

CHAPTER XIV: MINISTRY OF ROAD TRANSPORT AND HIGHWAYS

National Highways Authority of India

14.1 Loss of Revenue due to inordinate delay in commencement of toll operations

Against 45 days stipulated in National Highways Fee (Determination of Rates and Collection) Rules, 2008, for start of collection of toll from the date of completion, the toll collection at Allahabad Bypass project on NH-2 could be started after delay of about three years resulting in loss of revenue of ₹ 150.09 crore.

National Highways Authority of India (the Authority) executed the work of construction of Allahabad Bypass Road from 158.00 Km to 242.708 Km of NH 2 at a total cost of ₹ 1502.167 crore. The project was completed on 15 October, 2009. In accordance with the National Highways Fee (Determination of Rates and Collection) Rules, 2008, (toll rules), in case of public funded projects the collection of toll shall commence within 45 days from date of completion of the project. The Authority submitted (May 2009) the draft toll notification to the Ministry of Road Transport and Highways (MoRTH) for approval. The said draft notification was disapproved (21 August, 2009) by the MoRTH on the ground that the toll rules needed to be amended. Consequently, amendments to National Highways Fee (Determination of Rates and Collection) Rules, 2008 were notified on 3 December, 2010 and 12 January, 2011. The Authority sent the revised draft toll notification to MoRTH for approval on 24 January 2011, which was finally published on 18 August, 2011 and agreement with the toll collecting agency could be entered into on 31 July, 2012.

Examination in Audit revealed that toll operations could commence only after a period of about three years from the date of completion due to inordinate delays in taking timely action at various levels viz:

- About 20 months delay on the part of MoRTH i.e. 14 months in notifying the amendments to toll rules and a further delay of six months in issuing toll notification. The issue of toll notification was held up till the publication of revised fee rules. No alternate mechanism was approved by MoRTH to avoid loss of revenue.
- About 12 months delay on the part of NHAI i.e. delay of about six months due to poor response to the tenders invited for selection of toll collection agency as the Annual Potential Collection (APC) was fixed on higher side, delay of about four months in finalizing agreement with toll collecting agency from the date of receiving the proposal of the sole bidder and further delay in start of toll collection.

The above resulted in revenue loss of ₹ 150.09 crore out of which ₹ 92.67 crore was due to delay in issuance of toll notification by MoRTH and ₹ 57.42 crore was due to delay in toll collection by the Authority.

The Authority in its reply (June 2013) stated that it had submitted the proposal for toll notification to MoRTH well in time and the toll collection could start only after about one year of toll notification due to change in its policy regarding the engagement of toll collecting agency and poor response to its efforts for selection of toll collection agency through competitive bidding. It further stated that the loss pointed out in the para was not the actual loss but only deferment of fee realizable because after the recovery of the capital cost through user fee, the fee leviable would be reduced to 40 *per cent*.

The Ministry while endorsing (October 2013) the reply furnished chronology of events justifying delays at various levels/stages. It further replied (December 2013) that as amendments to toll rules were in the process, no alternative mechanism could be taken up for collection of user fee since the user fee collection could be started only when the fee notification for the instant stretch got notified. It also stated that APC is assessment of user fee collection on the basis of traffic survey and it could not be altered arbitrarily.

Reply of the Ministry/Authority is not acceptable in view of the following:

- (i) The MoRTH did not take suitable steps, under NH Fee Rules 2008 in vogue, to avoid revenue loss during the period while amendment to these Rules was in process. A proposal to consider applicability of existing NH Fee Rules 2008 (pending the proposed amendment in Rules) was initiated in the Ministry in December 2009. However, the Ministry did not take any action on the proposal for 11 months, till the time the fee Rules were modified.
- (ii) Ministry's contention that APC is assessed on the basis of traffic survey and could not be altered arbitrarily was in contradiction to the fact that annual traffic growth rate considered by NHAI as seven *per cent* in 2011 was in itself arbitrary as the NHAI revised the same to five *per cent* per annum in 2012 while fixing APC.
- (iii) As regards recovery of the capital cost of ₹ 1502.17 crore of the project, based on yearly APC of ₹ 61.11 crore finalized by NHAI with the contractor with five *per cent* yearly increase, the same was to be recovered in the next 17 years. However, the said stretch being part of Golden Quadrilateral (GQ) has already been approved to be upgraded into 'six lane' by Committee on Infrastructure (CoI), Government of India (GOI) in 2006 on BOT basis and NHAI has included the same in its work plans for the years 2011-12 and 2012-13 for award of six laning on BOT basis. Other stretches like Agra-Etawa-Chakeri, Etawa Bypass, Varanasi-Aurangabad, Aurangabad-Barwa Adda, Barwa Adda-Panagarh, Dankuni-Kharagpur of GQ had already been awarded for six-laning by end of March 2013 i.e. within a span of seven years of CoI approval for six laning. Thus, on award of work of the stretch for six laning on BOT, the question of any cost recovery through user fee did not arise.
- (iv) Poor response to bids for engagement of toll collection agency was indicative of unrealistic fixing of APC by Authority. Moreover, there was no justification for

entering into agreement with the toll collection agency after a delay of more than four months from the date of receipt of bid and a further delay of 14 days in collection of toll from the date of agreement.

Thus, delay in taking timely action by MoRTH and the Authority, resulted in loss of ₹ 150.09 crore.

14.2 Weak contract management resulting in short recovery of liquidated damages

Undue benefit to the contractor by issuing completion certificate with retrospective effect and short recovery of liquidated damages in contravention to the terms of contract resulted in likely loss of ₹ 35.63 crore.

The National Highways Authority of India (NHAI) entered into a contract (March 2002) with M/s PCL-SUNCON (JV) for four laning and strengthening of 76.17 Km. of the existing two lane National Highway (NH) 2, Varanasi-Mohania stretch in the State of U.P. and Bihar at a total cost of ₹ 396.48 crore. The project was divided into three sections with overall completion period of 36 months ended on 30 March 2005. The project commenced from 31 March 2002 but work on none of the three sections was completed in time. Extension of time (EOT) granted for all the three sections with last EOT for the third section up to 20 July 2006. The project was actually completed on 20 December 2010. As per Clauses 47.1¹ and 47.2² of the contract, the contractor was liable to pay liquidated damages for delay in completion of the work. Appendix to Bid stipulated the maximum amount of LD as 10 *per cent* of the final contract price. M/s. LEA Associates South Asia Pvt. Ltd. was the construction Supervision Consultant for the above work.

Examination in audit in June 2011 of records of Project Implementation Unit, Varanasi as well as subsequent follow up of the issue at NHAI Headquarters, revealed that:

- The Supervision Consultant issued taking over certificate (TOC) on 4 October 2007 indicating month of completion, retrospectively, as February and May 2006 for lengths totaling 67.55 Km (comprising stretches from all the three sections). This gave additional time of 16 months (June 2006 to October 2007) to complete the balance work unjustifiably which amounted to an undue favour to the contractor.

¹ *Clause 47.1: If the contractor fails to comply with the time for completion for whole of the works or, if applicable, any section within the relevant time prescribed then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty, for every day or part of a day which shall elapse between the relevant time for completion and the date stated in Taking Over Certificate of the whole of the works or the relevant section, subject to the applicable limit stated in the Appendix to Tender.*

² *Clause 47.2: If before the time for completion of the whole of the works or, if applicable, any section, a Taking Over Certificate has been issued for any part of the works or of section, the liquidated damages for delay in completion of the remainder of the works or of that section shall, for any period of delay after the date stated in such Taking Over Certificate, and in the absence of alternative provisions in the contract, be reduced in the proportion which the value of the part so certified bears to the value of the whole of the works or section, as applicable. The provisions of this sub clause shall only apply to the rate of liquidated damages and shall not affect the limit thereof.*

Against the above completed road stretch of 67.55 Km., MoRT&H issued toll fee notification on dated 7 September 2007 for reduced road stretch of 57 Km only, considering NHAI's clarification dated 7-9-2007 to MoRT&H that some portion of the stretch would not be completed in near future. This raises doubts regarding the correctness of actually completed length as mentioned in TOC.

- The length of road remained incomplete as on EOT date of 20 July 2006 was 8.62 Km (76.17 - 67.55) on which liquidated damages (LD) were to be calculated and levied for each day or part thereof of delay till completion of the whole work as per contractual provisions, the amount of which worked out to ₹ 38.13 crore. However, the Supervision Consultant assessed (2008) LD amounting to ₹ 2.5 crore by restricting the LD to 10 per cent of ₹ 25 crore being the assessed value of the balance work considering the incomplete stretch to be 3.96 Km. only. This was in violation of contractual provisions and led to short recovery of LD by ₹ 35.63 crore.

Thus, issuance of TOC with retrospective date and short recovery of LD by ₹ 35.63 crore raises doubt about the intention of Supervision Consultant being bonafide.

NHAI after the audit observation was issued, imposed additional LD of ₹ 34.29 crore (June 2013) on the contractor. In its response, the contractor submitted disagreement (July 2013) and obtained a stay order from the Delhi High Court.

NHAI stated (July 2011) that LD was deducted on the recommendation of the Supervision Consultant and in the interest of work. Despite follow up of the matter with the Management in January 2013 and again with the Ministry/Management in December 2013, reply with regard to justification for issuing TOC after 16 months of stated date of completion and short recovery of LD was awaited.

Recovery of balance LD from the contractor in the near future seems doubtful as the contractor has moved the Court. Thus, weak contract management coupled with delayed action by NHAI has resulted in an undue benefit to the contractor and likely financial loss to NHAI, of ₹ 35.63 crore.

The matter was reported to the Ministry in December 2013; their reply was awaited (March 2014).

14.3 Undue favour to Contractor

Undue favour was extended to a Contractor due to non-termination of the agreement coupled with payment of escalation charges of ₹ 10.56 crore and non recovery of liquidated damages of ₹ 7.06 crore during the years 2006 to 2009, in deviation to the terms of agreement despite substantial time and cost overrun for reasons attributable to the Contractor.

The National Highways Authority of India (Authority) entered into an engineering, procurement and construction (EPC) agreement with Bhagheeratha Engineering Limited, Kochi, (Contractor) in June 2001 for four laning on Km 180 to Km 199.20 of Bangalore-Salem-Madurai section on NH – 7 [Contract Package No.NS-26/TN] at a cost of ₹ 70.61 crore (Revised to ₹ 76.19 crore in January 2005). The due date of completion of the project of 29 August 2003 was extended up to 31 December 2009 by Authority

Headquarters, New Delhi from time to time. The work was completed by the Contractor on 31 December 2009 at a final cost of ₹ 95.33 crore.

The terms and conditions of agreement *inter alia*, stipulated that:

- For delay in completion of work the Contractor shall pay liquidated damages (LD) at 1/2000 of the initial contract price per day subject to the maximum of 10 *per cent* of initial contract price.
- Authority, without prejudice to any other method of recovery, could deduct the LD from any amount due or to become due to the Contractor.
- Payments shall be adjusted for deductions for advance payments, retention, other recoveries in terms of contract and taxes at source as applicable under the law.
- If the Contractor stopped the work for 28 days without authorisation by engineer, the Authority could terminate the contract for fundamental breach of contract.
- Price adjustment shall apply for the work done from the start date up to the end of the initial intended completion date or extension granted and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor.

There was time overrun of 76 months (more than six years) and cost overrun of ₹ 19.14 crore in execution of the highway project. As per decision of Authority, the delay of 1370 days from April 2006 to December 2009 was attributable to the Contractor for which the maximum LD recoverable from the Contractor worked out to ₹ 7.06 crore i.e 10 *per cent* of the initial contract price.

Authority (HQ) granted (June 2005) interim extension of time (EOT) up to July 2005 reserving the right to levy LD at the time of consideration of final EOT. The final EOT up to December 2009 was granted in August 2012 with levy of LD for delay in completion of the project attributable to the Contractor from April 2006 to December 2009 along with freezing of indices for price adjustment from April 2006 onwards. When the Authority claimed LD amount of ₹ 7.06 crore, the Contractor did not settle the LD amount and intimated that they would refer the matter to Arbitration as per terms of contract. The Contractor was yet to nominate an Arbitrator (March 2014).

Audit examination revealed the following:

Delay in approval EOT

The Project Implementation Unit (PIU), Salem of the Authority submitted proposals for approval of Authority at periodical intervals between January 2007 and October 2009 for EOT and review of levy of LD and price escalation adjustments at the time of final EOT. Authority issued orders against the proposals only in August 2012 i.e. after a delay of seven years from the date of interim extension of time upto July 2005. In fact, Authority took almost three years (October 2009 to August 2012) to decide on the PIU's final proposal for EOT. As most of the bills of the work were settled by August 2012, because of delayed decision of Authority, the PIU could not recover LD till date (March 2014).

Irregular payment of escalation charges

PIU settled ₹ 92.39 crore towards Contractor's work bills (₹ 76.27 crore) and price escalation bills (₹ 16.12 crore) till December 2009, but did not recover LD of ₹ 7.06 crore while making payment of bills. Authority issued orders in August 2012 for freezing of indices from April 2006 for price escalation. By that time PIU, in anticipation of approval of EOT along with price escalation and based on the recommendation of supervising consultant, released payment of ₹ 10.56[^] crore towards price escalation for the period, April 2006 to December 2009, in deviation to the terms of agreement. The Authority has not worked out the differential price escalation to be recovered from the Contractor so far (March 2014).

Non recovery of LD

Though the Contractor delayed the work for 1,370 days due to their financial problems and LD could have been recovered, Authority did not recover LD from the running bills. As the project suffered substantial time & cost overrun due to the reasons attributable to the Contractor, it was not a prudent decision to release the payment of the bills without recovering the LD.

Non termination of contract

The consultant to the project, Mukesh & Associates, had intimated the Authority in May 2007 that the Contractor stopped the work beyond 28 days and recommended termination of contract and execution of the balance work through any other agency, in accordance with the terms of the agreement. Authority, however, allowed the Contractor to continue the work on grounds that termination of contract and invitation of fresh bids would involve cost estimates higher than existing contract rates.

PIU stated (September 2013) that due to cash flow problems, the Contractor stopped activities at the site; that the authority approved financial support to the existing contractor in the interest of work to avoid any substantial cost /time overrun; that recovery of LD from Contractor's final bill was not recommended by the consultant.

The Ministry stated (January 2014) that they proposed to initiate action against the consultant for his misconduct; that further action taken would be intimated after the outcome of arbitration process invoked by the Contractor.

The above reply of the Management/Ministry is not acceptable as the Authority did not terminate the contract in May 2007 despite the recommendation of the consultant, which was in accordance with the terms of the agreement. However, on the grounds of a subsequent recommendation of the consultant, PIU released payment towards excess price escalation and did not recover LD, which was in deviation to the terms of the agreement and an undue favour to the contractor. There was substantial delay in decisions by the Authority on the proposals of PIU which suggests an undue favour to the Contractor.

Audit is of the view that the case merits investigation with a view to fix responsibility and to rectify systemic deficiencies, if any, so that such events do not occur in future.

[^] *From April 2006 to March 2007 indices as per prevailing indices, April 2007 to September 2008 based on March 2007 and from October 2008 to December 2009 at 75 per cent of prevailing indices.*