Model Concession Agreements: Paving the Path to Increased Public-Private Partnership

By Pratichi Mishra & Oshika Nayak

Introduction

India has the second-largest road network in the world, spanning approximately 6.7 million kilometers. The road network includes national highways, state highways, district roads and rural roads. In particular, the national highway network in India has increased by approximately 60% over the last decade[1].

The Ministry of Road, Transport and Highways, Government of India ("**MoRTH**") is responsible for road transport policy in India. The National Highways Authority of India ("**NHAI**"), an autonomous statutory body, is responsible for the development, maintenance and management of national highways. NHAI enters into concession agreements for the design, construction, operation and maintenance of highways with concessionaires. Such road projects are typically implemented on a toll-operate-transfer ("**TOT**"), hybrid-annuity model ("**HAM**"), engineering-procurement-construction ("**EPC**") or build-operate-toll ("**BOT**") basis. Public-private partnerships are common in the roads sector; concessionaires bid for projects and are awarded projects based on their technical and financial capabilities. Concession agreements and other bidding documents are based on model bidding documents which are updated periodically.

This article discusses the recent amendments to the Model Concession Agreements ("**MCA**") for BOT and TOT road projects, dated March 15, 2024, issued by the MoRTH.

[1] *Year End Review 2023-Ministry of Road Transport and Highways*, dated January 5, 2024, issued by the Ministry of Road Transport and Highways (available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1993425>, last accessed on May 17, 2024)

BOT Projects

A summary of key amendments to the MCA for BOT projects is discussed below:

- *Construction support*: The MCA earlier contemplated equity support by the NHAI to concessionaires to the extent of 10% of the total project cost. Under the amended MCA, in addition to equity support, the NHAI can provide construction support, based on the estimated toll revenue during the construction period, such that the aggregate construction support and equity support (if applicable) does not exceed 40% of the total project cost. The construction support is payable in 10 installments, linked to the physical construction progress of the road project.

- *Performance security*: Earlier, concessionaires were required to provide performance security to the extent of the higher of 5% of the total project cost and the anticipated 12-month toll revenue. This requirement has been reduced to 3% of the estimated project cost specified in the request for proposal issued by the NHAI for the project. Further, additional modes of providing such security have been permitted, including insurance surety bonds, demand drafts, bankers' cheques and e-bank guarantees.

- *Change in ownership*: The MCA prescribes certain minimum holding/change in ownership requirements for bidders that are awarded a project. The prescribed minimum holding for the members of the bidding consortium under the amended MCA is at least 26% of the equity in the concessionaire, such that the minimum holding is also not less than 5% of the total project cost, during the construction period and one year thereafter. The period of such one-year calculation has also been clarified.

- *Termination payment and compensation for NHAI default*: Earlier, no termination payment was payable by the NHAI to the concessionaire for the termination of the concession agreement because of concessionaire default prior to COD. Under the amended MCA, termination payment, calculated in the prescribed manner, is payable by the NHAI for termination due to concessionaire default even prior to COD if the physical construction progress of the project exceeds 40% prior to termination. Further, under the amended MCA, compensation for default by the NHAI is linked to the commercial operations date ("**COD**") of the project and comprises direct costs and loss of toll revenue (but excludes debt repayment) prior to COD and comprises interest on debt due and operating and maintenance expenses for the period after COD.

- *Termination for construction delay*. An independent engineer is appointed by the NHAI to monitor the progress of each BOT project. The independent engineer is required to inform the concessionaire of anticipated delays in the achievement of the project milestones. Under the amended MCA, the concessionaire is required to submit a revised project completion schedule to the independent engineer upon being informed of anticipated delays by the independent engineer. If the independent engineer reports construction progress of less than 75% based on the revised project completion schedule for a continuous period of 3 months, the NHAI now has the right to terminate the concession agreement.

- *Buy-back of the project if traffic exceeds design capacity*. Earlier, if the average daily traffic in any accounting year exceeded the designed capacity of the project highway, the NHAI had the discretion to terminate the concession agreement and make the relevant termination payment (applicable for an indirect political event) to the concessionaire. Under the amended MCA, the NHAI is required to buy-back the road project through termination of the concession agreement with prior notice of 90 days if the average daily traffic in any two financial years in a block of three continuous financial years exceeds the design capacity of the project. The termination payment payable to the concessionaire would be the higher of (i) 80% of the product of the average monthly fee and 75% of the months of the remaining concession period, less cost of major maintenance provisioned in the financial model in the remaining concession period; and (ii) the payment for an indirect political event of default.

- *Force majeure events*: Under the MCA, the occurrence of non-political events, indirect political events and political events constitute *force majeure* events. Under the amended MCA, indirect political events now include unforeseen political or economic events that make the construction or operation of the project financially unviable or otherwise unfeasible. Further, a change in law causing a reduction in traffic and corresponding increase in the concession period beyond 20% of the concession period, if invoked by the concessionaire, constitutes a political event. Also, specific guidelines have been prescribed for the calculation of *force majeure* compensation pre-COD and post-COD.

- *Competing roads and additional tollways*: Under the amended MCA, concessionaires can claim monetary compensation as well as seek extension of the concession period in case of construction of competing roads or additional tollways, subject to a maximum extension of 30% of the original concession period. Certain clarificatory amendments have also been made to the relevant provisions.

- *Change of scope:* Upon the receipt of a change of scope notice from the NHAI (i.e., a notice requiring the concessionaire to provide additional services and works or, as clarified under the amended MCA, modifying the existing scope of the project), concessionaires are required to submit a detailed proposal, including the impact on project cost and timing, breakdown of cost and material required, the proposed design and modifications. The method for the determination of the cost and time for implementation of a change of scope proposal has also been prescribed.

- *Other updates*: Concessionaires are required to submit certain monthly progress and management reports. Concessionaires are also required to ensure insurance coverage for certain specified events after COD, including the concessionaire's general liability arising out of the concession. Further, the MCA earlier contemplated that toll collections from traffic exceeding a traffic cap (i.e., if the average daily traffic in any accounting year exceeded a specified percentage of the designated project capacity) were deemed to be payable to the NHAI – these provisions have now been deleted.

TOT Projects

The manner of calculation of the average traffic and toll collection for determining modifications to the concession period for TOT projects has been amended. The amended MCA provides for three target points for traffic sampling (earlier two target points) and a uniform threshold of 5% (earlier 20%/30%) for toll variation between the target fee and the actual fee for determining modification of the concession period. The manner of calculation of the corresponding extension or decrease in the concession period has also been updated.

Conclusion

Given the increased financial participation of the government under the HAM and EPC models in recent years, the government has taken various initiatives to revive BOT projects (including schemes for harmonious substitution of concessionaires, one-time fund infusion and premium deferment). The amendments to the BOT MCA are expected to facilitate ease of doing business by addressing certain practical challenges faced by concessionaires, including with respect to performance security, construction support and termination payments. The amendments to the TOT MCA are expected to rationalize the calculation of modifications in the concession period.

Disclaimer:

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