

CHAPTER XI: MINISTRY OF ROAD TRANSPORT AND HIGHWAYS

National Highways Authority of India

11.1 Non-recovery of damages and maintenance cost from the concessionaire

National Highways Authority of India extended undue benefit to the concessionaire to the tune of ₹99.27 crore by not taking prompt action to recover the damages and maintenance cost from the concessionaire on account of its failure in achieving the project milestones and in meeting the maintenance obligations.

National Highways Authority of India (NHAI) entered into (21 March 2012) a concession agreement (CA) with Vijayawada Gundugolanu Road Project Private Limited (concessionaire) for six laning of Vijayawada-Gundugolanu section of National Highway No. 5 (NH-5) including six-lane Hanuman Junction bypass and four-lane Vijayawada bypass. As per the terms of agreement, the Appointed Date would be the date on which financial closure was achieved or an earlier date as may be mutually agreed upon by both parties. The financial closure which was to be achieved within 180 days from the date of CA (i.e., 17 September 2012) was actually achieved on 10 April 2013. Further, due to delays on the part of both NHAI and the concessionaire in fulfillment of conditions precedent, the Appointed Date was declared as 01 September 2014 by waiving the damages mutually. The scheduled six-laning date of the project was 28 February 2017.

The concessionaire did not commence the work till August 2016 and did not also maintain the road during the construction period on the ground that no funds were disbursed by the banks for the project. Consequently, NHAI issued (26 August 2016) a notice of termination to the concessionaire and stated that by virtue of the termination notice, NHAI was deemed to have taken possession and control of the project highway forthwith. The toll collection along with the two toll plazas set up on the project stretch, were handed over to another agency with effect from 27 August 2016.

As on the date of issue of notice of termination i.e., 26 August 2016, damages of ₹79.82 crore were recoverable from the concessionaire for non-achievement of milestones. Further, due to failure of the concessionaire, NHAI carried out emergency maintenance works amounting to ₹18.70 crore at the risk and cost of the concessionaire, as per the applicable terms of the agreement. In addition, penalty of ₹0.75 crore for breach of maintenance obligations were also recoverable from the concessionaire. Thus, the total dues recoverable from the concessionaire stood at ₹99.27 crore as on 26 August 2016.

Audit observed that:

- (i) Against the recoverable amount of ₹99.27 crore, NHAI possessed security in the form of Performance Bank Guarantees aggregating to ₹84.20 crore deposited by the concessionaire. Besides, there was a balance of ₹56.08 crore as fixed deposits in the Escrow account. However, NHAI did not encash the

bank guarantees based on the verbal directions of the Administrative Ministry. The bank guarantees were last extended (September 2016) with validity up to 16 September 2017 and the same could be claimed till 15 March 2018.

- (ii) As per clause 31.3.1 of the CA, the damages payable by the concessionaire could be recovered from the Escrow account. However, NHAI did not issue instructions to the Bank where Escrow account was operated, to freeze the fixed deposits in order to recover the amount due from the concessionaire. There was high risk of non-recovery of dues from the Escrow account since transfer had been made from the account towards mobilisation advance of ₹58.07 crore and parking of ₹69.80 crore in mutual funds/term deposits. Further, a sum of ₹2.07 crore was transferred from the account in respect of which, the purpose of transaction was not mentioned. The concessionaire did not also furnish the necessary documents for verification of Escrow Account transactions to the Financial Expert of the Independent Engineer (IE) despite request made by the IE.
- (iii) NHAI continued to grant additional time to the concessionaire for arranging funds for the project, even after failure of the concessionaire to achieve the project milestones, but the concessionaire did not fulfil their commitments. Despite this, NHAI did not take action to recover the damages. In a meeting held (May 2017) under the chairmanship of the Minister of Road Transport and Highways, it was decided that the matter regarding levy of damages for not achieving the milestones by the concessionaire may be referred to arbitration. The concessionaire proposed (September 2017) to refer the matter to conciliation as per the terms of the concession agreement and the same was under consideration of NHAI (September 2017).

Thus, NHAI failed to safeguard its financial interests as it neither encashed the bank guarantees submitted by the concessionaire nor recovered the dues from the Escrow account. Consequently, damages of ₹99.27 crore along with interest thereon as per the applicable provisions of the agreement remained unrecovered (November 2017). This amounted to undue benefit to the concessionaire.

The Management stated (September 2017) that clause 37.5 (Survival of Rights) of CA safeguarded the interest of NHAI as all the rights and obligations under the agreement would survive the termination, to the extent such survival was necessary for giving effect to such rights and obligations. Accordingly, as per the provisions of the above clause, necessary action would be taken by NHAI for recovery of damages plus interest from the concessionaire.

The Ministry stated (December 2017) that the concessionaire had been asked to keep the bank guarantee in force till completion of conciliation process. The latest balance available in the Escrow account was being ascertained and instructions for freezing the account were being issued. Further, all applicable recoveries would be effected in full after conciliation process.

The reply of the Management/Ministry is not acceptable since the enforceability of claims regarding the recoverable damages after termination of the agreement was not a valid

justification for non-enforcement of the rights available before such termination. Besides this process could be cumbersome involving delay in recovery. NHAI should have taken timely action to recover its dues by encashment of bank guarantees/recovery from Escrow account instead of continuing to grant additional time to the concessionaire to fulfil their commitments.

11.2 Non-recovery of damages from the concessionaires

National Highways Authority of India failed to recover damages of ₹85.19 crore on account of delayed/non-completion of work relating to renewal of wearing surface of the road pavements by the concessionaires in four road widening projects in Andhra Pradesh.

National Highways Authority of India (NHAI) entered into (March 2006 to September 2007) separate concession agreements (CAs) with four concessionaires¹ for execution, operation and maintenance of four projects viz. AP-6, AP-7, AP-8 and AP-2 on Build, Operate and Transfer (BOT) Annuity basis. All the four projects related to widening of the existing two-lane portion to four lanes on the National Highway 7 (NH-7) in the State of Andhra Pradesh. The four projects were implemented under the supervision of NHAI, Project Implementation Unit (PIU), Nirmal, Andhra Pradesh (now in Telangana). The provisional certificates of completion of these projects were issued on 24 June 2010 (AP-6), 11 June 2010 (AP-7), 22 July 2009 (AP-8) and 26 March 2009 (AP-2).

The operation and maintenance (O&M) requirements for the four projects, as laid down in clauses 2.6 of Schedule L forming part of the concession agreements, provided for renewal of wearing surface of the road pavement once every five years. Further, as per clause 4.3.1 of Schedule L, the surface roughness of the project highway on completion of construction should be 2000 mm/km. The surface roughness should not exceed 3000 mm/km during the service life of the pavement at any time. A renewal coat of bituminous concrete should be laid every five years after initial construction or where the roughness value reaches 3000 mm/km, whichever was earlier, to bring it to initial value of 2000 mm/km.

Clause 18.12 of each CA provided that in the event the concessionaire did not maintain and/or repair the project highway, and had failed to commence remedial works within 30 days of receipt of notice in this behalf from NHAI or Independent Consultant (IC), or the O&M inspection report, as the case may be, NHAI would be entitled to undertake the repair and maintenance at the risk and cost of the concessionaire and to recover the same from the concessionaire. Further, Clause 18.13 of each CA provided that in the event NHAI did not exercise its option under Clause 18.12, it would recover damages from the concessionaire after the aforesaid period of 30 days and until the default was rectified. The damages would be calculated for each day of default at the higher of (a) ₹10,000, and (b) 0.1 *per cent* of the cost of such repair as estimated by the IC. Clause 18.12 of the CAs also conferred the right on NHAI to recover the damages directly from the Escrow Account.

¹ *Adilabad Expressway Private Limited (for AP-6), Patel KNR Heavy Infrastructures Private Limited (for AP-7), Nirmal BOT Limited (for AP-8) and GMR Pochanpalli Expressways Private Limited (for AP-2)*

Audit observed that as per the above provisions of the CAs, the work relating to renewal of wearing surface in respect of the four projects should have been completed within five years of their completion dates i.e. by 23 June 2015 (AP-6), 10 June 2015 (AP-7), 21 July 2014 (AP-8) and 25 March 2014 (AP-2). However, the concessionaires did not commence the renewal work by these dates. The renewal work in respect of AP-7, AP-8 and AP-2 projects was completed after a delay of 599 days, 498 days and 250 days respectively after allowing the grace period of 30 days as per the provisions of the CA. The renewal work in respect of AP-6 project was yet to be completed (31 August 2017). The delay in completion of work upto 31 August 2017 was 770 days after excluding grace period. Accordingly, damages leviable on the concessionaires in terms of Clause 18.13 of the CAs worked out to ₹85.19 crore upto 31 August 2017 as shown below:

| Project | Provisional completion date | Due date of completion of renewal work | Actual date of completion of renewal work | Delay excluding 30 days grace period | Cost of renewal work estimated by IC (₹in lakh) | Damages per day at 0.1 per cent of cost of renewal ² (₹) | Damages leviable (₹in lakh) |
|---------|-----------------------------|--|---|--------------------------------------|---|---|-----------------------------|
| AP-6 | 24.06.10 | 23.06.15 | 31.08.17* | 770 | 3790.11 | 3,79,011 | 2918.38 |
| AP-7 | 11.06.10 | 10.06.15 | 28.02.17 | 599 | 3673.64 | 3,67,364 | 2200.51 |
| AP-8 | 22.07.09 | 21.07.14 | 31.12.15 | 498 | 2119.26 | 2,11,926 | 1055.39 |
| AP-2 | 26.03.09 | 25.03.14 | 30.12.14 | 250 | 9377.32 | 9,37,732 | 2344.33 |
| | | | | | | Total | 8518.61 |

(* The work was commenced but had not been completed till 31 August 2017)

Despite the inordinate delays in completion of renewal of wearing surface in respect of all the four projects, NHAI failed to recover the damages of ₹85.19 crore from the concessionaires. Further, these damages were also not recovered from the Escrow Account as per the terms of the CAs.

While accepting the audit observation in respect of AP-6, AP-7 and AP-8 projects, the Management stated (September 2017) that the concessionaires failed to pay damages despite issuance of notices and repeated reminders and the same were being contemplated to be recovered from Escrow Account of the concessionaires as per the provisions of the CAs. In respect of AP-2 project, the Management stated that though the Independent Consultant had recommended for levy of penalty, the concessionaire contested the same and the matter was referred to the Conciliation Committee of Independent Experts as per NHAI policy. The recovery action would be taken based on the outcome of the settlement.

The Ministry endorsed (December 2017) the reply of the Management in respect of AP-6 and AP-7 projects. In respect of AP-8 project, the Ministry stated that the concessionaire had approached the Conciliation Committee and final outcome of conciliation process would be intimated to Audit in due course. The Ministry further stated that Independent Consultant had worked out the damages of ₹10.81 crore in case of AP-2 project as against ₹23.45 crore worked out by Audit.

² *The per day damages calculated on the basis of 0.1 per cent of cost of renewal were more than ₹10,000 in all the four projects. Therefore, the same has been considered to calculate the damages leviable on the concessionaire*

The reply of the Management/Ministry is not acceptable since NHAI did not exercise the powers conferred on it by clause 18.12 and 25.2.1 of the CAs as per which the penalty/damages could be recovered directly from the Escrow Account. Further, the reply of the Ministry in respect of AP-2 project is also not acceptable as the methodology adopted for calculation of damages was same in respect of all the four projects and accordingly the damages leviable in respect of AP-2 project worked out to ₹23.45 crore only.

Thus, NHAI failed to recover damages of ₹85.19 crore on account of delayed/non-completion of work relating to renewal of wearing surface of the road pavements by the concessionaires.

11.3 Undue financial benefit to the concessionaire

NHAI failed to recover from the concessionaire damages of ₹9.20 crore for non-achievement of project milestone and delay in completion of punch list items, along with interest of ₹1.20 crore thereon as per contractual terms.

A concession agreement (CA) for construction, operation and maintenance of four laning of Armur-Adloor-Yellareddy section on Nagpur-Hyderabad section of National Highway (NH)-7 from Km 308.000 to Km 367.000 on Design, Build, Finance, Operate and Transfer (DBFOT) basis was entered into (August 2009) between M/s. Navayuga Dichpally Tollway Private Limited (concessionaire) and National Highways Authority of India (NHAI) for a concession period of 20 years. In terms of the agreement, the concessionaire furnished the performance security for ₹24.53 crore. The scheduled date for commencement of the project was fixed as 02 February 2010 and the completion date was agreed as 01 February 2012.

In terms of clause 12.4.2 of CA, in the event of the concessionaire failing to achieve any project milestone within a period of 90 days from the stipulated date of achieving such milestones in Schedule-G and unless such failure was due to force majeure or for reasons solely attributable to the Authority, it shall pay damages to the NHAI at the rate of 0.1 *per cent* of the amount of performance security for each day of delay until such milestone is achieved. Further, as per clause 15.2, subject to provisions of Clause 12.4, if Commercial Operation Date (COD) did not occur prior to 91st (ninety first) day from the scheduled four-laning date i.e. 02 May 2012, unless the delay was on account of reasons solely attributable to the NHAI or due to force majeure, the concessionaire shall pay damages to NHAI at the rate of 0.1 *per cent* of the amount of performance security for each day of delay until COD is achieved.

The COD of the project was achieved on 01 April 2013 with a total delay of 424 days. Based on the recommendations (October 2013) of the Independent Engineer (IE), the Project Implementation Unit (PIU), Nirmal, Andhra Pradesh of NHAI proposed (November 2013) to extend the scheduled four-laning date by 272 days (for reasons attributable to NHAI) and to levy damages amounting to ₹3.73 crore for the delay beyond the extended period (i.e. 152 days) attributable to the concessionaire. The proposal was agreed to (January 2014) by NHAI Headquarters with the directions to enter into a supplementary agreement with the concessionaire. However, on receipt (June 2014) of the draft supplementary agreement from the concessionaire, NHAI RO Hyderabad observed

that the damages payable by the concessionaire had been worked out for 62 days (instead of 152 days) after excluding the grace period of 90 days. The matter regarding inclusion/exclusion of grace period in calculation of damages was deliberated between NHAI RO, Hyderabad; PIU, Nirmal and Independent Engineer during July 2014 to November 2014 and was subsequently referred (January 2015) for legal opinion. The correctness of inclusion of grace period of 90 days in the calculation of damages was confirmed (February 2015) by the legal consultant. As the concessionaire was not in agreement with the legal opinion, the matter was referred (July 2015) by RO Hyderabad to NHAI Hqrs for further directions. Based on the directions from NHAI Hqrs to recover the damages for the entire period of delay (inclusive of grace period), PIU, Nirmal intimated (11 March 2016) the same to the concessionaire and requested concessionaire to submit the draft supplementary agreement for extension of scheduled four-laning date by 272 days.

Audit observed that though the COD of the project was achieved on 01 April 2013, NHAI did not levy damages on the concessionaire for delay in completion of the project for three years (upto March 2016) due to ambiguity in the concession agreement regarding calculation of damages. Even after the raising the claim for damages on the concessionaire (March 2016), the recovery thereof was awaited (December 2017).

Further, as per clause 14.4.1 of the agreement, the concessionaire had to complete all the punch list items within 90 days from the date of issue of Provisional Completion Certificate (PCC) and for delay thereafter, other than for reasons solely attributable to NHAI or due to force majeure, NHAI shall be entitled to recover damages from the concessionaire to be calculated and paid for each day of delay until all items are completed, at the lower of (a) 0.1 *per cent* of performance security, and (b) 0.2 *per cent* of the cost of completing such items as estimated by the IE. Though the PCC had been issued to the concessionaire on 1 April 2013, the punch list items were not completed within 90 days i.e. by 30 June 2013. However, NHAI notified the concessionaire regarding the damages due to non-completion of punch list items only on 6 February 2017, after a delay of about four years. As on 31 December 2017, the damages of ₹5.47 crore were recoverable from the concessionaire (₹4.78 crore upto July 2016 as recommended by the IE and ₹68.71 lakh as worked out by Audit for two punch list items of which one was completed on 7 April 2017 and the other was incomplete even up to 31 December 2017).

The delay in payment of damages by more than 15 days of receipt of demand from one party to another party would also attract interest at Bank rate plus 5 *per cent* as per clause 47.5 of the agreement. Accordingly, the interest of ₹1.20 crore (₹74.15 lakh³ for delay in recovery of damages of ₹3.73 crore for not achieving the project milestone and ₹46.11 lakh⁴ for delay in recovery of damages of ₹4.78 crore as recommended by the IE for not completing the Punch List items within the stipulated date) for the period upto 31 December 2017 also was recoverable from the concessionaire. Further, NHAI

³ *Interest on delayed payment of ₹3.73 crore has been calculated from the expiry of 15 days from 11 March 2016 i.e. 26 March 2016 to 31 December 2017 i.e. 645 days at Bank rate of 6.25 per cent as on 31 December 2017 plus 5 per cent*

⁴ *Interest on delayed payment of ₹4.78 crore from the expiry of 15 days from 6 February 2017 i.e. 21 February 2017 to 31 December 2017 i.e. 313 days at the rate mentioned at (1) above*

sustained loss of interest due to delayed raising of claims for damages on the concessionaire.

The Management stated (September 2017) that before granting extension of time upto 1 April 2013 along with damages amounting to ₹3.73 crore for delays attributable to the concessionaire, the matter was referred to concessionaire for giving their consent to sign the supplementary agreement. However, in spite of repeated reminders the response of the concessionaire was still awaited (September 2017). Further, despite several reminders, the concessionaire had failed to pay damages for delay in completion of punch list items. The Management further stated that the recovery process was in progress and the final status would be intimated to Audit.

The reply of the Management is not acceptable since clause 31.3.1 (h) of the agreement enabled NHAI to recover the dues/damages from Escrow Account. However, NHAI failed to recover the dues amounting to ₹9.20 crore (₹3.73 crore for failure in achieving the milestones and ₹5.47 crore for non-completion of Punch List items within the scheduled dates) and interest of ₹1.20 crore thereon upto 31 December 2017 apart from the loss of interest due to delayed raising of claims for damages. This resulted in extension of undue financial benefits to the concessionaire.

The Ministry stated (December 2017) that NHAI had already issued (October 2017) notice to the Escrow Bank for recovery of damages and the final recovery position would be intimated to Audit in due course of time.

11.4 Excess payment of bonus to Concessionaire

As per the concession agreement, Independent Engineer (IE) was to issue the provisional completion certificate for the project only after obtaining safety audit report. However, the IE issued provisional completion certificate 45 days prior to the safety audit report and the Authority paid bonus to the Concessionaire based on it, leading to payment of excess bonus of ₹6.11 crore to the Concessionaire.

National Highways Authority of India (Authority) entered (July 2010) into a Concession Agreement (CA) with M/s Shillong Expressway Private Limited, New Delhi (Concessionaire) for construction of two lane Shillong bypass in Meghalaya on Build Operate and Transfer (BOT) on annuity basis. As per the CA, the project was scheduled to be completed by 06 February 2014, i.e., on the 1095th day from appointed date (07 February 2011). Project completion would be marked by the completion/ provisional completion certificate issued by Independent Engineer (IE). The Concessionaire would be entitled to receive bonus from the Authority for completing the project prior to the scheduled completion date.

It was stipulated in the CA (Article 14.1.2, 14.1 & 14.2) that the IE would issue completion/provisional completion certificate after successful accomplishment of required tests of the project highway. Such tests included safety audit of the highway by the safety consultant to be appointed by the Authority. The safety audit report was a pre-requisite for issue of completion/provisional completion certificate, as specified in paragraph 2.9 of Schedule I and paragraph 3 of Schedule L.

The Authority appointed (March 2013) Indian Institute of Technology Guwahati as the Safety Consultant. The safety audit report was submitted on 29 April 2013 with some observations. The IE submitted the compliance report on the safety audit report on 08 May 2013 based on which, the Safety Consultant suggested (09 May 2013) opening the highway for traffic movement. The project completion date would therefore be on or after 9 May 2013.

Audit, however, noticed that at the request of the Concessionaire, IE conducted tests of the project highway and issued (April 2013) a provisional completion certificate with effect from 25 March 2013 prior to the safety audit report (dated 09 May 2013). On the basis of the provisional completion report, the Authority paid (November 2013) bonus amounting to ₹43.21 crore to the Concessionaire for early completion of the project by 318 days⁵.

Issue of the provisional completion certificate 45 days⁶ prior to the safety audit report (09 May 2013) was not in line with the provisions of the CA. This has led to excess payment of bonus amounting to ₹6.11 crore⁷ to the Concessionaire for 45 days.

The Management stated (December 2017) that:

- Provisional completion certificate was issued by IE w. e. f. 25 March 2013 after conducting all the required tests including safety tests by the Road Safety Expert of the IE which were carried out in the first week of February 2013.
- The Authority paid bonus to the Concessionaire for 318 days considering the provisional completion certificate w. e. f. 25 March 2013.

Reply of the Management is not tenable as:

- As per article 18.1.2 and paragraph 3 of Schedule L of CA, the safety consultant was to be appointed by the Authority itself. Safety audit by such safety consultant could not be substituted by safety tests carried out by expert appointed by the IE.
- The CA (2.9 of schedule I) provided that Completion/provisional completion certificate would be issued by IE only after successful accomplishment of all the required tests which included safety audit. The Authority should have considered that the safety audit report was issued 45 days after the provisional completion certificate while making the bonus payment to the concessionaire.

Thus, non-compliance of the provisions of CA has resulted in extra expenditure of ₹6.11 crore by the Authority.

The matter was referred to the Ministry in December 2017; their reply was awaited (February 2018).

⁵ 25 March 2013 to 06 February 2014

⁶ From 25 March 2013 to 08 May 2013

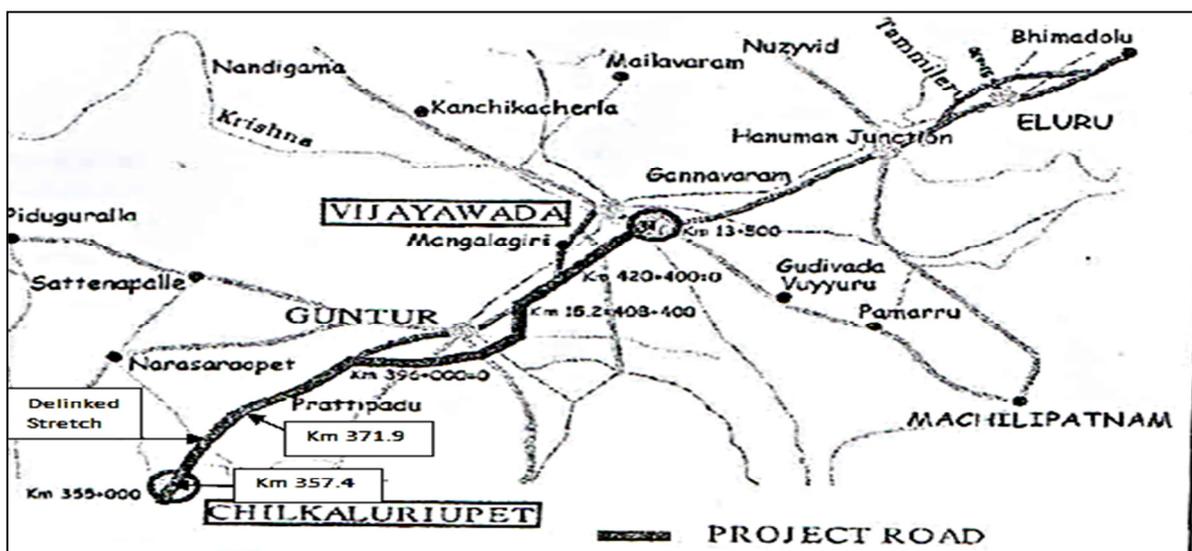
⁷ ₹43.21 crore x 45/318 = ₹6.11 crore

11.5 Loss of interest on toll revenue due to delay in delinking of road stretch

National Highways Authority of India failed to delink the Chilakaluripet town stretch from the project relating to six-laning of Chilakaluripet-Vijayawada section in the State of Andhra Pradesh, as per terms of the agreement entered into with the concessionaire. Consequently, it suffered loss of interest to the tune of ₹9.69 crore on account of delayed remittance of toll revenue collected by the concessionaire on the delinked stretch.

National Highways Authority of India (NHAI) entered into (June 2008) a concession agreement (CA) with Vijayawada Tollway Private Limited (concessionaire) for six laning of 82.5 kilometer (km) long Chilakaluripet-Vijayawada section in the State of Andhra Pradesh on Design, Build, Finance, Operate and Transfer (DBFOT) basis with a concession period of 15 years. The appointed date, i.e., the date of commencement of the concession period, was declared as 1 May 2009 and the construction was to be completed within 30 months from appointed date i.e., by 29 October 2011. As per terms of the agreement, collection of user fee on the existing four-lane highway which was hitherto being done by NHAI, was handed over by it to the concessionaire from the appointed date.

The concessionaire could not achieve the project milestones within the stipulated time frame due to land acquisition issues relating to a 14.5 km Chilakaluripet town stretch from Km 357.4 to Km 371.9, apart from other reasons attributable to both NHAI and the concessionaire. Based on a proposal by the concessionaire, a supplementary agreement (SA) was entered into between NHAI and the concessionaire on 9 September 2013. The terms of the SA provided, *inter alia*, that NHAI would hand over the 14.5 km stretch within three months from the date of SA i.e., by 9 December 2013. In the event of NHAI not being able to fulfil its commitment within the aforesaid period, the stretch would be delinked⁸ from the project and the toll revenue for the toll length of 14.5 km collected by the concessionaire from the appointed date would be passed on to NHAI.



⁸ Delinking means that the stretch of 14.5 km would be deleted from the scope of work and the concessionaire would be required to carry out the six-laning work on the remaining length of 68 km (82.5 km-14.5 km). The concessionaire would collect the toll on the entire 82.5 km stretch and would pass on to NHAI the toll revenue for the proportionate length of 14.5 km

As NHAI could not fulfil its commitment to hand over the stretch to the concessionaire within three months of SA i.e., by 9 December 2013, the stretch was to be delinked from the project and the toll revenue collected by the concessionaire with effect from 1 May 2009 was to be passed on by the concessionaire to NHAI. However, NHAI communicated the decision of delinking the stretch to the concessionaire after a delay of 17 months on 7 May 2015. Consequently, the toll revenue of ₹75.45 crore (net of expenditure) for the period from 1 May 2009 to 30 April 2015 was paid by the concessionaire to NHAI after a delay ranging from 5 to 22 months in November 2015.

Audit observed that as NHAI could not hand over the 14.5 km stretch to the concessionaire within the agreed period of three months from SA, it should have forthwith communicated to the concessionaire the decision of delinking of the stretch from the project. The delayed communication of its decision led to consequent delay in remittance of toll revenue collected by the concessionaire due to which NHAI suffered loss of interest to the tune of ₹9.69 crore (**Annexure-XIV**) at the rate of 8 per cent per annum⁹. This comprised of loss of interest of ₹7.83 crore on the toll revenue of ₹53.42 crore pertaining to the period between the appointed date of the project and the scheduled date of delinking the stretch from the project i.e., May 2013 to November 2013, and the loss of interest of ₹1.86 crore on the toll revenue of ₹22.02 crore pertaining to the period from December 2013 to April 2015.

The Management stated (September 2017) that the time taken by the concessionaire in remittance of toll revenue collected from the appointed date could not be considered as delay since the decision of delinking of 14.5 km stretch was communicated by NHAI only on 7 May 2015. The delay in remittance from 7 May 2015 to the actual date of payment i.e. 14 November 2015 would be notified to the concessionaire for payment of interest on delayed remittances.

The reply of the Management is not acceptable since Audit has commented upon the delayed communication of delinking of stretch by NHAI and not on the delayed remittance of toll revenue by the concessionaire as the latter was only a consequence of the former. The loss of interest on the delayed remittance of toll revenue by the concessionaire resulted from the delayed delinking of stretch by NHAI.

The Ministry in its reply (December 2017) accepted that there was delay in communication of delinking of the 14.5 km stretch by NHAI.

Thus, due to delayed delinking of stretch from the project by NHAI and consequent delay in remittance of toll revenue on that stretch by the concessionaire, NHAI suffered loss of interest to the tune of ₹9.69 crore.

11.6 Non-recovery of claims from Concessionaire

National Highways Authority of India's inaction for more than two years (July 2015 to November 2017) despite the recommendation by the IE, led to failure to recover damage claims amounting to ₹24.74 crore, while the concessionaire did not complete a single punch list item and continued to collect toll throughout the period.

⁹ During the years 2013 to 2015, the average rate of interest on term deposits for 1-2 years duration was 8 per cent per annum

National Highways Authority of India (NHAI) signed Concession Agreement (CA) (31 March 2011) with M/s. Patna Bakhtiyarpur Tollway Limited (SPV of M/s BSC-C&C Consortium), Hyderabad (Concessionaire) for four-laning of Patna-Bakhtiyarpur section of NH-30 from km 181.300 to km 231.950 on Design, Build, Finance, Operate and Transfer (DBFOT) toll basis. The concession period was 18 years with scheduled date of completion being 24 March 2014.

Clause 14.3 of the CA stated that the Independent Engineer (IE), at the request of Concessionaire may issue provisional certificate upon completion of 75 *per cent* length of the project by appending a list of outstanding items (punch list) signed jointly by the IE and the Concessionaire. Further, Clause 14.4 of the CA states that if the punch list items were not completed within 90 days of the date of issue of Provisional Certificate, NHAI was entitled to recover damages from the concessionaire for each day of delay at the lower of 0.1 *per cent* of the performance security or 0.2 *per cent* of the cost of completion of the punch list items. Subject to payment of such damages, the Concessionaire was entitled to a further period not exceeding 120 days for completion of punch list. Failure of the Concessionaire to complete all the punch list items within this period, for reasons other than force majeure or reasons solely attributable to the Authority, the Authority was entitled to terminate the agreement.

The project could not be completed within the stipulated time and extension of time was allowed up to 30 June 2015. The Concessionaire applied for grant of provisional completion certificate on completing 46.847 km of road; the IE reviewed the project and recommended (October 2014) grant of provisional completion certificate after completion of the items identified in the immediate list¹⁰. The items on the immediate list was completed by the Concessionaire by April 2015 and provisional completion certificate was issued on 10 April 2015. The Concessionaire started collecting user fees from 12 April 2015. The IE had also identified a punch list of works which had to be completed by the Concessionaire within 90 days (9 July 2015).

The IE informed the Project Director (July 2015) that the Concessionaire had not completed the punch list items within the scheduled time (work of only about ₹3 crore out of the estimated cost of ₹45 crore had been completed). In line with the CA, the IE requested the concessionaire (July 2015) to deposit the damages and ensure completion of all punch list items within next 120 days. The Concessionaire, however, failed to either deposit the damages or complete the punch list items.

Audit noticed that the IE kept the Project Director, NHAI, informed about delay in completion of punch list items and failure of the Concessionaire to deposit damages for the same (July 2015 to October 2016). In November 2016, IE recommended to the Project Director, NHAI for recovery of damages of ₹13.98 crore (@₹2.87 lakh¹¹ for 487 days for the period 10 July 2015 to 10 November 2016) from the Concessionaire. As the Concessionaire did not pay the damages or complete the works, the damage claim increased to ₹24.74 crore in November 2017.

¹⁰ *List of work to be completed before grant of provisional completion certificate*

¹¹ *Damages calculated based on Performance Security (as per Clause 9.1.1 being ₹28.70 crore) @ 0.1% per day i.e. ₹28.70 crore x 0.1%= ₹2.87 lakh*

Audit noticed that no action had been taken by NHAI during July 2015 to November 2017 despite recommendation of the IE to levy damages as per the agreement. Only after the matter was pointed out in Audit (August 2017), NHAI raised a claim of ₹24.74 crore in November 2017.

The Management replied (February 2018) that this was one of the few BOT projects which were successfully completed upto provisional completion certificate stage and that NHAI itself had delayed land acquisition for the project. Therefore, the Management did not consider termination of the contract and decided to levy penalty beyond the permissible grace period of 90 days.

Reply of the Management is not acceptable as

(i) As per the terms of the CA, the punch list items were to be completed within 90 days of provisional completion certificate and only if the damages as per the agreement were paid, the Concessionaire was entitled to a further period not exceeding 120 days. NHAI failed to take any action against the concessionaire when the punch list items remained incomplete after 90 days, despite IE highlighting the lapse to NHAI.

(ii) Grant of second extension of time, upto 30 June 2015, was approved by Executive Committee (February 2015) and a supplementary agreement was signed (7 April 2015) by the Authority and the concessionaire, which absolved NHAI from all losses, claims, expenses or impact due to delay on its part in meeting its obligation. Thus the delay on the part of NHAI in land acquisition had been considered and extension for the delay had already been allowed before provisional completion certificate.

(iii) Though the IE had recommended recovery of damages from the concessionaire in November 2016, it was only after lapse of a year in November 2017, that the Management raised the demand.

Thus, the punch list items worth ₹31.68 crore remained incomplete (November 2017) though the concessionaire continued to collect toll charges (since April 2015). Due to delay on the part of the Management, the claims have increased from ₹13.98 crore to ₹24.74 crore (November 2017). As of February 2018, recovery of damages has not been effected even after the lapse of 33 months from the date of provisional completion certificate.

The matter was referred to the Ministry in December 2017; their reply was awaited (February 2018).

11.7 Undue favour to a concessionaire

National Highways Authority of India extended undue favour to the concessionaire amounting to ₹25.67 crore by not levying penalty for delay attributable to the concessionaire in construction of Railway Over Bridge (ROB)-3 at Sitamarhi by-pass in the project of two laning of Muzaffarpur- Sonbarsa Section of NH-77 from km 2.80 to km 89.00 (approx. 82.08 km) in the state of Bihar.

National Highways Authority of India (NHAI) entered into a Concession Agreement (CA) with M/s North Bihar Highway Limited (Concessionaire) on 3 September 2010 for two

laning of Muzaffarpur- Sonbarsa Section of NH-77 from km 2.80 to km 89.00 (approx. 82.08 km) in the state of Bihar under NHDP-III on design, build, finance, operate and transfer (DBFOT) on annuity basis. Appointed date of the project was 30 May 2011 and the project was required to be completed by 25 November 2013. The project included three Railway Over Bridges (ROB) one at Jappaha and two at Sitamarhi by-pass.

As per clause 14.3.1 of the CA, the Independent Engineer (IE), at the request of the Concessionaire could issue a Provisional Certificate of Completion if at least 75 per cent of the total length of the project highway was complete which could be safely and reliably placed in commercial operation. On issue of such certificate, the Concessionaire would be entitled to receive annuity. As per schedule-M of the CA, 35 semi-annuity amounts of ₹52.40 crore each were payable to the concessionaire in case the project achieved provisional completion by the scheduled date (25 November 2013).

IE recommended (December 2014) issue of provisional completion certificate. However, a committee constituted (April 2015) for inspection of the project, noted that the three by-passes (Kwari, Singraha and Bhutahi) had to be completed for safe movement of traffic before provisional completion certificate could be issued. The land for the by-passes could only be made available by NHAI in March 2015. After completion of these by-passes, provisional completion certificate was issued on 29 June 2015 and NHAI started to collect toll since 07 July 2015. Thus, there was a delay of 582 days from the scheduled date of completion.

With delay of 582 days, three annuities, due prior to the provisional completion date, had been missed. The concessionaire requested the IE that the three annuity payments that had been missed be paid. IE reviewed the request (July 2015) and determined that the concessionaire was responsible for a delay of 90 days out of the total delay of 582 days and recommended a deduction of ₹25.67 crore on account of such delay. The Project Director, NHAI, requested the IE (July 2015) to re-examine the proposal in the light of the letters issued to Concessionaire by IE during 2012-2015 for slow progress of work. The issue was re-examined (17 July 2015) by the IE and a deduction of ₹25.67 crore was re-affirmed.

A committee comprising of three Chief General Managers of NHAI considered the case for penalty attributable to the concessionaire. The committee stated that the concessionaire had completed work up to DBM¹² in 75 per cent length up to July 2013, and hence could have achieved provisional completion by scheduled date (25 November 2013) after carrying out BC¹³ on this length. The committee also noted that the provisional completion certificate was delayed at the behest of NHAI and hence recommended the restoration of missed annuities with no deduction. The Executive Committee (EC) of NHAI accepted the recommendation.

Audit observed that the contention of the Committee that the entire delay was on account of inability of NHAI to make available land was not accurate.

¹² *Dense Bituminous Macadam*

¹³ *Bituminous Concrete*

- The delay of 90 days, attributed to the concessionaire by IE was for delayed structural completion of ROB-3 at Sitamarhi by-pass. The ROB at Jappaha and structural portion of one of the ROBs at Sitamarhi by-pass were completed before provisional completion date. The required approvals and railway land for ROB-3 at Sitamarhi by-pass was available with the concessionaire in September 2013 and ROB-3 could also have been completed by March 2015. This delay should not be subsumed in the delay on the part of NHAI in handing over of land as more than 90 *per cent* of the land was handed over before November 2013.
- It was noticed that NHAI had handed over 64.86 kms (more than 75 *per cent* of the stretch) to the concessionaire till December 2012 and 74.90 kms (more than 90 *per cent*) by 25 November 2013. While the Concessionaire completed the work upto DBM level on 68.20 km by November 2013, they had completed BC work on only 29.90 km by that date and hence was not ready for provisional completion certificate. The concessionaire could complete BC on 75 *per cent* of the stretch only by July 2014 i.e. eight months after the scheduled completion date. Since tests prescribed in the CA were completed by December 2014, provisional completion certificate could have been issued earliest on that date.

Thus, provisional completion certificate could not have been granted in 2013 and the restoration of annuities without any deduction despite the recommendation of IE and the Project Director, resulted in undue favour to the Concessionaire amounting to ₹25.67 crore.

NHAI in its reply stated (January 2018) that

- NHAI had also defaulted in handing over of land. Annuities were restored with the approval of Executive Committee based on the recommendations of three Chief General Managers Committee, after detailed analysis of the defaults on the part of NHAI and concessionaire.
- Delay days worked out to 588 against 582 days noted by IE. NHAI had considered the lesser of the two.

Reply of the Management was not acceptable as

- (i) IE recommended that the delay of 492 days was attributable to NHAI after considering the delay in handing over of land. Considering the fact that 12-18 months was reasonable period for construction of ROB-3 and required approvals and land became available in September 2013, the ROB-3 work could have been completed by March 2015. However, it was not completed even by the provisional completion date. Thus, the premise of NHAI, that the concessionaire could complete 75 *per cent* of the highway length, did not hold ground. Besides, it was noted from the minutes that the delay in the construction of structure of ROB-3 was not discussed by the committee.
- (ii) The Policy Matters – Technical Circular (January 2016) provided that IE should consider the delays on the part of concessionaire due to his inadequate mobilisation of resources and financial constraints for calculating the

compensation payable to the Concessionaire. In the subject case, IE had recommended delay of 492 days attributable to NHAI and not 582 days as considered by the management. However, the reply was silent on why the 90 days delay on the part of the concessionaire was not considered by NHAI and ₹25.67 crore was not deducted from the annuity.

Thus, by restoring the annuities without any deduction for the delay on the part of the Concessionaire in completion of ROB-3 at the project highway, NHAI extended undue favour to the concessionaire amounting to ₹25.67 crore.

The matter was referred to the Ministry in December 2017; their reply was awaited (February 2018).

11.8 Loss of revenue due to non-collection of toll

National Highways Authority of India failed to collect the toll at two toll plazas even after completion of the project relating to strengthening and upgradation of Karur-Coimbatore section of NH-67 which resulted in revenue loss of ₹142.28 crore.

National Highways Authority of India (NHAI) directed (April 2003) all Project Implementation Units (PIUs) to submit proposal for levy of toll fee on newly constructed sections at least 150 days prior to the likely date of completion of the project to the Headquarters. Rule 3(2) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008 provided (December 2008) that the collection of fee for use of any section of National Highway should commence within 45 days from the date of completion of the project and Rule 4(3) provided that the rate of fee for use of National Highway, having two lanes and on which the average investment for up gradation had exceeded ₹one crore per kilometre (km), should be 60 *per cent* of the rate of fee specified under Rule 4(2).

The Ministry of Road Transport and Highways (MoRTH) accorded (February 2006) administrative sanction for strengthening and upgradation of 114 km long Karur-Coimbatore Section of National Highway-67. The project was completed in June 2010 under the supervision of PIU, Karur at a cost of ₹279.14 crore, i.e., ₹2.45 crore per km. As per the directions (April 2003) of NHAI Headquarters, the proposal for toll collection on the Karur-Coimbatore stretch should have been forwarded by PIU, Karur in January 2010 i.e., 150 days prior to completion of project. However, the proposal for toll fee collection was forwarded by PIU, Karur only in September 2010, with a delay of eight months. Concurrently, MoRTH vide its notification (December 2010) revised the monetary limit of average investment on upgradation from ₹one crore per km to ₹2.5 crore per km for toll collection. As the cost of investment in the project was ₹2.45 crore per km (i.e., less than ₹2.5 crore per km), the proposal for toll collection was not approved by NHAI. In December 2013, MoRTH issued another notification which removed the provision related to average investment on upgradation and provided that the rate of fee for use of a section of National Highway, having two lanes with paved shoulders and above but below four lane on which substantial improvement had been made by widening carriageway by three meters or more, should be 60 *per cent* of the rate of fee specified under Rule 4(2).

Accordingly, NHAI Headquarters instructed (February 2014) its Regional Office (RO), Chennai to submit a proposal for toll collection on the Karur-Coimbatore stretch after examining whether it qualified for toll collection. As the strengthening and upgradation work on the stretch had resulted in widening of the road by three meters, i.e., from 7 meters to 10 meters, the stretch was qualified for levy of toll. Accordingly, the proposal for construction of two toll plazas at Pongalur and Thennilai, was forwarded (April 2014) by PIU, Karur and approved (July 2014) by NHAI Headquarters. Temporary toll plazas were constructed at a cost of ₹7.35 crore. Based on competitive bidding, letters of award were issued (December 2014/January 2015) for collection of toll at Pongalur and Thennilai toll plazas at ₹6.13 lakh per day and ₹7.23 lakh per day respectively for three months from 31 January 2015. However, toll collection was not commenced on any of the toll plazas on the ground that there was public resentment and a demand for converting the highway into four/six lane. Subsequently, the stretch (Karur-Coimbatore) was handed over to State Government for maintenance vide notification dated 9 April 2015.

Audit observed that:

- NHAI failed to collect the toll fee on both the toll plazas even after incurring expenditure of ₹279.14 crore and ₹7.35 crore respectively on strengthening/upgradation of the Karur-Coimbatore stretch and construction of two toll plazas. The non-collection of toll by NHAI on this stretch resulted in loss of revenue of ₹142.28 crore¹⁴ from 31 January 2015 to 31 December 2017.
- The project had been completed in June 2010 and as per the extant instructions the proposal for toll collection should have been forwarded by PIU, Karur in January 2010 itself. However, the proposal was submitted belatedly in September 2010 due to which it was rejected by NHAI Headquarters as the project did not qualify for toll collection in terms of notification of December 2010. Had the proposal for toll collection been submitted in time by PIU, Karur, the stretch would have qualified for toll collection in terms of the then prevailing notification (December 2008) as the average investment of upgradation of the stretch was ₹2.45 crore per km which was more than the required ₹one crore per km. Thus, NHAI lost the opportunity to collect toll on the Karur-Coimbatore stretch right since the year of its completion i.e. 2010.

The Management stated (September 2017) that Gazette notification for commencement of toll collection at Thennilai and Pongalur toll plazas on the Karur-Coimbatore section was issued on 10 December 2014. However, the toll collection could not be commenced due to agitation by local public/ public representatives. Further, MoRTH directed (March 2015) that NHAI should carry out substantial improvement on the stretch as per Rule 4(11) of its notification dated December 2013.

The reply of the Management needs to be viewed against the fact that (i) the notification of December 2013 had defined substantial improvement as widening of the carriageway by three meters or more. As the same had been done in the instant case, the stretch qualified for toll collection. Thus, NHAI should have brought these facts to the notice of the Ministry, and (ii) the issue of Gazette notification for toll collection by the Ministry

¹⁴ (₹7.23 lakh per day + ₹6.13 lakh per day)*1065 days from 31.01.2015 to 31.12.2017

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establishes the fact that the requirements of the notification of December 2013 with regard to carrying out of substantial improvement had been met. Further, the reply of the Management was silent on the initial delay of eight months (January 2010 to September 2010) in submission of the toll proposal which would have paved the way for collection of toll after completion of the project in June 2010 itself.

The matter was referred to the Ministry in November 2017; their reply was awaited (February 2018).