

Research Articles

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KEY CHANGES TO MODEL CONCESSION AGREEMENTS IN THE ROAD SECTOR

- The Ministry of Road Transport and Highways had modified the provisions of certain model concession agreements of the Tolling, Operation, Maintenance and Transfer Model (TOT) and Build, Operate and Transfer Model (BOT) in 2024.
- Model concession agreements being used for monetization of public funded operational national highway projects under the TOT Model; and
- Model concession agreements being used for capacity augmentation in the BOT Model.

The Ministry of Road Transport and Highways modified certain provisions of the model concession agreement (“**MCA**”) for the Tolling, Operation, Maintenance and Transfer (“**TOT**”) Model and the Build, Operate and Transfer (“**BOT**”) Model in 2024. At the outset, these changes could incentivise private players to make investments into the road infrastructure. This was done by virtue of two circulars, namely:

- Changes in the model concession agreement being used for monetization of public funded operational national highway projects under the TOT Model¹ and
- Changes in the provisions of the model concession agreement for capacity augmentation on BOT (Toll)².

KEY CHANGES IN THE TOT MODEL

The changes to the MCA regarding the TOT Model includes a variation in the toll collection by adding additional target points for checking the toll collections. The revised clauses also envisage a modification of the remaining concession period only if the Actual Fee³ falls short of or exceeds the Target Fee⁴ by more than 5% (as opposed to 20%/30% previously). A change in the Target Fee beyond this variation shall now result in an adjustment to the concession period on a pro-rata basis.

KEY CHANGES IN THE BOT MODEL

With respect to the changes in the provisions of the MCA for capacity augmentation on BOT, the following are the key amendments:

- **Change in Control/Ownership⁵:** While a change of control/ownership of the concessionaire can only be taken with prior approval of National Highways Authority of India (“**Authority**”) (as per Clause 5.3 of the MCA), Clause 7.1 (k) included additional restrictions on this in the form of a representation and warranty of the concessionaire. The amended representation now states that the selected bidder/consortium members procuring this equity shall, together with its associates, hold atleast 51% of the paid and issued equity of the concessionaire, out of which the selected bidder/consortium member must hold atleast 26% which also has to be minimum 5% of the total project cost. This must be held by the acquirer during the construction period and 1 (one) year after (calculated from the date of completion of the punch list items, excluding the items pending due to reasons attributable to the Authority).
- **Delays during construction⁷-** In the event the project milestones are not completed, or the independent engineer determines that as per the rate of progress, it is likely that the 6 (six) laning will not be completed by the scheduled 6 (six) laning date, the concessionaire shall inform the independent engineer of the steps it intends to take to expedite progress and submit a revised schedule. As per the amended clause, if the independent engineer reports that the progress achieved in any continuous three months is less than 75% as per the revised schedule, the Authority has the option to invoke termination of the concession agreement.
- **Equity Support⁸-** The amendment lays down that the equity support cannot exceed the sum accepted by the Authority in the bid, and also cannot be greater than a half of the equity. It also changes the restriction on the sum total of support such that the sum total of equity support and construction support shall be restricted to 40% of the total project cost (which would include the aggregate of equity support and construction support). The amendment further specifies the ambit of construction support, the disbursement installments, the payment milestones and the end use for such support.
- **Compensation for default by the Authority-** In cases where the Authority is in material default or breach of the agreement after the appointment date till the achievement of commercial operations date (“**COD**”), it shall compensate the concessionaire for direct costs incurred and loss of fee revenues, not including debt repayment obligations. The methodology required to be adopted for calculating the compensation payable has been specified in the amendment. If the Authority is in breach of its obligations after achievement of COD, the concession period may be extended in accordance with the terms and conditions of the concession agreement.
- **Termination on buy back by the Authority⁹-** In cases where the project has reached the design capacity in accordance with the terms and conditions of the concession agreement, the Authority has the right to buy back the said project by way of termination. The said buy back can be consummated by giving a notice of at least 90 (ninety) days to the lenders’ representative.
- **Termination prior to COD-¹⁰** In cases where there is termination that is occurring due to the default of the concessionaire prior to COD, where the physical progress exceeds 40%, the provisions of Clause 37.3.1 (termination payout) shall apply in respect of the expenditure exceeding 40% of the total project cost, to the extent of debt due. If the physical progress is less than 40%, no termination payment shall be due. For determination of this termination payment, the expenditure comprising the latest Payment Milestone¹¹ shall also be taken into account. The details of this calculation have been captured in the amendment.
- **“Change in Law” definition-** This definition has been modified to specify that the events mentioned in Article 48¹² will only fall under the category of a “change in law” if it has a direct effect on the project. This impacts Clause 41.1 and Clause 41.2 which stipulate the consequences of the concessionaire suffering an increase in cost or decrease in cost due to the “change in law” (the effect on net after-tax return due to this “change in law” has been deleted in the amendment). There is a further amendment in Clause 41.1 and Clause 41.2 that if the “change in law” leads to a reduction of traffic, the procedure in the aforementioned clauses shall not be followed, instead the concession period will be modified as per Clause 29.2.1¹³/Clause 29.2.2¹⁴.

CONCLUSION

The Authority, which is attempting to reduce its debt, has increased its spending without raising its borrowing levels, which is almost INR 3,000,000,000,000 (Indian Rupees Three Trillion)¹⁵. These amendments thus aim to reduce the Authority’s debt while also making it easier for private sector investment. As a whole, the changes seem to be made to (i) clarify provisions in the MCA which were previously ambiguous in nature; and (ii) incentivize private players by easing some of their obligations and increasing support provided to them by the governmental instrumentalities. This has been done through provision of construction support, modifications in the concession period, clarifying the termination payment and compensation for delays which are payable by the Authority, capacity augmentation and provisions relating to debt due, to name a few. These amendments are in consonance with the vision of the government to focus on infrastructure (as highlighted by the budget allocation), upgrade road infrastructure to match developed countries and construct a record of 13,813 kilometres of national highways in the financial year of 2024.¹⁶ They showcase the importance placed by the government on attracting private investment and the public-private partnership model in order to achieve their goals in this sector. However, the effectiveness of these amendments are yet to be seen, especially since BOT (Toll) models are not the preferred mode opted for by players due to issues with project implementation.

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¹ Accessible at: https://morth.nic.in/sites/default/files/circulars_document/Changes%20in%20the%20Model%20Bidding%20Document%20regarding001.pdf

² Accessible at: [https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT\(Toll\)%20reg.pdf](https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT(Toll)%20reg.pdf)

³The Actual Fee refers to the actual toll collections realized by the concessionaire during the specific periods corresponding to the Target Points. It refers to the real, or actual revenue generated from toll collection at the specified points. It is calculated through traffic sampling at the designated toll plaza for a continuous period of at least seven days during three specific times: (a) one year prior to the target month, (b) the target month itself, (c) and the first anniversary of the target month.

⁴The Target Fee refers to the estimated toll collections at the specified points during specific periods (such as Target Point 1, Target Point 2), at a predetermined value agreed upon by the Authority and the Concessionaire. It is the expected revenue based on the toll collections at those target points.

⁵Clause 7.1(k) of MCA, accessible at: [https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT\(Toll\)%20reg.pdf](https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT(Toll)%20reg.pdf)

⁶The National Highways Authority of India, constituted by the National Highways Authority of India Act, 1988, is responsible for the development, maintenance and management of National Highways. It is under the administrative control of the Ministry of Road Transport and Highways.

⁷Clause 13.4 of MCA, accessible at: [https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT\(Toll\)%20reg.pdf](https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT(Toll)%20reg.pdf)

⁸Clause 25.2.2 of MCA, accessible at: [https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT\(Toll\)%20reg.pdf](https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT(Toll)%20reg.pdf)

⁹Clause 37.2A of MCA, accessible at: [https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT\(Toll\)%20reg.pdf](https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT(Toll)%20reg.pdf)

¹⁰Clause 37.8 of MCA, accessible at: [https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT\(Toll\)%20reg.pdf](https://morth.nic.in/sites/default/files/circulars_document/2-Changes%20in%20the%20provisions%20of%20MCA%20for%20Capacity%20Augmentation%20on%20BOT(Toll)%20reg.pdf)

¹¹Payment Milestone refers to the payment made during the construction period on completion of a specified percentage of the physical progress The first payment milestone is on completion of 5% of the Physical Progress, and the second payment milestone is on completion of 10% of the Physical Progress, and for each additional 10% completion in Physical Progress, until 90% (the tenth Payment Milestone), there is a Payment Milestone.

¹²The events are as follows: (a) the enactment of any new Indian law; (b) the repeal, modification or re-enactment of any existing Indian law; (c) the commencement of any Indian law which has not entered into effect until the date of Bid; (d) a change in the interpretation or application of any Indian law by a judgement of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the date of Bid; or (e) any change in the rates of any of the Taxes.

¹³In the event that Actual Average Traffic falls short of the Target Traffic by more than 5%, the remaining Concession Period (subject to payment of Concession Fee under the agreement) will be increased by 1% for every 1% shortfall, provided that the total extension cannot exceed 20% of the Concession Period. For decrease in traffic in fraction of 1% or part thereof beyond 5%, the variation shall result in increase in Concession period on pro-rata basis. Additionally, subsequent Target Traffic will be reduced by the same percentage as the shortfall.

¹⁴In the event Actual Average Traffic exceeds Target Traffic by more than 5%, then for every 1% increase as compared to the Target Traffic, the Concession Period shall be reduced by 1 %; provided that the total reduction cannot exceed 20% of the Concession Period. For increase in traffic in fraction of 1% or part thereof beyond 5%, the variation shall result in decrease in Concession period on pro-rata basis. Further, it is clarified that the subsequent Target Traffic shall be increased by the same percentage.

¹⁵Business Standard, "*New BOT terms may revive private capex in highways: India Ratings and Research*", https://www.business-standard.com/economy/news/new-bot-terms-may-revive-pvt-capex-in-highways-india-ratings-and-research-124041801005_1.html (April 18 2024)

¹⁶Outlook Business, "*Road Ministry aims to construct record 13,813 km of highways in FY2024*", <https://www.outlookbusiness.com/news/road-ministry-aims-to-construct-record-13813-km-of-highways-in-fy24#:~:text=Highways%20In%20FY24,Road%20Ministry%20Aims%20To%20Construct%20Record%2013%2C813%20Km%20Of%20Highways,focus%20on%20transparency%20and%20efficiency> (February 03 2024)

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