It was pointed out that, in order to boost the investment in SEZs, there is a specific exemption to developers or enterprises engaged in operating or maintaining SEZs from payment of DDT on distribution of dividend under Section of 115(O)(6) of the Income Tax Act. It would be ideal if similar benefits may be provided to enterprises engaged in developing, operating and maintaining the infrastructure facilities.

Exemption from MAT

7. Where the income-tax payable by a company is less than fifteen per cent of its book profit, under the provisions of section 115JB of the Income Tax Act, the book profit shall be deemed to be the total income of the company and shall be taxable at the rate of 15% (prior to amendment by Finance Act 2009 the percentage was 10% of such book profits). Although, MAT credit is available, however, it leads to blocking of funds and increase in the cost of working capital.

8. The importance of infrastructure in sustained development of the nation is well recognized and section 80-IA was introduced to encourage private sector

participation in the development of infrastructure, and not for persons/entities who were merely executing the civil construction work or any other works contract. Infrastructure companies require huge capital investment and requirement to pay taxes under MAT despite having the benefit of deduction under the other provisions of the Act, affects the cash flow and in a way negates the benefit provided by way of deduction.

9. In contrast, by way of a specific exclusion under sub-Section (6) of section 115JB, income of developers or entrepreneurs carrying on business in a Unit or SEZ's are not required to compute their tax liability under MAT. The extract of the Section is reproduced below:

“The provisions of this section shall not apply to the income accrued or arising on or after the 1st day of April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone, as the case may be.”

10. To give a fillip to the infrastructure companies, it has been suggested to come up with a circular or notification to exclude the infrastructure companies including road developers from the provisions of MAT to ease off the tax burden.

11. Moreover, recently, the Government of India has released a comprehensive discussion paper and draft of the new Direct Tax Code (DTC), 2009. In the DTC -

- (i) the base for computing MAT is proposed to be shifted from 'book profits' to 'gross assets';
- (ii) the rate of MAT is proposed to be 2% of gross assets on all companies (except for banking companies for which it is proposed to be 0.25% of gross assets); and
- (iii) MAT will be a final tax and it will not be available as tax credit in subsequent years.

12. Since, the road developers invest heavily during the period of construction without any returns, they are likely to be badly hit by the proposed provision for MAT in DTC as the investments by road developers will be captured under the gross assets.

13. In view of the above, the following suggestions have been made to the Committee in the context of the road sectors –

- (i) Under DTC also infrastructure companies should be either exempted from MAT or if at all MAT is to be made applicable for such companies, the rate of MAT should be @0.25% on the asset as is applicable to the banks assets;
- (ii) MAT should be either at holding company or SPV level to avoid cascading effect. For instance, where an investment of Rs.100 is made by a holding company in its SPV's, the same Rs. 100 will be reflected in the gross assets of SPV's as well. This will lead to dual MAT liability on the same amount of assets among the related entities. Hence, it is suggested to mitigate the cascading effect;
- (iii) MAT should be on net assets. This will further help in mitigating the cascading effect as well as reducing the tax burdens to the entities under the road sector;
- (iv) MAT should be effective only after the commencement of business, i.e., project starts generating revenue. Since, as discussed above, the road developers invest heavily during the period of construction without any returns, levying MAT (which is on gross assets) under such phase may prove a heavy burden to the entities under road sector; and
- (v) MAT credit should be allowed to be set off against normal tax liability. Since under the proposed DTC MAT will be a final tax liability and there will be no tax credit of the same in the subsequent years, it is suggested to allow the set off of MAT credit available to the assessee as is available under the existing provisions to boost up the efficiency and effectiveness under the road sector.

Clarification with regard to 'new' infrastructure facilities

14. Currently, the 10-year tax holiday is available to only those enterprises which are developing 'new' infrastructure facilities. In case of the road widening project, except the expressways which are the greenfield projects, the widening and strengthening is being done only on the existing highways, thus, leading to the ambiguity as to whether 10-year tax holiday will be applicable to road sector widening and strengthening projects.

15. In contrast, there is no such ambiguity for an assessee who undertakes substantial renovation and modernization of the existing transmission or distribution lines in power sector. Profits from renovation and modernization of

the existing transmission or distribution lines in power sector are eligible for tax holiday under Section 80IA of the Act.

16. Hence it has been suggested that tax holiday should be available also to those who undertake renovation and major improvement of roads and highways (e.g., through widening). In order to claim the tax holiday on the development/ widening of existing roads, CBDT may be requested to issue a clarification on the issue.

17. Moreover, in the Thirteenth Schedule (read with section 30) of the DTC, for computation of profits of a specified business, the word 'New' in relation to assessee engaged in the business of developing, or operating and maintaining, any infrastructure facility has not been mentioned. Therefore, the above ambiguity may not be faced once the DTC comes into force.

18. The Administrative Ministry expressed the view that these issues do not specifically relate to national highways and are general in nature. Such issues are considered during pre-Budget interactions and are dealt with after taking an overall view while preparing the annual Finance Bill. As regards any ambiguity in the existing provisions, the issues are examined by the relevant division of the CBDT. The Administrative Ministry's view as reflected through the draft Direct Tax Code is that there should be a moderate tax rate on a wider tax base and no sector specific tax subsidies should exist.

Indirect Tax related Issues

Custom Duty Exemptions

19. Goods required for construction of roads, specified under List 18 of notification No. 21/2002-Customs, are exempt from custom duty subject to the equipment/machinery remaining in the project for the specified number of years (till the completion of the project). Some of this equipment (e.g. piling equipment) are required for only a specified purpose and also for a very limited period. Hence retention of the same till the end of the project serves no purpose and unnecessarily results into the blockage of funds in the form of equipment and the idling of the machinery.

20. Hence it has been suggested that once an equipment has been used in a project for which the import of the same was allowed without payment of custom

duty, it should be allowed to be removed from the project after completion of the activity so that the same can be utilized for other similar road projects by the same SPV or its parent/holding company or any other SPV of the parent company. In effect, this would mean that instead of the utilization of the equipment for any single road project, the duty free import should be allowed for the road construction business of the parent/holding company or SPVs floated by them for highway development/business.

Service Tax on Toll Revenues in BOT Projects

21. It was represented that as per a recent notification issued by the Customs and Central Excise Department, the construction, repair and maintenance and management activities have been exempted from the levy of service tax. However, the toll revenue being collected by BOT operators is being subjected to levy of service tax. It was contended that the road developers have no other source of funds except the toll revenue to recover the cost of investment made for creation of facility and also the cost of operation and maintenance. The toll revenue so collected may be kept out of the service tax net as it is a part of operating activity.

Service tax on input services.

22. Construction of roads is presently excluded from the taxable category of work contract services and the management, maintenance and repair of roads are also excluded from the taxable category. It was suggested that since road construction is exempted from service tax, all input services consumed by road sectors such as consultancy/ legal etc services for pre-construction activities may be exempted from service tax.

23. The Administrative Ministry presented its views in respect of the above suggestions on Indirect Tax issues, to the Committee, on the following lines:

- (i) As regards customs duty exemption for specified road construction equipment, the safeguards prescribed have been built into the exemption because the exempted equipment could be used for other of commercial construction activity also besides road development. The policy objective guiding the exemptions is to encourage and facilitate road construction because it relates to the development of infrastructure that has externalities and involves a long gestation lag. For the same reasons, it would be difficult to accede to the suggestion of allowing duty free import for road construction business because in such cases, diversion of imported

equipment for all kinds of construction activity cannot be ruled out. However, it is possible to consider some moderation or reduction in the retention period of such equipment after the views of MoRT&H are ascertained;

- (ii) Service tax is imposed only when toll collection is outsourced to contractors on commission basis, and the service tax is charged only on the commission earned by the contractors and not on the entire toll collected. The service provided by the contractors falls in the category of Business Auxiliary Service; and
- (iii) The policy of the Government has been to discourage end-use exemptions. End-use exemptions are difficult to monitor and increase the cost of compliance. Moreover, the exemption sought for input services amounts zero rating, a benefit available only to exports; and hence the suggestion to exempt service tax on all input services consumed in pre-road construction activities was not well taken.
