

No. RW/NH/37012/26/2009-PPP

OFFICE MEMORANDUM

Subject: Revised strategy for implementation of the National Highways Development Project (NHDP) - Framework and Financing

26/09
The undersigned is directed to convey the approval of the Competent Authority for acceptance of all the recommendations contained in the report (copy enclosed) of the B.K. Chaturvedi Committee on NHDP, as constituted by the Prime Minister on 8th August, 2009, with the proviso that the financing plan for 2010-11 onward would be considered by the Empowered Group of Ministers for further action, including such changes to the work plan as may become necessary. The Competent Authority has also desired that the impact of these decisions may be appropriately reviewed in due course.

2. In accordance with the said approval, sanction is hereby conveyed to the following:-

- (i) Acceptance of all the recommendations contained in the report of the B.K. Chaturvedi Committee on NHDP in regard to the modifications to the existing MCA, RFQ, and RFP documents for the road sector, as per details given below :-
 - a. Termination Provisions in Road Concession Agreements (Para 5.1.1).
 - b. Exit Policy for (Developer) Concessionaire in MCA. (Para 5.1.2).
 - c. Issue of Security to Lenders in MCA (Para 5.1.3).
 - d. RFP Provisions - Forfeiture of bid security of bidders on account of non-responsiveness (Para 5.1.4).
 - e. Eligibility of applicants/conflict of interest as per RFQ provisions-common shareholding levels (Para 5.1.5).
 - f. Eligibility of applicants /conflict of interest as per RFQ provisions - Continuation of conflict of interest (Para 5.1.6).

- g. Associate – definition in RFQ thereof (Para 5.1.7).
 - h. “Threshold technical capability” “Eligible projects” (TTC) in latest RFQ (Para 5.1.8).
 - i. Increase in Equity Grant (VGF) to 40% by merging 20% equity and 20% O&M Grant into Equity Grant (Para 5.1.9).
 - j. RFQ process – project wise pre-qualification be substituted with annual/periodic pre-qualification (Para 5.1.10).
 - k. Premium provisions under RFP/MCA (Para 5.1.11).
- (ii) Issuance of the RFQ and RFP for the road sector projects after incorporating the recommendations made by the Committee in the Model RFQ and RFP documents issued by the Ministry of Finance, as referred to at clause 2 (i) above.
 - (iii) Further amendments to RFQ and RFP provisions, where necessary, will be carried out by the Ministry of Road Transport and Highways (MoRTH) on the basis of recommendations of the NHAI Board.
 - (iv) Setting up of an Inter-Ministerial Group (IMG) under the Chairmanship of Secretary, MoRTH with representatives of DEA, Department of Expenditure, Planning Commission and Ministry of Law and Justice to consider issues relating to MCA. Where there is unanimity in the decision, the same will be then put up to the Minister, Road Transport & Highways for approval. Where there is no unanimity in the decision, the matter will be placed before the Empowered Group of Ministers (EGoM) comprising the Finance Minister, Minister of Road Transport & Highways and Deputy Chairman, Planning Commission. The EGoM will also consider and take decision on all issues where there is no unanimity in committees at the level of officers and which do not require approval of the Cabinet/CCI.
 - (v) Issuance of the RFQ and RFP for the road sector projects after incorporating the modifications contained in the recommendations made by the Committee in the Model RFQ and RFP documents issued by the Ministry of Finance.

- (vi) Carrying out further amendments to RFQ and RFP provisions for the road sector projects, where necessary, by the Ministry of Road Transport and Highways (MoRTH) on the basis of recommendations of the NHAI Board.
- (vii) Continuance of endeavour to award projects within the available overall budgetary ceilings, as per the detailed Work Plan for the current year (2009-10) for 12,652 Km presented by the NHAI to the Committee, with the break up of the proposed length for award as given below:-

Work Plan for 2009-10	
Mode of Delivery	Road Length
BOT (Toll)	
4 lane - Phase III	4,373
4 lane - Phase II	55
6 lane - Phase V	2,403
Expressways - Ph. VI	-
2 lane with paved shoulders - Ph. III	1,977
2 lane - Phase IV	-
4 lane - Phase VII	-
BOT (Annuity)	
4 lane - Phase III	524
4 lane - Phase II	380
J&K - Phase II	239
2 lane with paved shoulders - Ph. III	1,477
2 lane - Phase IV	-
4 lane - SARDP-NE	394
E P C	
4 lane - SARDP-NE	330
2 lane - Phase IV	-
2 lane with paved shoulders - Ph. III	500
Total	12,652

- (viii) Acceptance of the recommendations made by the Committee as regards the 'Modes of Delivery' and the 'Financing Plan' with the proviso that the financing plan for 2010-11 onward would be considered by the Empowered Group of Ministers for further action, including such changes to the work plan as may become necessary.
- (ix) Carrying out implementation of road projects on all the three modes of delivery viz. BOT (Toll), BOT (Annuity) and EPC (Item Rate

Contract) concurrently rather than sequentially. Roads below a certain threshold in terms of traffic do not merit testing on BOT (Toll) as the process only leads to delays in implementation and award. Hence, a road not found prima facie suitable for BOT (Toll) can be implemented directly on BOT (Annuity) subject to the overall cap as envisaged in the Work Plan. The decision of shifting a project from BOT (Toll) to BOT (Annuity) would be taken by the IMG chaired by Secretary, MORTH and approved by Minister, Road Transport & Highways.

- (x) Before implementing a project on EPC basis, it will be compulsorily tested for BOT (Annuity) and only if unacceptable bids are received then only the project will be awarded on EPC basis. Normally, an Annuity bid working out to an Equity IRR of up to 18% will be acceptable as per these norms. However, in the event of bids exceeding the Equity IRR of 18 %, the same will be bid out on EPC. In case of difficult areas having law & order problems, security, inhospitable terrain etc, a bid working out to an Equity IRR of up to 21% will be acceptable considering the risk premium of 3 %, on case to case basis. PPPAC will be empowered to give approval for projects to be moved from Annuity to EPC where acceptable bids have not been received.
- (xi) In case of projects under NHDP Phase IV, if the traffic is less than 5,000 PCUs, the project will directly be taken up on EPC. For the specific EPC km lengths recommended in the Work Plan, specific EPC packages will be presented before the existing EFC in the MORTH for approval.
- (xii) Based on the feasibility report, the projects would be tried first on BOT (Toll) and in case of non-viability/poor response, the same would be shifted to BOT (Annuity) failing which on EPC. For the projects where NHAI is not able to get bids, the process of preparation of detailed project report may be initiated immediately to save time in case such projects are required to be taken up on EPC.
- (xiii) Empowering the Board of NHAI to accept single bids after examining the reasonableness of the same.
- (xiv) Raising of overall VGF cap of 5% to 10% for the entire six-laning programme, and consideration of individual projects in low traffic GQ

- stretches with VGF up to 20% within an overall cap of 500 Km out of the 5080 Km of the Phase-V programme yet to be awarded.
- (xv) Funding of the NHDP Projects under SARDP-NE and in Jammu & Kashmir with Additional Budgetary Support (ABS) over and above the cess that the Government provides to NHAI on a yearly basis.
- (xvi) 'In Principle' approval of the Government Support to the NHAI for :-
- Issuance of Tax exempted bonds
 - Guarantee cover to the Borrowing Plan of NHAI.
 - Out of the borrowing approval of Rs.30,000 crores earlier provided to Indian Infrastructure Finance Company Limited (IIFCL), Rs.10,000 crores under the fiscal stimulus package will be transferred to NHAI, as per the its borrowing requirement.
 - Assistance in negotiating non-sovereign multilateral loans from World Bank, ADB, JBIC etc. by providing back to back support, if necessary.
 - Providing a Letter of Comfort from Ministry of Finance confirming the availability of Cess at least till 2030-31.

Puneet Kumar
 05/11/2019
 (Puneet Kumar)
 Director (H)
 Tel: 23710211.

Encl: As above.

To

- The Secretary, DEA, Ministry of Finance, North Block, New Delhi.
- The Secretary, Expenditure, Ministry of Finance, North Block, New Delhi
- The Secretary, Planning Commission, Yojana Bhavan, New Delhi.
- The Secretary, Ministry of Law & Justice, Shashtri Bhavan, New Delhi.
- The Chairman, NHAI, G-5&6, Sector-10, Dwarka, New Delhi.
- Member (Admn)/Member (Finance)/Member (P)-Shri S.K. Puri / Member (P)-Shri S.I. Patel, NHAI, G-5&6, Sector-10, Dwarka, New Delhi.
- Shri B.N. Puri, Sr. Consultant (Transport & Tourism), Planning Commission, Yojana Bhavan, New Delhi.
- Shri Rajive Kumar, Joint Secretary, Cabinet Secretariat, New Delhi-110001
- Ms. Vini Mahajan, Joint Secretary, P.M.O., South Block, New Delhi-110001.

Copy for internal circulation to:

- DG(RD)&SS/ ADG (A.V. Sinha)/ CE, NHDP-IV.

Copy for information to:

- Sr. PPS to Shri B.K. Chaturvedi, Member, Planning Commission, Yojna Bhavan.
- PPS to Secretary (RT&H)/PS to JS(Highways)

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REPORT OF THE B K CHATURVEDI COMMITTEE ON

NHDP

(27.08.09)

SUB: REVISED STRATEGY FOR IMPLEMENTATION OF THE NATIONAL HIGHWAYS DEVELOPMENT PROJECT (NHDP) – FRAMEWORK AND FINANCING

1. Background

A meeting was held by Hon'ble Prime Minister on 8.08.2009 to discuss the issue of ramping up of the National Highways Development Project (NHDP). In the meeting, it was decided to constitute a Committee comprising of the following –

Shri B.K. Chaturvedi, Member Planning Commission	-	Chairman
Shri Ashok Chawla, Finance Secretary	-	Member
Smt. Sushma Nath, Secretary (Exp.)	-	Member
Shri Brahm Dutt, Secretary (RT&H)	-	Member
Smt. Vini Mahajan, JS (PMO)	-	Member (Associate)

The objective of the Committee is to resolve procedural impediments to the programme as well as the need to take a holistic look at the financing need and arrive at a financing plan that balances the needs of the road sector and other priority areas of Government.

The Committee held its meeting on 17th, 19th and 26th August 2009. The Chairman of the Committee also separately consulted various Stakeholders including the developers, lenders, consultants and representatives of Ministry of Finance, Ministry of Road Transport & Highways and National Highways Authority of India (NHAI).

The Committee received a great deal of assistance from a number of individuals and some organizations. The Committee would like to acknowledge the support provided by NHAI and Transport Division of the Planning Commission under the stewardship of Dr. A. Didar Singh, Member (Finance), NHAI and Shri B.N. Puri, Sr. Consultant, Transport Division, Planning Commission respectively for providing valuable inputs for the drafting of Report and secretarial assistance. The Committee would also like to thank the Members of the Working Group for their valuable assistance in finalizing the Financing Plan and the team of officers under Shri Govind Mohan, Joint Secretary (Infra) Ministry of Finance for bringing up analysis of important financial and legal issues for consideration of the Committee.

2. IMPACT OF ECONOMIC SLOW DOWN – Recent experience of NHAI in bidding of projects.

2.1 The committee was informed that as per NHAI's experience of recently bid out packages, not many projects were found commercially viable resulting in very poor or no response from the bidders. In the last financial year NHAI placed some 60 projects for bidding under BOT Toll mode. Overall investment requirement for these was around Rs.70,000 crore. Unfortunately, the financial crisis from October, 2008 onwards resulted in a poor response from the market. NHAI received a total of 22 responses to the bidding, of which only 12 could be awarded, the reason being that six of the balance 10 were single bids which were not allowed as per the extant policy, and 4 were bids for NHDP Phase V packages where the demands for grant was much higher than the 10% which could be given as VGF as per Government decision. NHAI after obtaining Board approval has restructured these balance 48 projects and are placing them again for bidding. Over and above this NHAI has also restructured a further 22 projects and are also putting them out for bidding. Of these 70 BOT projects available for bidding, an internal exercise has shown that only 26 projects of Phase III are likely to be viable on BOT Toll and 12 projects of Phase-V alone are likely to be viable on BOT Toll. In order to assess the overall viability of all projects remaining in Phase III and Phase V an internal exercise has shown that 66 projects out of total 92 still to be bid out may not be viable and would not get bids under BOT toll model. Similarly an analysis of the NHDP Phase V projects has also been done wherein it has been estimated that of the balance 41 packages, 29 may not be viable on BOT Toll model with VGF being limited to 10% in each case as per Government directions.

3. Existing Comprehensive Policy for award of projects under different mode of delivery and proposed Revised Strategy:

As per existing Government policy all projects are to be first bid out as BOT Toll and on failure are to be then offered under BOT Annuity and if this also fails, then they are to be taken under EPC after taking specific approval from CCEA. The above mentioned 'water fall' of bidding process envisages that all projects identified under the seven phases are expected to be built using one of the 3 modes of construction. Not only does this process take several months but also the existing Financing Plan of NHAI envisages BOT Toll as the primary mode of implementation therefore resources for building the highways through Annuity or EPC would be limited.

As per the directions of Government to speed up the implementation of projects and achieve a target of 20 km per day for construction the implementation strategy needs to be revised from a predominantly BOT (Toll) model to one where the BOT (Toll) mode still remains the preferred mode however where traffic does not justify this mode, then the alternative modes of BOT (Annuity) or EPC would also need to be considered upfront in the light of extremely slow/non-response from the market. The modes for delivery of projects vary from BOT (Toll) to BOT (Annuity) and also EPC depending upon the financial & commercial viability of the projects and need for taking of the stretches for widening or strengthening. This proposed policy of delivery of projects is at variance as compared to the existing Government policy stated in above. However, to achieve inclusive growth, it is

imperative to speed up the construction of roads throughout the country. This would be possible if a mix of mode of delivery of projects is adopted as sole dependence on BOT (Toll) mode of delivery would not yield the desired results. This departure would thus require the approval of the Government before taking up the projects on the modes other than BOT (Toll).

4.0 Issues deliberated by the Committee and its recommendations

The BOT(Toll) mode has to be the principal and preferred mode of delivery. But considering the need of balanced development of National Highways in the country, this can not be sole one.

While it may be necessary to resort to BOT (Annuity) or EPC (item rate contracts) in some selected low traffic density National Highway stretches, particularly in backward areas, on the considerations of need for inclusive growth and balanced development of National Highway network, it must be ensured that the works on such highway sections are completed in the stipulated period (say 30 months). NHAI Board may review the implementation of these National Highways sections at regular intervals.

In order to implement the programme envisaged in this Report, the Committee felt that it is necessary that

- a) the process of restructuring of NHAI may be completed urgently.
- b) the projects may be structured strictly in accordance with the specifications formulated to meet the traffic demand and safety requirements

The economy in cost of construction consistent with traffic requirements would make more projects viable on BOT. This coupled with restructuring of NHAI would make the programme implementable at an accelerated pace.

The committee deliberated on a number of issues and based on discussions arrived at conclusions and recommendations on each of them. The broad issues discussed by the committee are categorized as under:

4.1 Making visible difference in road program

In order to build 20 kms. per day, NHAI is required to award at least 21,000 kms. over next 3-years so as to achieve the objective of constructing 7,000 kms. per year (equal to 20 kms. per day). To do this, the Committee examined the modified Financing Plan and the Work Plan presented by NHAI.

Presently, the approved NHDP Programme comprises about 54,000 kms., out of which, about 11,000 kms. have already been 4-laned and another 6,000 kms. are under different stages of implementation. Thus, about 37,000 kms. are yet to be awarded for construction. In the Financing Plan, it is envisaged that the construction of these 37,000 kms. shall be

completed in the year 2017. This envisages that the award of this entire length needs to be completed in 5-years time commencing from the Financing Plan 2009-10.

Based on the detailed work plan as presented by NHA and discussions in the Committee the break-up of yearly proposed length for award is recommended as under:

Table 1: Work Plan upto 2013-14

Mode of Delivery	Year-wise Length in Km.					
	2009-10	2010-11	2011-12	2012-13	2013-14	Total
BOT (Toll)						
4 lane – Phase III	4,373	-	-	-	-	4,373
4 lane - Phase II	55	-	-	-	-	55
6 lane – Phase V	2,403	1,200	-	-	1,477	5,080
Expressways – Phase VI	-	-	436	604	-	1,040
2 lane with paved shoulders – Phase III	1,977	-	-	-	-	1,977
2 lane – Phase IV	-	4,086	3,075	339	-	7,500
4 lane – Phase VII	-	-	681	-	-	681
BOT (Annuity)						
4 lane – Phase III	524	-	-	-	-	524
4 lane – Phase II	380	-	-	-	-	380
J&K – Phase II	239	-	-	-	-	239
2 lane with paved shoulders – Phase III	1,477	-	-	-	-	1,477
2 lane – Phase IV	-	4645	4000	1355	-	10,000
4 lane – SARDP-NE	394	-	-	-	-	394
EPC						
4 lane – SARDP-NE	330	-	-	-	-	330
2 lane - Phase IV	-	1,161	1,000	339	-	2,500
2 lane with paved shoulders - Phase III	500	-	-	-	-	500
Total	12,652	11,092	9,192	2,637	1,477	37,050

If the work plan is adhered to, it would be feasible to build 20 km of roads as targeted.

4.2. Modes of delivery

It was argued that all the three modes of delivery viz. BOT (Toll), BOT (Annuity) and EPC (item rate contract) should be carried out concurrently rather than sequentially. The committee discussed the issue in two parts (a) shifting projects from BOT (Toll) mode of delivery to BOT (Annuity) mode of delivery and (b) shifting projects from BOT(Annuity) to EPC (item rate contracts).

For (a) above, the committee felt that roads below a certain threshold in terms of traffic do not merit testing on BOT (toll) as the process only leads to delays in implementation and award. Hence, a road not found *prima facie* suitable for BOT (toll) can be implemented directly on BOT (Annuity) subject to the overall cap as envisaged in the above mentioned Work Plan. Recently DEA has carried out a study on the impact of location, traffic volume and construction cost for determining the mode of delivery, however the result of the study is yet to be tested. The decision of shifting a project from BOT (Toll) to BOT (Annuity) would be taken by the IMG Chaired by Secretary, DORTH and approved by Hon.'ble Minister, DORTH.

For (b) above, the committee felt that for implementing a project on EPC basis, it has to be compulsorily tested for BOT (Annuity) and only if unacceptable bids are received then the project can be awarded on EPC basis. The basis of unacceptability of BOT (Annuity) bids was also discussed and it was felt that normally a bid working out to an Equity IRR of upto 18% may be acceptable as per these norms, however, in the event of bids exceeding the Equity IRR of 18 %, then the same will be bid out on EPC. In case of difficult areas having law & order problems, security, inhospitable terrain etc a bid working out to an Equity IRR of upto 21% may be acceptable considering the risk premium of 3 %, on case to case basis. The Committee recommends that PPPAC may be empowered to give approval for projects to be moved from Annuity to EPC where acceptable bids have not been received.

In case of projects under NHDP Phase IV if the traffic is less than 5,000 PCUs, the project would directly be taken up on EPC. For the specific EPC km lengths recommended in the workplan, specific EPC packages may be presented before the existing EFC in the DORTH for approval.

DPRs and Feasibility Reports: Based on the feasibility report, the projects would be tried first on BOT (Toll) and in case of non-viability/poor response, the same would be shifted to BOT (Annuity) failing which on EPC. For the projects where NHA is not able to get bids, the process of preparation of detailed project report may be initiated immediately to save time in case such projects are required to be taken up on EPC.

Single Bid: On the issue of acceptance of single bid, the committee recommended that the Board of NHA be empowered to accept single bids after examining the reasonableness of the same.

Phase V – Six laning of the present four lane highways: Present policy restricts VGF for such six lane packages to 10% with an overall cap of 5% on VGF for the entire six laning programme. The committee recommends that the overall VGF cap could be raised to 10%

and individual projects in low traffic GQ stretches could be considered with VGF upto 20% within an overall cap of 500kms out of the 5080kms of the Phase-V programme yet to be awarded. It was also recommended that DoRTH should take the approval of Cabinet Committee on Infrastructure for this proposed change in policy.

4.3 Program Financing

The committee constituted a working group with representatives from MoF(DEA), DORTH/ NHA I and Planning Commission to review the work plan presented in Table-1 above and to work out a financing plan for the same.

4.3.1 The committee also felt that projects under SARDP-NE and in Jammu & Kashmir should receive Additional Budgetary Support (ABS) over and above the cess that government provides to NHA I on a yearly basis. On the basis of the work plan and the assumption that the ABS would be available to NHA I for projects under SARDP-NE and in Jammu & Kashmir, a financing plan was worked out. The summary of the financing plan is as under :-

Table 2: Summary of the NHDP Financing Plan

Particulars	(Rs in crores)
A. Estimated Expenditure	
Project Construction	337,959
Payment of Annuity	207,579
Interest on Borrowed Funds	78,285
Repayment of Borrowing	188,838
Total (A)	812,661
B. Sources of funds	
Cess funds	360,631
External Assistance(Grant and Loan)	9,782
Net surplus from Toll Revenue	117,418
Negative Grant	3,318
Budgetary Support	1,398
Addl. Budgetary Support	39,329
Share of private sector	211,315
Borrowings	191,948
Total(B)	935,139

The summary cash flow of the financing plan is presented below.

Table 3: Summary Cash Flow

Rs. Crore

Year	Requirement	Inflows	Interest	Repayment	Borrowing	Cumulative Outstanding Debt*	ABS for SARDP and J&K
2005-06	6,713	10,495	210	-	1,289	1,289	-
2006-07	9,490	11,751	139	-	1,500	2,789	-
2007-08	16,060	16,041	-	-	305	3,094	-
2008-09	18,470	17,460	214	1,289	1,631	3,436	-
2009-10	28,468	24,044	251	1,500	5,336	7,272	252
2010-11	47,736	41,618	798	539	7,455	14,188	940
2011-12	71,678	66,189	1,356	2,310	9,155	21,033	940
2012-13	77,468	62,278	2,437	4,295	21,922	38,660	1,203
2013-14	40,624	35,375	3,630	6,187	15,066	47,540	2,421
2014-15	33,056	29,910	4,368	7,393	14,907	55,053	2,421
2015-16	25,036	20,750	5,130	8,584	18,000	64,469	2,421
2016-17	17,076	17,809	5,780	10,084	15,131	69,517	2,421
2017-18	14,804	18,524	6,021	11,297	11,598	69,817	2,421
2018-19	14,804	19,511	6,097	12,157	13,547	71,207	2,421
2019-20	14,575	20,505	6,171	13,212	13,453	71,449	2,421
2020-21	13,501	21,907	6,055	14,023	11,671	69,097	2,421
2021-22	13,501	22,479	5,806	14,445	11,273	65,924	2,421
2022-23	13,501	24,005	5,435	14,657	9,588	60,855	2,421
2023-24	13,501	25,590	4,883	13,423	6,217	53,649	2,421
2024-25	13,501	27,261	4,126	12,539	2,904	44,015	2,421
2025-26	13,501	28,927	3,229	11,348	-	32,667	2,421
2026-27	13,413	30,635	2,365	9,848	-	22,819	2,421
2027-28	9,679	34,114	1,626	8,539	-	14,280	2,099
2028-29	3,728	35,081	1,070	4,775	-	9,505	-
2029-30	1,209	41,696	688	3,720	-	5,785	-
2030-31	446	47,293	400	2,675	-	3,110	-
Total	545,538	751,247	78,285	188,838	191,948		39,329

*NHA becomes debt free by 2028-29 (considering pre-payment of outstanding borrowings).

4.3.2 As indicated in the Table no. 3 above, NHA would require the Annual Additional Budgetary Support (ABS) to about Rs.2400 crore upto the year 2027-28.

4.3.3 BORROWINGS

The estimated borrowings of NHA at about Rs.1,90,000 crore are based on the estimation that 56 % of Roads will be constructed on BOT Model and 35 % on Annuity

and remaining 9 % on EPC basis. The annual average borrowings for the next 10 years works out to about Rs.13,000 crores with the cumulative outstanding debt at the end of 2019-20 would be about Rs.71,500 crore.

The Committee noted that as per the initial formulation submitted by NHAI out of the 5400 Kms. length under NHDP Phase V are yet to be awarded, it has been estimated that length of only 2400 kms. were found to be viable for award on BOT (Toll). It had, therefore, been suggested that the balance length of 3000 kms. should be taken up under OMT and only when traffic growth takes place in subsequent years, they would be considered for six laning. It was also mentioned by Chairman, NHAI that where Expressways are coming up, it may not be feasible to also do six laning which would then be a competing facility. With the earlier formulation the requirement of funding, the borrowing was at a much lower level (Rs. 140,000 crores). It was, however, discussed that as per existing Government policy, entire 6500 kms. of 4 lane including GQ should be taken up for six laning and, therefore, the Committee considered a revised formulation by which entire balance length of 5000 kms. would be taken up for six laning in the work plan upto 2013-14 resulting in a much higher impact on financing requirement and borrowings.

Presently the borrowings by NHAI mainly constitute 54 EC bonds which have limited availability due to cap on maximum investment of Rs.50 lakh per year per individual. The tenure of these bonds i.e three years is also a constraint. NHAI requires long tenure loans and the available instruments are Tax Free Bonds with 10 year maturity, Deep Discount Bonds, SLR Bonds & Long line of Credit from LIC and Pension Funds. However, issuance of these Bonds would first require the approvals from Government or Reserve Bank of India and also the necessary guarantee by the Government. Available appetite in the Money Market is also an important aspect to be seen in view of the fact that many other organisations are already in the process of raising funds through these instruments.

It may be noted that at present the only security that NHAI has is cess, hence to raise the borrowings of such magnitude, Government Guarantee would be required to enable NHAI to raise funds from the market as the cess accrual would not be available for securitization in view of budget, transfers voted yearly. Even if the securitization is permitted, it would be grossly inadequate in view of the quantum of borrowings projected to be raised. The issue of vesting of National Highways to NHAI by Government for the purpose of securitization to raise funds was deliberated upon. However, it was felt that such vesting of National Highways to NHAI would not serve as an actual security, however, a legal opinion on the issue would be obtained separately. Vesting of right of toll of such stretches has any case been appointed to the concessionaire during the same period and hence would also not serve as a substitute.

The likely sources of these borrowings are as under:-

	(Rs. in crore)
Capital Gain Tax Exemption Bonds u/s 54 EC of IT Act	20,000

(Rs.2,000 crore per year for next 10 years)	
Tax Free Bonds with 10 years maturity	10,000
Loans from Insurance Companies	12,000
Infrastructure Bonds	10,000
Loans from Multilateral Agencies (World Bank & ADB)	15,000
Market Borrowing (with Govt. Guarantee)	10,000
Loans from Domestic Financial Institutions (Banks)	20,000

4.3.4 ANNUITIES

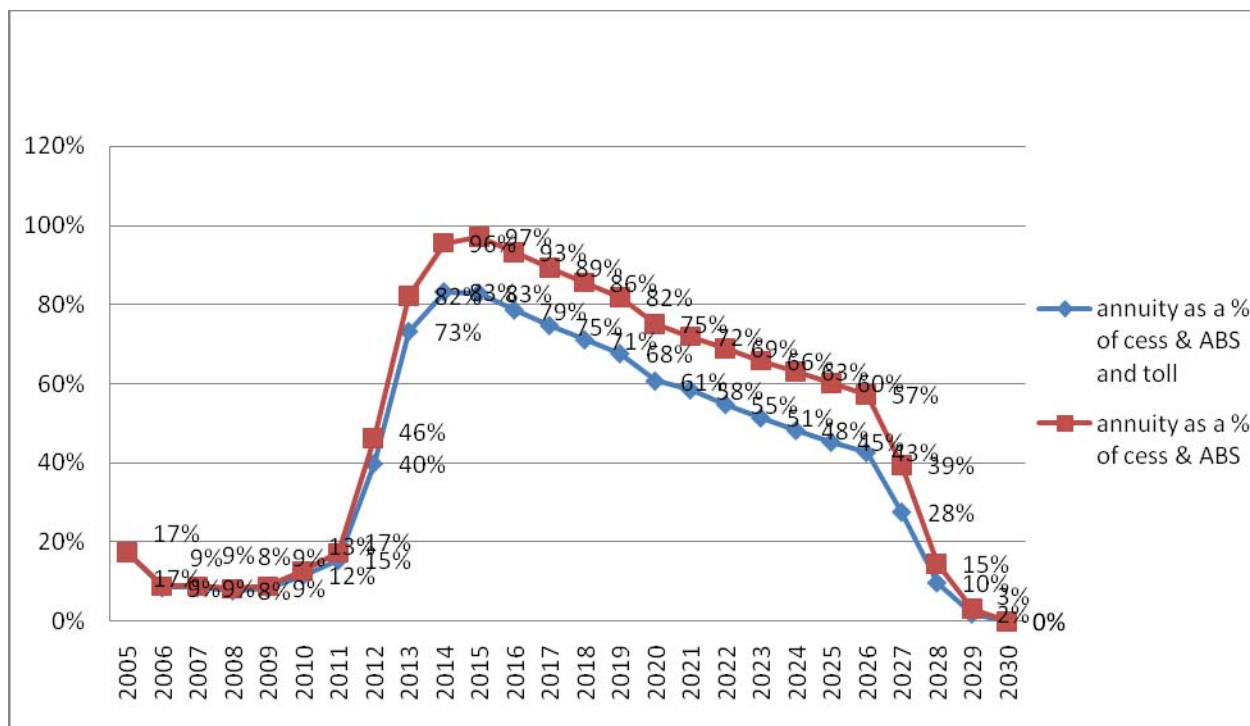
The details of phase-wise total annuity payments is provided below.

Table 4: Phase wise annuity payments

Rs. Crore	
Phase	Total Annuity Outgo (Rs crores)
NHDP - I	8,635
NHDP -II	31,925
NHDP-III	46,261
NHDP-IV	84,441
SARDP-NE	9,717
J&K	26,599
Total	207,579

Further Annuity outgo as pa percent of Cess and ABS also as a percent of Cess, ABS and Net Toll Revenue is provided in the graph below.

Graph 1: Yearly Annuity Outgo Compared With Committed Inflows



Also it was observed that the average annuity as a percentage of cess & ABS is 52% and the average annuity as a percentage of cess & ABS and net toll is 40%.

4.4 SUPPORT REQUIRED FROM GOVT.

The committee, while reviewing the financing plan felt that the quantum of financial resources required for implementation of the work plan is significantly high and therefore NHAI would require support from the Government in meeting its financial requirements through borrowings. It was also felt that availability of low cost long term funds is of utmost importance for the successful implementation of NHDP.

The committee felt that the government may consider providing support to NHAI through the following:

- a) Providing approval to NHAI for issuance of tax exempted bonds
- b) Provide guarantee cover to the borrowing plan of NHAI
- c) Out of the proposed borrowing approval of Rs.30,000 crores earlier provided to IIFCL, Rs.10,000 crores under the fiscal stimulus package may be transferred to NHAI, as per the its borrowing requirement.
- d) Assistance in negotiating non sovereign multilateral loans from World Bank, ADB, JBIC etc. by providing back to back support, if necessary
- e) Providing a Letter of Comfort from Ministry of Finance confirming the availability of Cess at least till 2030-31.

5.0 MODIFICATIONS SOUGHT IN MCA/ RFQ/ RFP

5.1 POWER TO REVIEW MCA/ RFQ/ RFP

Infrastructure sector has been benefited by the introduction of Model Concession Agreement, model RFQ and model RFP. However each sector under infrastructure has certain unique requirements and hence certain flexibility has to be provided to seek amendment of provisions which inhibit market acceptability.

Other than the modifications being recommended in this report, the committee proposed that further amendments to RFQ/RFP provisions could be left to the DORTH where recommendations of NHA Board could be placed where necessary. So far as MCA issues were concerned, it was suggested that an Inter-Ministerial Group (IMG) may be set up in the DORTH under Chairmanship of Secretary, DORTH with representatives of DEA, Department of Expenditure, Planning Commission and Ministry of Law. Where there is unanimity in the decision, the same may be then put up to Hon.'ble Minister, DORTH for approval. In other cases, the matter be then placed before a group of ministers comprising of Minister, Road Transport & Highways, Deputy Chairman, Planning Commission and Finance Minister. For specific changes in individual packages as per existing practice, such changes may be incorporated in the DCA and placed before PPPAC.

Presently the following provisions are sought for review. Formulations consequent to these are provided alongwith the specific items as referred hereunder.

5.1.1 TERMINATION PROVISIONS IN ROAD CONCESSION AGREEMENTS.

- The related provision in MCA (Art 29.2.3) reads as follows,

“Notwithstanding anything to the contrary contained in this Agreement, if the average daily traffic of PCUs in any Accounting Year shall exceed the designed capacity of the Project Highway and shall continue to exceed the designed capacity for 3 (three) Accounting Years following thereafter,, the Authority shall inform the Concessionaire of its intention to issue such Termination Notice and grant a period of 180 days for making a representation., and may, after the expiry of such period, ..in its sole discretion issue the Termination Notice”.

- NHA had suggested that art.29 be entirely be removed from MCA. The provisions thereunder will be difficult to implement, will lead to acrimony and disputes, and tends to make the concession arrangement to something less than a commercial venture.
- NHA's main concern is the lenders reaction to the aforesaid provision, which had affected financial close of some of the packages. Lenders have objected to non-availability of project upside to developers. However, by the 15-18th year of the Concession, mostly, all loans of the Concessionaires would have been repaid.

Hence provision which enters into force after 15-18 years of concession will not invite adverse reaction of lenders and will have no negative impact on financial close etc.

- Art 29.2.4 states that if the concessionaire completes the augmentation before such notice, then the Concession will continue, else it may get terminated. It was felt that in such a situation of project capacity being reached the quality of service to the consumers would deteriorate. It was widely felt that the aforesaid provision leaves little incentive for the Concessionaire to augment the facility, therefore the committee recommended that to facilitate financing of such upgrade, NHA I would commission a DPR as soon as it is expected that the cap may be imminent. Based on this DPR for lane capacity augmentation, NHA I would calculate the total project cost and based on the current traffic growth, calculate the extension in concession period that would be required for achieving a 15% IRR by the Concessionaire for the proposed investment. The committee felt that such extension should be limited to a maximum of 5 years and the no reduction in concession period should result. All other existing conditions of the contract including revenue share, if any, would continue to operate as it is and the calculation for the extension in concession period be worked out taking all these factors into account. The Concessionaire should therefore be required to add the lane capacity based on the said offer and should he fail to accept the same within a period of 3 months of being given such offer, would then be required to exit the concession so that alternative arrangement is made by NHA I for rebidding the said highway for its capacity upgrade. This would add comfort to the lenders too.
- Higher level of traffic can result in faster deterioration of riding surface/ highway. To ensure a more focused attention to maintenance in such a contingency and to ensure higher level of promptness in attending to any related issues, art 17.8.1 under “*Damages for breach of maintenance obligations*” is proposed for amendment as given as Annexure 1.b.

FORMULATION

a. *Art 29.2.3.2-“Notwithstanding anything to the contrary contained in this agreement, if the average daily traffic of PCU’s in any accounting year shall exceed the designed capacity of the project highway, the authority at it’s option may cause preparation of a detailed project report (DPR). The said DPR, inter-alia will assess the cost as may have to be incurred for augmenting the capacity of the project highway such that its capacity shall have increased sufficiently for carrying the then current traffic in accordance with the corresponding provisions of the Indian roads congress publication no. Irc -64, 1990 or any substitute thereof and extension of concession period, if any, that may be required to yield the concessionaire a post-tax return on equity (Equity IRR) of 16% per annum, such assessment being made at an assumed debt:equity ratio of 70:30. Such extension of Concession period shall be however limited to 5 (five) years. For avoidance of doubt it is stated that*

there shall be no reduction in the concession period as originally accepted. The authority may thereafter, at their sole option, issue a notice to the Concessionaire, (to be responded within a period of three months from the date of such notice), to undertake within six months of such notice, augmentation so determined by the authority. On refusal or non-acceptance by the Concessionaire to undertake such augmentation, either absolutely or on such extension of concession period as assessed under the DPR, or on the failure of the Concessionaire to undertake such augmentation on the due date so intimated by the authority, an indirect political event shall be deemed to have occurred and the authority may in It's discretion terminate this agreement by issuing a termination notice and making a termination payment under and in accordance with the provisions of clause 34.9.2; without the authority being liable to issue any further notice under this provision ”.

c. (part in italics is to be added into 17.8.1 as indicated below).

17.8 DAMAGES FOR BREACH OF MAINTENANCE OBLIGATIONS

17.8.1 In the event that the Concessionaire fails to repair or rectify any defect or deficiency set forth in the Maintenance Requirements within the period specified therein, it shall be deemed to be in breach of this Agreement and the Authority shall be entitled to recover Damages, to be calculated and paid for each day of delay until the breach is cured, at the higher of (a) 0.5% (zero point five per cent) of Average Daily Fee, and (b) 0.1% (zero point one per cent) of the cost of such repair or rectification as estimated by the Independent Engineer.

Notwithstanding anything contained in this agreement, should the actual traffic exceed the design capacity, during any year or part thereof and the Concessionaire fails to repair or rectify any defect or deficiency set forth in the Maintenance Requirements within the period specified therein, it shall be deemed to be in breach of this Agreement and the Authority shall be entitled, from such date, to recover Damages, to be calculated and paid for each day of delay until the breach is cured, at the higher of (a) 5% (five per cent) of Average Daily Fee, and (b) 1% (one per cent) of the cost of such repair or rectification as estimated by the Independent Engineer, for the balance period of the concession.

Recovery of such Damages shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.

5.1.2 EXIT POLICY FOR (DEVELOPER) CONCESSIONAIRE IN MCA

- As per extant policy on award of BOT Concession in NHAI, an SPV has to be formed by the winning bidder/ bidder consortium, in which shareholding of such bidders cannot be below 51%. This shareholding structure is required to continue during the construction period. On COD and for the period upto 3 years into operations period the winning bidder/ bidder consortium can reduce their

shareholding to 33%, after which this can be reduced to 26% (or such lower proportion as may be permitted by the authority) is required to be continued till the end of BOT Concession. In certain earlier CA's, the related provisions demand that the promoters hold 51% till 2 years into COD and thereafter 33% till end of concession.

- It is relevant that once shareholding of original promoters falls below 50% of the equity, effective control passes to the majority shareholder and insisting that 33%/26% be retained by the original promoters has no useful purpose to be served. The original promoter, in the role of a minority shareholder cannot hold out any special comfort to NHAI. In any case, performance can only be sought from the concessionaire, on terms specified under the concession, which has nothing to do with the ownership of the concession.
- In the Road construction industry, there are developer companies who occupy the construction space and those who occupy the O&M space. Their specialised capabilities in each segment can best be utilized if the developer construction companies are permitted to divest their entire equity holding in a Concessionaire company to O&M companies at the end of construction period. In the recent CII conference it was mentioned that once the completion and construction is over, equity issued at par in such Concession companies can demand a premium of roughly 100%. An assessment was projected in the said meet regarding the current private sector investment in concessions by way of equity as being to the order of Rs.8000 Crs. In such a case, by permitting such concessionaire companies to divest in favour of O&M companies a total capital of Rs.16000 Crs. will be freed and made available to the developer construction companies. Hence a policy initiative permitting such an action by concessionaires would enable faster rotation of capital which will translate into a higher level of capital availability for concessionaire companies.
- Since lenders are important stakeholders in the PPP mode, lenders NOC shall be one of the conditions before NHAI permits complete divestment. Further, this being not a bid parameter, these relaxations can be also extended to all Concessions, where such provisions do not currently exist, if so required by the Concessionaire.

FORMULATION

Underlined portions are the amended provisions to the earlier provisions.

(a) Article 48 Definitions on “Change in Ownership” :

“Change in Ownership means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the {selected bidder/ Consortium Members}, together with {its/their} Associates, in the total Equity to decline below 51% (fifty one per cent) thereof during Construction Period and two years thereafter; provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process for the purposes of meeting the minimum conditions of eligibility or for evaluation of its application or bid, as the case may be,) in the proportion of the equity holding of {the selected bidder/ any Consortium Member} to the total Equity, if it occurs prior to completion of a period two years after COD, shall constitute Change in Ownership;

(b) Art 7.1 (k), Representations and warranties “...it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 5.3 and that the {selected bidder/ Consortium Members}, together with {its/ their} Associates, hold not less than 51% (fifty-one percent) of its issued and paid up Equity as on the date of this Agreement; and that each Consortium Member whose technical and financial capacity was evaluated for the purposes of pre-qualification and short-listing in response to the Request for Qualification shall hold at least 26% (twenty six per cent) of Equity during the Construction Period and two years thereafter along with its Associates

Provided further that any such request made under art 7.1(k) and / or art 48, at the option of the authority, may be required to be accompanied by a suitable no objection letter from lenders”,

[For MCA for six laning, the term COD shall stand substituted with “from the date the project achieves/ is granted completion certificate”].

*

5.1.3 ISSUE OF SECURITY TO LENDERS IN MCA

- Highway project finance is dissimilar from other project finance as the Concessionaire has no ownership over assets created/ upgraded through application of Equity/ Debt by the Concessionaire. The right of the Concessionaire is to recoup his investment by toll receipts from the highway.
- Concessionaires right to toll receipts is circumscribed through the Lenders control over the escrow account, in the manner evidenced by the Escrow Agreement. The lenders right has been placed above that of the Concessionaire. In real terms Lenders have predominant priority over these cash flows, as charges with higher priority over that of the lenders, in the normal course, have lesser value claims. Further, the Substitution Agreement vests the lenders with the right to substitute the Concessionaire with another.

- Highways are public goods and no charge can ever be created on these. It has no characteristics of an acceptable security for lenders. Without there being a tangible security, as per RBI norms, lenders have to classify loans to highway projects as 'unsecured'. Though some lenders have taken a liberal view and classify these as secured, technically it cannot stand audit scrutiny. Such classification as 'unsecured' has far reaching consequences in terms of the lender being subjected to higher provisioning and capital adequacy norms. Also quantitative restrictions come to play. This, while on one hand increases the interest cost to the Concessionaire, on the other hand also limits the overall fund availability. Since the issue of a loan being secured or unsecured is more a technicality, if such loans can be got into the 'secured' loan category, then there will be cost and quantum benefits accruing to the concessionaire and therefrom to the highway project award.
- This can be achieved by making an explicit provision in MCA permitting lenders to create a charge on the Escrow Account to the extent permissible as per their priority in the 'waterfall'. Provisions of Art 40.2(b) can be amended to incorporate this explicitly.

FORMULATION

Underlined portions are additions to the original clause

Art 40.2 (b)

“mortgages/pledges/hypothecation of goods/assets other than project assets and their related documents of title, a charge on the Escrow account, arising or created in the ordinary course of business of the project highway, and as security only for indebtedness to the senior lenders under the financing. Agreements and/or for working capital arrangements for the project highway.”

5,1.4 RFP PROVISIONS- FORFEITURE OF BID SECURITY OF BIDDERS ON ACCOUNT OF NON-RESPONSIVENESS.

The following provisions of RFP is having a deleterious effect on Bid response to projects.

Para 2.1.14 states that a Bidder *“shall not have a conflict of interest (the **“Conflict of Interest”**) that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. In the event of disqualification, the Authority shall forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, the time, cost and effort of the Authority, including consideration of such Bidder’s proposal, without prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise.”*

Para 2.20.7 (a) states that *“The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time, cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise, under the following conditions:*

a) *If a Bidder submits a non-responsive Bid”*

Para 3.2.1 states that *“Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of the RFP. A Bid shall be considered responsive only if:*

- (a) it is received as per the format at Appendix – I;*
- (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;*
- (c) it is signed, sealed and marked as stipulated in Clauses 2.10 and 2.11;*
- (d) it is accompanied by the Bid Security as specified in Clause 2.1.7;*
- (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;*
- (f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified);*
- (g) it does not contain any condition or qualification; and*
- (h) it is not non-responsive in terms hereof.*

And also as per *“2.1.11 Any condition or qualification or any other stipulation contained in the Bid shall render the Bid liable to rejection as a non-responsive Bid”*.

Hence, as is evident, a bid can be considered non-responsive even on the most trivial and clerical omission. The bid security amounts to 2% to 1% of the Total Project Cost and is a substantial amount. In this regard, the following is noteworthy:

- (i) the conditions under which a bid can be called as non-responsive is quite extensive and given the sheer vastness of scope given to subject term in the RFP, even the most trivial of errors can trigger this clause.
- (ii) The entire bid process is intended to achieve only one result i.e. of award of the project. As long as the RFP process leads to this result, no damage can be deemed to have occurred / caused to NHAI, which needs to be compensated against.
- (iii) As a matter of general commercial practice, a bid guarantee (BG) is forfeited/ encashed only when the selected/ successful bidder, when awarded a project declines/ fails to accept the award or fails to provide the performance guarantee. All unsuccessful bidders only have their bid guarantees returned to them.
- (iv) Further, as a matter of commercial practice, the only consequence that visits a non-responsive bid is that such a bid is not accepted as a valid bid and is so rejected from the zone of consideration.
- (v) RFQ/ RFP documents are priced documents and the pricing thereof is intended to cover normal associated costs.

This provision has actually caused slackening of interest in NHAI's projects, which of late is slowly moving towards revival.

FORMULATION

(a) Para 2.1.14 to be restated as follows, with changes in the underlined portion,

Para 2.1.14 a Bidder *“shall not have a conflict of interest (the **“Conflict of Interest”**) that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. In the event of disqualification, the Authority shall forfeit and appropriate 5% of the value of the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, the time, cost and effort of the Authority, including consideration of such Bidder's proposal, without prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise.”*

And

(b) After Para 2.20.7 (a) a non-obstante clause as follows to be introduced

“Subject however that in the event of encashment of bid security occurring due to operation of para 2.20.7 (a), the damage so claimed by the authority shall be restricted to 5% of the value of the bid security”.

5.1.5. Eligibility of applicants/ conflict of interest as per RFQ provisions-common shareholding levels

Para 2.2.1 (C)(i) says that *“An Applicant may be considered to have a Conflict of Interest that affects the Bidding Process, if:*

(i) such Applicant (or any constituent thereof) and any other Applicant (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this qualification shall not apply in cases where the direct or indirect shareholding in a Applicant or a constituent thereof in the other Applicant(s) (or any of its constituents) is less than 5% of its paid up and subscribed capital; or”

It is impossible that at 5% level (or even 10% level) of common shareholding a conflict of interest situation, through commonality of interest or collusive bidding can arise. Many PE funds or such investors hold generally upwards till 10% in companies and any such passive holding should not become ground for disqualification.

The committee felt that the 5% shareholding provision triggering conflict of interest be raised to 25%.

FORMULATION

(a) In RFQ 2.2.1(c), changes as underlined

(c) An Applicant shall not have a conflict of interest (the “**Conflict of Interest**”) that affects the Bidding Process. Any Applicant found to have a Conflict of Interest shall be disqualified. An Applicant shall be deemed to have a Conflict of Interest that affects the Bidding Process, if:

- (i) the Applicant, its Member or Associate (or any constituent thereof) and any other Applicant, its Member or Associate (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of an Applicant, its Member or Associate (or any shareholder thereof having a shareholding of not more than twenty five percent of the paid up and subscribed share capital of such Applicant, Member or Associate, as the case may be) in the other Applicant, its Member or Associate, as the case may be, is not more than twenty five per cent of the paid up and subscribed share capital thereof; provided further that this disqualification shall not apply to a bank, insurance company, pension fund or a public financial institution referred to in section 4A of the Companies Act 1956;

(b) In RFP 2.2.14(i), changes as underlined

“such Bidder (or any constituent thereof) and any other Bidder (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this qualification shall not apply in cases where the direct or indirect shareholding in a Bidder or a constituent thereof in the other Bidder(s) (or any of its constituents) is not more than 25% (twenty five percent) of its paid up and subscribed capital; or

5.1.6. Eligibility of applicants/ conflict of interest as per RFQ provisions- Continuation of conflict of interest.

Further it is also relevant that

- a. There is no provision at RFQ stage to intimate any of the applicants as to who the other applicants are. Hence at RFQ stage applicants are unaware of each other and the earliest intimation of the identity of the other bidders occurs when the list of pre-qualified/ eligible applicants is put up for information.
- b. He who is not a party to a contract cannot be bound by the terms thereof. The RFQ provisions of cross-holding related ‘conflict of interest’ can operate at RFP stage only if all the applicants with a potential conflict of interest at RFQ stage also actually apply at the RFP stage.

- c. RFP does not provide a window for withdrawal by pre-qualified applicants on account of any other pre-qualified applicant, who being affected by these provisions, has also been pre-qualified.
- d. The obvious absence of any RFP provision for withdrawal in such conditions, ie., a provision that just one of the applicants out of those affected under this clause could alone remain in fray, would necessarily lead to an interpretation that all those having such cross-holding are automatically disqualified by the mere fact of their having applied at the RFQ stage. Such a situation cannot be intended.
- e. Hence the only possible inference in this regard is that as long as any of the bidders who participates in the RFP stage, (by placing their financial bids), have no conflict of interest inter-se, the provisions of the 'Conflict of Interest' clause cannot be invoked.

FORMULATION

As end para to 2.1.14 the following be added,

“Notwithstanding anything stated herein a conflict of interest situation arising at the pre-qualification stage will be deemed to subsist only, as between such applicants attracting conflict of interest provisions on account of shareholdings, submit bids under this document.”

5.1.7. Associate –definition in RFQ thereof.

The RFQ para 2.2.9 states that *“In computing the Technical Capacity and Net Worth of the Applicant/ Consortium members under Clauses 2.2.2 and 2.2.3, the Technical Capacity and Net Worth of their respective Associates would also be eligible hereunder.*

For purposes hereof, Associate means, in relation to the Applicant/ Consortium member, a person who controls, is controlled by, or is under the common control with such Applicant/ Consortium member (the “Associate”). As used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise”.

While the narration as above is sufficient to encompass entities formed under Indian laws, it is felt that it may not be so for entities such as Trusts/ Groups particularly incorporated/ formed abroad, and such entities who obtain associate status through “power to direct the management and policies”. Hence the committee felt that it will be justifiable to include as the closing sentence a suitable formulation.

FORMULATION

In 2.2.9 definition of associate have a closing sentence as follows,

“It is clarified that a certificate from a qualified external auditor who audits the book of accounts of the Applicant or the Consortium Member shall be provided to demonstrate that a person is an Associate of the Applicant or the Consortium as the case may be”.

5.1.8 **“THRESHOLD TECHNICAL CAPABILITY” “ELIGIBLE PROJECTS” (TTC) IN LATEST RFQ.**

a. Para 2.2.2(A), the same reads as under in the new RFQ,

2.2.2(A) Technical Capacity: For demonstrating technical capacity and experience (the “Technical Capacity”), the Applicant shall, over the past 5 (five) financial years preceding the Application Due Date, have:

- (i) paid for, or received payments for, construction of Eligible Project(s); and/OR*
- (ii) paid for development of Eligible Project(s) in Category 1 and/or Category 2 specified in Clause 3.2.1; and/ or*
- (iii) collected and appropriated revenues from Eligible Project(s) in Category 1 and/or Category 2 specified in Clause 3.2.1, such that the sum total of the above is more than [Rs.1000 crore (Rs. one thousand crore)] (the “Threshold Technical Capability”).*

[Provided that at least one fourth of the Threshold Technical Capability shall be from the Eligible Projects in Category 1 and/ or Category 3 specified in Clause 3.2.1.]

b. The above comes with a foot note provision that *“This amount should be equivalent to twice the Estimated Project Cost of the Project for which bids are being invited. Where deemed necessary, the Authority may increase/ decrease this amount by one half of the Estimated Project Cost”.* Hence for a Rs.1000 Cr project, the mandated threshold requirement is Rs.2000 Cr value per para 2.2.2(A) with NHA permitted to exercise its judgement to amend it in a band of Rs.2500 Cr-Rs.1500 Cr, the lowest being still 50% more than what was prescribed vide the former RFQ of Planning Commission.

c. Similarly, the provisions of previous RFQ paras 3.2.3 and 3.2.4, categorising the capital cost value of individual “eligible projects” that can be taken for assessing **Threshold Technical Capability” (TTC)** was that *“This amount should not be less than 10% of the amount specified in Clause 2.2.2 (A). In case of Projects with an Estimated Project Cost of Rs.1,000 cr or above, this amount may be suitably reduced but not less than 5% in any case”.*

- d. However, in the new RFQ the aforesaid value of “eligible projects” stands changed to *“This amount should not be less than 20% of the Estimated Project Cost. In case of projects with an Estimated Project Cost of Rs. 1,000 cr. or above, this amount may be suitably reduced but not less than 10% in any case”*. The value of eligible projects have been made twice that of the earlier RFQ.
- e. The Committee felt the provisions as existing in the previous version of RFQ may be permitted to continue.

(a) FORMULATION IN RFQ FOR ALL PROJECTS.

- i. Foot note 11 *“This amount should be equivalent to the Estimated Project Cost of the Project for which bids are being invited. In case the RFQ is for more than one Project, this amount may be suitably modified.”*.
- ii. Foot note 17 *“This amount should not be less than 10% of the amount specified in Clause 2.2.2 (A). In case of Projects with an Estimated Project Cost of Rs. 1,000 cr. or above, this amount may be suitably reduced but not less than 5% in any case”*.

5.1.9 INCREASE IN EQUITY GRANT (VGF) TO 40% BY MERGING 20% EQUITY AND 20% O&M GRANT INTO EQUITY GRANT .

- a. CoS has already permitted NHAI, for projects awarded during, NHAI to amend the existing provisions of MCA to merge Equity grant of 20% and O&M Grant of 20%, and extend the same as Equity Grant at a maximum of 40%.
- b. This may be made a permanent facility/ feature.
- c. MCA formulations made to facilitate the above is provided in amended provisions under 25.1.1, 25.1.2, 25.2.1, 25.2.2, 25.2.3 and 25.3 of MCA as below.
- d. .

Formulation

25.1.1 *The Authority agrees to provide to the Concessionaire cash support by way of an outright grant equal to the sum set forth in the Bid, namely, [Rs. (Rupees in words)], in accordance with the provisions of this Article 25 (the “Grant”).*

4.4 25.1.2 The Grant shall be disbursed to the Concessionaire by way of Equity Support in accordance with the provisions of Clause 25.2, ~~and the~~

~~balance remaining, if any, shall be disbursed as O&M Support in accordance with the provisions of Clause 25.3.~~

1.2 25.2.1 Subject to the conditions specified in this Clause 25.2, the Grant shall be credited to the Escrow Account and shall be applied by the Concessionaire for meeting the Total Project Cost (the "Equity Support").

25.2.2 *The Equity Support shall not exceed the sum specified in the Bid and as accepted by the Authority, but shall in no case be greater than [twice] the Equity, and shall be further restricted to a sum not exceeding 40% (forty per cent) of the Total Project Cost. For the avoidance of doubt, the Total Project Cost to be reckoned for the purposes of this Clause 25.2.2 shall include Equity Support.*

25.2.3 *Equity Support shall be due and payable to the Concessionaire after it has expended the Equity, and shall be disbursed proportionately along with the loan funds thereafter remaining to be disbursed by the Senior Lenders under the Financing Agreements. The Authority shall disburse each tranche of the Equity Support as and when due, but not later than 15 (fifteen) days of receiving a request from the Concessionaire along with necessary particulars.*

~~4.3~~ 25.3 O&M Support - Deleted

5.1.10 RFQ PROCESS- PROJECT WISE PRE-QUALIFICATION BE SUBSTITUTED WITH ANNUAL/ PERIODIC PRE-QUALIFICATION.

- a. As per the current RFQ stipulation, an applicant's request for pre-qualification in the RFQ process is specifically for an identified project or set of projects (upto 3).
- b. Separate pre-qualification for each project (or set of projects) involves avoidable wastage of time running into 3-4 months.
- c. Instead the pre-qualification may be permitted to be an annual exercise, with each applicant (individual and not consortium) being assessed to and permitted to quote his accepted technical score/ threshold capacity. Such applicants will be permitted to seek pre-qualification assessment at any time during the year and such pre-qualification and scores accepted thereunder shall be valid for a period of 12 months or the date of 30th September falling next, whichever is earlier.
- d. RFQ and RFP processes to be delinked from each other.

5.1.11. PREMIUM PROVISIONS UNDER RFP/ MCA

The RFP provisions “APPENDIX – I- Letter comprising the Bid” provides for the bidder to submit the bid either as a grant or in the form of a premium. If the quote is in the form of a premium, the same is required to be quoted as percentage of the “gross revenues of the project as share of the Authority”.

MCA provisions under art 26 carries this forward to say that “*the Concessionaire agrees to pay to the Authority for theth (.....th)^{\$\$} year of the Concession Period, but commencing from the day falling after (.....) days from COD, a Premium in the form of an additional Concession Fee equal to {2% (two per cent)} of the total Realisable Fee during that year, due and payable on a pro rata basis for the period remaining in that year; and for each subsequent year of the Concession Period, the Premium shall be determined by increasing the proportion of Premium to the total Realisable Fee in the respective year by an additional 1% (one per cent) as compared to the immediately preceding year. For the avoidance of doubt, the Premium for theth (.....th) andth (.....th) years shall be equal to {3% (three per cent) and 4% (four per cent)} respectively of the total Realisable Fee for the respective years.”.*

Premium quotes in percentage terms will be indefinite amounts and it is desirable that the quote be in the form of a specific monetary amount, as this will facilitate better planning for the Concessionaire and also for NHAI. Thus reduces the risk of under-reporting and is the concept followed in the OMT MCA. DEA had also suggested such a change. The committee felt that such premium should be payable from the COD date (for six laning from the “appointed date”) and increase the same by 5% per year for the balance period of concession period.

MCA formulations made to facilitate the above is provided as under.

FORMULATION

(a) In RFP- APPENDIX – I “Letter comprising the Bid” para 26 should be made to read as, “*I/We hereby submit our Bid and [offer a Premium in the form Rs. _____ (in words) out of the gross revenues of the Project as share of the Authority/ require a Grant of Rs. _____ (Rupees _____ only), (Strike out whichever is not applicable)] for undertaking the aforesaid Project in accordance with the Bidding Documents and the Concession Agreement”.*

(b) MCA provisions. Art 26. “*Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees to pay to the Authority, on the COD date, a Premium in the form of an additional Concession Fee equal to Rs. _____ (in words) as*

due to the authority during that year, due and payable for the period remaining in that year; and for each subsequent year of the Concession Period, the Premium shall be determined by increasing the amount of Premium in the respective year by an additional 5 % (five percent) as compared to the immediately preceding year. For the avoidance of doubt, the Premium for all subsequent years shall be determined by increasing the amount of premium by 5 % as compared to the immediately preceding year.”

* For 6 laning projects the phrase “on the COD date” shall be substituted by “on the appointed date”.

Future Policy Issues.

Chairman of the Committee opined that in view of the urgency of recommending key changes in the framework of implementation and Modified Financing Plan of NHDP, this Report is being submitted in the present form. Other important issues that could not be discussed such as Dispute Resolution mechanism; Further Delegation to NHAI Board; Amendments to Company Law with reference to SPVs; need for Long Term debt market etc. would be subsequently considered and taken up in Part 2 of this Report.

Chairman also emphasized that while recommendations of this Committee would be submitted to Hon’ble Prime Minister for orders, specific policy and NHDP implementation changes as proposed should be duly processed for approval from the relevant competent authority.

ANNEXURE-I

FINANCING PLAN OF NHDP [AUGUST, 2009]