

## CHAPTER II: MINISTRY OF ROAD TRANSPORT AND HIGHWAYS

### National Highways Authority of India

#### 2.1 Undue benefit to the concessionaire (PIU Begusarai)

**NHAI paid undue financial benefits to the Concessionaire of ₹ 51.03 crore comprising early completion bonus of ₹ 21.83 crore in violation of the concession agreement, and ₹ 29.20 crore being part of annuity that was not payable due to reduction in scope of work.**

National Highway Authority of India (NHAI) and M/s Mokama - Munger Highway Limited (the concessionaire) signed (12 July 2010) a concession agreement (CA) for construction of two-lane road on the Mokama - Munger Section of NH-80 in Bihar for a total project length of 68.582 kms which included construction of Barahiya Bypass (with length of 8.1 kms) and two Rail bridges (RBs). The project was to be completed in 730 days<sup>1</sup> i.e. by 14 May 2013 at a total project cost of ₹ 351.54 crore. Article 28.1.1 of the CA provided for payment of early completion bonus (ECB) to the concessionaire only after completion of the total project highway. Article 15.1 stated that the provisional completion certificate (PCOD)<sup>2</sup> would entitle the concessionaire his first annuity for completed part, subject to any deduction for any negative change in scope of work, but did not provide for early completion bonus on partly completed work. Audit noted the following irregularities:

- (i) Owing to land acquisition (LA) problems, NHAI could not provide encumbrance-free land and other clearances to the Concessionaire, hence, work on Barahiya bypass and RBs could not be commenced. Thus, the Independent Engineer (IE), in agreement with NHAI, provisionally certified the project length 60.482 kms as fit for commercial operation (PCOD) with effect from 20 January 2013. Audit observed that due to LA problems concessionaire had requested for de-scoping of work of Barahiya bypass and RBs thrice during October 2013 to July 2014. NHAI's Project Implementation Unit (PIU) at Begusarai, also recommended (May 2014) to NHAI Headquarters, New Delhi that 'it was in the interest of the organisation that Barahiya bypass may be deleted from the scope of work, as the concessionaire was enjoying full amount of annuities'. Nevertheless, citing the provisions of Article 28.1.1 of CA, concessionaire claimed 114 days early completion bonus (ECB) for partly completed 60.482 kms project length, as if full project highway (which included Barahiya Bypass and two RBs) were also completed prior to the scheduled date of completion i.e. 14 May 2013. On recommendation of IE, NHAI paid (February 2015) 100 days early completion bonus amounting to ₹ 21.83 crore to the concessionaire.

<sup>1</sup> 730 days from appointed date 15 May 2011

<sup>2</sup> Provisional Commercial Operation Date (PCOD)

The IE, however, used implausible assumptions (23 September 2014), to recommend ECB for 100 days to the concessionaire. Firstly, IE did not scientifically compute the likely time that the concessionaire would have taken to construct the Barahiya Bypass and two RBs while computing 100 days of early completion for payment of bonus. There was a time gap of 114 days between PCOD (20 January 2013) of partly completed project highway and Scheduled COD (14 May 2013) for full project highway including Barahiya Bypass road and two RBs. This indicated that while computing 100 days of early completion for partly completed project highway, the IE assumed to complete works of Barahiya Bypass road and two RBs, which had not commenced, in just 14 days which was beyond any reason. Secondly, 114 days should not be considered as fair basis for calculation of early completion for a part project length of 60.482 kms because timeframe of 730 days specified in CA was meant for previously envisaged entire length of 68.582 kms including Barahiya bypass of 8.1 kms and two Rail Bridges (RBs), hence, for calculation of early completion for partly completed project length i.e 60.482 km, the reference point ought not to be 14 May 2013 or 730 days but should have been proportionately brought down from 14 May 2013 based on linear progression of work completed. This was, however, not considered by IE while calculating early completion days for payment of bonus to the concessionaire. Further, mobilisation of resources by the concessionaire was not even-paced as overall monthly progress was less than the projected targets in first 8 months (from June 2011 to January 2012). It was close to targets in next five months (February 2012 to June 2012) and the pace of work increased from July 2012 onwards. Management stated that work of DBM<sup>1</sup> started in June 2011 while that of BC<sup>1</sup> started in February 2012, however, for calculating 100 days early completion period, the Independent Engineer based his assumption on maximum paving capacity of concessionaire considering DBM and BC work done in only one month i.e. June 2012. This was not average/ normal paving capacity in respect of entire project, hence, not fair to be considered as a basis for assumption. Therefore, payment of ₹ 21.83 crore to the concessionaire as an early completion bonus for 100 days was irregular and amounted to giving undue financial benefits to them.

- (ii) As per the CA, the concessionaire was entitled for 26 half yearly annuity payments of ₹ 39.94 crore each, starting from six months after COD or PCOD as the case may be. Article 28.4.2 of the CA provided for one *per cent* reduction in annuity for reduction of assured lane availability<sup>2</sup> (ALA) up to five *per cent*, and two *per cent* reduction in annuity for every one *per cent* fall in ALA beyond five *per cent*. Since there was no likelihood of commencement of work on bypass and RBs, and PIU Begusarai had already recommended (May 2014) to NHAI Hqrs., for deletion of these works, this was a clear case of negative scope of work to the extent of 11.81 *per cent*<sup>3</sup>, hence, half yearly annuity amount should have been

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<sup>1</sup> DBM (Dense Bituminous Macadam) is base course, BC (Bituminous Concrete) is wearing course. BC function is to seal the surface or stop water to penetrate into underlying layers and withstand with wheel load.

<sup>2</sup> Availability of carriageway assured by the concessionaire for each annuity payment period

<sup>3</sup> 11.81 *per cent* =  $8.1/68.582 \times 100$  where 8.1 kms was the reduction in length of project highway on account of exclusion of Barahiya bypass and two Rail bridges.

reduced by 14.62 per cent<sup>1</sup> before payment of five annuities, which was not done. As a result there was an excess payment of total ₹ 29.20<sup>2</sup> crore to the concessionaire till 31 October 2015.

NHAI signed a supplementary agreement (1 August 2013) with Concessionaire for completion of Barahiya bypass and two RBs without any escalation or higher cost to NHAI including delays in handing over of land. It was also decided that NHAI shall not exercise negative change in scope due to non handing-over of encumbrance free land and will not reduce or withhold annuity as construed in CA. Only when NHAI decides not to execute the balance works, the clauses of CA for reduction of annuity shall apply.

Management stated (January 2016) that (i) the work of Barahiya Bypass and 2 RBs were not commenced due to failure to hand over Right of Way (ROW) to Concessionaire for these works, early completion bonus was paid based on the recommendation of IE and as per the provision of the CA (ii) Annuity amount was not reduced or withheld as the final decision on negative change of scope is under examination and finalization. Ministry has re-iterated (February 2016) the views of the management.

Reply of management/Ministry is not acceptable because (i) No article in CA provided for payment of early completion bonus on partly completed work, (ii) Independent Engineer used implausible assumptions to recommend ECB for 100 days to the concessionaire, (iii) Decision has been delayed on the part of NHAI to effect negative change in scope of work resulting in payment of higher amount of annuities to the concessionaire which should have been adjusted with respect to the actual lane availability as per the provisions of article 28.4.2 of Concession Agreement. Resultantly there was total excess payment of ₹ 29.20 crore<sup>2</sup> to the concessionaire till 31 October 2015.

Thus, NHAI paid undue financial benefits to the Concessionaire of ₹ 51.03 crore comprising early completion bonus of ₹ 21.83 crore in violation of the concession agreement, and ₹ 29.20 crore being part of annuity that was not payable due to reduction in scope of work.

## **2.2 Undue benefit to the Concessionaire relating to four-laning project between Hazaribagh – Ranchi Section of NH – 33.**

**Payment of ₹ 47.05 crore to the Concessionaire as bonus for early completion was irregular and amounted to giving undue financial benefits to the Concessionaire.**

National Highways Authority of India (NHAI) and M/s Hazaribagh Ranchi Expressway Limited, Ranchi (the Concessionaire) entered into a concession agreement (CA - on 08 October 2009) for construction, operation and maintenance of four laning of 71.16 kms (including road passing through Ramgarh city) on Hazaribagh – Ranchi Section of NH –

<sup>1</sup> Reduction in annuity amounting to 14.62 per cent = 1 per cent + 13.62 per cent (i.e 1per cent reduction in annuity for initial 5 per cent reduction in scope of work + 2 per cent for next 6.81 per cent (11.81-5) reduction in scope of work)

<sup>2</sup> ₹ 29.20 crore = 14.62 per cent of ₹ 199.70 crore (₹ 39.94 crore x 5 annuity released to the concessionaire till 31 October 2015)

33 in the State of Jharkhand on Build, Operate and Transfer (BOT) Annuity Basis. The project length of 71.16 kms was to be constructed in 910 days, i.e. by 27 January 2013.

On 10 February 2010, as desired by NHAI, the Concessionaire agreed to include construction of Ramgarh Bypass portion measuring 15.723 kms of length, in lieu of road passing through Ramgarh city, without any financial liability whatsoever to NHAI. In the revised arrangement, the total length of project thus increased from 71.16 kms to 73.799 kms i.e. 15.723 kms length of Ramgarh-bypass and 58.076 kms excluding bypass portion. This was formalized (11 April 2013) by a supplementary agreement to the original CA dated 08 October 2009. In the supplementary agreement Concessionaire also agreed to condone the delay in handing over of encumbrance free land by NHAI including claims for delay in handing over of 2.335 kms of land for Ramgarh-bypass. A separate completion period was agreed for Ramgarh-bypass portion of 15.723 kms. Final measurement of road including Ramgarh bypass which was certified as completed on 1 April 2015, was 73.866 kms.

As per Article 28.1 of the CA (dated 08 October 2009), the Concessionaire was entitled to receive a bonus for early completion of the full length of project (71.160 kms) in case he achieved the commercial operation date (COD) prior to the scheduled completion date i.e. 27 January 2013 after being certified by the Independent Engineers (IE). Audit noted that NHAI paid ₹ 47.05 crore to the Concessionaire as bonus for early completion which was irregular and amounted to giving undue financial benefits to the Concessionaire due to the following reasons:

- (i) As construction of Ramgarh-bypass and its completion timelines were determined by the supplementary agreement (dated 11-4-2013), the Independent Engineers (IE) issued provisional completion certificate (12 April 2013) certifying that 58.067 kms were fit for entry into commercial operation w.e.f. 15 September 2012. NHAI made payment of ₹ 47.05 crore<sup>1</sup> to the Concessionaire towards early completion bonus for completing 58.067 kms 134 days<sup>2</sup> ahead of the scheduled completion date i.e. 27 January 2013. This was irregular, because for calculating early completion of 58.067 kms, 27 January 2013 should not be taken as the reference point as this date was the scheduled date for completing previously envisaged length of 71.160 kms. For 58.067 kms, reference point should have been proportionately brought down from 27 January 2013 based on linear progression of work completed. Based on linear progression, the length of 58.067 kms, should have been completed by mid-August 2012, whereas it was certified as completed on 15 September 2012, hence, this ought not to be considered as a case of early completion. Therefore, payment of bonus of ₹ 47.05 crore to the concessionaire was irregular and amounted to giving undue financial benefits to the Concessionaire under the provisions of the original or supplementary concession agreement.
- (ii) The concession agreement stated that all the listed project facilities forming part of four-laning should be completed on or before the project completion date.

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<sup>1</sup> *Product of average daily annuity and number of days by which PCOD preceded the scheduled four laning date i.e  $64.08 \times 2/365 \times 134$  days*

<sup>2</sup> *The period of 134 days between 15 September 2012 and 27 January 2013*

These project facilities also were not fully completed on 58.067 kms stretch as on 15 September 2012.

Management (April 2015)/Ministry (March 2016) stated that (i) bonus was paid to the Concessionaire according to Clause 28.1.1, 15.1 and 10.3.5 of the Concession Agreement, (ii) the methodology suggested for calculation of completion time for 58.067 kms length on proportionate basis was not justified as land for the project had been handed over to the concessionaire belatedly and on piecemeal basis, (iii) the proposal of Ramgarh bypass in lieu of town road was taken up by NHAI on request of Jharkhand Government. Concessionaire deployed adequate resources to complete the work before time but same could not be utilized due to non-availability of land, (iv) the works relating to Telecom system and Highway traffic management system were completed in stretches where land was provided but due to lack of connectivity of cable attributable to land problem in Ramgarh bypass, the system could not be made operational at the time of PCOD. After acquiring land, the system was made operational on 19-7-2013.

Management/Ministry reply is not acceptable because: (i) Under the referred clauses of the CA (dated 8 October 2009), bonus for early completion was payable if envisaged full length i.e. 71.160 km was completed by the Concessionaire before the associated scheduled completion date i.e. 27 January 2013. NHAI paid ₹ 47.05 crore to the Concessionaire towards early completion bonus for 134 days as if the whole 71.160 km was completed on 15 September 2012 whereas only 58.067 km was certified as fit for entry into commercial operation from this date; (ii) Ministry's reply that delay occurred due to non-availability of land is not relevant in the perspective of audit observation which highlights that due date of completion for reduced length i.e. 58.067 km. was not re-defined for calculation of early completion bonus for completing 58.067 km. Further, NHAI's inability to provide encumbrance free land on time cannot be taken as a justification for payment of early completion bonus for reduced partly completed length (58.067 km.) computed on the basis of time prescribed (910 days) for previously envisaged project length (71.160 km). Hence, taking 27 January 2013 as a reference point for completion of 58.067 km. was not proper and required to be redefined based on work completed, (iii) Issues concerning delay in handing over land and construction of the Ramgarh-bypass portion was resolved by a separate agreement with no cost to NHAI; and (iv) Telecom System and Highway Traffic Management System was not complete by 15 September 2012 on a stretch of 58.067 km., and were complete in all respect only by 19 July 2013.

Thus payment of ₹ 47.05 crore to the Concessionaire as bonus for early completion was irregular and amounted to giving undue financial benefits to the Concessionaire.

### ***2.3 Undue Benefit to the concessionaire (PIU Darbhanga)***

**NHAI paid undue financial benefits of ₹ 31.90 crore to the concessionaire due to deficiencies in issue of provisional completion certificate w.e.f. 8 February 2012 without completion of tests prescribed for safe and reliable commercial operation viz. toll management system and highway traffic management system, and prior to completion of project facilities in contravention of provisions of the Concession Agreement.**

National Highways Authority of India (NHAI) and M/s Kosi Bridge Infrastructure Company Limited (the concessionaire) signed (6 October 2006) a Concession Agreement (CA) for construction of four-lane bridge across River Kosi on NH-57 in Bihar between the milestone 148.55 and 159.185 Km on Build, Operate and Transfer (Annuity) basis. The Project could not be completed on scheduled project completion date (SPCD) i.e. by 4 April 2010. Independent Consultants (IC) issued (18 April 2012) a provisional completion certificate (PCC) w.e.f. 8 February 2012 (under Article 16.5 of CA), certifying this date to be provisional commercial operation date (PCOD) for the whole project. NHAI identified total delay of 675 days<sup>1</sup> in completion of project, including 507 days delay attributable to NHAI. Annuity payment schedule prescribed 34 annuities each amounting to ₹ 31.90 crore starting w.e.f. 4-10-2010 i.e. within six months of SPCD. Based on PCC w.e.f. 8 February 2012 NHAI approved payment of 31 annuities (out of 34 annuities) of ₹ 31.90 crore each, w.e.f. 4 April 2012 falling immediately after 8 February 2012. Deficiencies in issue of PCC with effect from 8 February 2012, however, resulted in undue payment of ₹ 31.90 crore to the concessionaire.

1. Articles 16.1, 16.4 & 16.5 of CA provided that IC may issue provisional completion certificate with the approval of NHAI, if all tests have been conducted in accordance with Schedule 'J' and are successful in respect of any stretch and such stretch can be legally, safely and reliably placed in commercial operation though certain works/things forming part thereof are not yet complete. In such case provisional completion certificate shall have appended thereto a 'Punch list'. Such punch listed works were required to be completed within 120 days from effective date of PCC, and included works like plantation and landscaping, unlined and lined roadside drains, rest areas, fencing, turfing on embankment slopes, stone masonry works and stone pitching in identified stretches/locations [article I(1.1) read with article 16.5]. All other items covered in project scope were prescribed in Schedule 'B' and minimum spatial/functional requirements of project facilities were prescribed in Schedule 'C' of the agreement. Works covered under Schedule 'B' and 'C' were project assets as they formed minimum spatial/functional requirements for the project and were not covered under the definition of punch list items prescribed under article 1(1.1) referred above .
2. The terms of reference between IC and NHAI provided that IC shall issue provisional certificate with punch list items, if any, as defined in the CA, after joint inspection with the concessionaire, if the concessionaire requests for it, after approval of NHAI. Based on concessionaire's request, IC had sought directions and formal approval on 31 January 2012 and 21 February 2012 from NHAI for issue of provisional completion certificate appending each time a draft punch list (updated till that date) which included some works forming part of schedule 'B' and 'C', along with other minor works.
3. The project was inaugurated on 8 February 2012 and NHAI agreed for issuance of Provisional Completion certificate of the project with effect from 8 February 2012. Subsequently, IC issued PCC on 18 April 2012 and formally declared PCOD of the project retrospectively w.e.f. 8 February 2012. The punch list appended thereto was updated till 18 April 2012 which revealed that prescribed tests were yet to be carried out in respect of toll management system, and highway traffic management system

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<sup>1</sup> 675 days is the timegap between SPCD i.e 04 April 2010 and PCOD i.e. 08 February 2012

(emergency communication system)<sup>1</sup>. Punch list also showed incomplete works like provision of administrative operation and maintenance base camp, roadside furniture and roadside facilities which formed part of Schedule 'C' of CA, besides other works of minor nature covered under the categories of article 1(1.1) of CA.

Audit observed that declaration of 8 February 2012 as PCOD was against the provisions of concession agreement because (i) the tests prescribed under Schedule 'J' in respect of toll management system and highway traffic management system (emergency communication system) had not been carried out till that date and without successful completion of these tests, NHAI's approval to IC for issuance of PCC from this date was in contravention of article 16 of CA. As per IC's letter dated 18 April 2012 these tests were not completed till 18 April 2012; (ii) works of Road furniture and roadside facilities and administrative operation and maintenance base camp forming part of Schedule 'C' should not have been included in Punch list items because these were project assets as they formed minimum spatial /functional requirements for the project and were not covered under the definition of punch list items prescribed under article 1(1.1) read with article 16.5 of CA. These should therefore have been completed by PCC date (8 February 2012). By including such Schedule 'C' items under punch list the benefit of 120 days was provided to these critical items which did not qualify to be part of punch list as pointed out in para 1 above. As certified by IC these works were incomplete as on 23 June 2012. The exact date on which pending works of Road furniture and roadside facilities and administrative operation and maintenance base camp were completed was not available, however, IC intimated (23 July 2013) NHAI that all items mentioned under punch list (dated 18 April 2012) were not completed by the concessionaire till 8 June 2012 i.e. within time limit of 120 days<sup>2</sup> prescribed under CA, but were actually completed in all respects by 8 February 2013. Hence, declaration of 8 February 2012 as provisional completion date by NHAI was not proper. The concessionaire, therefore, was not entitled for 4<sup>th</sup> annuity of ₹ 31.90 crore falling on 4 April 2012 (immediately after PCOD 8 February 2012) and the total annuity entitlements should be 30 annuities (instead of 31 approved by NHAI) starting from 5<sup>th</sup> annuity listed in Schedule 'G' falling due only on 4 October 2012. Thus there was an excess payment of annuity of ₹ 31.90 crore.

Management stated (February 2016) that real-time test was to be conducted on toll management system and emergency caller booth which could not be conducted because toll collection agency was not available at the time of PCC and that concessionaire submitted reports of these tests vide letter dated 19-4-2012, items under punch list were of minor nature, did not affect commercial operation and that these were completed within prescribed time of 120 days from PCC except the portion which was not allowed by public agitation. Ministry has re-iterated (March 2016) the views of the Management.

The reply is not acceptable because (i) tests on toll management system and highway traffic management system were essential for ensuring safe and reliable commercial operation of project and they were completed after PCC date of 8 February 2012, whereas article 16 of CA required that PCC should be issued after successful completion

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<sup>1</sup> *Highway traffic management system (HTMS) was to provide, inter alia, facilities to the highway users to make emergency calls through emergency caller booths (ECBs) to control centre in case of accidents, breakdown of vehicles and fire and pre-warn the highway users about unusual conditions on the road.*

<sup>2</sup> *120 days from effective date of Provisional completion certificate i.e. 8-2-2012*

of all the tests prescribed in Schedule 'J', (ii) The contention that punch list items were of minor nature is not relevant as punch list items included items of Schedule 'C' which lists minimum spatial/functional requirements of project facilities and inclusion of Schedule 'C' items in punch list was against the provisions of CA as these were minimum spatial and functional requirements of the facilities and were to be completed by PCC date. The concessionaire was expected to complete items of work in the contract in Schedule 'C' and also carry out tests prescribed in Schedule 'J'. The audit observation pertains to failure to carry out prescribed tests by PCC date of 8 February 2012 and wrong inclusion of Schedule 'C' items in Punch List. The fact of non-completion of some items in the punch list within 120 days prescribed for completion of such items due to public agitation, as stated by the ministry, does not therefore impact the audit observation. The other items in punch list like toll management system and highway traffic management system (emergency communication system) also were not complete till 18 April 2012 (as shown in punch list as of 18 April 2012, enclosed with IC's letter dated 18 April 2012) i.e till after 4<sup>th</sup> annuity payment falling on 4 April 2012. Hence, 4<sup>th</sup> annuity payments of ₹ 31.90 crore was not justified and annuity payments should have started from 5<sup>th</sup> annuity onwards listed in Schedule 'G' falling due on 4 October 2012.

Thus, untimely issue of provisional completion certificate w.e.f. 8 February 2012 without due regard to safety and reliability aspects was in contravention to provisions of concession agreement and resulted in undue payment of ₹ 31.90 crore by NHAI to the concessionaire.